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Judgment: approved by the Court for handing down | *Delivered:* **13.3.08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BERRY

Plaintiff

-v-

HAYDEN and MINISTRY OF DEFENCE

Defendants

HART J

[1] The plaintiff, who was born on 3 March 1955, claims that on 30 August 2002 she was struck by an army Land Rover on North Boundary Street in the lower Shankill area. At the time she was 47, and she suffered physical injuries in the form of fractures to the left superior and inferior pubic rami, and a fracture of the sacral iliac involving the sacro iliac joint. She also claims that she suffered an exacerbation of pre-existing anxiety and depression. By her amended statement of claim the plaintiff claims damages for negligence, assault and battery and trespass to the person, and aggravated damages.

[2] The first-named defendant was the driver of the Land Rover, and in their amended defence the defendants rely upon the defences of (1) *ex turpi causa non oritor actio*; (2) *volenti non fit injuria*; and (3) contributory negligence. The particulars of contributory negligence are set out in paras 12 of the amended defence in the following way.

(a) Causing and permitting herself to be involved in a riot.

(b) Attacking the Land Rover being driven by the first-named defendant.

(c) Attempting to open the bonnet of the said Land Rover.

(d) In the premises, attempting to compromise the safety of the personnel being carried in the said Land Rover.

(e) Causing and permitting herself to be in contact with a Land Rover which was involved in a public order situation.

(f) Causing and permitting herself to be in contact with a Land Rover which she knew, or ought to have known, was likely to move.

(g) Placing herself in a position of danger.

(h) Causing and permitting herself to be injured by virtue of her own illegal activities.

(i) Failing to move away from the Land Rover.

(j) Failing to stand a safe distance from the said Land Rover in the circumstances.

(k) Failing to respond or heed the revving of the engine of the said Land Rover.

(l) Causing and permitting herself to lose her balance fall.

[3] The plaintiff's evidence was that she was at a BBQ at the house of a friend, Elizabeth Hill, in Townsend Terrace. This is a side street not far from North Boundary Street which can be reached via California Close. They heard the sound of vehicles driving and screeching tyres, and as Mrs Hill had two young children playing in the street they decided to walk up and see where the children were.

[4] When they reached North Boundary Street the plaintiff said that she didn't see any rioting, and accepted that if there had been any she could not have missed it. However, she described how Elizabeth Hill proceeded to engage in what the plaintiff described as a 'confrontation' with the driver of one of two army Land Rovers on the street, asking why they were driving erratically, were they going to arrest someone; if so would they do it and leave because they were endangering her children playing on the street. She described Mrs Hill as being "quite excited" and going out and on the roadway, and approaching the Land Rovers.

[5] Mrs Hill then called the plaintiff out of the road and the plaintiff took 3 or 4 steps out on the road. The plaintiff accepted that when she did this she was angry, and shouted, "What are you doing" at the Land Rovers. It was suggested to her that she had gone to the front of the Land Rover driven by the first defendant, Richard Hayden and had undone one of two bonnet catches at the front of, and on either side of, the bonnet of the Land Rover. The plaintiff denied doing any of these things.

[6] It was suggested to her that what then happened was that two or three times the Land Rover moved forward a few feet after which she fell. She denied this, saying that the Land Rover deliberately drove at her whilst she was standing on the roadway close to the kerb. She saw it coming, but couldn't believe that it was doing so, and she was so shocked that she didn't get out of the way as she hadn't time to step on to the footpath. The Land Rover struck her a very forceful impact upon the lower left side. She thought that the wheel of the Land Rover went over her, and whilst she accepted that it may not have she thought that it did.

[7] Evidence was given on behalf of the plaintiff by Miss Catherine Warden, who is a carer for Mrs Hill's sister. Miss Warden described herself as an acquaintance, not a friend, of the plaintiff. Miss Warden described how she was driving down North Boundary Street from Denmark Street intending to turn into California Close on her left to go to Mrs Ash's home. She saw one of the Land Rovers drive forward several feet, she thought maybe 6'/8', and knock the plaintiff down, then it reversed. She said that the Land Rover was not travelling fast and it did not sound its horn or siren. During examination she said that in her reckoning the front two wheels of the Land Rover were driven over the plaintiff twice. She denied that the Land Rover had been "lurching" forward, or that she had seen a man attacking the passenger side of the Land Rover with a metal bar.

[8] Mrs Elizabeth Hill was not called as a witness. On the second day of the hearing Mr Rooney applied to have her police statement admitted as a hearsay statement by virtue of the Civil Evidence (NI) Order 1997, relying on a medical certificate dated the day before saying that she was unfit to attend because "She has extreme anxiety and is very unwell with nervous debility at present". Given (a) that this was only written on the final day of the hearing, and (b) that under the heading "Active Problems" were matters dated 1/11/2002 and 1/1/2005, this did not provide a particularly convincing explanation for the non-appearance of the witness. Nevertheless I admitted it, and given its significance I will set out the statement, which was dated 18 September 2002, in full.

> "On Tuesday 20 August 2002 around 8 pm I think I was in the front garden with my friend Mary Berry. I had just one drink when I noticed the Army in the estate. I then went up onto North Boundary Street to get my kids so they didn't get involved in any stone throwing. When I got up to North Boundary Street I seen two Army jeeps driving and reversing up and down North Boundary Street. There were about 6 or 12 people, teenagers in the area, some of them were throwing at the jeeps. I shouted to the Army to do

> what they had to do and then clear off. I got onto the road in front of one of the jeeps about 20 feet in front of it. My friend Mary who had came up with me stood out in front of the other jeep but as she was further away from hers. We were on the road to get the Army to stop coming into the street before a riot started. I then seen the jeep coming towards Mary and it hit her and knocked her over. The jeep then reversed back and ran over her again. The driver did not give Mary a chance to get out of the road. He knew what he was doing. E HILL."

[9] As will be apparent from this description, this does not coincide with the plaintiff's version of events in some respects.

(1) Mrs Hill was concerned that her children became involved in stone throwing, not because – as the plaintiff inferred – they might be at risk from the Land Rover because they were playing in the street.

(2) A significant number of teenagers were stoning the Land Rovers when the two ladies arrived on the scene.

(3) That the Land Rover that struck the plaintiff deliberately ran over her after she had already been knocked down in an earlier impact.

[10] Constable Perry arrived having heard a general radio call for an assistance. He thought it might have been 10 minutes after he heard the call, and he found the road not strewn with bricks, stones and broken glass. There was an angry and aggressive crowd of about 100 to 150 present, but because of the time lapse before his arrival I do not consider that the scene he found helps me resolve whether rioters were present when the plaintiff received her injuries, unlike the evidence of Constable Laverty to which I shall refer in due course.

[11] Richard Hayden has now left the army, but at the time was a private in the Royal Anglian Regiment driving the Land Rover under the command of Sergeant Perry who was in the front passenger seat. They were present as part of a ground foot and mobile patrol, the foot patrol element consisting of soldiers accompanied by 2 police officers. He described how 15/20 teenagers were stoning their vehicles from a grassy knoll at the junction of Boundary Walk and North Boundary Street. The Land Rovers pushed them back into Boundary Walk, allowing the foot patrols coming down from the direction of Denmark Street to pass along North Boundary Street towards the junction with the Shankill Road. Both Land Rovers then reversed out of Boundary Walk onto North Boundary Street, ending up facing Denmark Street.

[12] He described how the plaintiff and another woman appeared from the direction of California Close, one of them had a large bottle of WKD and lay down in front of their Land Rover. Sergeant Perry ordered him to `lurch', a manoeuvre they had been taught and practised. This involves revving the engine but holding the vehicle back with the handbrake and footbrake. As a result it rock to and fro, giving the impression that the vehicle is about to move forward in the hope that the rioters will get out of the way. The `lurching' was successful as the woman got up.

[13] He alleged that the other woman, the plaintiff, was leaning across the bonnet of the Land Rover, having released one of the spring-loaded catches on either side of the front of the bonnet that hold the bonnet down. Sergeant Perry then told him to lurch again, and when he did so the plaintiff moved back slightly, but then moved forward again, so the manoeuvre was repeated 3 or 4 times in all, and the last time the plaintiff fell away.

[14] Under cross-examination he accepted that his vehicle had come in contact with the plaintiff, whereas it was pleaded in paragraph 12(l) of the particulars of contributory negligence, and put to the plaintiff, that what happened was that she lost her balance and fell. He denied driving over, or reversing back over, the plaintiff.

[15] Sergeant Perry's evidence was to the same effect, except that he added that the catches had been secured with wire as an extra precaution, and that the plaintiff had removed the wire from one of the catches.

[16] Both showed considerable stress as a man who they said attacked the passenger door of their Land Rover with a metal pipe as they were confronted by the plaintiff, and that this man knocked a wing mirror off the Land Rover. They emphasised the damage that would be created if a rioter was able to raise the bonnet and perhaps immobilise the vehicle, thereby leaving the vehicle and the occupants isolated and unable to withdraw.

[17] Constable Laverty was one of the police officers with the foot patrol element of the ground foot/mobile patrol. He said that when they made their way down North Boundary Street they were confronted by a crowd, initially some 15/20 but it grew to 30/40, and as the stoning increased in intensity the foot patrol withdrew down to the junction with the Shankill Road past the Land Rovers.

[18] After they had done so he turned back within about 30 seconds of passing the Land Rovers and saw someone on the ground. Later he inspected the front of the Land Rover for signs of an impact with an individual and saw no sign of damage.

[19] Mr Yeates FRCS was also called by the defendants, and was asked what was his opinion of what might have been expected had the plaintiff been struck by a 4 tonne vehicle, which was the evidence of the defendants of the weight of the armoured Land Rover. Mr Yeates said that if one of the wheels had ended up on her chest he would have expected very serious injuries, with rib fractures and bleeding into the lung, with perhaps fatal results. Had a wheel gone over her pelvis he would have expected more serious injuries, possibly to the organs inside the pelvis. In his opinion the plaintiff's injuries were consistent with being struck a firm, forceful impact by the Land Rover, rather than in any subsequent fall.

[20] I am satisfied that when the plaintiff and Mrs Hill stepped on the road in front of the Land Rover there had been significantly more intense rioting than the plaintiff admitted and I accept Constable Laverty's evidence on this. Even on the plaintiff's own account, that the sound of revving engines attracted their attention, and drew them to the area, suggest that there was already something happening that was more than just vehicles driving about. The plaintiff accepts that she was angry and she stepped onto the road to obstruct the Land Rovers.

[21] I do not accept that she was immediately in front of the Land Rover or trying to undo the catches. For her to be in that position would have expected her to being struck by missiles thrown by the rioters at the vehicles. That means an improbable risk for someone of her age to assume.

[22] Nor do I accept that she was trying to undo the catches. If they had been secured by wire to prevent this eventuality as Sergeant Perry describes, somehow she bare-handedly untied the wire. This is highly improbable.

[23] The evidence of Mr Yeates leads me to conclude that the plaintiff was injured as the result of being struck by the Land Rover as Mr Hayden accepted, but I do not believe that a wheel of the vehicle went over her body once, let alone twice. Had this happened her injuries would probably have been a great deal more serious.

[24] On balance I am satisfied that she was struck when the Land Rover moved forward several feet, as was put to her, rather than the Land Rover just rocking backwards and forwards. As she accepts, she had stepped onto the road in front of the Land Rover to prevent it moving forward, and then did not move out of its way as she saw it moving towards her.

[25] In her evidence she said that she was agitated and annoyed, and she heard the Land rover engine revving and the next thing she saw it coming at her. She said that she did not have time to step on the footpath, but I am satisfied that had she moved to her right she could have regained the safety of the footpath and would not have been injured. She said that she did not get out of the way for two reasons. The first was that she could not believe that the

driver would drive at her. The second was that, as she put it, she was like a rabbit stunned in the headlights. Whilst these explanations may overlap to some degree, it is evident that in particular the impact of the Land Rover with her occurred because, having positioned herself in front of the Land Rover in the first place, she did not attempt to get out of its way once it started to move towards her.

[26] Before turning to the other issues that arise as a result of these findings it is appropriate to first identify whether the plaintiff was guilty of any unlawful act by stepping onto the road and then remaining in the path of the Land Rover as it moved forward. Whilst there was undoubtedly a riot taking place because of the stones and other missiles that were being thrown at the foot patrols and the Land Rovers, that does not necessarily mean that the plaintiff was guilty of either the common law offence of riot, or of the statutory offence of riotous behaviour. The offence of riot is, inter alia, committed by the use of force and violence by three or more persons in the execution of a common purpose without lawful authority. See Devlin v Armstrong [1971] NI 13, O'Brien v Friel [1974] NI 29, and Field v Metropolitan Police Receiver [1907] 2 KB 853. However, whilst the plaintiff's conduct in stepping into the path of the Land Rovers was clearly intended to impede the Land Rovers from moving to disperse the rioters, was she identifying herself with the rioters in the sense that she wished to assist them in their common purpose of attacking the police and soldiers? If I had been persuaded that she had attempted to release the bonnet catcher, or spat at the Land Rover, then she would have been identifying herself with the rioters in that sense. I consider it probable that she was intervening to encourage the army not to engage with the rioters and to leave, thereby hoping that the rioting would stop. However, the means she adopted were unlawful. By shouting at the Land Rovers in the manner she did she was certainly guilty of disorderly behaviour, contrary to Article 18(1)(a) of the Public Order (NI) Order 1987. By standing in the path of the Land Rovers she was thereby intentionally obstructing their free passage along the road, an offence contrary to Article 88 of the Roads (NI) Order 1993 because she was not acting with lawful authority or reasonable excuse in behaving as she did. See Lord Parker CJ in Nagy v Warton [1965] 1 AER at p. 80. Perhaps the *de minimis* principle could be invoked, but given the deliberate nature of her action, and that she remained in position for a short period of time, I do not think her action can be excused on that principle.

[27] Mr Conor Campbell for the defendants relied on the defences of (1) *ex turpi*, (2) *volenti*, and (3) contributory negligence. The defence of *ex turpi* in particular relied upon the allegation that the plaintiff was attempting to release the bonnet catches and that the Land Rover was lurching forward when the Land Rover struck the plaintiff and I have found that neither of these occurred. I can deal with the first defence quite briefly. The maxim *ex turpi causa non oritur actio* is one that has occasioned considerable debate, as may be seen from the exhaustive survey of the relevant principles and authorities in Clerk and

Lindsell on Torts, 19th Ed at 3-02 to 3-32. The principle is "that a plaintiff cannot maintain a cause of action which is based on his own criminal or immoral act". See Lowry LCJ in Farrell v Secretary of State for Defence [1980] NI 55 at p63. Here the plaintiff was guilty of a criminal act as she was guilty of disorderly behaviour and obstruction of the highway. But, as Lowry LCJ went on to point out in Farrell "*Ex turpi* does not mean that a plaintiff who is guilty of a crime cannot recover from a defendant whose tort is independent of the plaintiff's crime".

[28] What then was the tort of which the defendant was guilty when the Land Rover struck the plaintiff? Mr Rooney relies upon negligence and trespass to the person in the alternative.

[29] So far as negligence is concerned, Private Hayden could see the plaintiff in front of him and wanted her to get out of the way. In driving forward without sounding his horn when she remained in his path he was clearly running the risk that she would not get out of the way, although I consider that to be a small risk as it would be reasonable for him to assume that when she saw the vehicle moving towards her she would get out of the way, particularly as there is no evidence to suggest that the Land Rover moved forward quickly, indeed Miss Warden said that it wasn't travelling fast. Nevertheless, it would have been apparent to Pte Hayden as he came closer to the plaintiff that she was not going to get out of the way and I consider that he was negligent in not stopping his vehicle in time to prevent it striking her. However annoying her behaviour may have been, she was not behaving in a manner which justified him in not stopping to avoid an impact.

[30] I do not consider it necessary to explore the ramification of the defence of *ex turpi* in the light of these conclusions. On any showing I consider that the plaintiff's action were much less culpable than these of the plaintiff in cases such as Doyle v Doris [1993] NI 166, or Tumelty v MOD [1988] 3 NIJB, and should not result in her claim being defeated in its entirety.

[31] I can deal with the second defence of *volenti non fit injuria* very briefly. For his defence to succeed the defendant must show (1) that there was a voluntary agreement by the plaintiff to absolve the defendants from legal responsibility for the conduct of Pte Hayden; and (2) the plaintiff should have had full knowledge of the nature and extent of the risk it is alleged that she assumed. There is no basis whatever for concluding that the final requirement is met, and this defence therefore fails.

[32] The defendants final line of defence in the plea of contributory negligence, and Mr Rooney for the plaintiff accepted that if I found that the plaintiff stood in front of the Land Rover shouting at it then it would be open to the court to find that she was guilty of contributory negligence, and I consider that he was right to so concede. Mr Campbell submitted that the plaintiff was

guilty of a substantial degree of contributory negligence, and I accept that she was.

[33] The plaintiff was interfering in a riotous incident by placing herself on the road in the path of the Land Rovers. I am satisfied that she did so to prevent them moving forward to disperse the rioters for the reason I have already described. She was angry and shouting at the Land Rover and I am satisfied that her anger affected her appreciation of the danger she had placed herself in even after the Land Rover moved forward. Whilst it did not sound its horn, she did hear its engine revving and should have realised it was going to move. When it moved it appears to have moved slowly to judge by Miss Warden's evidence, and on the plaintiff's own account she did not move out of the way. I am satisfied that had she done so the impact might not have occurred. I consider that she was predominantly to blame, I assess her as being two-thirds responsible, and her damages will be reduced by that proportion.

[34] My finding that the defendants were guilty of negligence render it unnecessary to consider the plaintiffs claim for damage for trespass to the person, and exemplary and aggravated damages, and these heads of damages were not relied upon by Mr Rooney in his closing. Nevertheless I shall deal with them briefly for the sake of completion.

[35] The infliction of the injuries by the Land Rover could amount the assault and trespass to the person as at least the negligent infliction of a battery. However, so far as exemplary damages are concerned I do not consider that the action of Pte Hayden could properly be regarded as oppressive, arbitrary or unconstitutional behaviour by government servants, particularly as the plaintiff was herself predominantly to blame by standing in the path of the Land Rover. See Thompson v Commissioner of Police of the Metropolis [1998] QB 498 at p. 517D. I decline to award exemplary damages.

[36] For the same reason I do not consider that it would be proper to make any additional award by way of aggravated damages. There is authority that provocation by the plaintiff can be used to take away an element of aggravation of damages, though not to reduce them. See Lane v Holloway [1968] 1 QB, 379 and I can see no difference in principle between the position of exemplary and aggravated damages when the plaintiff was herself guilty of improper conduct.

[37] The plaintiff's physical injuries were fractures of the left superior and inferior public rami, with an associated fracture of the anterior aspect of the sacrum. As Mr Yeates acknowledged, this was a very painful injury, and when Mr Mawhinney gave his report of 21/11/02 he recorded that by 20 September 2002 (a month after the injury) she was mobilising on two crutches, and by 18/10/02 when he reviewed her she was mobilising with one crutch, and able to manage short distances indoors without crutches. However, by 21/11/02 she was still recording ongoing, constant pain and restriction of her daily

activities. His opinion was that the fractures were healing satisfactorily, but he would expect a diminishing level of symptoms, although he suggested that activity-related pain may persist for some time. Mr Yeates records that by 7/1/03 she was mobilising without crutches, and walking with a normal gait, but still had pain at night.

[38] Unfortunately her recovery from her physical injuries has been complicated by a further injury to her shoulder and back in November 2004 and an injury to her neck in the summer of 2005, both as the result of road accidents.

[39] When Mr Yeates saw her in March 2006 he recorded that she stated that her pain had "improved more than slightly", although she never had a day without pain since the injury. She could not walk for more than 15 minutes, had difficulty lying in bed, and had pain in her left groin and a pulling sensation on the left hip. She took up to 6 Kapake tablets each day.

[40] A later report by Mr Yeates refers to an analysis by Mr Mollan (which I have not seen) of the plaintiff's GP records indicating that she was having left sided pelvic pain in February 2004, 18 months after the injury. Mr Yeates view in his report of 15/3/06 was that her pain would be reduced to a low level after 18 months, but whilst she may have some activity related pain on the left side of her pelvis, this was probably unlikely to worsen in the long term. He suggested that her perception of her pain is probably accentuated by her previous psychiatric difficulties. He thought that at worst she would have recurring episodes of pain on the left side of her pelvis and groin which were unlikely to worsen in the future or lead to second arthritic changes.

[41] In contrast Mr Mawhinney paints a more pessimistic picture, recording complaints of ongoing pain in the left side of the pelvis, and his opinion is that "continuation of symptoms at this stage are likely to be associated with ongoing complaints. There is no indication that she has suffered any damage to the hip joint and she is unlikely to be at risk of any long term complication in that joint as a result of the accident described." In the current complaints section of his report of his examination of 2/10/07 he summarises her complaints as "overall, she records no change in her level of symptoms.," In his report of 21/11/02 he said "one would expect a diminishing level of symptoms although activity related pain may permit for some time", which would suggest he expected an outcome more in keeping with Mr Yeates' most recent opinion.

[42] Both counsel agreed that the plaintiff's physical injuries fell within the range at p.24(e) of The Green Book, Mr Rooney saying that it was a significant pelvic injury which should attract an award toward the higher end of the range, whereas Mr Campbell suggested it fell within the mid to lower range.

[43] I consider that when account is taken of the prospect of some recurrent bouts of pain from time to time as a result of these injuries the case is one that lies near the top of the current range, and I assess the damages under this lead, before allowing for contributory negligence, at £35,000.

[44] The plaintiff said in her evidence in chief that she had suffered from depression and anxiety since the death of her mother and father, but in cross examination she amplified this by saying that she had depressive type symptoms a couple of years before her parents died, although she had difficulty in remembering when they died. She agreed that at the time of this injury she was on Prozac as an anti-depressant, and Diazepam to help her sleep.

[45] Her accounts of her history of depression have not been consistent. She told Dr Bell in March 2003 that she started getting nerve tablets 6 or 7 years ago and has had them on and off since, but his review of her GP notes shows she was receiving medication in 1975. This may be when her sister was murdered. Inderal was prescribed on 9/3/94, and thereafter there are regular entries for prescriptions of, inter alia, anti-depressants, with certification for anxiety and depression.

[46] He concluded at that time that the incident occurred on 20/8/02 this brought about "an exacerbation of a pre-existing anxiety and depression, characterised by some post traumatic symptoms."

[47] Dr Bell saw her again on 14/3/05 which was after the November 2004 incident, but before the incident in the summer of 2005. Dr Bell said "This road traffic accident (ie the November 2004 accident) has set her back, although she no longer has so many traumatic symptoms than when I first interviewed her. There has been little or no improvement in the anxiety and depression from which she suffered over the years."

[48] Given the many personal and family difficulties from which the plaintiff has suffered over the years, and the subsequent road traffic injuries she has sustained, I consider that damages should be awarded for an exacerbation of her anxiety and depression of some two years or so, and before making a reduction for contributory negligence I allow £5,000 under this heading.

[49] I therefore assess the general damages at £40,000, to which has to be added £250 for physiotherapy, a total of £40,250, and after deduction of two-thirds of the damages for contributory negligence there will therefore be judgment for the plaintiff for £13,416.66 and costs. I will hear counsel on the level of costs.