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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

GAVIN McKENNA

Plaintiff/Appellant

v

MINISTRY OF DEFENCE

Defendant/Respondent

Before: McCloskey LJ, Horner LJ and Huddleston J

Mr Patrick Lyttle KC and Mr Conleth Rooney (instructed by Phoenix Law Solicitors) for the Appellant
Mr David McMillen KC and Mr Joseph Kennedy (instructed by the Crown Solicitor for Northern Ireland) for the Respondent

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<u>McCLOSKEY LJ</u> (*delivering the judgment of the court*)

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Introduction

[1] Gavin McKenna (whom we shall continue to describe as the "plaintiff") appeals against the judgment and consequential order of McAlinden J whereby his claim for damages for personal injuries and special damage – which had been agreed in the amount of £225,000 – was dismissed.

The plaintiff's case

[2] The plaintiff's claim arose out of an incident which occurred at approximately 8.30pm on 26 April 1997 (when aged 13) in a field, or waste ground, adjoining Antrim Road, Lurgan, Co Armagh. There he was struck by a plastic bullet fired by a serving soldier as servant or agent of the Ministry of Defence (the "Ministry"). The plaintiff's case is that he and other young people were collecting wood at the location. When he was bending or hunkering down for this purpose, with his back to the road, his friend shouted out his name and, upon standing up and turning around towards the road, he was struck by the plastic bullet on the left side of his face. Following a police investigation the determination of the Director of Public Prosecutions was that there should be no prosecution of any person. The two causes of action invoked by the plaintiff are trespass to his person and negligence.

The trial

[3] Whereas the plaintiff's claim was first intimated by a letter from his solicitors in March 1999 and the Writ was issued in May 2000, the Statement of Claim was not served until some nine years later and the trial did not begin until 6 December 2021. These regrettable delays had certain predictable consequences. In particular, some witnesses were not available to give evidence for either party, certain material records of the Ministry were apparently no longer available and one of the recurring features of the evidence of those who did testify at the trial was impaired recollection due to the passage of time, with a related reliance on contemporaneous written statements.

[4] Another consequence of these delays was that no objective or other reliable evidence of the topography was available. Ultimately, at the appeal stage, this court received a helpful Google Map which identifies the two main landmarks of the location in question, namely a railway intersection straddling the Antrim Road and a petrol station known as Bellevue Garage, on the same road. These two landmarks are separated by a straight stretch of road measuring 160 metres. Each of them features in both the oral and documentary evidence adduced at first instance. It will suffice to note that the transition from the railway intersection to the aforementioned garage involves proceeding along a straight stretch of roadway in a townward direction. This is the direction in which the military patrol in question was advancing at the material time. The area of waste ground where the plaintiff was struck, and which features repeatedly in the evidence was located to the north easterly side of this stretch of road. It is now occupied by a residential development.

[5] As noted the trial began on 6 December 2021. Oral evidence, much of it of the remote variety, was received on that date and on five subsequent dates scattered between 7 December 2021 and 30 September 2022.

[6] The judge commissioned a transcript of all the oral evidence adduced at the trial. He then received the parties' closing written submissions and reserved his decision. He subsequently promulgated a reserved judgment. It is clear from this that the judge had to grapple with certain key factual issues and make findings accordingly, a topic to which we shall return.

[7] On behalf of the plaintiff the following persons gave evidence:

(i) The plaintiff himself, who was unable to provide any description of how his injury had been inflicted.

(ii) Mr Stephen Knox, a member of the group of young persons, who similarly was unable to provide any description of how the plaintiff's injury had been sustained.

(iii) Catherine Mitchell, whose evidence was similarly limited.

(iv) Mr Stephen Haughian, a member of the group of young persons, who also did not observe how the plaintiff's injury had been sustained.

(v) Michael Mitchell, who was some distance away from the area occupied by the group of young persons and was able to describe a large bang but not how the plaintiff's injury had been inflicted. The main significance of this witness's testimony is that based on a combination of his oral evidence and contemporaneous witness statement he described his awareness of a confrontation of sorts involving soldiers and others on the nearby road. None of the other witnesses on behalf of the plaintiff was prepared to accept this as a fact.

[8] The witnesses who gave evidence on behalf of the Ministry belonged to a six soldier patrol, divided into two groups, advancing in a townward direction. The first group included Lieutenant Colonel Cattermull. Lieutenant Corporal Cameron and Corporal McGann formed a sub-group of two at the rear of the patrol, separated from the other four and walking backwards. They claimed that the patrol came under attack from two separate groups of missile throwing youths, one positioned to the rear and the other positioned to their right i.e., in the field/waste ground. They apprehended the risk of being isolated from the other four patrol members. The requisite strategic decision/authorisation having been made by Cpl McGann, Lt Cpl Cameron discharged a baton round towards an identified target, being a youth who had a rock in his hand and appeared to be getting ready to throw it, from a distance of some 20 to 30 metres. Mr Cameron could not say whether he struck his human

target in the challenging circumstances prevailing and having regard to the lighting conditions.

[9] The second eyewitness who testified on behalf of the Ministry was Lieutenant Colonel Cattermull, who was a member of the "sub-group" of four within the patrol of six military personnel. His account was substantially in alignment with that of Mr Cameron. He described the first group of assailants as consisting of around 12 youths while the membership of the second group was approximately 20 to 30 youths. All were throwing stones and bottles at the patrol. He apprehended a real risk of the two "rear" patrol members being separated from the other four.

[10] The evidence of the other three witnesses on behalf of the Ministry concentrated on issues of systems, process, record keeping and training. None of these witnesses had any direct involvement in the events under scrutiny.

[11] The evidence adduced at the trial included various documentary items, some of which were witness statements. Of particular note are the following:

(a) Anthony McEnoy made a statement to the police approximately one month after the incident. He recounted that he had been in the company of the plaintiff and Stephen Knox at the material time, gathering firewood. They were on the waste ground close to the road. He and Stephen were facing the road. The plaintiff was "bent over facing away from the road", about 8 to 10 feet away. This witness heard Stephen shouting the plaintiff's name. He then heard a bang "within 3–4 seconds" and saw the plaintiff lying on the ground. There were soldiers on the road, who "… were walking real fast …" This witness "… did not see anyone throwing anything at anybody … there was no shouting other than as normal between ourselves … we were the only ones down near the wire – the others were all up the other end of the field".

(b) Michael McVeigh, in his statement to the police one month after the event, recounted that having driven in a countrywards direction he stopped his vehicle at the Bellevue Service Station. He noticed "some soldiers walking past me" towards the town. After this he "heard a bang". Next his girlfriend, who had been making purchases in the shop, alerted him whereupon he ran to the "field" and encountered an injured boy who must have been the plaintiff. This witness and one Brian Kelly then conveyed the plaintiff to hospital. He claimed:

> "Throughout this incident I did not witness any rioting and the only occasions when I noticed the army were when I was sitting in my car parked at the service station and later when we were travelling in Brian's car to the hospital."

(c) Oliver Headley, an employee of Northern Ireland Railways, made a statement to the police within 24 hours of the relevant events. He recounted that at approximately 8.40pm –

> "… I noticed army personnel passing the signal box heading in the direction of Lurgan. I noticed that approximately 6 children whom I would describe as between 6 to 10 years, following the army and throwing objects at this patrol. There is a high wall to my right hand side and I lost sight of the army and the children. The next thing I seen was a crowd whom I believed were children gathering in the field which runs along the Antrim Road … I then saw a person being lifted by … I would have been approximately 150 yards from this crowd …
>
> The light was just getting dusk and the weather conditions good."

(d) The hospital accident and emergency record includes the words "Was hit by plastic bullet ... no LOC … army patrol coming … felt something to the left side forehead … fell to the ground … remembers everything happened."

(e) Mr Murugan, the medical author of the aforementioned record, made a statement some 6 weeks later, in the form of a standard medical report. This includes the following passages:

> "This 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."

(f) Private Hawthorne, a member of the six man foot patrol, describes himself in his statement to the police as the "front man", continuing:

> "As we approached the Bells rail crossing I noticed approximately 10 youths on the playing fields … to my right. As we drew level with them they stopped playing football and started to follow us. We carried on across the

crossing and then I noticed another crowd of youths on waste ground to my left. I would estimate the crowd at approximately 30. As we crossed the Bells crossing the crowd on the waste ground to our left started to stone us. Private Mooreland and myself pushed on down the road passed the Kilmore Road junction. I looked back and saw a youth come through a gap in the hedge from the waste ground and threw 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 moved back into the waste ground again and I heard a baton round being fired."

(g) Corporal McGann (noted above) made a statement to the police on the date of the relevant events. He describes himself as the commander of the foot patrol on question and continues:

> "At approximately 20.59 hours we patrolled … over Bells Row crossing and were approaching the Kilmore Road junction when a group of approximately 30 youths rushed at us from waste ground between the Kilmore Road and Bells crossing. They were throwing stones, bricks and bottles along with other things at us. We continued to move towards the Kilmore Road junction when one of the crowd attacked the search dog by throwing a lump of concrete at the dog's head …
>
> [description provided] …
>
> Some of the crowd then started to move around the back of the patrol by crossing the road between ourselves and Bells Row crossing. The crowd continued to stone us. I ordered the patrol to move on and I stayed at the back with the baton gunner. At this stage the crowd from the waste ground attempted to cut myself and L/Cpl Cameron, the baton gunner, off from the rest of the patrol. At this stage I ordered L/Cpl Cameron to load the baton gun. As the crowd moved into the road to cut us off I identified one male with a large rock in his hand above his head as if he was about to throw it …
>
> [description provided]
>
> … I ordered L/Cpl Cameron to fire this baton gun. Once we fired the crowd moved away and we were able to make our way to the rest of the patrol. We continued to

> move up the Antrim Road and the crowd re-formed and attempted to chase us …
>
> The person who fired the baton round at was approximately 25 to 30 metres from us … nobody fell as a result of the baton gun being fired."

[12] This court took the step of identifying the other documentary items, other than those identified above, which formed part of the evidence at the trial. We have considered all of these and do not propose to rehearse their contents in detail. They include in particular the written statements of witnesses who gave live evidence at the trial, the "Northern Ireland Shooting Handbook", the "Rules of Engagement for PVC Baton Rounds", the related documents and the personnel records relating to Corporal McGann.

The trial judge's findings

[13] The trial judge prefaced his findings with a rehearsal of the evidence of the aforementioned ten witnesses in extenso. He then outlined the essence of the competing accounts, describing them as "utterly irreconcilable". He expressed the view that this was not a case of faulty or inaccurate recollection attributable to the passage of time. Nor was it a case of "…mistake as to events or … the innocent misinterpretation of those events." Rather, in his words:

> "This is a case in which either the plaintiff and some of his witnesses or most of the Defendant's witnesses 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."

The judge starkly drew the battle lines in this way.

[14] Next the judge expressed his satisfaction that the hybrid nature of how the parties' evidence had been adduced (in person/remote) had impaired neither …"the parties' ability to properly present their case… [nor] … the court's ability to address the issue of credibility at the heart of this case." In the same passage the judge stated:

> "I have assiduously listened to the evidence and read the transcripts of that evidence …"

The judge then identified an issue of incontestable central importance:

> "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."

The judge followed this by the observation that if there had been any missile throwing by youths in the vicinity of the events this must have been visible and/or audible to the plaintiff and other witnesses. It followed:

> "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."

[15] The judge then debated various aspects of the evidence bearing on this critical issue. In the discourse which followed, he highlighted elements of the parties' competing evidence, pointing to relevant inconsistencies, which were likely to be either true or untrue. Certain unambiguous findings followed:

(i) The plaintiff "… has a distinct and long-standing animus against the military and security apparatus of the British state."

(ii) 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.

(iii) The plaintiff "… was evasive in his answers when pressed on the evidence of whether he would have been in a position to perceive the presence of missile throwing youths in the field …"

[16] The judge next highlighted several aspects of the evidence of Mr Fox which he considered dubious. He then conducted a similar assessment of the evidence of Mrs Mitchell, concluding:

> "I was entirely unimpressed by Mrs Mitchell's evidence."

The judge then adverted to the evidence of Michael Mitchell noted in para [7](v) above. This was followed by his assessment that "... in general, the soldiers' statements are largely consistent without revealing any signs of copying or collaboration in their preparation."

[17] McAlinden J then conducted the discrete exercise of analysing certain aspects of the evidence of both parties, yielding the assessment that the claims of certain witnesses that "… there was no trouble in the area that night" were not credible. This exercise incorporated a careful analysis of the evidence of the driver of Michael McVeigh (supra).

[18] The judge then turned to the evidence of Messrs Cameron and Cattermull. Having noted the "skilful and probing" cross examination to which their evidence had been subjected:

> "… 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 …."

Followed by:

> "… 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."

[19] The judge then reverted to the evidence of Mrs Mitchell, making the following specific finding:

> "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 judge elaborated on this, before reiterating:

> "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."

[20] The judge next identified the following issues of fact to be addressed:

> "… 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?"

Having rehearsed certain aspects of the evidence bearing on this issue, the judge made the following specific finding:

> "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."

The judge next identified the factual issue of "… where the plaintiff was and what was the plaintiff doing at the time that he was struck". In conducting this exercise he observed that he had "… already determined that the plaintiff deliberately lied in the witness box …": see para [15] supra.

[21] This was followed by the self-direction, based on *Fairclough Homes v Summers* [2012] UKSC 26 at para [52]:

> "…Where a claimant deliberately lies on oath about one aspect of his claim the trial judge should be very cautious about accepting any of his evidence and would be justified in rejecting his evidence expect 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."

(In passing, there is no challenge to this self-direction)

[22] Next the judge, having rehearsed other aspects of the evidence, made the following finding:

> "… The plaintiff was not on the road in front of the target at the time that the baton round was fired."

This was followed by another finding:

> "… The plaintiff was struck by a plastic bullet fired by Lance Corporal Cameron."

The next succeeding finding was favourable to the plaintiff's case:

> "… 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."

The judge then analysed, with conspicuous care, various items of documentary evidence, including medical records.

[23] At this juncture McAlinden J turned to consider the discrete factual issue of the conduct and intentions of Lance Corporal Cameron in discharging the offending baton round. This gave rise to two specific factual findings. First, the human target at which the baton round was aimed was not struck. Second, this baton round struck the plaintiff when he was "… still crouching or hunkering down …" In making these findings the judge, by engaging with certain material aspects of the evidence, provided his reasons.

[24] The next issue addressed by the judge was that of whether Mr Cameron's training was up to date at the material time. He supplied an affirmative answer "… having carefully considered all the evidence in the case …" A further finding followed:

> "The fact that he missed the target can readily be explained by the inherent inaccuracy of the weapon and ammunition and its wide dispersion."

The judge, while critical of the absence of material records, was satisfied that this:

> "… does not in my view have a causal bearing on the plaintiff being injured by a plastic bullet on the night in question …."

Within these passages the judge also made a finding, albeit by implication, that the baton round deployed was of the 25 (rather than 45) grain variety.

[25] In the concluding passages of his judgment the judge addressed the central issues of the use of reasonable force and burden of proof, by reference to section 3 of the Criminal Law Act (NI) 1967 and the decisions of this court in *Farrell v Ministry of Defence* [1980] NI55, *Tumelty v Ministry of Defence* [1988] 3 NIJB 51 and *Kelly v Ministry of Defence* [1989] NI 341. This gave rise to a self-direction, followed by these conclusions:

> ".. I am entirely satisfied that the two soldiers honestly believed that the group of youths that was attacking them from the field … 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."

This was an objective judicial assessment of the subjective states of mind of the two soldiers concerned. This was followed by:

> "I am also entirely satisfied that they had ample reasonable grounds for holding these beliefs and fears."

This was another purely objective judicial evaluative assessment. This was followed by another kindred assessment:

> "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."

[26] In the next succeeding paragraph the judge, having reiterated certain findings of fact already made and certain further findings of fact, made the further objective conclusion:

> "… I am satisfied that the manner in which the baton gun was discharged constituted the use of force which was reasonable in the circumstances … [and was] ... entirely justified …."

The appeal

[27] The specific submissions within the argument of Mr Lyttle KC on behalf of the plaintiff in substance subdivided into the two groups of (a) should have and (b) should not have: it was contended that the trial judge should have made certain findings and should not have made others, with the result that his conclusions were unsustainable in law.

[28] In particular (and inexhaustively) Mr Lyttle submitted that the trial judge, while correctly finding that the members of the patrol were confronted by a public order disturbance, should have found that this was minor in nature. Likewise, the judge should have found that the soldiers' claims of a much more serious disturbance were not credible. He should further have found that the plaintiff was in an upright position when struck and that Lance Corporal Cameron had not been aiming low.

[29] Mr Lyttle further submitted that the distinction which the judge drew between what the plaintiff saw and what he heard was not tenable. In particular, he submitted, if the disturbance had been of the dimensions asserted by the soldiers the plaintiff was bound to have seen it. The judge, it was submitted, should have given

greater weight to the evidence of Mr Haughian and Mr Headley. The judge should also have drawn on the evidence of Michael McVeigh in support of a finding that there was no major public order disturbance at the location. In addition, the judge should have attributed greater weight to the absence of any radio warning from Messrs Cameron and McGann to the other patrol members. The judge should also have placed greater weight on the absence of any significant injury suffered by any patrol member. Likewise, the judge should have treated the written evidence of Private Hawthorne as supportive of a finding that there was no major, pre-meditated riotous attack on the patrol.

[30] Addressing the circumstances prevailing when the plaintiff attended hospital (within minutes of being injured) Mr Lyttle challenged the judge's analysis of the accident and emergency record and the related report of Dr Murugan. The judge, he argued, failed to give sufficient weight to the plaintiff's youth and the severity of his injury. This was the final main submission developed on the battery aspect of the plaintiff's case. It is convenient to address it at this juncture.

[31] We can identify no merit in this discrete submission for the following reasons. The submission, properly analysed, isolates three paragraphs in the judgment, [113]-[115], from their full context. It is necessary to begin at para [107], where the judge states:

> "The next issues to be addressed are where the plaintiff was and what was the plaintiff doing at the time that he was struck."

Paras [107]–[117] are devoted entirely to this single factual issue. Within these passages the judge debated various aspects of the evidence of both civilian and military witnesses. His assessment of the evidence of Messrs McGann and Cameron was entirely favourable to the plaintiff: their evidence corroborated the plaintiff's case that he was not part of the main group of attackers but was, rather, separated from them in the field. It was in this context that the judge subjected the medical evidence to careful scrutiny. Within these passages he positively accepted the plaintiff's claim that he had not seen the army patrol and, further, identified this as fortification of his aforementioned finding. The passages which follow, criticised by Mr Lyttle, resolve quite simply to the judge's evaluative assessment that these did not provide further corroborative evidence of the favourable finding already made by the judge. The final material finding in this discrete section of the judgment was that the plaintiff "… was still crouching or hunkering down and he was not at that stage standing erect …" For these reasons we consider that the challenge to this discrete section of the judgment is not sustained.

[32] Mr Lyttle's remaining submissions focused on the negligence aspect of the appeal. They highlighted in particular the lack of material documentary records relating to (a) the baton gun training of Lance Corporal Cameron and (b) the armoury records which one would expect to have been generated both before the

commencement of the relevant patrol exercise and following its termination. The second central feature of these submissions was the absence of any evidence from potentially material Ministry witnesses, in particular the armourer in question (or, indeed, any armourer) and any quartermaster. These submissions were deployed to challenge the judge's findings that Lance Corporal Cameron had been properly trained and that the baton round fired had been the smaller of the two possible candidates. Mr Lyttle submitted that by virtue of these identifiable frailties in the Ministry's case the judge should have made inferences favourable to the plaintiff.

[33] On behalf of the Ministry, Mr McMillen KC submitted, in brief compass, that the outcome of the trial was one whereby the judge preferred the Ministry's case for the reasons given in his judgment; there was no misunderstanding by the judge of the evidence, no disregard of material evidence, no unsustainable drawing of inferences, no irrational findings and no failure to apply, or misapplication of, the governing legal principles. Properly analysed, the plaintiff's appeal entailed an invitation to this court to review all of the evidence, form a different view and come to a different conclusion. The judge, he submitted, committed no error in his espousal of a binary approach to all the evidence. We shall advert to Mr McMillen's submission on the negligence aspect of the appeal infra.

Governing Legal Principles

[34] The principles governing the correct approach of an appellate court in an appeal of this nature are well settled. Some brief citation of authority will suffice for this purpose. In *Breslin v Murphy* [2013] NICA 75 this court, differently constituted, stated at para [8]:

> "In this Court's decision in the first appeal we set out at paragraphs [6]-[10] the relevant appellate principles, referring to both the Northern Ireland and English authorities. These can be found in Northern Ireland Railways v Tweed [1982] NIJB, Murray v Royal County Down Golf Club [2005] NICA 2, McClurg v Chief Constable [2009] NICA, Stewart v Wright [2006] NICA, Smith New Court Securities v Citibank NA [1997] AC 259, Lofthouse v Leicester Corporation [1948] 64 TLR 604. The principles may be summarised briefly as follows:
>
> (a) Time and language do not permit exact expression of judicial findings and are surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (see Lord Hoffman in Brogan v Medeva plc [1996] 38 BMLR).
>
> (b) Where there is no misdirection by the judge on an issue of fact conclusions on issues of fact are to be presumed

correct and will only be reversed if the Court of Appeal is "convinced his view is wrong".

(c) It must be clearly shown that the judge did not take all the circumstances and evidence into account, misapplied evidence or drew an inference which there was no evidence to support.

(d) A judge's judgment must be read in bonam partem.

(e) Provided he deals with the substantial issues in the case and reaches supportable factual conclusions and does not neglect to take account of matters that might affect those conclusions his findings on disputed facts cannot be disturbed."

[35] More recently, in *Kerr v Jamison* [2019] NICA 48 this court stated, at para [35]:

> "Where invited to review findings of primary fact or inferences the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility: see for example *Kitson v Black* [1976] 1 NIJB at 5–7. The review of the appellate court is more extensive where findings are made at first instance on the basis of documentary and/or real evidence. However even where the primary facts are disputed the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently: *White v DOE* [1988] 5 NIJB 1. The deference of the appellate court will of course be less appropriate where it can be demonstrated that the first instance judge misunderstood or misapplied the facts. See generally *Northern Ireland Railways v Tweed* [1982] 15 NIJB at [10]–[11]."

Continuing, having considered the decision of the Supreme Court in *R (AR) v Greater Manchester Police* [2018] UKSC 47, this court stated at para [68]:

> "Lord Carnwath also adverted to 'the general policy consideration that the purpose of the appeal is to enable the reasoning of the lower court to be reviewed and errors corrected …
>
> In the sense explained, the function of this court is one of review rather than rehearing."

Most recently, this court was prompted to observe:

> " … one of the appellant's complaints is that the courts below did not engage fully with everything that was assembled and advanced on his behalf. There is no legal system in the world in which a court can engage fully with every single detail. Long hours, late nights, weekends and supposed holiday periods are expended by judges in studying every case, preparing for hearings and compiling judgments and rulings/orders. The hearing is but one part of the process. It is of course a very important part, but it is undertaken in the real world. The legal system would grind to a halt if there was a judicial duty to address every single factual and legal issue raised in every case. That is not realistic, it is not viable, but more important it is not a requirement of the rule of law".
>
> (*DPP v Nixon* [2023] NICA 57 at paras [11])

Our analysis and conclusions

[36] Mr Lyttle submitted that the first instance proceedings should properly be viewed as, in many respects, a "documents trial". This, he contended, was an incident of the lengthy passage of time and was reflected in the evidence of certain witnesses, in particular Messrs Cameron and Cattermull. It is correct that these witnesses did indeed formulate many responses by reference to the written statements made by them in the aftermath of the events in question. However, we are unable to agree with this submission. Its fundamental flaw is that these witnesses, and others, gave live evidence thereby enabling the trial judge to undertake assessments of demeanour, veracity and reliability. Furthermore, on every occasion when these witnesses stated in terms ".. it's in my statement …", the judge was enabled to assess the veracity and reliability of these discrete replies.

[37] Next, the judge was criticised for his "black and white" approach. This we have noted in para [13] above. This complaint, in our view, provides a classic illustration of territory upon which an appellate court should not properly tread, absent a clearly demonstrated and compelling reason to do so. For the reasons summarised in the submission of Mr McMillen (supra) and giving effect to the governing principles rehearsed above, we conclude without hesitation that this threshold is not overcome.

[38] The other main submissions on behalf of the plaintiff, which we have digested in above, must fail on the same basis. It is not necessary to address these seriatim as they all relate to findings of fact lying within the province of the trial judge none of

which is infected by the kind of infirmity which would enable this court to properly intervene. The judgment under challenge in tandem with the judge's conduct of the trial bear all the hallmarks of meticulous care and attention. The judge clearly agonised in the exercise of making the critical findings of fact. He was mindful of both the severity of the plaintiff's injury and his finding that the plaintiff was an entirely innocent bystander in the events which occurred. This fundamental finding in the plaintiff's favour was made in a context where the judge had made findings that the plaintiff was lying on two specific counts.

[39] On the crucial factual issues of the severity of the public disorder and the threat which this posed to the patrol members – each bearing directly on the legal justification for firing the baton round - the judge, of course, could have swung in the opposite direction. Findings in favour of the plaintiff on these critical issues would have lain within the judge's margin of appreciation. As a matter of legal principle, however, this analysis provides no basis for interference by this appellate court.

[40] Equally, the judge could have engaged more fully with certain aspects of the evidence which the plaintiff contends was in his favour. In the hypothetical world of perfect judgment compilation, the judge could have dealt in greater detail with the evidence of Mr Haughian and Mr Headley. However, as a matter of legal principle, he was not obliged to do so. When one juxtaposes the judgment of McAlinden J with (a) the written evidence of these witnesses and (b) the transcript of the trial there is no basis for concluding that any material judicial error has occurred. The crucial consideration is that the judge was manifestly alert to the evidence of these witnesses and took it into account.

[41] By the same measure, the judge's findings relating to what the plaintiff saw and what he heard are manifestly unassailable. They were made following consideration of all of the material evidence and the judge's evaluation of the live evidence of the plaintiff and others and the documentary evidence noted above. The submission advanced to this court is that if this was in truth a public disorder situation of the dimensions claimed by the soldiers the plaintiff was <u>bound</u> to have seen it. Having reviewed all the evidence this court considers this submission to be manifestly unsustainable. There is no compelling reason why this young man who the judge found to have been engaged in the innocent activity of collecting firewood and who <u>on his own evidence</u> had his back to the road – which the judge in substance accepted - and was a disinterested non-spectator must inevitably have seen the attack on the military patrol which, based on the judge's findings, was manifestly of a sudden and unexpected nature and immediately gave rise to high speed events in a situation of some turmoil. On the same basis the judge's finding that the plaintiff was not fully astride when struck is manifestly unassailable.

[42] Equally unsustainable is the suggestion that the judge should have found the military witness' account of heavy attack incredible on the ground that there was no evidence that any of them had sustained significant injury. It is clear from the

judge's findings that what erupted was of a sudden and unexpected nature, each of the patrol members was equipped with heavy self-protective attire, events were fast moving and the firing of a baton round had its desired quelling effect. It follows that the suggestion that the two rear members of the patrol – Messrs Cameron and McGann – must inevitably have sustained some significant injury is simply untenable. Equally unsustainable is the suggestion that the judge's findings of fact about the magnitude of the public order threat are unsustainable by reason of the absence of any evidence of a radio warning.

[43] From all of the foregoing the conclusion must follow that the battery aspect of this appeal must be dismissed. We turn to consider the case in negligence.

[44] There is force in Mr McMillen's submission that the plaintiff's case in negligence was pleaded in general and unparticularised terms. It was, however, formulated in a manner which distinguished it clearly from his case in battery. Furthermore, it evolved organically as the trial progressed. By the conclusion of the trial the case in negligence was ultimately shaped in the following way, per para [42] of the grounds of appeal:

> "Further, or in the alternative, Lance Corporal Cameron and Corporal McGann were negligent in the manner in which the baton round was discharged:
>
> (a) Lance Corporal Cameron was not properly trained contrary to mandatory guidelines and regulations.
>
> (b) The alleged target was not properly identified and it is impossible to understand if Lance Corporal Cameron was aiming at a rioter with a stone in his hand on the roadway he managed to miss the alleged rioter and ended up discharging the baton round into the adjoining field.
>
> (c) Neither Lance Corporal Cameron or Corporal McGann can describe or explain what happened at any stage after the discharge of the baton round, nor can they or did they explain how the plaintiff/appellant in the adjoining field was struck.
>
> (d) The assessments previously referred to by the Commanding Officer of Corporal McGann are damming and raise issues as to whether he was fit to take charge of this particular patrol and certainly to give directions in respect of the discharge of the baton round.

(e) On the evidence of Lance Corporal Cameron it appears that Corporal McGann did not take the rudimentary steps of establishing if Lance Corporal Cameron had been properly trained and was therefore properly qualified to take charge of the baton round on this occasion."

The final ingredient in the case in negligence was the suggestion that a baton round of inappropriately large dimensions may have been discharged.

[45] The plaintiff's case in negligence is laid out in extensive detail in paras [42]–[67] of the grounds of appeal and was developed forcefully in the submissions of Mr Lyttle. Its centrepiece is the paucity and shortcomings of the Ministry's discovery, bolstered by the evidence of Mr Hepper.

[46] It is clear from para [118]ff of his judgment that McAlinden J accepted that the cause of action in negligence existed independently of that in battery. As our preceding observations about the pleading confirm he was correct to do so. In general, in a large number of claims for personal injuries against police or military forces battery will be the only realistic and sustainable cause of action. In *Farrell v Secretary of State for Defence* [1980] NI55, Lowry LCJ instanced accidental shooting or want of authority as illustrations of negligence in this domain (at 61a). He elaborated thus:

> "In certain cases the superior authorities might show that they had not authorised the trespass but might still be sued for negligence because the system was unreliable or the orders had not been made clear.

We consider that there is no difference in principle between the illustrations provided by the Lord Chief Justice and the central features of the plaintiff's case in negligence outlined above.

[47] The trial judge's alertness to and grasp of the plaintiff's case in negligence is demonstrable from a combination of the trial transcript and several sections of his judgment. At the trial, the judge was especially proactive and interventionist when the evidence of Messrs Spender and Hepper was being given. Both at the trial and in his judgment, he displayed a keen awareness of the limitations of the Ministry's discovery and was critical of this. It is against this background that the findings which he formulates in paras [118]–[119] must be considered:

> "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 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 … and that this training had been regularly refreshed …"

The judge then expressly acknowledged Lance Corporal Cameron's inability to recall the details of this. He then made another specific finding:

> "I accept the evidence of Lieutenant Colonel Spender that training would have taken place four times per year and that if there were an issue in respect of the training of any individual soldier remedial action would have been taken."

[48] In the next passage the judge acknowledged the force of Mr Lyttle's criticism of the Ministry's inadequate discovery and highlighted the absence of any "excuse or explanation". Having done so, he reiterated his aforementioned findings:

> "However, taking full account of all the evidence I have heard in this case, I do consider that a robust system for providing appropriate training four times per year was in place …
>
> 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 his 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."

The judge then embarked upon a strong criticism of the absence of armoury and quartermaster's records. Having done so, he pronounced the following finding:

> "I am satisfied on the balance of probabilities that only one type of baton gun and only one type of baton round were used …"

He then confronted squarely the discrete issue of the terms of the "Rules of Engagement" and, specifically, Mr Hepper's unequivocal acceptance of their inadequacies, making the following finding:

> "…. 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."

[49] This court is satisfied that the trial judge identified and addressed the most important elements of the evidence bearing on the plaintiff's case in negligence and, further, made a series of findings which, having regard to the governing principles rehearsed above, cannot properly be disturbed by this court. Mr Lyttle submitted with some force that the judge had not expressly addressed the discrete issue of neither Lance Corporal Cameron nor Corporal McGann having transmitted a radio warning of riot to either the other four members of their patrol or the second military patrol in the general vicinity. This submission is well made. However, this court must bear in mind one of the consistent themes of appellate court decisions in this sphere, namely it is not incumbent upon a first instance judge to identify, grapple with and make findings in respect of each and every single factual issue in the fray. Of course, in principle, a failure by a trial judge to do so could potentially have significant appellate consequences. That, however, is not so in this instance because the judge rehearsed extensively large swathes of evidence bearing on the issue in question, namely the proportions and threat of the public disorder confronting the last two members of the patrol, and made specific findings which on any showing are both adequate and sustainable. Furthermore, this court cannot overlook the reality, based on the trial judge's findings, that Messrs Cameron and McGann were making split second decisions in highly fraught circumstances. We are satisfied that if the judge had addressed his mind to this discrete issue a finding in these terms would inevitably have followed.

[50] Giving effect to the preceding analysis and reasoning the negligence limb of the plaintiff's appeal must also be dismissed.

Some reflections

[51] The following observations are appropriate. The importance of the contextual features of the trial giving rise to this appeal highlighted in paras [3] and [4] above must not be underestimated. Judicial determination of multiple types of litigation involves the receipt of sworn oral testimony from parties and eyewitnesses. Sometimes the hearing will unfold in relatively optimal conditions: these would include minimal delay between the underlying events and the court listing, detailed and coherent contemporaneous records, the full availability of such records and good physical and mental health on the part of the parties and the eyewitnesses. The judicial experience is that even in such favourable conditions the inadequacies, idiosyncrasies and ambiguities of linguistic expression, coupled with varying

frailties of memory, all duly seasoned by the vagaries and unpredictability of the human mind, will feature. Each of these phenomena is magnified in a case of the present kind.

[52] The following passage in a paper presented by Elizabeth Loftus of the University of Washington to the Royal Society of Psychologists seems especially apposite:

> "In a typical experiment, subjects see a complex event and are then asked a series of questions which exposes them to post-event information. Typically some of the questions are designed to present misleading information, that is to suggest the existence of an object or detail that did not in fact exist. Thus, in one study, subjects who had just watched a film of an automobile accident were asked 'How fast was the white sports car going when it passed the barn while travelling along the country road?' Whereas no barn existed. The subjects were substantially more likely to later 'recall' having seen the non-existent barn than were the subjects who had not been asked the misleading questions."

("Misfortunes of Memory", January 1983, quoted by Sir Thomas Bingham in The Business of Judging, p 16).

[53] The thoughtful reflections of Lord Pearce in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 at 431 resonate forcefully in this appeal:

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, …. Has his memory correctly retained [the relevant facts]? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? …
>
> It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a judge that his present recollection s preferable to that which was taken

> down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken?"

In 1985 Sir Thomas Bingham opined:

> "I think that in practice judges do attach enormous importance to the sheer likelihood or unlikelihood of an event having happened as a witness testifies in deciding whether to accept his account or not."

(Current Legal Problems, Vol 38, 1)

[54] Lord Pearce, in the passage quoted above, continued:

> "One thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial judge has, except on rare occasions, a very great advantage over an appellate court: evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a Court of Appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial judge and the Court of Appeal has not been occasioned by any demeanour of the witness or truer atmosphere of the trial (which may have eluded an appellate court) or by any other of those advantages which the trial judge possesses."

Alternatively phrased, perhaps, intervention by an appellate court in such cases is justifiable only where it can be demonstrated that something has gone seriously wrong in the approach, analysis, reasoning, findings or conclusion/s – or any combination thereof – of the trial judge.

[55] This appeal demonstrates, once again, that even the best of reserved judgments can be subjected to merciless scrutiny by the skilled advocate. In the world of adversarial litigation this should be viewed as a positive merit. The limits of the appellate court function are the same in every appeal of this kind, while the discharge of this function will invariably be facilitated by high quality advocacy, both oral and written. This is one such case. The judgment under appeal in this case unfolded in the imperfect world of civil litigation entailing a trial which in turn unfolded in the imperfect world populated by the imperfect members of the

imperfect human race and overseen by a human judge. This is the abiding message of these proceedings.

Omnibus conclusion

[56] For the reasons given this court can identify no legally tenable basis for interfering with the judgment of McAlinden J, which is couched in admirably comprehensible and structured terms and is clearly the product of careful thought and effort. We affirm the order at first instance and dismiss the appeal.