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

Delivered: **11/04/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

NICOLA McALEER

Plaintiff;

and

CHIEF CONSTABLE OF THE PSNI

Defendant.

GILLEN J

[1] This is an appeal from the decision of Deputy County Court Judge Rodgers when he dismissed the plaintiff's claim for damages for personal injury sustained by her, allegedly as a result of trespass to the person by members of the PSNI on 30 September 2012.

The Plaintiff's Case

[2] In the course of examination-in-chief and cross-examination the plaintiff made the following points:

(i) On Saturday evening 30 September 2012 she had been in Omagh town with some friends from about 10.00pm. Between 10.00pm and approximately 2.30am she had taken approximately 5/6 gin and tonics and was "tipsy" but not drunk.

(ii) Emerging from a local pub, she noticed that a male friend of one of her companions was being arrested by the police and was on the ground in handcuffs.

(iii) He was on the opposite side of the road from her and she went over to see what was happening. There were probably about 12 people standing around. Some people had mobile phones and were shouting at the police. In turn the police were shouting to them to put away their phones. The

crowd were jeering and shouting at the police. The police were shouting to them to keep back.

(iv) The plaintiff claims that the closest she got to the arrested person was about 10-12 feet. A police officer then took three steps or thereabouts towards the plaintiff and hit her twice with her baton on the right upper thigh.

(v) The plaintiff asked the woman police officer why she had struck her but she turned her back and walked away to the rest of the crowd.

(vi) The plaintiff claims she did not know why this police officer had picked on her although there were people who were jeering at the police beside her.

(vii) Shortly after this she was walking up Kevlin Avenue. A male police officer approached her and told her to go to hospital, "get it on record because it should not have happened".

(viii) She telephoned her stepfather who was a doorman in the area. He arrived on the scene and spoke to the police officer who had struck her.

(ix) Her thigh was very sore where she had been struck. She had to sleep on her side. It continued to be painful for about 1-2 weeks. It was a few weeks before the pain went away and the bruising disappeared. She was anxious and emotionally affected. She had never been involved with the police before and found this matter very distressing.

(x) She denied in cross-examination that her speech was slurred or that she was staggering.

(xi) She also did not agree that there was a substantial amount of disorder going on around her.

(xii) She denied that she had been aggressive and had been "roaring at the police" or that she kept coming towards them and pushing up against the police officer. She also denied that she had been warned to get back.

(xiii) After the incident the plaintiff asked police to get her to an ambulance. They refused but said they would ring an ambulance for her. She said this would be a waste of resources.

[3] The plaintiff's stepfather, Mr Devine, gave evidence that having been telephoned by his stepdaughter he attended the scene. She was not staggering or crying and was not aggressive. He asked the police officer who had struck her why she had done so and he was told there had been a large crowd around her, that she

had not specifically picked anyone out. He denied in cross-examination that he had said he was happy with her explanation and that he had shaken her hand.

The witnesses on behalf of the defendant.

[4] The key witness in this case was Constable Simpson who at that time was a temporary Sergeant for the evening and was in charge of the public order police officers patrolling Omagh. In examination-in-chief and cross-examination the following points emerged from her evidence:

(i) Along with other police officers she had observed the arrest of the young man, Mr O'Neill. She had gone with officers to assist in his arrest. She observed him placed on the ground at the rear of a police vehicle on the footpath.

(ii) She noticed Woman Constable Convie struggling with a female. That female was trying to get to Mr O'Neill past Constable Convie. Constable Simpson struck that female on the leg with her baton and she fell back. It was a very aggressive situation.

(iii) At this stage there were about 15-20 people around the police who numbered approximately 4. The crowd were coming on top of them and were right in front of Constable Simpson.

(iv) Constable Simpson had her baton in the low carry position. Her focus was on the plaintiff and a male who was also aggressive in front of her. They were about 5-6 feet away from the arrested person.

(v) The plaintiff was shouting and very aggressive and was about 1-2 feet away from Constable Simpson. The crowd were shouting "up the RA" and "black bastards".

(vi) The plaintiff presented very aggressively and was trying to get over the top of the witness and was shouting and screaming. Constable Simpson shouted "get back, get back" but the plaintiff continued to come on top of her.

(vii) Constable Simpson then struck the plaintiff's left calf/thigh on two occasions with her baton.

(viii) Constable Simpson said she had been in the police about 7 years and in Omagh 4½ years. She had a lot of experience of public order matters but had never been in a situation like this and had never used her baton before that evening.

(ix) After the incident she spoke to Mr Devine and took him to the side. She explained to him that the plaintiff had been the most aggressive in the crowd and she had hit her twice. Once she explained it he said he had been thinking of making a complaint but he was now happy. She gave him details of the Ombudsman.

(x) She said she had been taught to strike to the side and was likely to get the back of the calf rather than the front.

(xi) She was adamant that she had hit the Plaintiff on the left leg and did not understand how she had any injuries on her right leg. In the witnesse's view she had quite clearly hit her to the right leg.

(xii) She accepted she was the only officer to hit people that night but she denied she had lost control.

(xiii) She accepted that the thigh mark bruising to the plaintiff was very high and, being close to the hip, was dangerous at that point. However, everything happened very fast and she felt she was going to be assaulted. It was the minimum use of force.

(xiv) Four other officers gave evidence but none of them had witnessed Constable Simpson striking the plaintiff. Their evidence was largely dealing with the general situation at the time of the arrest of O'Neill and the scene thereafter. It can be summarised as follows:

(1) Constable Convie had been attempting to restrain a female from getting to the arrested person. She saw Constable Simpson striking that female on the thigh. It was the worst disorder situation that Constable Convie had been in. She did not use her baton but Constable Simpson was more experienced and she took control of the situation.

(2) Constable McCrystal had been dealing with the arrested person O'Neill. He described the crowd around them as very hostile, drunk and shouting and swearing. A female had attempted to grab at his flak jacket and he had had to push her back. He believed about two police officers had drawn their batons. He had taken his baton out as well.

(3) Constable Cunningham described the crowd in similar vein. He also said he had never seen a crowd turn on the police like this before. After the incident he was approached by the plaintiff and a male friend who asked him to take her to hospital. He told her that they

couldn't do that but he would call an ambulance. She told him not to waste resources.

(4) Constable Donnelly similarly described the hostile crowd. He had drawn his baton and warned the crowd to keep back. He confirmed the conversation with the plaintiff after the incident in which he requested an ambulance.

Conclusions

Lawful force

[5] It is lawful for one person to use force towards another in defence of his own person or in defence of others. Section 3 of the Criminal Law Act 1967 provides 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.

[6] Such force, however, must not transgress the reasonable limits of the occasion, what is reasonable force being a question of fact in each case.

[7] The law does not require that a person when labouring under a natural feeling of resentment consequent on gross provocation should very nicely measure the weight of the blows. A mere assault may justify a battery but there must be some proportion between the aggression and the defence. The minimum force must be used to accommodate the permitted objective. The court will measure and balance the harmfulness of the injury or damage sought to be avoided against the harmfulness of the force needed to prevent it.

[8] Having heard all the witnesses in this case, I have no doubt that this was a highly charged incident in which vile abuse was heaped on the police officers who were doing their duty to the best of their ability. They were subjected to gross and obvious hostility. In such circumstances the actions of police officers cannot be measured with a jeweller's scale if they are to protect their own safety and secure the arrest of those who are breaking the law.

[9] I carefully watched the plaintiff giving evidence. Regretfully I was convinced that she was being less than candid with the court in her description of events on that evening. I can conceive of no good reason why she lent herself to the crowd around the police which was jeering and shouting in a vile abusive manner. Why did she not refrain from joining that group? Having joined it, and having heard the police ordering people to stand back, why did she not immediately leave that group and absent herself from any connection with it? The crowd was clearly behaving in a thoroughly disorderly manner and any right thinking person would immediately have recognised that her very presence was

perhaps serving to encourage that behaviour and make life more difficult for the police. I am satisfied that her behaviour was fuelled by an over consumption of alcohol and perhaps a sympathy for her male friend who had been arrested.

[10] I am satisfied in this case that the plaintiff, contrary to what she told me, was displaying aggression by shouting at the police. I have no doubt that her behaviour was fuelled by alcohol and I strongly suspect that she was more than merely tipsy. I also believe that Constable Simpson was telling me the truth when she said that this plaintiff was pushing against her and that she did not obey the instruction of the police to step back. The behaviour of this plaintiff was unacceptable.

[11] However, I must still stand back and consider whether the force applied by Constable Simpson in this instance was the minimum force necessary to achieve her object of keeping the plaintiff back from close contact with the police. I found Constable Simpson a straightforward and candid witness who refused to avail of opportunities afforded during the hearing to tailor her evidence to meet the circumstances. In particular, I believed her account of the plaintiff's behaviour. It would have been very easy for her to have made the case that the movement of the crowd and the pressures on her caused her baton to be inadvertently misdirected. On the contrary, she adamantly asserted that she had struck the plaintiff where she had aimed. In the event I have found that in doing so she exercised excessive force in not effectively controlling her strikes. Notwithstanding that I found her much the more impressive of the two witnesses.

[12] It is not without some hesitation that I have concluded that, on Constable Simpson's own evidence, the force applied in this instance could not be described as the minimum necessary. As Constable Simpson herself accepted, use of the baton should have been applied to the lower legs and should not have been applied to the upper thigh as happened in this instance. Moreover, despite my affording her the opportunity to reconsider her evidence, Constable Simpson was adamant that she had struck this plaintiff on the left lower leg and could not understand the bruising to her right upper thigh. I am satisfied that the plaintiff did sustain injuries in this area. It was clear from the records of the Accident and Emergency Department and indeed from the photographs shown to me that this plaintiff did sustain heavy bruising to the upper thigh and indeed to the mid thigh area on the right side. I am satisfied, therefore, that Constable Simpson, despite the clear abuse to which she was exposed from the plaintiff, did not sufficiently control her wielding of the baton so as to ensure that the minimum force was applied to an appropriate area of the plaintiff's body. In the circumstances I have concluded that the response to the plaintiff's actions was disproportionate and unlawful.

Contributory Negligence

[13] The question then arises as to whether or not the defendant can rely on the partial defence of contributory negligence under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948.

[14] In Ward v Chief Constable of the Royal Ulster Constabulary Girvan J [2000] NILR 543 considered that, on first principles, under the 1948 Act, where a person suffered damage as a result partly of his own fault and partly of the fault of another, he was entitled to recover damages with such deduction as the court thought fit and equitable in all the circumstances. "Fault" was defined in Section 6 of the 1948 Act as meaning "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort or would apart from this Act give rise to the defence of contributory negligence".

[15] Having regard to the definition of fault under Section 6 of the 1948 Act, Girvan J concluded that the behaviour of the plaintiff in Ward's case – she had physically made contact with police officers who then pushed her with excessive force over a small wall – meant that she bore a degree of responsibility for the ensuing damage.

[16] This decision has been followed in a number of first instance cases in Northern Ireland e.g. Donkin v Reid t/a The Whiskey Haw [2006] NIQB 2. The question of whether or not the equivalent Law Reform (Contributory Negligence) Act 1945 in England applied to actions for trespass to person was considered by the Court of Appeal in England in Co-operative Group CWS Ltd v Pritchard [2011] EWCA Civ 329. In that case the plaintiff was employed by the defendant company to work in its store. One morning the plaintiff telephoned the defendant's manager to request permission to stay at home for the day on the grounds of illness. Upon her request being refused the claimant went to the store and launched a vehement tirade at the manager. Following her refusal to leave the premises, the manager grasped the plaintiff's arms and a struggle ensued. The plaintiff brought proceedings in battery and false imprisonment against the defendant claiming that the altercation with its manager, for whom she said the defendant was vicariously liable, caused her to develop a severe psychiatric illness. The Court of Appeal unanimously held that apportionment is unavailable in proceedings for trespass to the person.

[17] Aikens LJ, dealing with the effects of the 1945 legislation, said at [61] et seq:

> "61. The (defendant) is only entitled to assert that (the plaintiff) was 'contributorily negligent' so that any damages to which he is entitled must be reduced if, at common law, there was a defence of 'contributory negligence' to a claim against the defendant for

> damages for the torts of assault or battery. There is no case before the 1945 Act which holds that there is such a defence in the case of an `intentional tort' such as assault and battery. There are many pointers indicating that there was no such defence.
>
> 62. In so far as there are cases since the 1945 Act that suggest that the Act can be used to reduce damages awarded for the torts of assault or battery in a case where it is found that the claimant was 'contributorily negligent' they are unsatisfactory and cannot stand with the statements of principle made in two subsequent House of Lords decisions (ie *Reeves v Commissioner of Police [2001] 1 AC 360 and Standard Chartered Bank v Pakistan Shipping Corporation [2003] 1 AC 959 at (12) per Lord Hoffmann*). I would conclude that the 1945 Act cannot, in principle, be used to reduce damages in cases where claims are based on assault and battery, despite the remarks in such cases as *Lane v Holloway [1968] 1 QB 379* and *Murphy v Culhane [1977] 1 QB 94* which I would say are not binding on this court. Moreover, it seems to me that such a conclusion is in keeping with the purpose of the 1945 Act, as set out in Section 1(1), which was to relieve claimants whose actions would previously have failed, not to reduce the damages which would have previously been awarded to claimants."

[18] I find myself in complete agreement with the concerns voiced by Lady Justice Smith in that case at [82] where she indicated that she reached that conclusion with regret "because I think that apportionment *ought* to be available to a defendant who has committed the tort of battery where the claimant has, by his misconduct, contributed to the happening of the incident, for example by provocative speech or behaviour".

[19] Thus in the present case I have no doubt that the plaintiff contributed to the happening of this incident in large measure and it is not without some measure of reluctance that I have come to the conclusion that Constable Simpson's response went beyond what she was entitled to do. In the circumstances I think it would be just and equitable if the plaintiff's damages could be reduced by up to one-third/one-half but I do not believe that the law permits me to so hold. Whilst I am not bound by a decision of the Court of Appeal in England, it is a highly persuasive authority and I find the logic in this case compelling.

Provocation

[20] At the conclusion of this case I drew to the attention of counsel the issue of provocation including an article in LQR Vol 127 October 2011 p519 by James Goudkamp of Jesus College Oxford in which the issue is illuminatingly touched upon. In the course of that article considering the judgment in Pritchard, supported by a number of authorities, the author contends that exemplary and, probably, compensatory damages can be reduced on account of the plaintiff's provocative conduct (Fontin v Katapodis (1962) 108 CLR 177; Lane v Holloway [1968] 1 QB 379 CA; Hoebergen v Coppens [1979] 2 NZLR 597 SC; Murphy v Culhane [1977] QB 94 at 98 (CA); Smith v Doucette (2006) NSSC 67; Wilson v Bobbie (2006) ABQB 75; (2006) 394 AR 11).

[21] The author queries why the provocative conduct on the part of the plaintiff was not raised in Pritchard opining that perhaps the doctrine was overlooked by the defendant's lawyers. Aikens LJ in Pritchard's case did refer to authorities which invoked the use of the word "provocation" but made no attempt to distinguish this concept from the general concept of contributory negligence in trespass to person cases. Similarly at [82] Lady Justice Smith expressly stated that Miss Pritchard's conduct was "provocative verging on the intimidatory" but still concluded that the law did not permit any reduction for this.

[22] Mr Goudkamp asserts that provocative behaviour is capable of limiting both compensatory and exemplary damages and, accordingly, apportioning damages for contributory negligence in proceedings in trespass may be unnecessary.

> "Intuition suggests that a claimant should suffer a reduction in his damages where his behaviour is particularly inflammatory".

[23] The author argues that an intention to injure is not inconsistent with having an excuse. Contributory negligence is not in the nature of an excuse. Whilst there is no consensus amongst theorists as to the definition of an excuse, it is agreed that excuses are defences that are concerned with the defendant. Contributory negligence focuses on the plaintiff. The author concludes that provocation is capable of limiting both compensatory and exemplary damages and thus apportionment of damages for contributory negligence in proceedings in trespass to the person may be unnecessary.

[24] McGregor on Damages 18th Edition at 37-008 states

> "Provocation of the assault by the claimant will lead to mitigation of the damages recoverable under the head of damage concerned with injured feelings."

[25] *McGregor on Damages Third Supplement to the 18th Edition at 37-009A*, deals with the Pritchard case. The author questions whether there survives a possibility of reducing the damages for non-pecuniary loss on account of provocation by the victim of an assault making the insults suffered by him or her the less. The author states:

> "Since the Court of Appeal (*in Pritchard*) was dealing only with contributory negligence, could it not be said that provocation can still be introduced for the purpose of damages reduction? It is thought that this should be possible. But we shall have to wait and see."

[26] The competing arguments on the issue are clear. First, the principle on which damages of all kinds are reduced or mitigated because of provocation in a case of assault and battery is that the plaintiff has brought the trespass on himself. It is, as it were, a contribution charged to him on account of his own fault. The counter argument is that the law provides a remedy for any damage or loss occasioned by a wrongful act and therefore if provocation brings the defendant to do any act in excess of lawful self-defence which results in personal injury and economic loss to the plaintiff, the plaintiff is entitled to just and adequate damages and to mitigate or reduce actual or compensatory damages is to deprive the plaintiff *pro tanto* of a legal right. That would place actual or compensatory damages for assault and battery on the same footing as damages for personal injury caused by negligence.

[27] This is a vexed area of law. The Canadian authorities, e.g. the Supreme Court of Nova Scotia decision in Smith v Douhette (2006) NSSC 67 and the Alberta court decision in Kuehn v Hogen [1997] A.J.No.982 point to provocation being a factor in mitigation of compensatory damages. English authorities, e.g. Lane v Holloway [1968] 1 QB 379 and Murphy v Culhane [1977] QB 94 at 98 (CA) give similar indications. Australian authorities, e.g. Fontin v Katapodis (1962) 108 CLR and New Zealand authorities, e.g. Hoebergen v Coppens [1979] 2 NZLR 597 SC point the other way.

[28] For my own part, I incline to the view that provocation may still serve to reduce compensatory damages in some cases. The law has a bias towards the rational. Ronald Dworkin, one of the great legal philosophers of the modern era, was a proponent of the "right answer" thesis. I consider that reduction of damages for provocative behaviour is the right answer. If the law is to maintain public confidence, legal integrity demands that in a case where a plaintiff provokes a defendant into a measure of excessive force he should not be permitted to recover full damages against such a defendant. The focus in this regard should be on the role of the defendant and his excuse for the behaviour as opposed to contributory negligence where the emphasis is on the role of the plaintiff and his /her

behaviour. Is it fair, reasonable or just that a plaintiff's provocation should be ignored? I think not. Where there is a synergistic interaction between the behaviour of the plaintiff and the defendant it may be appropriate to proceed on the basis that both were causative of the damage suffered by the plaintiff.

[29] I pause only to observe that I have not been deflected in adopting this reasoning by the decision in Pritchard because, as the author to the Third Supplement of *McGregor on Damages* notes, the Court of Appeal was dealing only with contributory negligence and did not specifically address the issue of whether or not provocation could still be introduced for the purposes of damages reduction.

[30] It may well be that the last word has not been spoken on this subject of provocation. Now that contributory negligence has made its exit from the stage of trespass to the person cases Iprovocation may find a higher profile as a defence to such actions.
Determination of its parameters may require higher authority than this court.

[31] However, in the particular circumstances of this case, I consider the defendant has a practical difficulty invoking the defence of provocation. The *Oxford English Dictionary* defines provocation as "Something that provokes anger or retaliation". Hence in the criminal law –albeit a wholly different context from civil law- the concept connotes a measure of loss of control. Those definitions do not capture the tone of Constable Simpson's evidence. This was an officer who eschewed any suggestion of loss of control, anger or retaliation. She took a measured decision of crowd control by use of a baton in light of the conditions that obtained at that moment albeit I have determined that the force she used was excessive. I do not believe she was "provoked" in the true or legal sense of this word.

[32] Turning to the issue of damages, in so far as an assault and battery results in physical injury to the plaintiff, the damages will be calculated as in any other action for personal injury. However, beyond this comment the tort of assault affords protection from the insult which may arise from interference with a person. Thus a further important head of damage can be the injury to feelings, i.e. the indignity, the mental suffering, disgrace and humiliation that may be caused. Damages may thus be recovered by a Plaintiff for an assault which in fact has done him no injury at all.

[33] However, the Court of Appeal in Richardson v Howie [2005] PIQR Q3 CA at paragraph [23] has heralded a change by holding that in cases of assault it is in general inappropriate to award aggravated damages on top of, and in addition to, damages for injured feelings. Thomas LJ said at [23]:

> "It is not clearly accepted that aggravated damages are in essence compensatory in cases of assault.

> Therefore we consider that a court should not characterise the award of damages for injury to feelings, including any indignity, mental suffering, distress, humiliation or anger and indignation that might be caused by such an attack as aggravated damages; a court should bring that element of compensatory damages for injured feelings into account as part of the general damages awarded. It is, we consider, no longer appropriate to characterise the award of damages for injury to feelings as aggravated damages, except possibly in a wholly exceptional case".

[34] The approach of Richardson v Howie has been criticised in *McGregor on Damages 18th Edition at 37-006*. In the first supplement to *McGregor*, it records:

> "Separate awards of aggravated damages have been made in a number of cases since then. It seems that the Court of Appeal in Richardson v Howie is fortunately, being generally ignored."

[35] How far this is true seems to be a matter for further consideration at a court level beyond that of a first instance judgment. In any event in this case, I consider the circumstances of the incident, and in particular the behaviour of the plaintiff, render this a wholly unsuitable case for an additional award of aggravated or exemplary damages.

[36] In terms of general damages, the plaintiff suffered bruising and swelling to the upper thigh and to the latter aspect of the mid-thigh with bony tenderness. She took regular paracetamol. She was extremely upset as a result of the injuries and was unable to sleep because of anxiety and distress for a week following the incident. Dr Rogers records that since the incident she has suffered from anxiety levels. By the time of his report of 28 May 2013 her physical injuries were fully restored but she remained hyper anxious with sleep disturbance. He felt she might benefit from referral for trauma counselling.

[37] I value the case at £3,000. I therefore reverse the decision of the lower court and I invite counsel to address me on the question of costs.