Neutral Citation : [2012] NIMaster 7 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **7/9/12**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Colin James Keys

Plaintiff;

and

The Chief Constable of the Police Service of Northern Ireland

Defendant.

Master Bell

INTRODUCTION

[1] The plaintiff is one of some 5,500 former and serving members of the Royal Ulster Constabulary and Police Service of Northern Ireland who have claimed to have sustained a psychological/psychiatric disorder following exposure to trauma experienced during the course of the terrorist campaign in Northern Ireland.

[2] In this application the defendant seeks an order pursuant to the inherent jurisdiction of the court, Order 18 Rule 12, Order 18 Rule 15(2), and Order 18 Rule 19 of the Rules of the Court of Judicature (Northern Ireland) 1980 striking out those portions of the plaintiff's pleadings that allege :

(a) Breach of statutory duty;

(b) Operational failures on the part of the defendant in respect of policing operations at or about Pomeroy Post Office on or about 28 November 1983;

(c) Collusion and criminal activity on the part of the defendant;

(d) Negligence relating to the plaintiff's working conditions including reduced resources and inadequate management; and

(e) Breach of contract.

[3] At the hearing the plaintiff consented to an order against him in respect of the reliefs sought at (a), (c), (d) and (e) above. The application continued therefore in respect of the relief sought at (b) only. The essence of the issue is that the plaintiff wishes to include in this action a claim for negligence to the effect that on 28 November 1983 an armed robbery occurred at Pomeroy Post Office when the plaintiff was exposed to an exchange of gunfire with armed terrorists and during which an elderly woman was killed and others were injured. The allegation is that the defendant knew about this armed robbery in advance and did not provide proper warning of the imminent attack to the plaintiff because the defendant wished to protect the identity of a police informant. The plaintiff claims that as a result he suffered psychiatric injury.

[4] At the hearing the plaintiff was represented by Mr Timothy Warnock and the defendant by Mr Donal Lunny. I heard oral submissions from both counsel and both assisted me with skeleton arguments. Both parties indicated a preference to receive a written judgment setting out the reasons for my decision.

[5] The significant milestones in this litigation are as follows :

i. On 27 June 2001, following consideration of how the litigation should proceed, Coghlin J (as he then was) made an order establishing a Group Action.

ii. On 29 June 2007 Coghlin J delivered a written judgment in *McClurg v Chief Constable* [2007] NIQB 53 (which he subsequently referred to as "the generic judgment"). This judgment dealt with whether there was a reasonably foreseeable risk of psychiatric injury to police officers who were exposed to events which were liable to involve intense fear, helplessness or horror, and if such was foreseeable, when it was foreseeable. It also dealt with the adequacy of steps taken by the defendant to discharge his

duty of care by way of ensuring that the plaintiffs received adequate education, training, and instruction, taking into account factors such as culture, alcohol and the development of the Occupational Health Unit.

iii. On 3 July 2007, having heard evidence in a number of lead cases, Coghlin J gave separate written judgments in each of these.

iv. On 24 January 2008 Coghlin J issued written Consequential Orders and Directions.

v. On 25 June 2009 the Court of Appeal determined an appeal in *McClurg v Chief Constable* [2009] NICA 37. This was referred to by Girvan LJ as "the generic appeal". The Court of Appeal also determined five appeals in respect of the individual lead cases.

vi. In March 2010 Gillen J began case managing the remaining cases within the Group Action. The plaintiff's case is one of a small number which has not been discontinued or dismissed.

[6] The defendant's submission is that the plaintiff's claim for negligence in respect of the Pomeroy incident does not fall within the scope of the Group Action commenced by the writ, of which his individual claim forms part. The defendant submitted that the plaintiff must issue a fresh writ in respect of the Pomeroy incident.

THE ORDER OF 27 JUNE 2001

[7] The defendant's first argument was that the order of 27 June 2001 prohibits the plaintiff from raising the Pomeroy issue. That order stated :

> "AND UPON hearing counsel for the said Charles Wayne McClurg and the plaintiffs listed on the schedule annexed to the writ and Counsel for the said defendants,
>
> IT IS ORDERED :
> 1. The said actions of Charles Wayne McClurg and the plaintiffs listed on the schedule annexed to the said Writ and other plaintiffs to be identified be certified as a group action and will hereinafter be referred to as "Post Traumatic Disorder and Psychiatric Disorders Group Action". The said Group Action is to include any action against the Chief Constable and the Police Authority for Northern Ireland for damages

for personal injury caused or contributed to by failure by the defendants :-

i. to take adequate steps to avert the onset of Post Traumatic Disorder or other related psychiatric disorders, or;

ii. to diagnose or treat Post Traumatic Disorder or other related psychiatric disorders arising from stress or trauma suffered by the claimants as a result of their service in the Royal Ulster Constabulary.

2. That the Honourable Mr Justice Coghlin be assigned as the designated judge for the time being in respect of the said Group Action.

3. The co-ordinating solicitors of the Group Action are to be Messrs Edwards & Company of 28 Hill Street Belfast BT1 2LA.

4. That this application be adjourned for further directions in this Group Action to 18th September 2001 before Mr Justice Coghlin.

5. Liberty to apply."

[8] Neither counsel appearing on this application was involved in the litigation at the time the order of 27 June 2001 was made and neither was able to inform me as to the submissions made to the judge prior to his making of the order. However in my view what Coghlin J did in the order of 27 June 2001 was to creatively case manage the action using the inherent power of the High Court to deal with its own proceedings. He did so by making an order which paralleled a Group Litigation Order (hereafter "GLO") available in England and Wales under Part 19 of that jurisdiction's Civil Procedure Rules (hereafter "CPR") but which has no counterpart in the Rules of the Court of Judicature in this jurisdiction.

[9] I have concluded that the order of 27 June 2001 does not prohibit the plaintiff from raising the Pomeroy issue. There are two reasons for my conclusion. Firstly, there is an absence of an express declaration that Coghlin J was imposing a restriction on the issues which could be litigated. The use of the word *include* in his order clearly implies he did not intend to impose such a restriction. Had Coghlin J intended to restrict each of the plaintiffs from raising any additional issues, he could be expected to have done so in express terms. Secondly, the very nature of the order itself suggests that the judge

intended no such restriction. To understand this requires a consideration of group litigation.

[10] Different jurisdictions have adopted different solutions to the problem of how to manage a situation where large numbers of citizens who believe they have similar rights seek to vindicate those legal rights through the courts. In certain jurisdictions the procedural solution is known as a "class action."

[11] In *Emerald Supplies Ltd and another v British Airways plc* [2010] EWCA Civ 1284 Mummery LJ described the nature of the underlying problem for the courts as follows :

> "Procedures under CPR 19 for representative parties and for group litigation and the problems posed by them are concisely put in context by Professor Zuckerman in his valuable pioneering exposition of the principles of procedural law, Civil Procedure-Principles of Practice (2nd ed-2006):
>
> > '12.22 There is no limit to the number of persons who can be claimants or defendants to an action. There is therefore no impediment to a large number of claimants suing together or to a large number of defendants being sued together, but the multiplicity of parties, all of whom exercise their right to participate in the proceedings, may hinder the effective resolution of a dispute by causing duplication and confusion. Yet, it might be equally inefficient if each of a multitude of claimants with similar cases were required to establish their claims independently of each other, because it would require the court to deal with identical issues many times over. As Uff observed, two different sorts of interest may arise in the multi-party proceedings context. One is the true collective interest, where all those concerned share a single common interest (e.g. pollution; anti-discrimination). The second arises where individual substantive rights happen to be shared by several persons relating to a single event or similar transactions (e.g. personal injury claims following mass disasters; product liability claims). The procedural process suitable for administering one such sort of claim is not necessarily suitable or most appropriate for administering the other. Accordingly CPR 19 provides two principal devices for handling multi-party actions. One is the representative action. The other is the group litigation order…' "

[12] In *Europcar UK Ltd and others v Revenue and Customs Commissioners* [2008] EWHC 1363 (Ch) Henderson J explained the background to the introduction of GLO's in England and Wales :

> "The rules relating to GLOs are contained in s III of CPR Pt 19 (CPR 19.10 to 19.15) and an associated Practice Direction (see CPR Pt 19; Practice Direction—Addition and Substitution of Parties PD19). These provisions were added to the CPR by the Civil Procedure (Amendment) Rules 2000, SI 2000/221, r 9, and came into force on 2 May 2000. They were intended to achieve the objectives stated in Lord Woolf's final *Access to Justice* report, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (July 1996), Ch 17 of which recommended that new procedures dedicated to multi-party claims should be introduced with the following objectives: (a) to provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable; (b) to provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure; and (c) to achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner. Examples of circumstances in which the handling of claims involving multiple parties giving rise to common or related issues of fact or law might be assisted by a dedicated procedure included personal injury claims, arising, eg, from a sudden disaster or industrial disease or accident, and (more relevantly for present purposes) financial loss arising from such matters as the mishandling of investments, publishing misleading information or fraud on minority shareholders."

[13] I was not directed to any English authority by either counsel on the subject of GLO's. In my view, however, an implication of the language used in CPR 19 is that GLO litigation may involve "GLO issues" and "non-GLO issues". CPR 19 provides that a GLO must :

> "(a) contain directions about the establishment of a register (the 'group register') on which the claims managed under the GLO will be entered;

(b) specify the GLO issues which will identify the claims to be managed as a group under the GLO; and

(c) specify the court (the 'management court') which will manage the claims on the group register."

[14] Importantly, there is material in Coghlin J's Consequential Orders and Directions that he viewed the generic judgment as dealing with "the generic issue of foreseeability" which he also describes as "the foreseeability ruling". He also states that "the judgment dealt separately with a number of specific issues". This language supports the view that the generic judgment simply dealt with issues which the plaintiffs had in common rather than being a definitive judgment on all the issues which were entitled be raised by all the plaintiffs in the litigation. The issue of what would happen to plaintiffs with other issues does not appear to have been raised by any of the counsel involved in the litigation with Coghlin J.

[15] One would not therefore expect a case management order in group litigation, as was the order of 27 June 2001, to have the purpose of excluding issues from the litigation. Rather one would expect its focus to be upon those matters which the plaintiffs had in common, which the CPR refers to as "GLO issues".

REPRESENTATIONS

[16] The defendant's second argument was that, because of representations made during the litigation, it would be inappropriate to allow the plaintiff to raise the Pomeroy incident in these proceedings. Counsel referred me to particular passages from the generic trial judgment and the generic appeal judgment.

[17] Coghlin J stated in the generic trial judgment:

"[17] The Defendant expressly concedes: (*a*) that during the relevant period it was foreseeable that, in the course of their duties, police officers were on occasions liable to experience, witness or be confronted with events that would involve actual or threatened death or serious injury, or a threat to the physical integrity of self or others; and (*b*) that it was foreseeable that the response of such officers to their exposure to such events was liable to involve intense fear, helplessness or horror. However, the Defendants do not concede that there was a reasonably foreseeable risk of psychiatric injury to police officers, who were not subject to any relevant vulnerability or predisposition, as a consequence of exposure to such events until, at the earliest, after the Occupational Health Unit ("OHU") had been established in 1986. The effect of these concessions is to focus upon the

distinction, accepted by both sides, between a recognised psychiatric injury or condition, whether it is termed acute or chronic, and the transient emotions experienced by the majority of human beings as a result of exposure to such events. The Defendant further submits that, in addition to the risk of sustaining a recognised psychiatric condition, the Plaintiffs must also establish that it was reasonably foreseeable that the Defendant's failure to act would result in the loss of an opportunity to prevent or alleviate all or part of the original injury caused in the first instance by exposure to the traumatic event. The need for such a refinement arises from the fact that the alleged relevant act or omission in this case is not the act of exposing the individual to a traumatic event but the failure to take some step or steps to prevent or alleviate the consequences of such exposure."

[18] On appeal in *McClurg and others v Chief Constable of the Royal Ulster Constabulary* [2009] NICA 37 Kerr LCJ stated :

"[2] The appellants do not contend that the respondent is liable for the fact that they were exposed to trauma. They have accepted that such exposure was on occasions a necessary and inevitable part of their duties. They assert, however, that their psychiatric and psychological injury is real and can be, in certain circumstances, as disabling as physical injury. The learned judge found this to be established in the individual cases that he dealt with and the findings that he made on that subject have not been challenged by either side in this appeal.

…

[38] In his written submissions for the appeal, Mr Hanna introduced the respondent's challenge to the findings of the trial judge with a number of prefatory remarks which proved on the whole not to be controversial and which we consider provide an admirable overview of the backdrop to the respondent's appeal. We therefore replicate them here in full: -

> "24. All of the approximately 5,500 appellants allege that they have suffered psychiatric ill health caused by their exposure to one or more severe traumatic incidents during the course of their service with the RUC. Their complaint against the defendant is not that he was legally responsible (through negligence or some other tort) for any of those severe traumatic incidents, or for causing the

> appellants to suffer any resultant psychiatric ill health, but rather that, in breach of the duty of care which he owed them as their notional employer, he failed to take some action which would have prevented the development of, or would have alleviated, the psychiatric ill health which they suffered as a result of their exposure to those incidents."

[19] Counsel offered no authorities to support the submission that the representations made, or indeed not made (in the sense that Mr Hanna's remarks do not appear to have been challenged by the plaintiff), should now prohibit the plaintiff from alleging negligence in relation to the Pomeroy incident. I do not consider that the passages cited by the defendant lead me to the conclusion that the representations made on behalf of the plaintiff during the generic hearing before Coghlin J or the generic appeal before the Court of Appeal are such that the plaintiff should now be prohibited from raising the Pomeroy issue. Both hearings clearly concerned GLO issues and the representations made during those hearings simply focused on such issues alone.

COGHLIN J'S FINDINGS OF FACT

[20] A third argument on behalf of the defendant was that the plaintiff is not entitled to raise the Pomeroy issue because it occurred in 1983 and that, since Coghlin J decided that, prior to 1986 it was not reasonably foreseeable that police officers of normal fortitude were at risk of psychiatric injury as a consequence of exposure to traumatic events in the course of their duties, the 1983 incident cannot now be included within the scope of this action.

[21] Certainly Mr Lunny was correct in submitting that the plaintiff is bound by the findings of Coghlin J in the generic phase of the Group Action. Indeed Coghlin J's Consequential Orders and Directions of 24 January 2008 explicitly included a provision that :

> "Pursuant to the order of 12 February 2002 I direct that the findings of law and fact set out in the generic judgment of 29 June 2007 are my findings of fact and that, as such, they should bind the plaintiffs and defendant in the trial of any further individual cases."

[22] However the plaintiff submits that he wishes to raise a very different issue than that determined by Coghlin J. Coghlin J's findings of fact concerned the foreseeability of psychiatric vulnerability of police officers to traumatic events which in the course of their duties they might on occasions be liable to experience. The argument which the plaintiff wishes to make is

that it was nevertheless reasonably foreseeable in 1982 that an officer who was *deliberately* exposed to a traumatic event would suffer psychiatric injury.

[23] In *Rush v Police Service of Northern Ireland and Secretary of State for Northern Ireland* [2011] NIQB 28 Gillen J summarised the principles to be applied on an application to strike out pleadings :

> "[7] For the purposes of the application, all the averments in the Statement of Claim must be assumed to be true. (See O'Dwyer v Chief Constable of the RUC (1997) NI 403 at p. 406C).
>
> [8] O'Dwyer's case is authority also for the proposition that it is a "well settled principle that the summary procedure for striking out pleadings is to be used in plain and obvious cases." The matter must be unarguable or almost incontestably bad (see Lonrho plc v Fayed (1990) 2 QBD 479).
>
> [9] In approaching such applications, the court should be appropriately cautious in any developing field of law particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the Statement of Claim. Thus in Lonrho plc v Tebbit (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:
>
> > "In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-by-case basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim."
>
> (See also E (A Minor) v Dorset CC (1995) 2 AC 633 at 693-694).
>
> [10] Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or

> defence no evidence is admitted. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."

[24] Applying these principles I consider that the argument made by the plaintiff does not reach the point of being "unarguable or almost incontestably bad". It should not therefore be struck out by the court at this stage.

CONCLUSION

[25] For the reasons set out in this judgment I therefore refuse the defendant's application to strike out the particulars referred to in paragraph (b) of his summons. I note that Lord Woof said in *Boake Allen Ltd and others v Revenue and Customs Commissioners* [2007] UKHL 25 that GLOs are an area of the law the parameters of which are still evolving. This is undoubtedly true in this jurisdiction where there are fewer actions of this kind and limited court rules to provide a procedural framework for them. I observe that it would be helpful if in any future group litigation counsel would attempt to ensure that both group litigation issues and non-group litigation issues are clearly identified at an early stage and communicated to the other side.