Neutral Citation No: [2023] NIKB 17	*Ref:* **McA12067**
	ICOS No:
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **28/02/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

GAVIN McKENNA

Plaintiff

and

MINISTRY OF DEFENCE

Defendant

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Mr Patrick Lyttle KC with Mr Conleth Rooney (instructed by Phoenix Law Solicitors) for the Plaintiff
Mr David McMillen KC with Mr Joseph Kennedy (instructed by the Crown Solicitor for Northern Ireland) for the Defendant

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McALINDEN J

[1] The plaintiff was born in February 1984. He claims damages against the Ministry of Defence arising out of an incident which occurred on 26 April 1997 at approximately 8:30pm when he was struck on the left side of the face by a plastic bullet while present in a field at the side of the Antrim Road, Lurgan, County Armagh. At the time of the incident, the plaintiff was 13 years old, and he was living with his family at 63 Lurgan Tarry, Lurgan, County Armagh. As a result of being struck by the plastic bullet, the plaintiff suffered an orbital fracture and a serious permanent injury to his left eye, resulting in impaired vision on that side. The parties have agreed quantum in the case for general damages, special damages, and interest in the sum of £225,000 and it is the court's task to determine the liability issues that remain at large between the parties.

[2] The letter of claim in this case was issued on 31 March 1999. Following a request for more information which was provided by the plaintiff, the defendant responded by correspondence dated 15 October 1999 in which it stated that it had fully investigated the matter, it was satisfied that no negligence attached to any of the soldiers and that liability was, therefore, denied. A writ of summons was issued

on 17 May 2000. The statement of claim was belatedly served on 15 September 2009 and this was followed up by a defence and notice for particulars, both dated 24 May 2010, with the plaintiff's replies being served on 26 July 2010. The matter eventually came on for hearing on 6 December 2021, when the court heard evidence from the plaintiff, Mr Stephen Knox and Mrs Catherine Mitchell. On 7 December 2021, the court heard evidence from Mr Stephen Francis Haughian, Mr Michael Mitchell, and Lance Corporal Cameron. The next hearing dates were 1 April 2022 and 9 June 2022 when the court heard evidence from Lieutenant Colonel Cattermull. On 18 July 2022, the court heard the evidence of Lieutenant Colonel Clements. On 30 September 2022, the court heard the evidence of Lieutenant Colonel Spender and Mr Hepper. Finally, on 13 January 2023 the court heard final oral submissions in this case, having previously been provided with comprehensive and erudite written submissions assiduously prepared by the legal representatives of both parties. I have been greatly assisted in my task of adjudicating upon this matter by the quality of the forensic advocacy deployed senior counsel in this case and by the high calibre of written submissions provided to the court.

[3] The plaintiff's case is that at about 6:00pm on the evening in question, he and two friends, Stephen Knox and Anthony McEnoy (now deceased) went to the field in question in order to collect wood from the area of the field closest to the road and to transport this wood to the middle of the field where an internment commemoration bonfire was being built. This was a relatively large field and it would appear that every year this field was used for the purpose of building an internment commemoration bonfire and local residents would regularly dump old furniture and wood and other combustible materials in the area of the field closest to the road for use in the building of the bonfire and this material would be transported from the area of the field closest to the road to the middle of the field where the bonfire was being built by youths who lived in the area. At other times of the year the field was used as a gathering place by youths and young children. The entire area has now been redeveloped and there are no photographs before the court of the area at the time of this incident. It would appear that the boundary of the field contiguous to the Antrim Road was marked by some sort of chain-link fence which was a few feet in height. There was no footpath on that side of the road. It would appear that those dumping material in the field for the bonfire would have been required to throw the material over the chain-link fence into the field.

[4] I should add that the court was provided with what was described as a copy of an Ordinance Survey map of the area which depicted the locus as it existed at the time of the incident. This map was referred to regularly by the witnesses in this case. The map appears to be an extract from an Ordinance Survey map of unknown scale which is an A4 sheet in portrait orientation with north being at the top of the page. Part of the Lurgan Tarry estate where the plaintiff lived at the time is shown in the top left quadrant of the map with the field in question being shown in the lower right quadrant. Dissecting the map from about 2 o'clock to 8 o'clock is a major railway line. Also dissecting the map from 1 o'clock to 7 o'clock is the Antrim Road. There is a level crossing where the Antrim Road crosses the railway line and this is

identified on the map as the Bell's Row crossing. This level crossing is located in the upper right quadrant of the map. On the opposite side of the Antrim Road from the field, a petrol station/shop is shown, which was called the Bellevue garage or Kelly's garage at the time. This is located about a third of the way up from the bottom of the map, just slightly to the left side of the midline. If one were travelling along the Antrim Road at this point in a roughly northerly direction from the bottom of the map to the top, this would take one out of Lurgan and the Antrim Road would become the Cornakinnegar Road. The garage would be to one's left-hand side and the field would be to one's right-hand side. If one were travelling along the Antrim Road at this point in a roughly southerly direction from the top of the map to the bottom, this would take one into Lurgan town centre. The garage would be to one's right-hand side and the field would be to one's left-hand side.

[5] The plaintiff's case is that at about 8:30pm on the evening in question when it was coming up to sunset, he and his two friends were in the field near the fence, roughly opposite the garage and were in the process of collecting wood that had been thrown into the field in order to transport the wood to the middle of the field. The plaintiff recalls that other youths and children were in the field but as far as he was aware there were no signs of any trouble. He did not see or hear anything that would have alerted him to any ongoing disturbance involving an army patrol. Indeed, he was entirely unaware of the presence of an army foot patrol on the Antrim Road. He was bending down or hunkering down to pick up wood with his back to the Antrim Road when his friend Stephen Knox shouted over to him. He called out his name. The plaintiff stood up and turned to look around at the road to see why Stephen had shouted at him and as he did this, he was violently struck on the left side of the face and fell to the ground.

[6] The plaintiff gave evidence that he was knocked out for a short period of time and when he regained consciousness, he got to his feet and realised that he was bleeding badly from around his left eye. He was disorientated and remembers staggering around before falling to the ground again. It would appear that two adults, Mr Brian Kelly, the owner of the garage, and Mr Michael McVeigh, a customer in the garage came over to the field and one of them carried the plaintiff over to the garage and placed him in the back of Mr Kelly's car. In that it was possible for Mr McVeigh and Mr Kelly to easily enter the field and for Mr McVeigh to carry the plaintiff out of the field, I can safely conclude that there were gaps in the chain link fence at the side of the road that facilitated easy access to and from the field. A first-aid dressing was retrieved from the garage, and this was held over the plaintiff's wound by Mr McVeigh while Mr Kelly drove the plaintiff to Craigavon Area Hospital. The plaintiff received initial treatment in Craigavon before being transferred up to the Royal Victoria Hospital in Belfast.

[7] The documentation submitted in evidence by agreement at the hearing of this matter included a number of statements taken by the police during the course of the police investigation into this matter. Incidentally, this investigation resulted in a file being prepared for the DPP with the DPP subsequently directing no prosecution.

One such statement was obtained from a doctor in the Accident and Emergency Department of Craigavon Hospital on the evening of 26 April 1997. Dr Murugan's statement is dated 11 June 1997. This statement records the following history:

> "The patient alleged that he was hit by some flying object on the left side of his forehead. He was going around the area collecting wood for a bonfire and heard a noise of a vehicle coming along, looked around and felt something hit hard on the left side of his forehead and he fell to the ground. There was no loss of consciousness and he remembers everything that happened and people standing by informed him that he had been hit by a plastic bullet by an army patrol."

It is clear that the first recorded history obtained from the plaintiff is consistent with the evidence given by the plaintiff at trial; that he was in the field beside the Antrim Road at the time that he was struck by the plastic bullet, doing nothing other than collecting wood for a bonfire.

[8] In his evidence in court, the plaintiff was adamant that in the 2½ hour period prior to his injury, he did not see or hear anything unusual in the area and he did not see any soldiers prior to the incident. He specifically denied being involved in any form of public disorder, rioting or verbal abuse of soldiers. He stated he did not remember seeing any soldiers until he was in Brian Kelly's car on the way to the hospital and this would have been some distance down the road. At that stage the soldiers who were not wearing riot gear were walking down both sides of the road towards the town centre. This was the sum total of the plaintiff's evidence in chief.

[9] Before dealing with Mr McMillen's cross-examination of the plaintiff, I should indicate that the plaintiff made a statement to the police about this matter on 12 May 1997. In the witness box, the plaintiff's account of events up until the time he was struck by the plastic bullet was entirely consistent with the contents of this statement. His oral testimony relating to the events which occurred after he was struck was also largely consistent with the contents of the statement, barring one detail. In his statement, the plaintiff indicated that when he saw the soldiers on the side of the road on his way to hospital in Brian Kelly's vehicle, the soldiers pointed at the plaintiff and started laughing. This detail was omitted from his evidence in chief.

[10] The court also considered the contents of two newspaper articles relating to this incident which appeared at the time. The first was a piece which appeared in the Irish News on 28 April 1997 which was written by Louise McCall. The plaintiff's parents appear to have been the main sources of information for this story. The events as described in the Irish News article are largely as described by the plaintiff in his oral evidence. However, the plaintiff's father is reported to have informed the

journalist that the soldier shot the plaintiff "less than four yards away – point blank range, when there was no provocation, no trouble or anything going on."

[11] An account of this incident also appeared in the edition of An Phoblacht dated 1 May 1997. This article was written by Eoin O'Broin. The plaintiff is described as being engaged in collecting wood for a bonfire. It is stated that witnesses told An Phoblacht that the soldier fired from almost point-blank range. The article went on to state that in contravention of regulations governing the use of such weapons, the soldier fired an aimed shot at the boy's head. The plaintiff is reported as saying: "After the ambulance arrived and was driving me to the hospital, I could see the soldier with the plastic bullet gun pointing at me and laughing." The article also reported that the plaintiff had said that the young people in the area felt as if the army and RUC were trying to provoke a reaction. It is clear that an ambulance was not tasked to the scene of the incident and the plaintiff made no reference to a soldier pointing at him and laughing when he was giving his evidence in chief. Further, the Accident and Emergency Record relating to the attendance of the plaintiff at Craigavon Area Hospital on 26 April 1997 at 21:14 hours refers to the plaintiff arriving by private transport and refers to the incident as "Civil Disturbance." The history recorded was that the plaintiff was "hit by plastic bullet (army) no loss of consciousness. Had not seen the army patrol coming. Felt something hit the left side of his forehead and fell to the ground." The reference to a civil disturbance is important.

[12] Mr McMillen KC, in cross-examination of the plaintiff, raised the issue of the history provided by the plaintiff to Dr Paul, a Consultant Psychiatrist who examined the plaintiff in December 2020 for the purposes of preparing a report for the court on the psychiatric/psychological impact that the incident and the resulting injury had upon the plaintiff. Mr McMillen's questions related to why the plaintiff did not tell Dr Paul about a period of time he had spent in prison on remand in the months shortly before the plaintiff was assessed by Dr Paul. It was put to the plaintiff that the relevant entries in the plaintiff's General Practitioner's notes and records revealed that this period of imprisonment had resulted in a deterioration in his state of mental wellbeing resulting in a prescription of medication, but this fact was not revealed by the plaintiff to Dr Paul. It was put to the plaintiff that this information was deliberately withheld from Dr Paul in order to better suit his case on the basis that it would be better for the plaintiff's case if the court was not made aware about the period of the time the plaintiff spent in prison and was unaware of the link between the time in prison and any recent psychiatric/psychological difficulties. The plaintiff had no satisfactory answer for the failure to provide a full and accurate history to Dr Paul.

[13] The plaintiff was then questioned about the interest Republican Sinn Fein had publicly expressed in the imprisonment of the plaintiff and the conditions in which he was being held during that period of imprisonment. The plaintiff accepted that he was a member of Republican Sinn Fein, a member of its ruling body and that Republican Sinn Fein had published material on the internet protesting against the

imprisonment of the plaintiff and criticising the conditions in which he was being held. It was put to the plaintiff that as a member of Republican Sinn Fein, his political views coincided with the views of those who reject the compromise of the Good Friday Agreement and who support the continued use of violence for the purposes of achieving change in the constitutional status of Northern Ireland as a constituent part of the United Kingdom. While Mr McKenna did not definitively state whether he did or did not support the use of violence to achieve constitutional change in Northern Ireland, he did state that Republican Sinn Sein was a political organisation and it did not engage in violent activities. The plaintiff accepted that his sister and twin brother were both prominent members of Republican Sinn Fein and that another brother had previously been involved with this organisation and had pleaded guilty to possession of a mortar bomb and mortar tube in a field just off the Cornakinnegar Road in April 2007 and had been sentenced to a lengthy term of imprisonment in 2009.

[14] Mr McMillen KC then questioned the plaintiff about his childhood growing up on the Kilwilkie Estate in Lurgan and whether there were regular instances of public disorder when army foot patrols ventured into or near the Kilwilkie Estate. The plaintiff indicated that Lurgan Tarry was different from Kilwilkie and his childhood was spent in the Lurgan Tarry estate. When pressed further, the plaintiff gave the impression that such occurrences may have occurred but they were mainly restricted to the hours of darkness and as a child he "would have come across soldiers from time to time, but 90% of the time you'd have been sitting with a soldier and he was letting you look through the scope of his gun. You know, they'd have no trouble." However, he accepted that the Kilwilkie Estate had a reputation for being a "hot spot" for trouble in the past and was associated with dissident republican activity up to the present time. Mr McKenna denied that any member of his family had been involved in any "run ins" with the army or police at any time prior to the incident when he was injured. Mr McKenna stated that his father possessed a firearms certificate for two shotguns at the time "which would suggest that the house was not marked down as anything other than a normal household" and he asserted that the family home was not the target of regular searches or any activity like that.

[15] Mr McMillen KC then suggested to the plaintiff that the Bell's Row crossing was a bottleneck where there were regular confrontations between the security forces and local youths. Mr McKenna denied that he had ever seen any trouble at that location. Mr McMillen KC put to the plaintiff that on the evening in question a group of youths in the same field as the plaintiff attacked the soldiers with stones, bricks, and bottles as they made their way down the Antrim Road and that the plaintiff would have been aware of this and would have been aware of the preparations that would have been necessary for such an attack, including the collection of bricks, stones, and bottles. The plaintiff flatly denied seeing any rioting or any preparations for rioting taking place. It was properly put to the plaintiff that if such activities had been taking place that evening, he would almost certainly have

been aware of them taking place. The plaintiff avoided giving Mr McMillen KC a direct answer to this proposition.

[16] The plaintiff accepted in cross-examination that when he was struck by the baton round, he was at or near the chain link fence line in the field. It was put to the plaintiff that a six man army foot patrol had been making its way down the Antrim Road at that time and had come under attack from behind, at or about the Bell's Row crossing, by youths coming out from the estate onto the Antrim Road after the patrol. Another group of youths then started attacking the patrol from the field and began moving onto the Antrim Road in an attempt to separate the last two soldiers in the six man foot patrol from the first four soldiers in the patrol. When the two soldiers at the rear realised that they were at risk of being cut off from the rest of the patrol and, in effect, being hemmed in from both ends by rioters, a decision was taken to fire a plastic bullet at one of the rioters moving onto the road from the field and the plaintiff was struck by that plastic bullet. In essence, it was put to the plaintiff that the bullet missed its intended target and struck the plaintiff who was also present in the field.

[17] The plaintiff's response to this proposition was that he was not aware of any trouble in the area. He was simply hunkered or bent down collecting wood near the fence with his back to the road. One of his friends shouted over to him. He stood up, turned around to see what was happening and as he turned to his left, he was hit on the side of the head by a plastic bullet. It was put to the plaintiff that if there had been a group of rioters in the field moving onto the road to cut off the two soldiers from the rest of the patrol then he could not have been oblivious to this development. Again, the plaintiff was somewhat evasive in his answer to this question but he did reiterate that he was not aware of any trouble of any nature on the evening in question. On further questioning directly by the court, the plaintiff accepted that if the events of that evening unfolded as alleged by the soldiers, then he would have been very proximate to the rioters and it would have been impossible for him not to have been aware of the presence and actions of the rioters.

[18] The next witness called to give evidence was Mr Stephen Knox. Mr Knox gave evidence that he has been employed as a steel worker for the last ten years. He is slightly older than the plaintiff and at the time of the incident he was friends with the plaintiff and Mr McEnoy who died suddenly a number of years ago. This witness accepted that he had made a statement to the police at the time but only had a vague recollection of events at this distant remove. Mr Knox stated that he had difficulty reading and writing and had not read the statement that he made to the police on 17 May 1997 before getting into the witness box to give his evidence. Mr Knox stated that he was in the field collecting wood for the bonfire with his two friends. He stated that he was not aware of anything untoward occurring before the plaintiff was struck by the plastic bullet. He stated he heard a loud bang and saw the plaintiff fall to the ground. When he went over to the plaintiff, he could see that he had sustained a serious injury to his eye. Adults came over from the garage and took Mr McKenna over to the garage. Mr Knox could not remember seeing anyone

else in the field at the time. He only saw the army after Mr McKenna was injured. The soldiers were on the road at that time. He did not see any youths attacking the soldiers at any time.

[19] During the course of Mr Knox's cross-examination by Mr McMillen KC, Mr Knox stated that during his entire childhood period he had not witnessed any incidents involving groups of youths and soldiers in the Lurgan area. He also stated that he could not remember ever speaking to the plaintiff about this incident at any time after the incident. He could have done so but he could not remember such a conversation. He specifically denied that he had ever spoken to anyone about what he should say to the police before making his statement to the police. The court then asked Mr Knox about the contents of the statement that he made to the police in May 1997. In his statement to the police Mr Knox stated that when he and his two friends arrived at the field there were about ten to twelve other people in the field collecting wood for the bonfire. He did not know any of them. When asked about this in the witness box he stated that he could not remember another group of ten to twelve youths being present in the field collecting wood. Returning to the statement, Mr Knox stated that sometime later when he and his friends were collecting wood and playing on a swing in the field, he saw soldiers stop on the road in front of the Bellevue garage. In the witness box he stated that he could still remember this but then said that this occurred after the incident. However, it was pointed out to Mr Knox that his statement continued with the following account.

> "We just continued collecting wood. Gavin and Anthony were with me at all times, but I can't say whether they seen the soldiers or not. Nor can I say where the other people were that were in the field as we were bent down collecting wood. I did not hear anyone shouting or see anyone throw anything at the soldiers. The other fellas in the field were further away from the Antrim Road than us, directly across from us. The soldiers were directly across the road from us. We were only 15cms or so on the other side of the fence. Gavin and I were collecting the wood and Anthony was carrying it over to the bonfire. I then seen one of the soldiers hunker down and aim a gun at us, the other soldiers were behind him, they also had a dog and there wasn't many of them. The next thing I heard a bang and Gavin fell. The soldiers then cheered."

[20] It was pointed out to Mr Knox that the version of events contained in his statement given to the police in May 1997 was dramatically different from the account given by him in the witness box. Mr Knox stated: "I'm only trying to do my best with remembering what I can." Mr Knox specifically stated that he did not remember a soldier hunkering down and aiming a gun at them. It was suggested to him that if that did happen, it was the sort of thing he would have remembered; to which he replied: "I dunno."

[21] The next witness to give evidence was Mrs Catherine Mitchell. The witness accepted that she had given a statement to the police on 29 April 1997 and that her son Michael Mitchell had also made a statement to the police on that date. Mrs Mitchell stated that she lived in the Kilwilkie Estate and that at the time of this incident, she worked in a hot food bar in one of the units of the Bellevue garage. This unit was the unit closest to the town. On the day of the incident, which was a Saturday, Mrs Mitchell stated that she probably was scheduled to work between 4:00pm and 10:00pm. Mrs Mitchell stated that her son Michael who is roughly the same age as the plaintiff used to play in the field on the other side of the Antrim Road from the garage and that he was playing in the field on the evening of the incident in question. Mrs Mitchell stated that she saw the army patrol pass by the garage on its way down the Antrim Road towards the town centre. Mrs Mitchell stated that she then heard some shouting. As a result of this, Mrs Mitchell and another woman, Ann Trainor, who was in her sixties, went out of the hot food bar to see what was happening. Mrs Mitchell stated that she walked across the forecourt of the garage out onto the footpath at the Lurgan town side of the garage forecourt. She stated that she saw some youths shouting at the soldiers, with the soldiers shouting back at the youths. Mrs Mitchell stated that she then heard a bang and then she heard a child in the field shouting: "he's hit." She gave evidence that she could see the smoke from the plastic bullet gun but she did not see the gun being fired and she could not identify who fired it. Mrs Mitchell denied that there were any youths attacking the soldiers at the time. Mrs Mitchell stated that if there had been any rioting, she would have gone across to the field to get her son out of the field and bring him into the hot food bar.

[22] Mrs Mitchell was asked how she felt when she heard a child in the field saying "he's hit" or words to that effect. She said she was concerned because the victim could have been her son. As a result, she went over to the field and saw the plaintiff with a bad head wound. Neither she nor Mrs Trainor were concerned for their safety because there was no trouble in the area at the time. There was no stone throwing or anything of that nature. The army were still quite close and if there had been any trouble Mrs Mitchell stated that she would have observed it. In fact, she would have been in the middle of it. Mrs Mitchell stated that other adults including the owner of the garage then came over into the field and Mr Kelly who owned the garage but not the hot food bar brought the plaintiff back over to the garage. Mrs Mitchell could not recall where the soldiers went to. She stated that the incident was over as soon as it started. Mrs Mitchell stated that she did not know the plaintiff at the time but she would have known the plaintiff's mother and her family. She also stated that she had no political affiliations and no member of her family had ever gotten into trouble with the police or army. Mrs Mitchell stated that she worked in this hot food bar for approximately five years and she did not recall the Bell's Row crossing being a flashpoint for rioting or civil disturbances. However, she revised this statement to a significant degree when cross-examined by Mr McMillen KC in that she accepted that in the late 1990s this area would have been in the news regularly as the scene of frequent rioting.

[23] Under cross-examination, Mrs Mitchell agreed that the railway crossing was a "choke point" and those who were intent on attacking the army (and this commonly occurred during weekends) would know that army foot patrols would have to pass through this "choke point" on the way back into Lurgan town. She also agreed that youths would also have congregated in the field beside the Antrim Road down from the level crossing and that at times some of these youths would have engaged in the stoning of soldiers. Mrs Mitchell was asked about the statement that she made to the police and the passage in it where she stated that she was chatting in the hot food bar with Mrs Trainor when she saw "about three fellas who had been drinking in Bell's Row earlier come out onto the road and start shouting at the army." When quizzed by Mr McMillen KC about this, she stated that these individuals were in their late teens, but she had to concede that she had not observed them drinking earlier and she had not even seen them in Bell's Row earlier. However, she stated that she made that statement to the police because the three young men were drunk, and they came out onto the road from that direction of the Bell's Row field. She stated that she did not see any other youths or young men in the field at that time. The three drunk young men did not have anything in their hands. They were not carrying any cans or bottles. In her evidence she stated that the soldiers were shouting abuse back at these three young men, but she had to accept that when she made her statement to the police, she stated that the army simply ignored these three young men and walked on. When quizzed about this, Mrs Mitchell initially stated that her statement was right but then she changed her evidence and said that she did recall the army shouting back and she should have put that in her statement. She stated that it would not have been all the soldiers who were shouting back just one or two of them.

[24] Mrs Mitchell was asked by Mr McMillen KC why she and Mrs Trainor walked out of the hot food bar across the forecourt to the footpath and she answered: "Just being nosy." She was asked what she was being nosy about and she replied: "Just to see what the exchange, what the – what was – was anything going to happen." Mr McMillen KC then pointed out that in her statement made to the police Mrs Mitchell had stated that she and Mrs Trainor walked to the corner of the forecourt of the garage: "the corner closest to Bell's Row" and not the corner closest to Lurgan town as stated by her in her evidence in chief. He enquired why Mrs Mitchell walked in that direction? Mrs Mitchell needed this question explained to her. It was then explained to her that she had stated that she had seen the soldiers walking down the Antrim Road towards Lurgan town and the three young men then following the soldiers down the Antrim Road towards Lurgan town, so why would she be walking out of the hot food bar which was the unit nearest the town centre, across the garage forecourt to the corner of the forecourt closest to Bell's Row which was away from Lurgan town centre if she was keen to ascertain what was going to transpire between the soldiers and the three young men? Mr McMillen KC suggested to her that she walked over to that corner of the forecourt because something was happening up towards Bell's Row. Mrs Mitchell denied this, but she could not recall why she walked to that corner of the forecourt.

[25] Mr McMillen KC then continued to cross-examine Mrs Mitchell about the contents of her statement to the police. He reminded Mrs Mitchell that she had told the police that after she walked to the corner of the garage forecourt, she saw eight to ten children playing the field opposite the garage and that before she heard the bang, some of the army patrol had gone out of sight behind a wall. When probed about these issues, Mrs Mitchell confirmed that the child who was hit was not part of this group of eight to ten children. This group did not engage in any stone throwing. This group would have been of roughly the same age as the plaintiff and her son. To the best of her recollection, her son was not part of this group, nor was he with the plaintiff that night, although he was in the field and to the best of her recollection, she did not see her son when she went over to the field and did not bring him back to the garage with her. Finally, she confirmed that the wall in question was a wall further down the road towards Lurgan town centre. At the conclusion of Mrs Mitchell's evidence, I was left pondering two questions. Firstly, why would she and Mrs Trainor come out of the hot food bar just to see three drunk young men giving verbal abuse to some soldiers? Secondly, having done so, why would she walk diagonally across the entire garage forecourt to the corner of the forecourt closest to the Bell's Row junction when at that stage the soldiers and the young men had passed the garage and were moving down towards Lurgan town centre at such a distance that some of the army patrol had gone out of sight behind a wall?

[26] The next witness to give evidence was Mr Stephen Haughian who gave evidence by video-link on 7 December 2021. Mr Haughian is just a few years older than the plaintiff and is a married man with two children. He is in full-time employment with the Hyster-Yale Group in Craigavon and has been employed by this company for the last eighteen years. He has no previous convictions and is not involved with any political party or grouping. He knew the plaintiff when they were children but had lost contact with him. Mr Haughian gave evidence that he was also collecting material for the bonfire that evening. He and others were sitting, chatting on an old settee in the middle of the field. He then heard a bang, and he made his way over to see what had happened. He then saw the plaintiff in a badly injured state. "… Gavin had got up again, ran a few steps and fell again. The same thing happened again; he got up and he ran. This is when I seen the blood on his injury." Mr Haughian stated that he was not aware of the presence of soldiers before he heard the bang and then as he moved over to where the plaintiff was, he saw soldiers on the road. Mr Haughian stated that there were a lot of young people in the field; there were several groups spread about the field but "we were all doing our own thing." Mr Haughian did not remember any rioting and he did not remember any stone throwing or anything like that taking place. Mr Haughian could not remember what the soldiers did after the incident. He stated that he and others left the area. They took the long way out of the field up to the railway crossing and then went home. Mr Haughian denied seeing any rioting at any stage that evening.

[27] When cross-examined by Mr McMillen KC, Mr Haughian indicated that he had not given a statement to the police about this matter but had spoken to the plaintiff's former solicitor at some stage in the weeks or months after the incident and he had not heard anything else about the case until he received a letter from the plaintiff's present solicitor in October 2021. Mr Haughian accepted that in such circumstances, his recollection of events was somewhat impaired. He stated he "wouldn't remember, step-by-step the sequence of events now." He stated that the children in the field would have ranged from twelve to fifteen or sixteen years of age. Mr Haughian remembered the plaintiff and his two friends, Stephen Knox and Anthony McEnoy being over towards the Antrim Road edge of the field. Mr Haughian stated that he was seated on the settee facing the road, but he did not see any soldiers at that stage as "… it was dusk. It was dark." He also stated that he was not paying much attention to what was happening on the road at that time. Mr Haughian stated that he did not see or hear the three young men Mrs Mitchell described in her evidence. When quizzed further about this issue by Mr McMillen KC, Mr Haughian initially stated that traffic noise may have prevented him from hearing the three young men but then conceded that he did not remember what the traffic conditions on the Antrim Road were like that evening.

[28] Mr Haughian agreed that at the time of this incident, it was common for there to be public order incidents involving army patrols in the general area of the Kilwilkie Estate but he had no recollection of the Bell's Row crossing being a particular flashpoint. He was of the view that at the time "there would have been trouble all over the Estate, not just in that one area." Mr Haughian went on to state that the Bell's Row crossing was outside the Kilwilkie Estate proper and as such there was less likelihood of trouble occurring at that particular spot. According to Mr Haughian, Bell's Row was his playground when he was a child and he and his friends would have been there practically every day. There were times that rioting developed when soldiers were passing through the area. However, he stated that "it happened regular throughout the whole estate." In relation to the night in question, Mr Haughian was adamant that he did not observe any trouble involving local young people and soldiers.

[29] The final witness called on behalf of the plaintiff was Mr Michael Mitchell, the son of Mrs Catherine Mitchell. The court was informed that Mr Mitchell now works for a company laying out football pitches and prior to this he had worked as a welder. The court was informed that it was proposed that Mr Mitchell would give evidence by video-link from a work location as he would have difficulty getting time off work to give evidence either in court or at a more suitable location. The court agreed to Mr Mitchell's evidence being given in this manner but the shortcomings of this approach soon became apparent. In his evidence, Mr Mitchell indicated that he is roughly the same age as the plaintiff. He confirmed that he made a statement to the police about this incident on 29 April 2007. He stated that he has no links to any political organisations or groupings and he has no criminal record. Mr Mitchell stated that he had an independent recollection of the events of the night in question

separate and distinct from the contents of the statement he made to the police in 1997.

[30] Mr Mitchell stated that on the evening in question he was in the Bell's Row field with a friend near a pond which was located some distance from the road and is shown on the extreme right side of the map which was before the court, about a quarter of the way down from the top of the map. He stated that there were children in the field collecting wood for a bonfire. Some would have been down near the road collecting material that had been dumped in the field and some would have been breaking branches off trees at the back of the field. He stated that he heard shouting coming from the direction of the road and he and his friend decided to make their way over towards the side of the field nearest the road in order to see what was happening and it was when they were making their way over towards the road that he heard a loud bang. It was after this that he first saw the plaintiff running across the field. He was a bit of a distance away from the plaintiff at that time. He stated that the plaintiff fell to the ground and then got up again and started running and it was at this stage that Mr Mitchell saw the blood on the plaintiff's face.

[31] The court was then asked to rise for a short while to see whether the quality of the video-link (both video and sound) could be improved as Mr McMillen KC was having difficulty picking up what the witness was saying. Following a short adjournment, Mr Lyttle KC informed the court that due to difficulties with the video-link, no further evidence would be received from Mr Mitchell. Even though his evidence was truncated, the aspect of his evidence which was of special interest was his recollection that even from his position at the far side of the field near the pond, Mr Mitchell heard shouting from the direction of the road and he had started to make his way over in that direction to see what was happening when he heard the bang. In relation to this aspect of his evidence, I note that when Mr Mitchell made his statement to the police he did so in the presence of his mother and he told the police in late April 1997 that before hearing the bang, he heard a lot of people cheering and shouting "there's the Brits" and phrases like that. Mr Mitchell's evidence concluded the oral evidence adduced on behalf of the plaintiff.

[32] The first witness called on behalf of the defence was Mr Paul Cameron who confirmed that he had made two statements to the police on 26 April 1997 shortly after the incident. In the first statement the then Lance Corporal Cameron gave details of the incident in which the plaintiff was struck by a plastic bullet and in his second statement he indicated that he handed over a baton gun serial number 1010998399754 along with a spent baton round cartridge to a Detective Sergeant Currie at Lurgan RUC Station on the night of the incident. The police investigation of this incident involved taking of a number of statements and testing of the plaintiff's clothing for traces of cartridge discharge residue of the type associated with baton rounds, presumably to look for evidence to support or refute the claim that the plaintiff was shot at from point blank range. No cartridge discharge residue was found on any of the plaintiff's clothing. From the list of items provided to the

police by the plaintiff's father, it would seem that the plaintiff was wearing a red T-shirt, a pair of black jeans, a blue coat and a brown shirt on the night in question.

[33] Mr Cameron who was twenty-six years old at the time of this incident gave evidence by video-link as he is now engaged as a security contractor outside the United Kingdom. He stated that he was born in South Africa and was brought up in Scotland on the east coast just north of Dundee. He joined the army in 1988 and initially served in the first battalion of the Black Watch. He was initially posted to Berlin and then to Ballykinler where he was initially part of a normal rifle company before engaged in surveillance activities as part of a Close Observation Platoon. As part of a normal rifle company, he was engaged in regular foot patrol duties in the Newry region, including the Derrybeg Estate which was a very difficult area to patrol at that time. There also was a railway track to one side of the Derrybeg Estate. The main Belfast to Dublin railway line ran past the Estate and suspect devices were regularly left on the tracks, stopping cross-border train travel. As a result, the area had to be intensively patrolled in order to deter the deployment of real or hoax explosive devices. Following his tour of duty in Northern Ireland, Mr Cameron was posted to Hong Kong but he requested to be transferred to the 3rd Battalion of the Royal Irish Regiment so that he was not required to serve outside the United Kingdom and following his transfer he was originally based in Mahon Road barracks in Portadown and he would have been involved in foot patrol duties in Lurgan, including the areas around the Kilwilkie Estate, which again included a section of the Belfast to Dublin railway line. Mr Cameron's evidence was to the effect that foot patrols regularly encountered trouble when patrolling in the area of the Kilwilkie Estate and the likelihood of encountering trouble was significantly increased if the foot patrol took place during the evening time or at the weekend. His evidence was that if a foot patrol did not encounter trouble during a patrol taking place during a weekend, then this was interpreted as an indication that something more significant or sinister might be taking place in the area.

[34] Mr Cameron's evidence was that on the evening in question, he was part of a six man foot patrol commanded by Corporal McGann. Lieutenant Colonel Cattermull (then a Major) was taking part in the patrol as a supernumerary. Major Cattermull had just joined the first battalion of the Royal Irish Regiment and was finding his feet by going out on patrol to observe conditions in the area at first hand. It would have been unusual for an officer of the rank of major to go out on a foot patrol. The six man patrol consisted of Major Cattermull, Corporal McGann, Lance Corporal Cameron, Private Moreland, Private Hawthorne, and Private Hewer, who was a dog handler. All the soldiers made statements to the police on the night of the incident. Mr Cameron accepted that as the incident occurred over 24 years before the date of him giving evidence, he was largely dependent upon his statements for his recollection of events. However, he was able to state that the patrol would have originated in Mahon Road barracks in Portadown and the patrol would have been transported by vehicle to Lurgan police station. There would have been a briefing in the police station and then the foot patrol would have commenced

from this location, taking a pre-determined route, and finishing back at the police station.

[35] On the night in question, the members of the foot patrol were wearing normal military attire, including helmets. They were not carrying specialist riot equipment or wearing specialist riot protection. It was usual for one member of a foot patrol to carry a plastic baton round gun when the foot patrol was patrolling in an urban environment. On this occasion, Mr Cameron was assigned to carry and, if necessary, operate the plastic baton round gun, in addition to his standard issue rifle. This was somewhat unusual because it was more common for a private rather than a lance corporal or corporal to be assigned to fulfil this role. He stated that he had received training in the use of plastic baton round guns and that such training was repeated at regular intervals. Throughout his military career he had been assigned to carry and, if necessary, operate a plastic baton round gun on a "handful" of occasions when performing foot patrols in urban areas and this was the only occasion on which he fired a baton round when on a foot patrol. In fact, this was the only occasion when Mr Cameron was on foot patrol in Northern Ireland on which a plastic baton round was fired by any member of the foot patrol. It was an uncommon event.

[36] Mr Cameron gave evidence that on the night in question, the foot patrol joined the Cornakinnegar Road from fields beside Lurgan golf course and proceeded towards the Bells Row railway crossing. He stated that he always regarded the Bell's Row crossing a choke point in the sense that it was the only point where a foot patrol could cross the railway line to patrol back towards the town centre. He stated that he and Corporal McGann were at the rear of the six man foot patrol and that Major Cattermull and the other soldiers were ahead of them and he and Corporal McGann were separated from the other four by some distance. Mr Cameron stated that he would have been walking backwards a good bit of the time but would also have been keeping an eye on the other members of the patrol who were further down the road. Of the leading four members of the foot patrol, the dog handler could have been closest to Corporal McGann and Lance Corporal Cameron who were bringing up the rear.

[37] Mr Cameron's evidence was to the effect that as the patrol crossed the Bell's Row crossing, a group of youths came out of the Kilwilkie Estate onto the road behind the patrol and commenced throwing missiles at the patrol. One of the youths had a catapult. This was quite a serious attack, with the dog handler and dog being specifically targeted. All the patrol was "getting hit with all debris that they could throw at us." In terms of the number of youths involved, Mr Cameron was of the opinion that "you're probably talking at least double figures … we are talking about multiple youths and adults." Mr Cameron stated that although members of the patrol were being struck with missiles, most of the strikes were to the lower body and no member of the patrol sustained any significant injuries.

[38] Mr Cameron's evidence was that having crossed the Bell's Row crossing and as he was walking backwards down the Antrim Road, he noticed that another group of youths (numbering approximately 20) had come out of the wooded area at the far side of the field to his right, and these youths, some with their faces covered, also joined in the missile throwing at the patrol. Both he and Corporal McGann became concerned that as these youths made their way across the field they were intending to attempt to come onto the road and effectively cut off the two soldiers at the rear of the patrol from the leading four member of the patrol. He stated:

> "Well, the situation obviously escalated because the amount of youths that then came from that wooded area and, in a sense, the military way of looking at it was we had just been outflanked, that's the way we would perceive it as."

Their concern was increased when they realised that these youths obviously had a pre-collected supply of items to throw at them which suggested that this was not a spontaneous event but a pre-planned ambush. In terms of his level of concern at that time, Mr Cameron stated:

> "Well worst-case scenario was obviously things can escalate very quickly from there really, realistically a soft option is that you only get beaten up but the concern is that they end up taking your weapons off you and then use the weapons against you. So, again, that was the escalation where we all had it in our heads."

[39] Mr Cameron's evidence was to the effect that both experienced soldiers knew that a potentially serious situation was quickly developing and that they had to react quickly to avoid being cut off from the rest of the patrol. The gap was such and the proximity of the rioters to the road was such that there was no opportunity to simply turn on their heels and sprint towards the other soldiers, so the decision was taken by Corporal McGann to deploy the plastic baton round gun to deter the rioters from rushing onto the road and cutting the two soldiers off from the rest of the patrol. Mr Cameron stated that Corporal McGann gave him the order to ready the baton round gun for use and Mr Cameron did this by loading the gun. Corporal McGann then identified a target as a youth wearing a black bomber jacket, blue jeans and a Celtic scarf on his face who had a rock in his hand and appeared to be getting ready to throw it. Mr Cameron then identified the target described by Corporal McGann and aimed the baton round gun at this target. It was all done very quickly. The target was more than twenty or thirty metres away. It was getting dark at the time. He aimed at the target's lower limbs, but he is unable to say whether the plastic baton round that he fired that night struck the intended or any target. However, the action of firing the plastic baton round at this target did have the intended effect in that the rioters stopped their advance, and the soldiers were able to make their way quickly down the road at a sprint without encountering any significant impediment

and were able to join up with the rest of the patrol and, as a group, were able to make their way back to Lurgan police station. Mr Cameron gave evidence that as they were making their way back to the station, a radio communication was made warning another foot patrol in the area to avoid the Bell's Row crossing area. When the patrol had returned to the police station, he was later informed that a youth had been struck by a baton round and he was required to make a statement and hand over the baton gun and the spent round to the police.

[40] In his examination in chief, Mr Cameron gave the impression that the group of rioters which included the identified target were still in the field when he fired the baton round, but he was not sure about this. He stated:

> "All I can say is the individual was within the crowd within the wooded area, he was pointed out of what items he was wearing with the scarf covering his face and that is the target that we aimed of and that was again past, it would have been over twenty metres away … He would have been in the wooded area or the edge of the wooded area"

It is worthy of note that the statement made by Corporal McGann at the time states that: "As the crowd moved into the road to cut us off, I identified one male with a large rock in his hand held above his head as if he was about to throw it." The location of the target at the time that the decision was taken to discharge the plastic baton round gun is an important issue in this case and it is one to which I will return at a later stage in this judgment. In answer to questions, Mr Cameron stated that with the passage of time, he was unable to pinpoint the location of the target on the map which has been referred to above.

[41] Mr Cameron also stated in his evidence that although he could not be sure at this remove, the likelihood was that the baton round used on this occasion was a twenty-five grain round rather than the more powerful forty-five grain round, the use of which was more tightly controlled. Mr Cameron's recollection was that the forty-five grain round would only be deployed when heavy and sustained rioting was anticipated. Mr Cameron's recollection was not supported by any other evidence dealing with this point.

[42] Under cross-examination by Mr Lyttle KC, Mr Cameron stated that he could not remember whether he had been provided with a copy of the instructions on the use of the relevant baton round gun entitled: "Restricted. Rules of Engagement for PVC Baton Rounds. L104A1 Baton Gun … Amdt 5/94" at any time that he was on active service in Northern Ireland. He stated that he could not remember how many baton rounds he was provided with by the armourer that evening but it was probably between two and four and again he could not recollect whether they were twenty-five grain or forty-five grain rounds but he considered it more likely that they were twenty-five grain rounds. In relation to the issue of training, Mr Cameron

stated that he definitely received regular training in the use of plastic baton round guns during each year in which he was on active service in Northern Ireland but he could not remember whether he received any such training in the four month period prior to being issued with a baton round gun that evening, as was required by paragraph 3 of Appendix C to Chapter 1 of the Northern Ireland Shooting Handbook. Tellingly, Mr Cameron admitted that he was not aware of the requirement to have received training in the use of a baton round gun in the four month period immediately prior to deployment on any armed duty with a riot gun. Mr Cameron gave evidence that it was possible that he may have been asked if he had received relevant training prior to being provided with a baton round gun but he cannot remember being asked if he had been trained within the previous four months prior to being permitted to take charge of such a weapon.

[43] Mr Lyttle KC quizzed Mr Cameron about the severity of the attack that night including the claim that one of the attackers was using a catapult. Mr Cameron repeated his evidence that the patrol was subjected to a sustained attack and that he and others were struck by missiles but he had to accept that none of the soldiers reported being struck by any missiles and no significant injuries were sustained by any member of the patrol or the military dog. Mr Lyttle KC challenged this account by referring Mr Cameron to the statement of Mr Oliver Headley who was the Northern Ireland Railways employee who was covering the late shift in the signal box at the Bells Row crossing that evening. According to this statement there were approximately "six children whom I would describe as between six to ten years following the army and throwing objects at this patrol." It was put to Mr Cameron that this description of the incident indicated a very minor and non-threatening event. Mr Lyttle KC also referred Mr Cameron to the statement made by Private Hawthorne in which he described ten youths playing football on the Kilwilkie Estate side of the road who then stopped playing football when the patrol passed and started following the patrol down the road. Again, Mr Lyttle KC relied upon this passage of the statement to suggest to Mr Cameron that he was exaggerating the level of threat posed by any children that evening. Mr Cameron denied this.

[44] Although it was not put to Mr Cameron to comment upon, it should be noted that a subsequent passage of Private Hawthorne's statement contains the following relevant account:

> "We carried on across the crossing and then I noticed another crowd of youths on waste ground to my left, I would estimate to crowd at approximately thirty. As we crossed the Bell's Crossing the crowd on the waste ground to our left started to stone us. Private Moreland and myself, pushed on down the road past the Kilmore Road junction. I looked back and saw a youth come through a gap in the hedge from the waste ground and throw a lump of concrete at the search dog. I think it hit the back of the dog. He was wearing a grey top. At this

point the crowd started to come through the hedge onto the road and move back into the waste ground again and I heard a baton round being fired."

[44] Mr Lyttle KC then questioned Mr Cameron about various aspects of the incident, pressing him to provide precise details of the makeup, location and movements of the two groups of youths, the activities of the person with the catapult, the areas of the body where Mr Cameron was struck with missiles and the description and activities of the target. He questioned Mr Cameron on what part of the target he aimed at, whether he hit the intended target, whether he had any recollection of hitting any other individual and whether the crowd chased the soldiers down the road as they sprinted to catch up with the other members of the patrol. It became clear from his answers that Mr Cameron had little independent recollection of the events of that night and was heavily reliant upon the contents of his statement.

[45] The following exchange then took place:

"Mr Lyttle KC: "Tell me, Mr Cameron, are the events of this night not seared into your memory?"

Mr Cameron: "It makes me laugh."

Mr Lyttle KC: "That makes you laugh. Why does that make you laugh?"

Mr Cameron: "It makes me laugh that you would think that you would remember something like that after twenty odd years."

Mr Lyttle KC: "You might remember the fact because I'm sure you heard within a matter of hours that a young fella of thirteen had suffered a very serious injury to his eye."

Mr Cameron then responded in the following terms:

"No, I can't remember. Not just for you, right, I'll put you in the picture of where since I left the military, I have spent 16 years in the Middle East and within that Middle East not bumming or bragging or anything like that, there is a lot I have had to deal with. If it hasn't been the fact that I've been shot at, blown up or rocket propelled grenades fired at me there have been quite a lot in the

past 16 years that have gone on. So yes, I'll apologise that I can't remember all these details of where I was hit, was somebody else hit 20-odd years ago."

[46] This exchange which I have fully recorded in this part of my judgment graphically illustrates the difficulties faced by witnesses dealing with events of such vintage. Of course, recollections of specific incidents are going to be impaired and significantly so by the passage of time and in some cases by the occurrence of other subsequent traumatic events and, of course, statements made to the police in the immediate aftermath of such incidents are not going to include all the forensic detail and minutiae that may be explored and addressed during a much-delayed hearing of a damages claim. It is important for the tribunal hearing such long-delayed cases to make appropriate allowances for the frailties in the oral evidence of witnesses especially in circumstances where the delay has been occasioned by unexplained inactivity by the plaintiff over a considerable number of years.

[47] Mr Lyttle KC concluded his cross-examination by questioning Mr Cameron about whether he had any advanced knowledge of the construction of a bonfire in the field beside the Antrim Road. Mr Cameron stated that as far as he could remember, he had no knowledge that a bonfire was being constructed in that field, but such knowledge would not have made any difference to the route followed by the patrol. It was suggested to Mr Cameron that if the army was aware that the Bell's Row crossing was a flashpoint especially in the evenings and at weekends, it certainly was not prudent to plan a foot patrol to pass through that area at that time. Mr Cameron stated that the planning of the foot patrol was not something he could comment on.

[48] In answer to questions from the court, Mr Cameron described the procedure he would have followed when Corporal McGann ordered him to make ready the baton gun. Upon receipt of this instruction, he would have slung his rifle over his shoulder and then would have unslung the baton gun from his other shoulder. He would then have broken the gun open, loaded a round into the gun and then closed the gun again. Corporal McGann would then have identified the target and when Mr Cameron had also identified the target, he would have fired. There would have been no need to wait for a further instruction from Corporal McGann. In relation to Mr Knox's assertion that he saw a soldier hunker down and fire a baton gun, Mr Cameron stated that a baton gun would usually be fired from a standing position or when kneeling on one knee. A baton gun could not be fired from a prone position. Mr Cameron could not remember whether he was standing or kneeling when he fired the baton round. Mr Cameron could not remember seeing any child in the vicinity of the target, either standing erect or crouching down. Finally, Mr Cameron stated he had no recollection of a chain link fence forming the perimeter of the field and, therefore, could not say whether this impacted upon either the level of threat he perceived from the group of youths in the field or his ability to aim at the lower limbs of the intended target. As stated above, I fully appreciate the impact of the passage of time on the ability of Mr Cameron to

recollect details of the incident. With that comment, I leave the evaluation of the evidence of Mr Cameron until a later stage of this judgment, and I move on to set out in detail the evidence given by Lieutenant Colonel Cattermull by video-link on 1 April 2022 and 9 June 2022.

[49] In his evidence in chief, Lieutenant Colonel Cattermull confirmed that he had given a statement to the police about the incident on the night of 26 April 1997. In relation to his military career, he confirmed that he had been in receipt of an army bursary throughout his university education and had been commissioned as an officer in April 1989. He was initially commissioned into the Royal Irish Rangers which then became the Royal Irish Regiment. Prior to this incident, he had been deployed in Bosnia, Germany, Cyprus, Mozambique, Zimbabwe, the Falkland Islands and Northern Ireland. His first tour of duty in Northern Ireland was in 1997 and he had reached the rank of Major by that time. On the night in question, Lt Col Cattermull confirmed that he was present as part of the foot patrol as a supernumerary. He confirmed that he was new (two to three weeks) into his command appointment (G Company) and lacked situational awareness, and needed to understand the battalion's tactical area of responsibility. He, therefore, chose to go out on a number of patrols with more experienced members of the company in the battalion: "to understand our role, and the geography, and the situation - well, to improve my situational awareness of the area that Three Royal Irish operated in at the time." For the sake of completeness, Lt Col Cattermull subsequently served in Iraq, Afghanistan, and Yemen and, like Corporal Cameron, in the years after this incident he was exposed to many traumatic incidents and experiences with the result that the events of the evening in question do not particularly stand out in his mind and he was dependent to a large extent on the contents of his statement in giving his evidence.

[50] Lt Col Cattermull gave evidence that apart from his statement there may well have been information about the particular foot patrol in question recorded in his Northern Ireland patrol notebook which was an accountable document in which all the pages were serially numbered. This notebook was attached to his uniform by a lanyard so that it could not be lost or misplaced, and it was usually placed in the right-hand pocket of the uniform. When the notebook was filled with entries, it had to be handed into the regiment for retention and a fresh notebook would be issued. Lt Col Cattermull stated that it was not just every officer who would have carried such a notebook, every soldier serving in Northern Ireland was issued with such a notebook and upon completion of a soldier's tour of duty in Northern Ireland, his notebook would have been handed back to and retained by the regiment. It is unfortunate that none of the relevant notebooks have been provided by way of discovery and no explanation has been proffered for the failure to do so.

[51] Lt Col Cattermull confirmed that unusually for an infantry regiment, the Royal Irish Regiment foot patrol as constituted that evening consisted of twelve soldiers, made up of two manoeuvre units of six soldiers each. This was due to a shortage of manpower in the regiment. The preferred make up of an infantry foot

patrol was four manoeuvre units of four soldiers each. On the night in question, the two manoeuvre units were providing mutual support and depth for each other. They would have been operating in the same general area so as to be able to come to each other's assistance, if needed, but not necessarily following precisely the same route. They would have been out of sight of each other but in radio contact so that potential attackers of one manoeuvre unit would not know where the other manoeuvre unit was. Lt Col Cattermull, Corporal McGann, Lance Corporal Cameron, Private Hewer, Private Moreland and Private Hawthorne made up one manoeuvre unit that evening. This was a semi-rural patrol, commencing at Lurgan police station, patrolling the fringes of the town, and then finishing at the same location. The route included traversing the countryside near the golf course, travelling down the Cornakinnegar Road, crossing the railway line at Bell's Row crossing, and proceeding down the Antrim Road back into Lurgan town centre.

[52] In relation to his knowledge of the general area, Lt Col Cattermull stated that the Kilwilkie Estate would have regularly featured in intelligence briefings "due to there being a number of known, as it was termed, players – who resided in the Kilwilkie Estate." He also cited a number of events which occurred in that area and the wider Lurgan area in the weeks and months following this incident. There were a number of search operations in the Kilwilkie Estate in which Semtex, coffee jar bombs, ammunition and components that could be used for remotely detonating explosive devices were recovered. There were very significant episodes of public disorder related to the Drumcree parading issue and the regiment provided support for the police in this regard. In relation to the general Kilwilkie area, the Bell's Row crossing was a notable flashpoint. The witness recounted how "an off-route mine" was laid in this area in the period after this incident and a train was hijacked and set on fire. The regiment was required to render safe the area so that the train could be recovered. Lt Col Cattermull also referred to the murder of two police officers, Constables Johnston and Smith, outside Lurgan police station in June 1997. He stated: "there was a lot going on there."

{53] In relation to the events of the night in question, Lt Col Cattermull gave evidence that although he was the senior officer on the patrol, Corporal McGann, as the most experienced soldier, was leading the patrol in order that Lt Col Cattermull could learn from his experience. In relation to the equipment used on the patrol, the witness described the use of ordinary field uniform, Northern Ireland ballistic armour which consisted of a Kevlar vest with ceramic plates, front and rear, protecting the chest and back, a ballistic helmet with a visor, a radio carried by one soldier in each manoeuvre unit, electronic counter measures to prevent the remote radio detonation of explosive devices also carried by one soldier in each manoeuvre unit, standard issue arms carried by each soldier and a baton round gun carried by one soldier in each manoeuvre unit. Lance Corporal Cameron was the soldier assigned to carry the baton round gun in Lt Col Cattermull's manoeuvre unit. Lt Col Cattermull was keen to point out that only those soldiers who were qualified in the use of baton round guns would have been provided with such a weapon on patrols. The mandatory training consisted of a series of presentations on the

characteristics, use and ballistics of the weapon, followed by a series of practical range exercises to test each soldier's proficiency in the use of the weapon and a number of judgmental exercises to test each soldier's decision making to ensure that each soldier only discharged a baton round gun in appropriate circumstances. This was not one-off training but as part of the Northern Ireland training package, the training had to be repeated a number of times per year, possibly up to four times per year.

[54] Lt Col Cattermull gave evidence that the second in command of each Company, who was also the Company training officer, was responsible for organising residential training sessions for the Company, usually at Ballykinler, and was also responsible for maintaining and keeping up to date each soldier's training record and these records were regularly passed on to the Battalion training officer so that there was a record of who was trained in the use of specific weapons and items of equipment. In relation to the procedure to be followed when a weapon was being issued, prior to a patrol, each soldier would go to the armoury, show his ID card, sign out a weapon identified by a serial number and at the end of the patrol, the soldier would sign that weapon back into the armoury. After he had taken possession of the weapon in the armoury, each soldier would then have attended the quartermaster who would have issued appropriate ammunition that also had to be signed for and signed back in again, if unused. The personnel files of Corporal McGann and Lance Corporal Cameron have been discovered in this case. Unfortunately, no documentation relating to Corporal Cameron's training in the use of baton round guns has been discovered. No armoury or quartermaster records relating to the signing out of weapons or ammunition on the night in question have been disclosed.

[55] In relation to the issue of whether a twenty-five grain or a forty-five grain plastic baton round was used that night, Lt Col Cattermull was of the opinion that only the RUC was authorised to fire the forty-five grain baton round. He stated that the "grain is difference in density", so that the forty-five grain projectile was a "harder projectile" than the twenty-five grain projectile. "The difference being that one had greater stopping power than the other." He was firmly of the view that the army was only provided with twenty-five grain projectiles. In relation to what actually happened that evening, Lt Col Cattermull was reliant to a very great extent on his statement made shortly after the incident. In general, his account was consistent with that given by Corporal Cameron. Lt Col Cattermull described quite an intense bombardment and he remembered putting his visor down and he stated that he was concerned that the actions of the two groups of youths were intended to either channel the foot patrol into an area where an improvised explosive device would be detonated or were intended to separate to last two members of the patrol from the rest of the patrol and he referred to the fate that befell the two corporals on the Andersonstown Road in 1988. Lt Col Cattermull gave evidence that he did not have any clear recollection of Lance Corporal Cameron as a soldier under his command but he did remember Corporal McGann as a stand-out soldier who over his time in Northern Ireland developed an extensive knowledge of "players" and

their associates. He was a member of the elite "spotter platoon" due to his highly rated observational skills.

[56] Mr Lyttle KC began his cross-examination by questioning Lt Col Cattermull in relation to the notebooks he had referred to in his evidence in chief. Unfortunately, the video-link then failed, and it could not be restored. It was not possible to complete Lt Col Cattermull's evidence until 9 June 2022. Before the court adjourned on 1 April 2022, Mr Lyttle KC raised the issue of inadequate disclosure in the case. He stated that the original letter of claim in this case was directed to the defendant on 31 March 1999. The defendant responded on 6 May 1999, seeking some further details of the claim being made by the plaintiff. Those details were furnished by further correspondence dated 25 May 1999. The substantive response from the defendant is dated 15 October 1999. It reads as follows:

> "I can advise you that our investigation into this matter is now complete. I should first of all point out that this office looks at all claims on the basis of legal liability. Where it can be shown the Ministry of Defence, its servants and agents have been negligent then this office considers the payment of compensation. I can find no evidence to support the allegations of negligence made against the Ministry of Defence and, therefore, your client's claim for compensation is repudiated."

[57] Mr Lyttle KC submitted that any entries made by the soldiers in their notebooks concerning this incident would have been discoverable as would the baton gun training documentation relating to the soldier who was assigned to use the baton gun that night. Similarly, any documentation identifying the baton gun handed out by the armourer and any ammunition handed out by the quartermaster that evening would have been discoverable and, if it had been disclosed, it is very likely that the last category of document would have dealt with the issue of the type of baton round used that night. When Mrs P A Hatton, the author of the letter dated 15 October 1999, stated in open correspondence that the Ministry of Defence had completed its investigation into this matter and had found no evidence of negligence, Mr Lyttle KC submitted that the court was entitled to assume that a central government department such as the Ministry of Defence would have garnered and carefully considered all such documentation before making a decision or whether to accept or repudiate liability. If it had done so, then it is difficult to understand why the documentation had not been produced to the plaintiff and the court. If it had not done so, then the court was entitled to conclude that the Ministry of Defence had failed to properly investigate this matter prior to repudiating liability. Mr Lyttle KC requested the court direct that these categories of documents be provided by way of discovery and, failing that, an adequate explanation should be provided to the court for the defendant's inability to do so. The court made such a direction.

[58] When the case resumed on 9 June 2022, the defendant was unable to produce any of the categories of documents sought and was unable to give any explanation as to what had become of the documents or whether they had been considered by the defendant prior to the dispatch of the letter repudiating liability on 15 October 1999. Lt Col Cattermull agreed with Mr Lyttle's suggestion that the documentation had either been destroyed or lost.

[59] Lt Col Cattermull was then cross-examined in relation to the contents of the Rules of Engagement referred to at paragraph [42] above. Mr Lyttle KC referred to paragraph 2 of the Rules which states that the rounds "must be fired at selected persons and not indiscriminately at the crowd. They should be aimed so that they strike the lower part of the target's body directly (ie without bouncing)." Lt Cattermull, despite being pressed by Mr Lyttle KC did not agree that the fact that the plaintiff had been struck on the head by a plastic baton round necessarily meant that something went very wrong that night. Mr Lyttle KC read out the account contained in Corporal McGann's statement and referred to the fact that Corporal McGann had identified a target who was clearly standing upright and was about to throw a missile and who was moving onto the road. If this person was the target and if the intention was to strike this person on the legs, then Mr Lyttle KC suggested that something must have gone badly wrong if the baton round that was fired by Corporal Cameron missed the intended target but struck the plaintiff who was at that stage was standing upright and was turning round towards the road in the vicinity of the target (either beside or behind the target), not on the lower body, but on the head.

[60] Lt Col Cattermull answered the question in the following manner:

> "Something has gone wrong but experience of the baton round gun is that it's inherently inaccurate. Therefore, it is limited in range because it is a short-barrelled weapon system and, therefore, accuracy is not it's strength. So, aiming for the legs, below the, you know the leg area, was in order to compensate for any accuracy of the weapon system." When pressed on this point that the wrong person had been struck and the wrong part of the body had been struck, Lt Col Cattermull replied: "Something has gone wrong."

[61] Lt Col Cattermull was the questioned again about the twenty-five grain/forty-five grain issue and he repeated that to the best of his recollection, soldiers were only ever provided with twenty-five grain baton rounds. All training was conducted using twenty-five grain rounds. The witness repeated that he believed that only RUC officers were provided with forty-five grain baton rounds. However, Mr Lyttle KC pressed the witness on the contents of the Rules of Engagement which specifically referred to the circumstances in which a forty-five

grain round could be used by the army. Mr Lyttle KC referred to the following paragraphs of the Rules of Engagement:

> "7. Authority to use the 45 grain round must be obtained from the CLF (Commander of Land Forces), who may delegate this authority on specific occasions.
>
> 8. The orders to fire the round are to be given only by a commander not below platoon/troop level at the scene of the incident and he is to control the fire throughout the engagement.
>
> 9. The round is to be fired only by a soldier or soldiers who are specially selected by the officer in charge, have been trained in its use and are aware of its characteristics.
>
> 10. In order to avoid any risk of confusion, soldiers selected to fire the 45 grain PVC round are not to be issued with any other type of baton round.
>
> 11. **The Round is NEVER to be fired at ranges less than 35m**, or in circumstances in which persons between the firer and the target are within an angle of 550 mils either side of the line of fire."

[62] The reference to "550 mils" is a reference to an angular measurement of 550 milliradians or approximately 31.5 degrees. In essence, paragraph 11 means that a forty-five grain baton round should not be discharged at a target that is closer than thirty-five metres or when anyone else is between the target and the firer and within 31.5 degrees of either side of the line of fire. In answer to Mr Lyttle's line of questioning, the witness repeated that to the best of his recollection, only twenty-five grain baton rounds were used by the army.

[63] Lt Col Cattermull was then asked to explain a number of entries which appeared on Corporal McGann's personnel file. He was referred to an assessment of Corporal McGann dated 6 March 1998 which reads as follows:

> "Cpl McGann is a lively member of the company with a refreshing sense of humour. He is one of those rare breeds of soldier who does not let things get him down, consequently his effect on morale is always beneficial. My criticism of Cpl McGann is that in being so focused on defeating the terrorist he has found the transition to ceasefire soldiering and operations difficult. He ranks at the top of the middle third of the Company's NCOs.

> Corporal McGann is an enigmatic figure. Operationally he is superb. His historical knowledge of the ground and its terrorist suspects is unrivalled and his ability to ferret out munitions and items of forensic or intelligence value unequalled. He has been personally involved in three separate finds this year. He has a natural enthusiasm for counter terrorist operation and goes about his business in a professional and business-like manner. There is however a streak of recklessness about him and on occasion he teeters close to the brink of unacceptable practice. He must guard against becoming a zealot in his pursuit of counter terrorist success. Overall, however, a valuable NCO."

[64] Lt Cattermull stated that he had written the first paragraph but not the second paragraph which would have been written by a more superior officer and he was unable to comment on the views expressed by this superior officer. At the conclusion of Lt Cattermull's evidence, the matter was adjourned until 18 July 2022 when the court heard evidence from Lt Col Clements who was the commanding officer of the 3rd Battalion of the Royal Irish Regiment at the relevant time and held the same rank at that time. He was also the author of the entry in Corporal McGann's personnel file that is set out in the second sub-paragraph of paragraph [63] above.

[65] Lt Col Clements gave evidence that he joined the British Army in 1972 and retired in February 2009, holding the rank of Lieutenant Colonel at that time. His last posting was in Kosovo. Lt Col Clements was asked by Mr McMillen KC to provide context for the entry made by him in Corporal McGann's personnel file for the year ending March 1998. Lt Col Clements explained that at that time, the Lurgan sub-division was regarded as a particularly hostile environment in which the army was regularly tasked with providing support to the RUC in the performance of its policing duties. In providing that support, Lt Col Clements stated that the army had to be extremely cautious that it did not provoke an incident due to the manner in which it provided that supporting role. Lt Col Clements went on to state:

> "I think sometimes Corporal McGann would push the envelope out a bit and get himself into areas which were uncomfortable where he might have put his patrol at risk. So that was one particular area where I was forever cautioning the company commanders when they were dishing out orders to their patrols that were operating in the Lurgan environment."

[66] Lt Col Clements stated that he did not have any adverse reports about Corporal McGann's performance and the interaction between Corporal McGann or his patrol with "the locals." As far as Lt Col Clements was concerned, Corporal

McGann was simply doing the job that he was employed to do and the witness also highlighted the fact that Corporal McGann had come to the notice of his superior officers "because he was so successful on a number of occasions in finding ordnance or coming up with pieces of information that the RUC were interested in."

[67] Lt Col Clements was also requested to cast any light he could on the twenty-five grain versus forty-five grain baton round issue. Lt Col Clements gave evidence that infantry battalions were only provided with the twenty-five grain baton round but his explanation for this opinion differed markedly from that put forward by Lt Col Cattermull. According to Lt Col Clements, the forty-five grain round was only ever issued to Royal Engineer specialist search teams and its use was confined to "taking doors off hinges or for dislodging pieces of material during a search. It certainly wasn't used against a human target, and we were not issued with them." In relation to the training of soldiers on specific weapons systems, it was Lt Col Clements' recollection that the battalion second in command was responsible for training, and he would organise refresher training events at Ballykinler. Lt Col Clements had no recollection of the system in place to ensure that only soldiers whose training was up-to-date could sign a plastic baton round gun out of the armoury. He then stated: "I am assuming that what happened was that the companies submitted a list of qualified soldiers who were allowed to draw a baton round."

[68] Lt Col Clements stated that as commanding officer of the battalion, he would have received a briefing every morning concerning the salient events that had occurred during the previous twenty-four hours and, as a result, he would have been briefed about this incident, but he has no recollection of being briefed about the incident at this remove. He was of the opinion that during the two year period the battalion was based in that area perhaps ten plastic bullets were discharged per year.

[69] Under cross-examination, Lt Col Clements confirmed that despite what the Rules of Engagement might have stated in relation to the use of forty-five grain baton rounds: "I have never in my military career come across a forty-five grain baton round issued to a patrolling unit." However, he did accept that the Rules of Engagement clearly contemplated forty-five grain baton rounds being fired at persons. Lt Col Clements stated that he had a recollection of this incident being covered in local news media outlets and becoming aware of that news coverage. He stated that this incident would clearly have been of great interest to him. He stated that he left Northern Ireland in August 1998 and up to that time, he could not recollect the Ministry of Defence contacting the battalion about this incident. It should be remembered that the letter of claim in this case was directed to the Ministry of Defence at the end of March 1999, after Lt Col Clements had left Northern Ireland. The witness accepted that he would have expected the Ministry of Defence to request all relevant documentation from the battalion when conducting an investigation into the incident, following receipt of a letter of claim and that would include all documentation relating to the question of whether the soldier who fired the baton round was properly trained or not.

[70] In relation to the retention of such training records, Lt Col Clements stated: "I would hope that the training records of all the people who were trained up in the use of baton round guns would have been retained somewhere on either the soldier's record or on the battalion training record." The witness was then asked the following question: "… from your experience, in your opinion, isn't it almost certain that the records in relation to the training of Lance Corporal Cameron who discharged this baton round, those records would have been available in 1999?" He answered in the following manner: "You would think so but as I say again, I wasn't there at the time so I cannot vouch that that was the reality."

[71] Lt Col Clements was then questioned about the entries in Corporal McGann's personnel file, and he was asked to give details about the incidents that were in his mind that led him to conclude that there was a "streak of recklessness about him" and what information the witness had been given that warranted the inclusion of this phrase in Corporal McGann's assessment.

[72] Lt Col Clements explained that in February 1997, a direct fire mortar was discovered by a patrol on the main Belfast to Dublin railway line adjacent to the Kilwilkie Estate and they then had caught three people on the command wire. However, very quickly a large crowd had collected at the scene and the patrol was driven back by sheer overwhelming numbers and the device was spirited away and it was strongly suspected that it was spirited away into the Kilwilkie Estate. The 3rd Battalion was then tasked with going into the estate to recover what was regarded as a very dangerous explosive device. This was a major, prolonged search operation. The direct fire mortar was found by the army along with a substantial quantity of other weapons and munitions. The witness recalled that Corporal McGann and his patrol uncovered a Claymore mine:

> "but he didn't follow the precise procedures in recovering that device and I would have thought that, I would have hoped after, on reflection after the incident that he might have been slightly more cautious, he was a bit sort of reckless in the way in which he recovered it and normally we would have involved an ammunition technical officer and all the rest of it but there were a few short cuts taken, but it was a success nevertheless and he managed to get away with it."

[73] Lt Col Clements went on to state that in another operation:

> "… he came up and he found a crate full of what we called coffee jar bombs at the back end of the Gaelic Athletic Association club that were primed and ready to go and again he did not go through what I would call the proper procedures to recover those. We are quite mechanistic in the way in which we like to recover

> suspicious items and he didn't follow the sort of procedures that we would have preferred he followed at the time and they could both be described as rather reckless."

Lt Col Clements accepted that Corporal McGann did not follow proper procedures in respect of the recovery of explosive devices and in doing so, he put himself and his patrol at risk. When asked by Mr Lyttle KC what he had meant by the use of the phrase: "… he would push the envelope out a bit" when describing Corporal McGann's interactions with locals, Lt Col Clements stated: "I meant perhaps he got too close for comfort."

[74] In answer to a number of questions from the court, Lt Col Clements stated although he had no knowledge or recollection of specific systems being in place, it was possible that between the battalion second in command who was responsible for training and the officer commanding Headquarter Company who was responsible for the armoury, there was some means or system in place for keeping the armoury updated as to which soldiers were current and up to date in their training in respect of the use of baton round guns.

[75] In light of this evidence and in light of the views expressed by Lt Col Clements in relation to the use of forty-five grain rounds being restricted to specialist Royal Engineers search teams, the matter was further adjourned to 30 September 2022 in order to afford further time to the defendant to make more focused enquiries and, if necessary, to call further evidence. In advance of that date, the court was notified that the defendant intended to adduce evidence from Lt Col Spender who was the second in command of the 3rd Battalion of the Royal Irish Regiment at the relevant time and Mr Hepper, a weapons systems expert.

[76] Lt Col Spender gave evidence by video-link that he was commissioned into the Royal Irish Rangers in 1978. In 1990 he attended Camberley Staff College, following a rigorous selection process, and, thereafter, served in various senior staff appointments. As second in command of the 3rd Battalion of the Royal Irish Regiment in 1997, he would have been responsible for: "putting together the unit's training plan for the year and managing how that training works and supervising the outcomes of it." Lt Col Spender described how each subunit in the battalion underwent four training courses per year. Three of those courses took place in Northern Ireland at Ballykinler or Magilligan (they were of five days' duration each) and the fourth course, which was a more prolonged, in-depth and intensive course, took place at a training area in Great Britain. This training event usually lasted twelve days. The records of the training courses were fed back to Lt Col Spender's unit and if anyone had not reached the appropriate standard, then remedial training would be organised. This training would have included Northern Ireland specific training such as training in the use of plastic baton round guns. Details of all mandatory training was recorded on the "unit common administration system" but

Lt Col Spender was unable to recollect whether details of Northern Ireland specific training were recorded on this system.

[77] However, in respect of Northern Ireland specific training, Lt Col Spender did go onto state that:

> "We would have kept the training records at the time because we were very clear that if there was an incident, the first question any investigator asks is: 'were these people trained? Were they properly trained to the operational standards? Were they trained in the use of weapons? Were they properly trained?' And if they weren't trained then we would be looking at, I'm fairly certain, some form of negligence or censure."

[78] In relation to the twenty-five grain versus forty-five grain issue, Lt Col Spender, like Lt Col Clements, stated that the forty-five grain round was restricted for use in special search operations and the twenty five grain round was issued to regular foot patrols. He also confirmed that at that time he regarded Lurgan as a very polarised area and that it was a "difficult place." He described the Kilwilkie Estate as a nationalist estate within which there was a hardcore republican element. Because of the high likelihood of an organised violent response to the presence of an army patrol in the estate, the Brigade Headquarters had prohibited the 3rd Battalion from entering the estate except when supporting the police in the performance of their duties or when conducting a planned operation with Brigade authority.

[79] Lt Col Spender stated that he did not have any specific recollection of this incident or its aftermath. He stated that it would have been usual for a baton round report to have been compiled and to have been sent to brigade headquarters and for this report to have been forwarded on to Headquarters Northern Ireland.

[80] Under cross-examination by Mr Lyttle KC, Lt Col Spender accepted that plastic baton round guns would have undergone regular inspection, servicing, maintenance and repair during their service life and that records relating to such inspections, servicing, maintenance, and repair would probably have been created and would have existed at the relevant time. Similarly, he accepted that records relating to the training of soldiers in the use of such weapons and their proficiency in the use of such weaponry would probably have been created, maintained, and regularly updated at that time. However, he was not at all surprised that with the passage of time and the disbandment of the 3rd Battalion of the Royal Irish Regiment, the records no longer existed or could no longer be traced.

[81] Lt Col Spender could not cast any light on the nature of any system which was in place at the time to ensure that only those soldiers whose training was current and up-to-date were permitted to sign for and take a baton round gun out of

the armoury, bearing in mind that unlike rifles, these weapons were pooled weapons and were not permanently assigned to a specific soldier. However, he was of the opinion that there would have been an armoury book which recorded the identity of a soldier who signed out a specific weapon and the details recorded would have included the serial number of the weapon. He was unable to say whether the armoury book would have included details of the soldier's last relevant training. Similarly, there would have been a quartermaster's book or an ammunition issue book or something of that nature which would have recorded the identity of a soldier who signed for and received ammunition and this book would have recorded the amount of ammunition received by a soldier, the type of ammunition and the amount and type of ammunition returned by the soldier at the end of the patrol. The witness did not believe that this would have recorded the specific type of baton round issued because, to the best of his recollection, only twenty-five grain rounds were issued to infantry foot patrols. However, he accepted that if twenty-five grain and forty-five grain baton rounds were simultaneously stored by the quartermaster then when providing baton rounds to soldiers, it would have been appropriate to record the type of baton round being handed out.

[82] When questioned by Mr Lyttle KC in relation to whether the documentation referred to in the previous paragraph was likely to have remained in existence until at least some time after the letter of claim was dispatched at the end of March 1999, Lt Col Spender replied in the following manner:

> "What I'm saying is that there were books that recorded" (this information) "at the time. What happened to those books and the regulations for keeping and storing them I don't know. You would have to ask someone with a quartermaster's background, not me."

When asked whether such records would have been destroyed within two years of creation, Lt Col Spender stated:

> "Some records are and some records aren't. It depends on the nature and the – how the record is classified. Some records need to be kept for five years or ten years or whatever, and that's clearly laid down, some, some things, as I've already stated like the training records, probably get overwritten because it's about currency so it doesn't matter what you did six months ago. It's what you're doing now. So, that's currency. Some of this stuff is just – may just be purely administrative that when the books fill up, you replace it with a new book and the old book gets destroyed. I don't know. I'm not an expert on that particular area."

[83] Mr Lyttle KC then asked Lt Col Spender whether the defendant's letter dated 15 October 1999 which repudiated liability on the basis that its investigation into the matter had concluded and no evidence of negligence had been found could have been written unless the defendant had checked the records including the quartermaster's records and the armourer's records in relation to the discharge of this particular baton gun and the baton round. In response Lt Col Spender stated that he did not know the answer to that question, but he would have assumed that the defendant would have "checked everything that needed to be checked."

[84] The final witness called on behalf of the defendant was Mr Hepper who is a Chief Scientist and a Fellow at the Defence Science and Technology Laboratory at Porton Down in Wiltshire. He gave evidence by video-link on 30 September 2022. Mr Hepper stated that he was a Fellow of the Institution of Mechanical Engineers, a member of the Royal Aeronautical Society and a member of the Society of Operations Engineers and he gave evidence that he has been involved for the last twenty years in the development and assessment of less lethal or non-lethal weapons including baton guns and baton rounds. Mr Hepper did not produce a formal report for the court. Instead, his evidence was intended to deal with five specific documents discovered by the defendant in this action. The first three documents were the "Patten Report Recommendations 69 and 70 relating to Public Order Equipment", second report dated December 2001, third report dated December 2002 and third report dated January 2004. The fourth document was the "History of the Development of the Baton Round 1969-1980 DRIS Working Note No 4/82." The fifth document was entitled "The Introduction and Development of Baton Guns and Baton Rounds into the UK Police Service. A Review of Process and Documentation" dated May 2005.

[85] Mr Hepper's evidence was to the effect that as of 1997, the plastic baton round gun L104A1 was the main baton gun used by the army and the L5 baton round (twenty-five grain) was the only baton round used with this gun. In essence, his evidence was that the L3 baton round was the forty-five grain round and the L5 was the twenty-five grain round but the L104A1 baton gun could not be used to discharge the L3 round because it had "something called three point swaging" which meant that "it wouldn't fit in. It also had a stepped cartridge case…" In Mr Hepper's opinion the L3 round could only be fired from the L67 baton gun which was not the gun used on this occasion. However, this evidence conflicted with the "Rules of Engagement for PVC Baton Rounds L104A1 Baton Gun" referred to above at paragraphs [61] and [69] above which clearly envisaged a twenty five grain round or a forty five grain round being fired from the L104A1 weapon. Mr Hepper subsequently stated that the "three point swaging" on the L3 round meant that it was difficult but "not necessarily impossible" to fit the L3 round into the L104A1 weapon.

[86] In relation to the conflict between his evidence and the Rules of Engagement, Mr Hepper stated that the Rules of Engagement were inaccurate in a number of respects. Firstly, the baton round used in the H104A1 gun in 1997 was made of

polyurethane as opposed to PVC. Secondly, he was adamant that the L3 forty-five grain round was not intended for use in the L104A1 gun. Mr Hepper suspected that when the Rules of Engagement were updated to cover the L104A1 gun, they were not properly updated to substitute polyurethane for PVC and no attempt was made to remove references to the L3 forty-five grain round. In answer to questions from the court, Mr Hepper accepted that his evidence would indicate that the Rules of Engagement which were important rules governing the use of a weapon were updated in a haphazard manner. He stated that the errors he had identified "would certainly be consistent with a hasty update of an old - of the existing rules of engagement."

[87] In cross-examination by Mr Lyttle KC, Mr Hepper conceded that in relation to the use of the L104A1 gun and the L5 baton round, the greater the distance beyond 20 metres the target was from the firing point, the less chance there was of striking the aiming point on the target and the greater elevation of aim would be required to strike the aiming point on the intended target. He also conceded that if this baton gun were to be fired at the legs of a target that was thirty-five to forty metres away, the baton round could well strike the ground and ricochet in an unpredictable manner before it reached the target. He was referred to the statement of Lance Corporal Cameron in which Lance Corporal Cameron had stated that the youths were approximately thirty-five to forty metres away when he fired. It was put to him that in such circumstances, it was likely that the plastic bullet struck the ground before it reached the intended target and thereafter ricocheted in an unpredictable manner and he agreed with this proposition. In light of this evidence, Mr Lyttle KC asked Mr Hepper whether the Rules of Engagement should have included a warning not to fire at a target that was thirty-five or forty metres away because of the inaccuracy of the weapon and the risk of bounce. In answer to this question, Mr Hepper stated: "Quite probably, or that would be brought - I would expect that to have been brought out in training."

[88] Mr Hepper was then asked by Mr Lyttle KC whether he would endorse the view that making sure there was appropriate training, recording the results of that training and ensuring that the training guidelines were adhered to are matters that are absolutely essential in dealing with a baton round and baton gun of this type. Mr Hepper replied in the following manner: "Yes, for the whole system, so it's the gun and ammunition as well."

[89] Mr Lyttle KC then referred to the document entitled: "The Introduction and Development of Baton Rounds and Baton Rounds into the UK Police Service" and pointed out to Mr Hepper two specific entries on page two of that document in which the L104A1 baton round gun was described as being an extremely reliable and well-tested weapon system. Mr Hepper agreed with this assessment of the weapon system. Mr Hepper was then referred to the statements of Lance Corporal Cameron, Corporal McGann and Lt Col Cattermull in which the specifically identified target is variously described as being between thirty-five and forty metres away (Cameron), twenty-five to thirty metres away (McGann) and twenty to thirty

metres away (Cattermull). Mr Lyttle KC then posed the following question to Mr Hepper in relation to Lance Corporal Cameron's ability to hit the target at a range somewhere in the middle of the estimates given by the three soldiers: "…. you would really have thought: look, he can see the target; it's pointed out to him; he's got a very reliable gun; he's properly trained; there's nothing in his way; there's nothing to stop him hitting the target, is that right?" Mr Hepper agreed. Mr Lyttle KC continued: "It would surprise you if, in those circumstances, he completely misses the target." Mr Hepper replied that if Lance Corporal Cameron was not being jostled or anything like that and had a good stable position and a clear line of sight then, he would have expected him to have hit the target and he could not think of any reason why he would have missed other than the fact that the weapon is known to have quite a wide dispersion because of the relatively low velocity of the baton round. In answer to some questions from the court, Mr Hepper confirmed that a simplistic definition of accuracy of a weapon system is striking the target at the aiming point. He also expanded on what he meant by a wide dispersion. He stated:

> "The problem with this ammunition is because it is low velocity ammunition, it has a wide dispersion. So, the ammunition itself was not that accurate and that's why there was a lot of follow-on work to improve the accuracy; and why the weapons changed was to try and improve the accuracy to make it more likely to - that the round would hit where it was aimed because there's a wide dispersion with this low velocity ammunition."

Mr Hepper also confirmed that a baton round, once fired will follow a ballistic trajectory which means that for targets at greater distances an elevated aiming point must be used. He also confirmed that the greater the initial velocity of the projectile, the less elevation is generally required. This concluded the oral evidence in the case.

[90] The matter was then adjourned to allow the parties to file written closing submissions and to make final oral submissions. Very comprehensive and extremely helpful written submissions were provided, and the court heard final submissions from senior counsel on 13 January 2003. The court was greatly assisted by the focus and quality of the submissions made by Mr Lyttle KC for the plaintiff and Mr McMillen KC for the defendant.

[91] The court's first task is to determine on the balance of probabilities what actually happened on that night in April 1997. At the outset I would wish to make clear that this task has not been rendered any easier by the significant delay on the part of the plaintiff in the prosecution of this action. There are two accounts of how the plaintiff came to be struck by a plastic bullet fired by Lance Corporal Cameron. The plaintiff's version of events is that he was present in a field beside the Antrim Road with two friends gathering pieces of wood for a bonfire when he was struck. There were no disturbances in the vicinity. There was no rioting. There was

no excuse whatsoever for the discharge of a plastic baton round. The plaintiff's evidence was that he was hunkering down with his back to the road when he heard his friend who was also in the field gathering wood call his name. He stood up and was in the process of turning around to his left when he was struck on the left side of the head, near his left eye. He was quite near a chain link fence that formed the boundary between the field and the Antrim Road. On the plaintiff's case, the soldier who discharged the baton round fired the baton gun into a field where children were collecting wood for a bonfire. If this is what happened that night then the firing of this plastic baton round was an utterly callous, cruel and unjustified act of wanton violence, deserving of the strongest censure.

[92] The defendant's version of events is that at the time of this incident, this area of Lurgan and the Bell's Row crossing in particular were very difficult areas to patrol. On the night in question, a six man foot patrol had traversed the crossing and were progressing down the Antrim Road towards the town centre when they came under attack from missile throwing youths. Corporal McGann and Lance Corporal Cameron were bringing up the rear of the foot patrol and they became separated from the other four members of the patrol, including Major Cattermull who was there in an experience building, observing role. One group of youths came onto the Antrim Road from the direction of the Kilwilkie Estate behind the foot patrol. Another group of youths came across the field on the other side of the road and attempted to move onto the road in the gap that had formed between the front four soldiers and the back two soldiers. Corporal McGann, fearing that he and Lance Corporal Cameron were going to be cut off and attacked by a significant number of youths from front and rear, ordered Lance Corporal McGann to fire a baton round at a specifically identified missile throwing youth who was part of the group making its way onto the road in an attempt to cut the two soldiers off. This youth was approximately thirty metres away from Lance Corporal Cameron when he fired. He aimed at the legs of the identified target. He did not see the baton round strike the target or anyone else for that matter. He could not say what happened this baton round. However, this action achieved its intended aim and the group of youths backed off into the field and the two soldiers were able to sprint along the Antrim Road and join up with the rest of the foot patrol. The foot patrol was then able to return to Lurgan police station where they made statements to the police and the baton round gun and spent baton round cartridge were given to the police.

[93] These two versions of events are utterly irreconcilable. Furthermore, this is not a case of loss of accurate recollection due to the passage of time, or a case of mistake as to events or an instance of the innocent misinterpretation of those events. This is a case in which either the plaintiff and some of his witnesses or most of the defendant's witness have deliberately lied about what happened that night and have maintained that lie from the time of the events in question up to the present time. During the lengthy and fragmented hearing of this action, I heard oral evidence given both by witnesses in person in court and by video-link. I have carefully considered whether the quality of the video-link was sufficient to enable me to

assess issues relating to the credibility of witnesses who gave evidence by video-link. I have carefully considered whether the ability of those witnesses to give proper accounts of themselves was impaired by the remote giving of that evidence. I have assiduously listened to the evidence and read the transcripts of that evidence in order to assess whether the ability to cross-examine any witnesses was impeded by the limitations of technology or the absence of the witness from the court room and I have concluded that the hybrid manner in which this case was conducted did not in any way interfere with parties' ability to properly present their cases and to vigorously challenge the cases made against them. I am also satisfied that the hybrid manner in which this case was conducted has not interfered with the court's ability to address the issue of credibility at the heart of this case.

[94] One of the key issues in this case is whether the patrol was attacked by missile throwing youths that night or whether this was an utterly unprovoked, unwarranted, and inexcusable attack on children collecting scrap wood in a field beside a road for the purposes of building a bonfire.

[95] The plaintiff's case is that he did not hear or see any evidence of missile throwing youths that evening. Could such events have occurred without him perceiving those events? The answer is firmly no. If the events as described by the soldiers did happen then the plaintiff's and his friends' proximity to those events would have been such that they could not have failed to perceive that there was significant trouble in the field that night. Therefore, either the events as described by the soldiers did not take place or they did take place and the plaintiff and his witnesses, by stating that they did not see or hear anything untoward that evening, are simply lying.

[96] There are a large number of matters that have been set out in detail in the preceding paragraphs that the court can look at in order to determine where the truth lies in relation to whether the soldiers were attacked in the manner alleged by them that night. There is ample, cogent, and compelling evidence that this area was a very difficult area for the army to patrol and that the Bell's Row crossing was indeed a flash point. Some of the plaintiff's witnesses accepted this. Another matter to be considered is that it is extremely unlikely that a Corporal would order a Lance Corporal to discharge a baton round at a relatively isolated youth when neither he nor anyone else for that matter was posing any form of threat to the patrol in the presence of a Major who was newly appointed to the battalion and was a member of the foot patrol in the capacity of an observer. Not only would they have exposed themselves to the risk of serious criminal and disciplinary sanctions, they would have been forced to rely upon a senior officer who was a largely unknown entity joining in a conspiracy to cover up such wrongdoing and to lie on their behalf. This is inherently very unlikely.

[97] In his statement to the police, the plaintiff indicated that when he saw the soldiers on the side of the road on his way to hospital in Brian Kelly's vehicle, the soldiers pointed at the plaintiff and started laughing. This detail was omitted from

his evidence in chief. The account given to the Irish News shortly after the night in question included the assertion that the soldier fired the baton round from a distance of about four yards from the plaintiff. This allegation of being fired at from point-blank range was repeated in the story which appeared in An Phoblacht. This allegation did not form part of the plaintiff's case at hearing. The An Phoblacht article appears to attribute the following account to the plaintiff: "After the ambulance arrived and was driving me to the hospital, I could see the soldier with the plastic bullet gun pointing at me and laughing." This was not the plaintiff's evidence at the hearing and the hospital records show that the plaintiff was taken to hospital by private transport. The same hospital records refer to a civil disturbance.

[98] The plaintiff and two of his siblings are prominent members of Republican Sinn Fein. Another brother has republican terrorist convictions. It is, therefore, reasonable to conclude that the plaintiff has a distinct and long-standing animus towards the military and security apparatus of the British state. The plaintiff deliberately withheld relevant information (a recent spell of imprisonment on remand) from Dr Paul, a psychiatrist who assessed him for the purposes of this claim so that Dr Paul would remain unaware of the potential link between the time the plaintiff spent in prison and any recent psychiatric/psychological difficulties. Another matter of some importance is that the plaintiff was evasive in his answers when pressed on the issue of whether he would have been in a position to perceive the presence of missile throwing youths in the field, if the soldiers' accounts were to be believed.

[99] The evidence given by Mr Knox in the witness box differed materially from the contents of the statement he had given to the police days after the incident. See paragraphs [19] and [20] above. In his statement, he referred to another group of children being present in the field. In his evidence, he could not remember any other group of children in the field. In his statement he asserted that he saw the soldiers stop on the road in front of the Bellevue Garage before the shooting but in the witness box he stated that he only saw the soldiers stop after the shooting. In his statement he asserted that he saw one of the soldiers hunker down and aim a gun at him and his two friends. After the plaintiff was struck, the soldiers cheered. In his evidence, Mr Knox specifically stated that he did not remember a soldier hunkering down and aiming a gun at them. Nor did he remember them cheering. It was suggested to him that if that did happen it was the sort of thing he would have remembered; to which he replied: "I dunno."

[100] Mrs Mitchell's evidence was that she came out of the chip shop and crossed the garage forecourt diagonally to the side of the Antrim Road closest to the Bell's Row crossing because she heard and saw three drunk young men giving verbal abuse to the soldiers as they passed down the Antrim Road with the three young men following them. She could not explain why she would have walked to the corner of the forecourt closest to the Bell's Row crossing when the soldiers and the three young men would have been walking away from the garage forecourt down towards Lurgan town centre. She changed her evidence in relation to whether the

soldiers responded to the verbal abuse being directed at them by the three young men. I was entirely unimpressed by Mrs Mitchell's evidence. I cannot believe that she came out of the chip shop that evening simply to see three young men verbally abusing an army patrol. There was something much more significant happening that evening to cause her to leave her place of work and move across the garage forecourt in the direction of the Bell's Row crossing and the fact that she moved in that direction is very telling. Another witness, Mr Michael Mitchell, stated in his evidence that from a position at the back of the field he heard shouting from the direction of the road and it was when he was making his way over to the part of the field closest to the road that he heard the shot. His evidence was cut short at that stage. Finally, in general, the soldiers' statements are largely consistent without revealing any signs of copying or collaboration in their preparation.

[101] There are a number of matters that are relied upon as supportive of the plaintiff's case that there was no trouble in the area that night. Firstly, neither the soldiers nor the military dog appear to have sustained any significant injuries as a result of being the subject of a prolonged bombardment with one of the assailants using a catapult. However, it is relevant that the soldiers were moving targets that were spaced out as opposed to being stationary targets in a line. Further, they were wearing helmets with visors and body armour. Other matters relied upon included the evidence of Mr Haughian who indicated that he did not witness any trouble and the statement of the level crossing keeper Mr Oliver Headley that only made reference to a group of six children aged between six and ten throwing stones at the army. Mr Headley also referred to the fire brigade being out earlier to deal with a fire in the vicinity. Other matters relied upon were the references to Corporal McGann being a zealot and being somewhat reckless in the performance of his duties. In relation to this last point, I fully accept the evidence of Lt Col Clements that these references relate to risks taken by Corporal McGann in retrieving viable explosive devices that were found in searches before the ammunition technical officer arrived on the scene to ensure that the finds were not spirited away. In relation to the issue of the plaintiff's and his family's alleged political leanings, the plaintiff's evidence on this point was that as children in the Lurgan Tarry estate, he and his friends interacted well with soldiers, and he gave an example of being allowed to look through the telescopic sights of soldiers' rifles. He also informed the court that his father had been granted a firearms licence, the implication being that such a licence would not have been granted to someone who the police had concerns about.

[102] Mr Lyttle KC in his closing submissions relied on the statement of Mr Michael Anthony McVeigh to support the proposition that there was no rioting taking place at the relevant time because if there had been rioting on the Antrim Road that evening, Mr McVeigh would not have been able to drive his car onto the garage forecourt shortly before the incident. The difficulty with this proposition is that Mr McVeigh stated in his statement dated 25 May 1997 that on the evening in question he was driving along the Antrim Road out of town towards his home. He clearly had reached the Bellevue Garage and had turned into the garage before the

soldiers came down the Antrim Road in the opposite direction. His route into the garage would have been completely unobstructed at that stage. He was sitting in his car in the garage forecourt when he saw the soldiers pass. His girlfriend had gone into the garage to buy some sweets and lemonade. Mr McVeigh remained in the vehicle with his girlfriend's young daughter. He then heard a bang. A short time later, his girlfriend returned to the car and informed him that she could hear young boys in the field opposite the garage and they were shouting that a young boy had been shot. Mr McVeigh got out of the vehicle and went across the road and into the field where he found the plaintiff in a badly injured state. Mr McVeigh also stated that he did not witness ay rioting at any stage.

[103] Mr McVeigh was not called as a witness in this case so his evidence about not witnessing any rioting could not be tested. Insofar as the ability of Mr McVeigh to make his way by vehicle to the garage is relied upon to support the proposition that there was no rioting, I reiterate that timing of his approach to the garage and his route of approach means that he would not have been impeded or inconvenienced by or even aware of any youths following the soldiers as he did not even see the soldiers coming down the road until he was parked in the forecourt for some time.

[104] I listened carefully to the evidence of the plaintiff, Mr Knox, Mrs Mitchell, Mr Haughian and Mr Mitchell. I observed the demeanour of plaintiff, Mr Knox and Mrs Mitchell in the witness box. I was particularly unimpressed by Mrs Mitchell. I listened carefully to the evidence of Lance Corporal Cameron and Lt Col Cattermull. They were subjected to the most probing and skilful cross-examination by Mr Lyttle KC. I have to state that having heard their evidence tested in this manner, I formed the very firm conclusion that these two individuals were doing their very best to give the court an entirely accurate and truthful account of what happened that night. Lt Col Cattermull remembered pulling down the visor on his helmet that night. Little details like that impressed me greatly. Having listened carefully to their evidence and weighed up all the other evidence in the case, I found myself convinced by their account that the patrol came under sustained attack that night and that a situation arose whereby Corporal McGann and Lance Corporal Cameron honestly and genuinely and with good cause feared that they could be cut off from the rest of the patrol and the baton round was fired to prevent this happening and this tactic was successful and resulted in the attackers backing off and giving them the opportunity to sprint back to the rest of the patrol.

[105] I simply do not believe Mrs Mitchell when she says she came out of the fish and chip shop to observe three drunk young men verbally abusing the soldiers. I consider that what brought her out of the chip shop was the sight and sound of youths attacking the patrol. I do not believe Mrs Mitchell, the plaintiff and Mr Knox when they assert that they did not see any trouble that night. I believe that they were fully aware of the attack that must have been unfolding around them and they have deliberately chosen to lie about this matter to cast the members of the foot patrol in a very bad light. The plaintiff initially claimed that he had been shot at point blank range and he and Mr Knox both initially claimed that the soldiers cheered or laughed

after he had been hit. Both these claims were not pursued at the hearing of this action because they were patently untrue and unsustainable. The evidence of Mr Haughian is explicable on the basis that his recollection of what happened that night has faded with time. He initially gave some form of statement to the plaintiff's former solicitor and then had no contact with anyone about this incident until shortly before the trial started. Mr Headley was not called to give evidence and his statement is somewhat suspect in that it is open to question whether Mr Headley would have revealed the full extent of the trouble that night having regard to the fact that he had to continue to work in that area. In conclusion, I am convinced that the foot patrol did come under sustained attack that night and that the actions of the attackers involved an attempt to cut off Corporal McGann and Lance Corporal Cameron from the rest of the foot patrol.

[106] The next related issues of fact that have to be determined are: where was the group of youths that included the target identified by Corporal McGann and Lance Corporal Cameron when the baton round was fired and where was the plaintiff and what was he doing at that time? Lance Corporal Cameron placed the youths in the field at the time the shot was fired but he was not sure about this and the location of the group at the time he fired the baton round was not dealt with in his statement. Corporal McGann in his statement asserted that as the "crowd moved into the road to cut us off I identified one male…" Corporal McGann's statement is the only statement which specifically deals with the issue of where the group of youths were when the decision to fire was taken. I am satisfied on the balance of probabilities that this group of youths were in the process of moving onto the road to cut off the two soldiers at the rear of the patrol when the decision to use the baton gun was made.

[107] The next issues to be addressed are where the plaintiff was and what was the plaintiff doing at the time that he was struck. In deciding this issue, I must take into account that I have already determined that the plaintiff deliberately lied in the witness box when giving evidence about whether he was aware of any disturbances in the immediate vicinity of his location in the field prior to being struck by the plastic bullet. I must remind myself of the guidance contained in the case of *Fairclough Homes Limited v Summers* [2012] UKSC 26 and in particular paragraph [52] of Lord Clarke's judgment where he stated:

> "52. A party who fraudulently or dishonestly invents or exaggerates a claim will have considerable difficulties in persuading the trial judge that any of his evidence should be accepted. This may affect either liability or quantum. In the instant case, as explained above, the claimant's fraud and dishonesty led the judge to reject his evidence except where it was supported by other evidence. The judge naturally refused to draw any inferences of fact in his favour ...."

[108] I interpret this paragraph as support for the proposition that where a claimant deliberately lies on oath about one aspect of his claim, the trial judge should be very cautious before accepting any of his evidence and would be justified in rejecting his evidence except where it is supported by other evidence. I intend to adopt this approach in this case. I consider it necessary to do so in order to do justice to the parties.

[109] The plaintiff's case is that he was in the field, quite close to the fence, hunkering down to pick up wood when he heard his name being called and he stood up and turned to his left and was struck on the left side of the head. In relation to independent supportive evidence or corroboration from other sources, I do not consider that I can use the evidence of Stephen Knox as corroboration as I have found that Mr Knox also lied about what he saw and heard that evening. In any event, Mr Knox did not make any reference in his statement to calling over to the plaintiff just prior to the plaintiff being struck. Nor does he make any reference to the plaintiff standing up before he was struck. I note that Anthony McEnoy (now deceased) made a statement to the police on 19 May 1997. He died some considerable time before this case came on for hearing. In his statement, he did assert that he heard Mr Knox calling the plaintiff's name shortly before the shot was fired but he did not see the plaintiff standing up before he was struck. Mr McEnoy also stated that there were no disturbances in the field in the field at the time and having regard to my findings in relation to that issue I must treat Mr McEnoy's statement with some caution.

[110] It is clear that the plaintiff was found in the field by Mr McVeigh and Mr Brian Kelly after he was struck and I can safely conclude that this was in a part of the field close to the Antrim Road. I consider that it is also safe to conclude that the plaintiff would not have moved a great distance from where he was struck to where he was intercepted by Mr McVeigh. It is clear from the evidence of the soldiers that the plaintiff was not the intended target (the description of the target's clothing definitively rules this out) and it is also clear that none of the soldiers identified anyone matching the plaintiff's description or anyone wearing clothes matching the clothes worn by the plaintiff that night as a rioter. Finally, neither Corporal McGann nor Lance Corporal Cameron placed anyone between them and the identified target. Given that the identified target and the other youths were making their way onto the road at the time the baton round was fired and given that there was no one between the soldier firing the baton round and the target, the court can safely conclude that the plaintiff was not on the road in front of the target at the time that the baton round was fired.

[111] Given that it is beyond doubt that the plaintiff was struck by a plastic bullet fired by Lance Corporal Cameron and given that the plaintiff was not on the road in front of the target at the time that the baton round was fired, the plaintiff must either have been in the group of youths moving onto the road with the target or must have been a relatively short distance behind that group of youths in the field. The plaintiff's evidence was that he was in the field and was a short distance from the

fence when he was struck and, if this is correct, then he must have been relatively close to the group of youths who were intent on entering the road in order to cut off the two soldiers from the rest of the patrol. What evidence is there to corroborate this?

[112] As stated above, neither Corporal McGann nor Lance Corporal Cameron saw anyone matching the plaintiff's description or wearing clothes matching the clothes that the plaintiff was wearing that night engaged in rioting. But more importantly, neither soldier saw anyone being struck by the plastic bullet that was fired by Lance Corporal Cameron. If the plaintiff had been alongside the target in the group of youths making its way onto the road when he was struck by the plastic bullet, I would have expected one or both soldiers to have observed this and to record this in their statements. The fact that they did not see the plastic bullet strike any of the group making its way onto the road and the fact that they did not see any of this group in an injured state immediately after the shot was fired is independent corroboration of the plaintiff's case that he was not part of this group and does support the proposition that the plaintiff was behind this group in the field at a location in the field near the edge of the field and at a location that meant that he was near but not part of the group making its way onto the road.

[113] The court must now consider whether there is any other corroborative evidence supporting the plaintiff's evidence as to where he was and what he was doing at the time that he was struck by the plastic bullet. The two newspaper articles refer to the plaintiff collecting wood for a bonfire. However, these articles also contained assertions that I have found to be blatant lies and in any event the accounts are from the plaintiff or members of his family and cannot, therefore, be regarded as independent corroboration. In relation to the history recorded in the medical notes and records, the Accident and Emergency Casualty Note refers to a "Civil Disturbance." The hand-written history recorded by Dr Murugan was that the plaintiff was hit by plastic bullet (army) with no loss of consciousness. "Had not seen the army patrol coming. Felt something hit the left side of his forehead and fell to the ground." This record does not make any reference to him collecting wood for a bonfire and it does not make any reference to him hearing his name being called and standing up and turning round. Importantly, it does state that he had not seen the army patrol before he was struck. Although this is a history probably recorded from the plaintiff and, therefore, it is an account that has to be treated with caution, the reference to the plaintiff not seeing the army patrol does, in my view, support the conclusion that I have formed that the plaintiff was not in the group of youths making its way onto the road to cut the two soldiers off from the rest of the patrol.

[114] The statement of the clinician who saw the plaintiff in the Accident and Emergency Department at 21:14 that evening expands somewhat on the history set out in the Accident and Emergency Record. The statement of Dr Murugan, which was made on 11 June 1997, well after the incident had been prominently reported in the press, records that the plaintiff was going around the area collecting wood for a bonfire when he heard the noise of a vehicle coming along, looked around and felt

something hit hard on the left side of his forehead and he fell to the ground. Dr Murugan was not called as a witness. No explanation was put before the court for the additional details contained in his statement. No source material in the form of additional medical notes and records were put before the court containing such additional information. For the avoidance of doubt, the additional pieces of information contained in his statement which are not contained in the Accident and Emergency Record are: (a) the claim that the plaintiff was going around the area collecting wood for a bonfire; and (b) the claim that he heard the noise of a vehicle coming along. The question which the court must answer is whether the Accident and Emergency Record and the statement of Dr Murugan provide independent supportive evidence of the plaintiff's account as to where he was and what he was doing at the time he was struck by the plastic bullet.

[115] The first matter which the court has to have regard to is the lack of independence of the evidence. These records are in essence records of what the plaintiff told the clinician shortly after the incident. Secondly, I have concerns about the expanded history recorded in Dr Murugan's statement. There is no explanation as to how the history came to be expanded in this manner. Thirdly, in Dr Murugan's statement it is recorded that the plaintiff looked round because he heard the sound of a vehicle not because his name was called. Having given the matter careful consideration, I conclude that this material does not provide significant or weighty independent evidence supporting the plaintiff's version of events.

[116] The outcome of this case depends to a large extent on whether I accept that the plaintiff was standing upright and turning round to his left when he was struck by the plastic baton round, or I conclude, that the plaintiff was probably crouching or hunkered down picking up wood when he was struck. Bearing in mind the ballistic trajectory of a baton round, for the plaintiff to have been struck by the baton when he was standing fully erect in a location near the edge of the field but behind the group moving from the field onto the road, the baton round must have been aimed roughly at the target's head for it to hit the plaintiff on the head some distance behind the target. I entirely discount the proposition put forward by Mr Lyttle KC in his cross-examination of Mr Hepper that the baton round could have hit the ground before the target and could then have ricocheted in such a manner so as to have missed the target and the other members of this group moving onto the road and then have struck the plaintiff on the side of the head as he was standing erect some distance behind this group. If the plaintiff was standing erect when he was struck, the much more likely scenario is that the baton round was aimed at the head of the target and missed the target's head either to one or other side or above and then travelled on in a ballistic trajectory and struck the plaintiff on the head as he was standing erect behind the group moving onto the road. If I accept that the plaintiff was struck whilst standing erect, having just got up from a crouched or hunkered then I would be compelled to conclude that Lance Corporal Cameron aimed high at the head or thereabouts of the identified target.

[117] On the other hand, if I accept Corporal Cameron's evidence that he aimed his shot at the lower limbs of the identified target then the only reasonable explanation for the plaintiff's injury is that he was crouched down or hunkered down near the edge of the field behind the target and he was struck on the side of the head when the baton round missed the intended target and struck him instead. This would also readily explain why the soldiers did not see anyone being struck or did not see what happened the baton round after it was fired. As I have stated in an earlier part of this judgment, having listened to Lance Corporal Cameron's evidence, I formed the very firm conclusion that he was doing his very best to give the court an entirely accurate and truthful account of what happened that night. I entirely accept his evidence that he aimed his shot at the lower limbs of the identified target. Lance Corporal Cameron' s evidence was that he could not say whether he hit the target or not. I conclude that he did not hit the intended target. I conclude that the plastic baton round passed to one side of the target in a ballistic trajectory and struck the plaintiff who was in the field near its edge and located behind the group of which the target was a member. I also conclude that when he was struck by the baton round, the plaintiff was still crouching or hunkering down, and he was not at that stage standing erect and that explains why he was struck on the side of the head. In coming to this conclusion, I take into account that Lance Corporal Cameron was not being jostled or otherwise interfered with so as to cause him to discharge the baton gun at a much higher aiming point that initially envisaged or intended. I also note that the statements of Mr Knox and Mr McEnoy do not refer to the plaintiff standing up before he was struck.

[118] Two issues remain to be determined. They are the issues of whether Lance Corporal Cameron's training was up-to-date at the time of the incident and whether Lance Corporal Cameron used a twenty-five grain or a forty-five grain baton round that evening. Having carefully considered all the evidence in the case, I am satisfied the training provided by the battalion to its soldiers in respect of the L104A1 baton round gun was comprehensive, thorough, and appropriate. I am satisfied that Lance Corporal Cameron was trained to an appropriate standard in the use of this weapon when he was serving in Northern Ireland with the Black Watch regiment and that this training had been regularly refreshed whilst he was on active service in Northern Ireland either with the Black Watch or with the 3rd Battalion of the Royal Irish Regiment. What Lance Corporal Cameron could not remember and what I would not expect him to be able to remember is whether his last refresher training on this weapon system took place within four months of this incident. I accept the evidence of Lt Col Spender that training would have taken place four times per year and that if there were any issues in respect of the training of any individual soldier, remedial action would have been taken.

[119] I entirely accept the submission made on behalf of the plaintiff by Mr Lyttle KC that Lance Corporal Cameron's training records should have been preserved and produced to the court, especially when the defendant stated in open correspondence that it had investigated this matter as far back as 1999, as I consider that any proper and comprehensive investigation into the circumstances of this incident would have

looked into the issue of Lance Corporal Cameron's training. Despite the delay in this case coming on for hearing, mainly resulting from the plaintiff's inactivity, and even taking into account the disbandment of the 3rd Battalion of the Royal Irish Regiment, the defendant has no valid excuse for its inability to produce these training records to the court and, indeed, the defendant did not offer anything by way of an excuse or explanation. As a result, important documentary evidence is not before the court which would have confirmed one way or other whether Lance Corporal Cameron received refresher training within the four month period prior this incident. However, taking full account of all the evidence I have heard in this case, I do conclude that a robust system for providing appropriate training four times per year was in place at 3rd Battalion level at that time. I also conclude that the fact that Lance Corporal Cameron did not hit his intended target on this occasion does not mean that there were any deficiencies or inadequacies in his skills in the use of this weapon system. The fact that he missed the target can readily be explained by the inherent inaccuracy of the weapon and ammunition and its wide dispersion. In essence, the inability of the defendant to produce records establishing whether or not Lance Corporal Cameron had received refresher training in the use of this weapon system within four months of the incident does not in my view have a causal bearing on the plaintiff being injured by a plastic bullet on the night in question.

[120] I am equally critical of the defendant's inability to either produce or explain the non-production of soldiers' notebooks and the relevant armoury and quartermaster documentation. No cogent evidence was adduced by the defendant in respect of any system in place in the armoury in Mahon Road barracks to ensure that only soldiers with up-to-date training were permitted to sign for and carry a baton round gun while on patrol. The absence of quartermaster documentation means that the court is deprived of material evidence in relation to what type of baton round was issued to Lance Corporal Cameron that evening. Although I cannot be certain about this issue and although the various witnesses for the defendant gave various accounts of the limited circumstances in which a forty-five grain round could be used, I am satisfied on the balance of probabilities that only one type of baton gun and only one type of baton round were used by the 3rd Battalion of the Royal Irish Regiment and that was the L104A1 gun and the twenty-five grain round and that the explanation given by Mr Hepper in relation to the failure of the defendant to properly update the Rules of Engagement is an entirely valid and proper explanation.

[121] Having exhaustively analysed and determined the relevant facts of this case, I now turn to consider the law in this area. The relevant legal framework is non-contentious and was set out with admirable clarity by Lowry LCJ in the case of *Farrell v Ministry of Defence* [1980] NI 55 at page 61 C where he stated:

> "When a soldier deliberately applies force, by restraining or striking or shooting a person, that is prima facie an assault and battery for which the soldier and (if he is acting under orders or within the scope of his authority)

> his superiors are liable in tort at the suit of that person, unless the act of the soldier can be justified at common law or by statute ... When the cause of action is framed in trespass and the assault in fact is proved, the defendants must then prove the defence of justification . . ."

The rule at common law is that force used in self-defence or in the defence of others must be reasonable in the circumstances. As was pointed out by Hutton J in the case of *Tumelty v Ministry of Defence* [1988] 3 NIJB 51, prior to 1967 under section 4 of the Riot Act (Ireland) 1787, peace officers were indemnified if rioters were "killed, maimed or hurt" in the "dispersing, seizing or apprehending" of them after the passage of an hour from the reading of the proclamation set out in that Act. But section 4 of the 1787 Act was repealed by the Criminal Law Act (Northern Ireland) 1967 and, under the present law, as the plaintiff has proved that he was struck by a baton round deliberately fired at him by a soldier, the onus rests on the defendants to establish that the firing was justified in self-defence or in defence of other soldiers or in the prevention of crime.

[122] Section 3 of the Criminal Law Act (Northern Ireland) 1967 provides as follows:

> "1. A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
>
> 2. Sub-section (1) shall replace the rules of the common law as to the matters dealt with by that sub-section."

Therefore, the plaintiff is entitled to succeed and to recover damages in this case unless the defendant establishes on the balance of probabilities that the force used by Lance Corporal Cameron in firing the baton round in the manner in which he did constituted the use of such force as was reasonable in the circumstances.

[123] How the court is to approach the issue of justification set out in section 3 was helpfully explained by the Court of Appeal in the case of *Kelly and Others v Ministry of Defence* [1989] NI 341 where the judgment of the court was given by O'Donnell LJ. Quoting from the headnote will suffice.

> "Section 3 of the Criminal Law Act (Northern Ireland) 1967 allowed a person to use reasonable force to prevent a crime or to arrest a suspected offender, and it provided a defence for the user of force in an action for trespass. The trial judge was correct in considering the question in two stages. The first stage was related to the facts and

> circumstances honestly and reasonably believed to exist at the time of the incident. The determination of this issue required the use of both a subjective test as to whether each soldier honestly believed that the occupants of the car were terrorists and an objective test as to whether there were reasonable grounds for the belief. The trial judge correctly held that the soldiers honestly believed the occupants of the car to be terrorists and that there were reasonable grounds for so believing. The second stage involved the issue of whether, given that honest and reasonable belief, it was reasonable to fire in the prevention of crime or to effect an arrest. This was to be determined by the court using an objective test, applying the judgment of the reasonable man and, in the light of the circumstances, it had been reasonable to fire."

[124] In applying the law to the facts of this case, the court will adopt this two-stage test and will consider whether Corporal McGann and Lance Corporal Cameron had an honest belief that group of youths that was attacking them from the field beside the Antrim Road were intent upon entering the road in order to cut the two soldiers off from the rest of the patrol. This is the subjective element of the analysis. The court will consider whether they had reasonable grounds for this belief. This is the first objective element of the analysis. The court will then go on to consider whether it was reasonable for Lance Corporal Cameron to fire at the identified target in the circumstances that prevailed at the time and in the manner that he has been found to have done so. This is the second objective element of the analysis applying the judgment of the reasonable man. I now turn to consider whether the defendant has proved on the balance of probabilities that the circumstances in which and the manner in which Lance Corporal Cameron fired the baton round which struck the plaintiff on the head was the use of force which was reasonable in the circumstances.

[125] Having considered the entirety of the evidence in this case and in light of the findings of fact set out above, I am entirely satisfied that the two soldiers honestly believed that the group of youths that was attacking them from the field beside the Antrim Road were intent upon entering the road in order to cut them off from the rest of the patrol. They genuinely feared for their own safety. I am also entirely satisfied that they had ample reasonable grounds for holding these beliefs and fears. The issues at the very heart of this case are whether the circumstances in which Lance Corporal Cameron fired the baton gun and the manner in which he fired the baton gun which resulted in the plaintiff being struck on the side of the head by the baton round was the use of force which was reasonable in those circumstances.

[126] I am satisfied that Corporal McGann and Lance Corporal Cameron were facing a dangerous and volatile situation and if they had been cut off from the rest of the foot patrol, these two isolated soldiers, surrounded by a large number of missile throwing youths, could have been seriously injured. I am entirely satisfied that the

discharge of a baton round at an identified member of the group of youths that was making its way onto the road in order to deter this group from cutting off the soldiers' escape route was, in principle, an entirely reasonable use of force, especially when that individual was preparing to throw a missile at the soldiers. In relation to the manner in which the baton gun was discharged: having accepted that the baton gun was aimed at the lower limbs of the identified target who was approximately thirty metres away from the firing point; having concluded that there was no one between Lance Corporal Cameron and the target; having determined that the target was a member of a group of youths moving from the field onto the road; and having concluded that the plaintiff was behind this group of youths, crouching or hunkering down near the edge of the field, I am satisfied that the manner in which the baton gun was discharged constituted the use of force which was reasonable in the circumstances. It was very unfortunate that the plaintiff was struck by a baton round that night. He was neither the intended target nor a member of the group of youths, intent on making their way onto the road to cut off the soldiers' escape route. He was struck when the baton round missed the intended target and travelled on into the field. It is very unfortunate that the plaintiff was crouched or hunkered down when he was struck by the baton round. This has resulted in a significant permanent injury to his left eye. Be that as it may, I have found that the circumstances in which Lance Corporal Cameron fired the baton gun and the manner in which he fired the baton gun were entirely justified on the night in question and, therefore, the plaintiff's claim for compensation against the Ministry of Defence must fail.