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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

BETWEEN:

CHARLES WAYNE McCLURG AND OTHERS

Plaintiffs/Appellants;

-and-

CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY

Defendant/Respondent.

LEAD CASE OF A

Before Kerr LCJ, Girvan LJ and Sir Anthony Campbell

KERR LCJ

Introduction

[1] This appellant joined the RUC in 1982 and has served in various capacities in that force and in PSNI ever since. Details of his career are given in the first paragraph of Coghlin J's judgment in his case. Like so many of his colleagues, he was exposed to horrific trauma during his time as a police officer. Again, the various incidents have been fully described in Coghlin J's judgment. Those details are to be found in paragraphs [2] and [3] of the judgment. Because the appellant is still a serving officer and, in light of the nature of his duties, he has been referred to as A throughout the proceedings.

[2] The worst incident in which the appellant was involved occurred on 16 March 1993. On that date he had been on surveillance duties. He was discovered by a number of men. They subjected him to a brutal beating. His nose was broken and a hammer was used to fracture his skull. His weapon was taken from him and an attempt was made to shoot him. This failed only because the gun had a broken firing pin. Eventually, the appellant was rescued when a number of his colleagues arrived on the scene. He was taken directly to the City Hospital where he remained overnight. The following day he discharged himself because he was worried about his security.

[3] It has not been claimed on behalf of the appellant that he suffered any psychological ill-effects until March 1993. Following the attack on him, he was absent from duty for five months. During that time he suffered anxiety/panic attacks in which he experienced palpitations and shortness of breath. His sleep was disturbed and he had nightmares linked to the attack. He became much more emotional and he was prone to crying when watching sad or violent films. He was also afflicted by a marked stammer. He had last had a stammer when he was eleven years old.

The medical issues

[4] The appellant's claim that the assault of 16 March 1993 precipitated "a clinically significant post-traumatic reaction which fulfilled the diagnostic criteria for PTSD" was not disputed. Both experts (Dr Turner for the plaintiff and Professor Fahy for the defence) agreed that he did indeed suffer from this condition. There was disagreement, however, about its duration. Professor Fahy estimated that the condition would have abated after some twelve to eighteen months after which the appellant had mild residual symptoms. Dr Turner considered that PTSD was present for a longer period and that it was associated with a major depressive disorder. Both agreed, however, that the post-traumatic reaction had improved to the extent that the appellant was able to resume a demanding job without substantial impairment. At the time of the trial it was the agreed position that such symptoms as endured were on the borderline of clinical significance, possibly representing a very mild PTSD or mild adjustment disorder.

[5] Estimates of the duration of the appellant's symptoms and the level of their intensity were not made easy by his inconsistent accounts to the doctors and the plainly self contradictory evidence that he gave. The appellant himself had suggested that he continued to suffer significant symptoms for about a year after his return to work (which would tend to confirm Professor Fahy's estimate of the likely duration of his symptoms) but the judge favoured a rather longer period, largely on account of the testimony of the appellant's wife, which the judge clearly found to be deeply impressive.

The appellant's contact with OHU

[6] This proved to be the critical aspect of the hearing before Coghlin J. The appellant was dismissive of the efforts of both Mr McCloskey, the nurse from OHU, and Dr Poole, the clinical psychologist. The judge rejected much of the appellant's account of his contact with these gentlemen and he was plainly right to do so. The extensive notes prepared by Mr McCloskey were eloquent testament to the care with which he approached the treatment of the appellant. Ultimately, the appellant revealed in evidence that he wanted Mr McCloskey "off [his] back". There can be no question of the assiduity of Mr McCloskey in his care of the appellant and his encouraging him to seek help from OHU.

[7] The judge had two reservations about Dr Poole's evidence. The first was his failure to read before his interview with A the post-trauma questionnaire which Mr McCloskey had prepared following his consultations with the appellant. Coghlin J considered that this provided a useful analysis of relevant symptoms and progress between Mr McCloskey's two home visits on 22 March and 14 May 1993. Clearly, the judge was not convinced by Dr Poole's explanation that he liked to approach his initial contact with an open mind and obtain his own assessment of the individual. The second matter of concern about Dr Poole's evidence was the failure to arrange a follow-up consultation with the appellant. In the event, the judge held that the appellant would not have derived benefit from this, if indeed he had agreed to see Dr Poole again. This was unlikely since the appellant himself had said to Professor Fahy that he would not have returned to see Dr Poole if he had been asked to do so.

[8] Coghlin J's conclusions about the appellant's preparedness (or, rather, his lack of it) to obtain assistance from OHU is summarised in the following passage from paragraph [16] of his judgment: -

> "[16] However, it is difficult to conclude that the failure to ensure that a review appointment was made for the plaintiff had any significant effect upon any treatment that he might have received from the OHU. It seems clear that, for whatever reason, the plaintiff formed an adverse view of Dr Poole. Indeed, the plaintiff told Professor Fahy that if he had been offered a follow-up appointment with Dr Poole he would not have gone back. He certainly does not appear to have raised any possibility of a further appointment with Dr Poole during his subsequent contact with Joe McCloskey. The plaintiff emphasised in evidence that he was keen to get back to work and

equally keen not to discuss matters with Mr McCloskey. He said:-

> 'Whenever he (Mr McCloskey) did phone the last thought was it was paramount in my mind not to really to discuss anything with him, I didn't want him to know how I felt. I suppose, to put it bluntly, I didn't want to tell him any of my business.'

In short, the plaintiff said, mentally, I really wanted Mr McCloskey 'off my back'. In such circumstances, however disillusioned he may have been with his interview with Dr Poole, it appears that the plaintiff became quite determined not to make any further disclosures about post traumatic symptoms to the OHU or, for that matter, to his own GP. Such an attitude would have been perfectly consistent with his assertion to his GP, when he attended in November 1998, that anxiety was not a cause for his complaint of palpitations and for his statement to Dr McFarland, consultant physician, in January 1999 that he was not aware of any undue stress or strain through his work that might explain his history of indigestion, despite the fact that both these attendances would have occurred during the period at which his wife described the plaintiff as being emotionally at his lowest point. As a consequence of seeing the various medical experts retained in relation to the litigation from at least 2001/2002 the plaintiff has had a diagnosis and recommendation that he would benefit from pharmacological and psychological treatment but has chosen not to undergo either. Indeed, when giving evidence he volunteered the information that, at the conclusion of one consultation, the expert recommended treatment but he gave the specialist 'some reasons' why he was not prepared to accept treatment. To date, it seems the furthest he has been prepared to commit himself was sometime around 1994-1996 when he carried out some research on the internet and made a self-diagnosis of PTSD …"

Culture

[9] On the subject of the cultural outlook of the unit to which the appellant belonged, the judge's view was that this was likely to have been even more 'macho' than that of the general force. But he pointed out that this had not prevented the appellant from giving a detailed account of post-traumatic symptoms to Mr McCloskey in the nor did it prevent him from giving a full account of his emotional symptoms to his GP and Dr Lyons in the course of his criminal injury claim.

[10] Significantly, the appellant accepted that, since 2001, his authorities must have been aware of his inclusion in the group litigation and that subsequently his was one of the lead cases. It was not suggested that this knowledge had any adverse impact on the appellant's career. From all of these circumstances, it can safely be concluded that the appellant has been for some time fully aware of arguments about not permitting cultural influences to deter one from obtaining treatment. Yet, he has remained resistant to obtaining treatment, even when recommended by a specialist who saw him for the purpose of the litigation. On this account the judge also found that an absence of training in the period 1988-1994 had no causal connection with the appellant's failure to seek treatment.

The arguments on the appeal

[11] It was submitted that the judge was wrong to hold that the failure of Dr Poole to arrange a follow up appointment or other follow up medical care, coupled with adequate training was not a causal factor in the appellant failing to seek or obtain treatment. It was accepted that A had formed an adverse view of Dr Poole but it was contended that the judge should have examined why the appellant had adopted this attitude. It was submitted that he was adopting the attitude he was trained to adopt. He had been trained to "be suspicious of anybody and everybody … that within other police departments, civilian departments and offices, normal governmental departments, really anywhere at all that you couldn't [or shouldn't] have trusted anybody." When the appellant had confidence in the medical or nursing expert (such as Mr McCloskey) he was prepared to give details of his symptoms.

[12] It was also argued that the judge was wrong to hold that the failure to provide the appellant with adequate training in the period 1988-1994 was not a causal factor in his failing to obtain such medical assistance as would have materially reduced his symptoms. This was linked, the appellant claimed, to the issue of culture. If the questions of culture and knowledge as to psychiatric sequelae had been addressed in a timely fashion (and particularly before A was in a personal psychological crisis) the probability is that this would have made material difference to his outcome, the appellant argued. It

was claimed to be clear from the appellant's evidence that once the culture and ignorance in the force intruded in his thinking he became suspicious of motives, and worried for his job. This coupled with the fact that he was not clear as to what he was suffering from and what could be done for him led him to reject help. These were the core matters that training and addressing the culture should have targeted.

Conclusions

[13] We consider that the judge was perfectly entitled to reach the conclusions that he did on the evidence that was presented to him. Indeed, we feel that it is almost inevitable that he would reach those conclusions.

[14] What the submissions on behalf of the appellant omit to address is the attitude of the appellant *after* the time that he was fully aware of the need not to allow misguided cultural influences to prevent him from obtaining treatment. It could not be suggested that his experience in this litigation would have left him ignorant of this. But there is nothing discernible from his behaviour or attitude to suggest that he has evinced a change of heart on the question of seeking treatment. On the contrary, all the evidence available to the judge pointed unmistakably to the conclusion that no amount of training would have made the slightest difference to his attitude. It is for this reason that we consider that the judge was virtually bound to conclude that there was no causal connection between the absence of training and the appellant's decision not to avail of treatment.

[15] The appeal is dismissed.

Ref:	**GIR7214**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

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POST TRAUMATIC STRESS DISORDER GROUP ACTION

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BETWEEN:

CHARLES WAYNE McCLURG AND OTHERS

Plaintiffs/Appellants

-and-

CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY

Defendant/Respondent

_____

Before Kerr LCJ, Girvan LJ and Sir Anthony Campbell

GIRVAN LJ

[1] I am in agreement with the judgment given by the Lord Chief Justice on the other issues raised in the generic appeal. In this judgment I deal with the issues raised in the generic appeal in respect of the training and education of officers and superior officers and in respect of the provision of information

to them in relation to the consequences of exposure to trauma while officers were carrying out their duties as members of the police and in relation to medical and other assistance available in connection therewith. The trial judge sets out in paragraphs [139] to [145] of his judgment his conclusions in relation to what he considered to be shortcomings on the part of the Chief Constable in relation to the education and training of officers in the RUC in respect of stress management and identification of symptoms indicative of post-traumatic stress disorder or stress related mental ill health.

The recommendations of the CHMF

[2] The recommendations made by the Committee of Health and Management of the Force ("CHMF") in relation to education and training and the manner in which the Chief Constable responded to those recommendations form an important background to the judge's consideration of the issues of training, education and information. The judge deals extensively with the role and recommendations of the CHMF and the Chief Constable's response thereto throughout his judgment and in particular in paragraph [66] – [70] and [115] – [122].

[3] In a report furnished to the defendant in June 1984 the CHMF recommended the establishment of a small occupational health unit providing (inter alia) for a counselling service for those exposed to traumatic events. It recommended the introduction of short training modules for all ranks dealing with the value and importance of health, fitness and lifestyle in coping with the pressures of police life. It also recommended that training on basic stress management should normally be provided as a fully integrated part of training for all levels and that special modules should be incorporated on the identification of stress symptoms. The recommendation led in due course to the establishment of the Occupation Health Unit ("the OHU").

[4] In 1986 the CHMF further considered the introduction of modules on stress management to be introduced as an integrated feature of force training on stress and in that connection considered a purpose designed video and hand book for general issue together with the development of training modules for introduction over the next year. A pilot scheme was planned for 1987. The Committee proposed that the modules should only be considered as a foundation for more advanced training and counselling skills for sergeants upwards needed to be developed. Notwithstanding the recommendations of the Committee and its call for strong support from senior management the development of the training modules was not progressed satisfactorily. Training sessions for reserve constables and probationer constables did provide some information about the OHU about self referral and they received a short presentation on stress and post traumatic stress. From October 1987 Dr Crowther gave talks to sergeants, inspectors and chief inspectors which included explanations of trauma, acute

stress reactions, the recognition of physical behavioural and psychological signs and symptoms of stress and stress coping. Formal training with regard to the OHU and trauma associated stress would have reached only 3-4% of the Force each year. Operational demands were likely to affect the frequency with which training sessions could be arranged and the numbers able to attend.

[5] In 1991 a Force Stress Working Party recommended the concept of stress awareness training for the whole force. It made various recommendations to raise awareness in the RUC of signs and symptoms of stress, the provision of stress management training and the training of police managers in stress awareness with the aim of providing them with basic counselling skills. Force Order 15/94 was published in March 1994. It confirmed that Force Command had approved a recommendation that a stress awareness package would be delivered to all serving officers of the RUC and the RUC Reserve in early 1994. This package was to include a 20 minute video and an individual information pack of leaflets. Two motivated officers were to be trained as welfare liaison officers who were to personally arrange for all officers to view the information pack. However, the delivery of this proposed information programme was not entirely satisfactory. There was delay in the distribution of the package and the welfare officers were not universally facilitated. Assistant Chief Inspector Johnston, who was trained as a welfare officer, did not gain the impression that the package made a particular impact. He felt it was received just as "another lecture". It was accepted that there was delay in the delivery of the package. Ultimately the package was delivered by mail shot to the remaining 3,000 officers who had not received face to face contact and when they received it they did so without the benefit of the video.

The judge's conclusions of the issue

[6] The trial judge in his judgment concluded that it was important for the defendant to take all reasonable steps to ensure that officers were aware of the facility provided by the OHU and the opportunity to benefit from its service in the aftermath of exposure to traumatic events. There was a need for the effective dissemination of information to be properly understood. Attempts to inform and educate officers in this field were likely to meet with strong cultural resistance within an organisation which was described as having a "macho" culture. Force Orders 14/88 and 16/95 highlighted the existence of the OHU and the facilities available there for those who had been exposed to traumatic events. Force Orders, however, were an unsatisfactory means of communicating with officers on the ground. Despite the apparent clarity of the wording of the Force Orders in fact a significant area of discretion was exercised and management's understanding of its duties was ambiguous. Force Orders were only as good as the people who made them work. They did not enjoy any real degree of priority compared with the need to ensure

that officers were on duty to deal with the almost daily serious incidents particularly at the busiest stations. Problems of patchy availability and distribution and the adoption of ad hoc solutions in some areas may have contributed to a degree of misunderstanding and ambiguity over time. Whilst individual supervising officers who "knew their men" may very properly have identified symptoms of post-traumatic stress and may have taken appropriate steps this was by no means universally the case. Training and education was necessary. If supervisors themselves were not trained then they could not give advice and guidance. A significant ancillary benefit of disseminating appropriate guidance and information was that such information was likely to reduce the stigma of mental disorder and help counteract the "macho" culture.

[7] The trial judge concluded that officers could not be expected to become skilled in the identification of the subtle signs of mental disorder. Nor could it be expected that members of the Force should be taught that mental disorder was the normal consequence of exposure to trauma. Supervisors could not be expected to be trained to conduct clinical examinations or ask each officer exposed to trauma whether they had psychological problems nor could he be expected to routinely question officers exposed to trauma if the officer appeared to be fully capable of discharging his functions. What was required was practical and appropriate training along the lines recommended by CHMF and that should have started by late 1987/1988. This would have complemented the introduction of Force Order 14/88. The defendant did not commence to do so until six years later. The trial judge considered that the failure to adopt the training precautions recommended by the CHMF and Dr Courtney represented what he described as a systemic failure on the part of the defendant. The failure to properly deliver the stress awareness package represented a systemic failure on the part of the defendants. Dr Courtney considered that the training and deployment of welfare liaison officers were fundamental components of the package. The system broke down because of inadequate arrangements for overtime. 3,000 packages had to be delivered by mailshot confounding the basis for involving welfare liaison officers who would be likely to "get it over to the men." Coghlin J, however, did accept that many of the packages were delivered and that officers had a personal responsibility to attend properly arranged presentations and read packages received.

[8] The trial judge concluded that training and education would have ensured that probably by 1988/1989 there would have been much more widespread understanding amongst the management and other ranks of the risk of the relevance of exposure to trauma together with the availability of the OHU. In paragraph [145(8)]of his judgment he concluded:

> "The extent to which such failure would be relevant to any particular individual will of course depend

upon the circumstances of a particular case and a consideration of the lead cases will illustrate some of the difficulties that may arise."

The parties' contentions

[9] Mr Hanna QC in presenting his argument brought the question of training, education and information together under the composite heading of training. He identified the fundamental question to be whether the defendant had taken sufficient steps to avoid avoidable harm and whether the defendant was under a duty to take steps to increase the chances of individual plaintiffs going for treatment. Those questions arose in the context of "non-presenters," that is individuals with post-traumatic psychiatric damage who were not seen following exposure to a severe traumatic event. It was not part of the defendant's duty of care to devise and implement systems to seek out non-presenters or late presenters. The question was not whether a system of protection *might* have been implemented or might have been a good idea but whether it *should* have been implemented. In applying a realistic standard of reasonableness it is necessary to have regard to evidence of what others were or were not doing. No other employer had been shown to take the training steps for which the plaintiffs contended or the training steps suggested by the judge. In the case of Multiple Claimants v. Ministry of Defence Owen J concluded that the Ministry of Defence were not under a duty to devise and implement systems to seek out the non-helpseekers. Counsel contended that in considering whether the defendant acted as a reasonable employer regard must be had to the measures actually taken by the defendant to encourage the attendance of individuals at the OHU including those officers who had mental health problems which may have been trauma induced. Mr Hanna in his review of the evidence given by the various experts argued that there were cogent reasons why it would be wrong to impose on the defendant a duty to provide training along the lines for which the plaintiffs contended. He contended that none of the experts called on behalf of the plaintiffs made out such a case and he pointed to the dangers that could flow from imposing such a duty. The plaintiffs failed to explore in evidence the justification for such training and scarcely made out a case in favour of it.

[10] Mr Dingemans QC on behalf of the plaintiffs rejected Mr Hanna's argument on the evidence and argued that a number of the plaintiffs' witnesses did give evidence supporting the imposition of a duty. He contended that the judge was fully entitled to reach the conclusions which he had on the systemic failure of the defendant to provide education, training and information.

The evidence

[11] The plaintiffs' experts included Dr Turner and Dr Higson. Dr Turner, a consultant psychiatrist, in his report dated 2 November 2004 gave evidence that

an information package would be potentially helpful. It would have helped to have reinforced the onus on line managers to recognise the effects of trauma. At paragraph 190 of his report he stated that there was no research data to support management intervention in relation to the implementation of the Force Order. In his view managerial elements including the monitoring and training of line managers and education for officers about emotional reactions to traumatic events "should have been considered". Some basic training would "probably have reduced areas of non-compliance with the Force Order" and this would have helped in the identification of people with more severe symptoms who were hanging on to work with difficulty and who were avoiding the OHU. A programme of education would have been helpful in dealing with cultural effects. Dr Turner did refer to training sessions in stress management in the Greater Manchester police organisation which were well attended and which he described as helpful.

[12] Dr Higson, Chief Executive of Health Care Inspectorate Wales and a chartered clinical psychologist, stated that organisations can assist with the early detection and management of stress experienced by employees by introducing stress education and stress management workshops which can help to develop self awareness and to provide individuals with a number of basic relaxation techniques. They can also help to overcome much of the negativity and stigma associated with stress. This can be useful to employees to deal with those aspects of work which cannot be changed or modified. Dr Higson did not give evidence arguing in favour of training, education and information before exposure to traumatic stress.

[13] Professor Shalev, an Israeli professor with a long experience as a medical officer in the Israeli Defence Force in which he was chief psychiatrist between 1985 and 1987 gave evidence on behalf of the defendant. He referred to the major barriers to those with post-traumatic and mental health problems seeking mental health care as being the fear of appearing weak, of being treated differently, of being blamed for the problems of the illness and of harming one's career. Barriers to seeking help were substantial and were only partially reduced by systematic outreach. Seeking help is a personal choice. Attempting to bend such personal choice might lead to under reporting. Attempting to inform the choice might increase help seeking and contribute to the reduction of stigma. One should operate continuously to optimise the balance between necessary defences and helpful disclosures, between self reliance and receiving help and between continuous task performance and assuming a sick role. Suggesting that short lived disability may be pathological may become a self fulfilling prediction. He did distinguish between stress management and teaching coping with stress on the one hand and trauma management on the other. The Israeli Defence Force did not systematically seek out those who might be suffering in silence or specifically instruct commanders to identify a potential post-traumatic stress disorder. In his oral evidence he stated that educating officers in advance of exposure to trauma

about the possibility that they may be affected by trauma or may suffer psychological or psychotic symptoms was a bad thing. It could provide people with a language they could not properly understand and "you don't know if it is going to do any good to them." He took issue with the overuse and abuse of the word *trauma* itself since trauma is often post hoc. Professor Shalev stressed that officers should not be trained to discern psychological ill health. Common sense would show if a subordinate officer was not functioning properly.

[14] Professor Wessely, professor and head of the Department of psychological medicine at the Institute of Psychiatry in King's College, London also gave evidence on behalf of the defence. In Section 3 of his report he addressed the question whether people can be trained to reduce the risk of breakdown. He considered that the suggestion of psycho-education would reduce the chances of breakdown after exposure as mere speculation. Psycho-education packages invariably included some statement to the effect that experiencing symptoms after a traumatic event is normal but in a proportion of cases it is not normal and this can lead to the development of PTSD. Psycho-education is a controversial intervention for which there is no evidence on the balance of risk or benefit. He considered that there is no evidence that it is effective in any setting let alone a police service. Any intervention can have harmful as well as good effects. The problems of psycho-education are well known and include encouraging introspection, self-monitoring and suggestibility. This is not an area where there is any consensus or compelling body of knowledge. In this field there was no standard of care. While there was a probability of resistance amongst RUC officers to present to the employer with mental distress this was a general phenomenon not unique to the Police Service. The belief that mental health problems would adversely affect careers would reduce help-seeking but no responsible employer could ever say that this would never be the case. The stigma of mental illness is a massive challenge to society and not just to the police. There was simply no reliable evidence in his view that psycho-education worked. Recent psycho-education experience in Sheffield actually showed that people who received information on trauma got more symptoms. In the context of the police his view was that psycho-education would probably not make any difference either way. Experience showed Professor Wessely that health information leaflets given to soldiers returning from Iraq by plane were left unread. A study from the Royal Navy indicated that 80% of people who had received stress education denied they had ever had it. People do not pay much attention to such information. Any change of culture or attitude in such matters is a long slow process. He referred to a trial that he was conducting in the Royal Navy on educating middle ranks about stress. His considered view was that in the absence of established data it is at best speculative as to whether psycho-education would make any difference.

[15] Professor Pitman, Distinguished Fellow of the American Psychiatric Association and a forensic psychiatrist with expertise in forensic aspects of

PTSD considered that despite the best laid plans there was a serious question as to how much practical difference pre-trauma training and education could make. He noted that while it may seem intuitively to be sensible as a technique it had not been evaluated in randomised controlled trials.

[16] Dr Slovak, a consultant occupational physician and part time senior lecturer in the Department of Occupational Medicine in Manchester University and Chief Medical Officer of British Nuclear Fuels between 1990 and 2003 stated that it is astonishingly difficult to change cultures in organisations. Attitude to issues like health and safety and for that matter drinking are generational. To consciously turn things round one has to keep at it and at it. If this is done too proactively it can alienate the subjects. The stigma attached to mental illness is deeply ingrained in society in Dr Slovak's view. In paragraph 46 of his report he did refer to the clear "and agreed benefits of" the proposed delivery of the stress awareness initiative though he did not provide an evidential basis for that view.

[17] Dr Courtney who became the Chief Medical Adviser of the RUC in February 1984 and is a member of the Faculty of Occupational Medicine of the Royal College of Physicians of Ireland considered that training was fundamental to any occupational health programme. He conceded that the delivery of the stress training package as delivered was less than adequate. Dr Crowther and Dr Reid both of the OHU held the view that it was important to raise awareness amongst the officers at all levels of the problems of stress and trauma stress in particular.

[18] Dr Stewart Turner, a consultant psychiatrist and Fellow of the Royal College of Psychiatrists in his report acknowledged that he lacked detailed information on the implementation of the Force Order. Among managerial elements of policy which in his view should have been considered included monitoring, training of line manager and training for all officers and it would have been important to consider the prevailing organisational culture. Helping all officers to know what sort of problems they might experience and the range of services available might have been helpful. It had been suggested that a significant barrier to police officers was the macho culture of the organisation. He considered that there were pre-exposure manoeuvres that might be relevant for example making sure that officers knew about services that might be available and giving people basic information but he recognised that there was no specific preventative strategy.

[19] ACC White in his evidence considered that the proposed educational seminars would inform every single officer what the potential psychological impact of being exposed to critical incidents was. If an officer were experiencing symptoms for four to six weeks following the incident then he was vulnerable, needed to be monitored and assessed and referred to the OHU. It was a question of educating officers on symptoms and informing them that

they could expect to be referred after an incident to a peer support officer to provide the risk assessment. ACC White cited research by a Dr Bryant that purported to show that those who had an understanding of the effects of traumatic incidents were less anxious about any reaction that might be experienced later. The chances of suffering detrimental long term effects may be reduced by such information.

The relevant issues

[20] Although the topic of training, education and information were compendiously brought together by counsel under the composite title of training in fact distinct and separate questions arise in relation to:-

(a) the provision by the defendant to officers within the RUC of information about the availability and nature of the facilities provided by the OHU particularly in relation to help following exposure to traumatic stressors ("the issue of awareness of the OHU");

(b) the training of supervising officers to pick up signs and symptoms of post traumatic stress in subordinates and to take appropriate steps in relation to the subordinates displaying such signs and symptoms ("the issue of training superior officers");

(c) the education and training of officers in relation to –

    (i) dealing with stress including in particular stress induced by traumatic events; and

    (ii) identifying within themselves signs and symptoms of such stress; and

    (ii) taking appropriate steps to refer themselves to the OHU or other professionals for counselling and/or assistance with the problems created by the stress ("the issue of training officers"); and

(d) the training and education of all officers to overcome the cultural stigmatisation of mental health problems, in particular relating to post traumatic stress ill health which formed a barrier to the recognition by officers of symptoms and to a willingness to seek professional advice in relation to such symptoms ("the issue of culture change").

Some general considerations

[21] In Blyth v. Birmingham Waterworks Co [1856] 11 Ex 781 at 784 Alderson B set out the classic definition of what is meant in law by negligence, a

definition which has not been bettered or buried in the avalanche of subsequent case law:-

> "Negligence is the omission to do something which a reasonable man grounded upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do."

As pointed out in Salmond and Heuston on the Law of Torts:-

> "A duty is a notional pattern of conduct and such a pattern can take shape in the mind only after consideration of the person on whom the obligation is imposed, the mode of its performance, the persons to whom it is owed and the nature of the interests protected."

The duty imposed on a defendant in the given case cannot be determined in the abstract as Holmes in "The Common Law" stated:-

> "The featureless generality that the defendant was bound to use such care as a prudent man would do ought to be continually giving place to the specific one that he was bound to take this or that precaution."

It is necessary to take into account the circumstances of the persons to whom and by whom it is alleged the duty is owed. One plaintiff may fail to establish negligence which might be established in favour of a different plaintiff with different characteristics in otherwise similar circumstances. It is for this reason that the normal approach of the common law is to decide individual cases on their own facts. As individual cases are decided it may be possible to draw more general conclusions that may assist in the determination of other cases in a similar factual matrix.

[22] In the present proceedings the litigation involved both individual lead cases which fell to be determined in the light of individual circumstances and a generic trial in which the plaintiffs sought to establish common principles and factors that would apply throughout the litigation of individual cases. The trial judge's categorisation of the shortcomings which he identified in relation to training, information and education as systemic failures carries with it the legal conclusion that the defendant breached his duty of care to officers in failing to provide a proper system of training, education and information which should have avoided those shortcomings. The trial judge recognised that in individual cases the plaintiff may not be able to rely on any systemic breach of duty. The

finding of a breach of duty to provide a proper system of training education information is thus to a degree theoretical. In fact in none of the lead cases was any plaintiff successful in establishing that the theoretical breach of duty led to any loss as far as that individual was concerned. Nevertheless it is necessary to determine the legal validity of the judge's conclusion that the defendant breached a duty of care in committing what he described as system failures in the provision of training, education and information. If the conclusion is not well founded then the generic finding can add nothing to an individual plaintiff's claim which will only succeed if the plaintiff establishes that on the facts of his case the defendant breached his duty of care to him.

[23] In Hatton v. Sutherland [2002] 2 All ER 1 Hale LJ pointed out that to say that an employer has a duty of care to his employee does not tell us what he has to do or refrain from doing in any particular case. The duty in most if not all cases is whether the employer should have taken positive steps to safeguard the employee from harm. The employer sins are those of omission rather than commission. The employer's duty is owed to each individual employee not to some as yet unidentified outsider. At paragraph [33] of her judgment Hale LJ stated:-

> "It is essential, therefore, once the risk of harm to health from stresses in the work place is foreseeable, to consider whether and in what respect the employer has broken that duty. There may be a temptation, having concluded that some harm was foreseeable and that harm of that kind has taken place to go on to conclude that the employer was in breach of his duty of care in failing to prevent that harm (and that breach of duty caused the harm) but in every case it is necessary to consider what the employer not only could but should have done . . . an employer who tries to balance all the interests by offering confidential help to employees who fear that they may be suffering harmful levels of stress is unlikely to be found in breach of duty: except where he has been placing totally unreasonable demands upon an individual in circumstances where the risk of harm was clear."

Throughout the judgment in Hatton the court lays weight on the personal autonomy and personal responsibility of the individual who is alleging that he suffered from stress.

The issue of awareness of the OHU

[24] Since individual cases must be seen in their own context answering in the affirmative the question whether there was a general duty to inform people of the availability of the facilities at the OHU will not in itself establish a cause of action for an officer who is not aware of the facility. Whether he has a cause of action will depend on whether the defendant as a reasonable employer in the circumstances of his case should reasonably have been aware of indications that would lead a reasonable employer to realise that he should do something about it. If it he should have been so aware then in the circumstances of this group action the obvious something that should have been done was to counsel the officer to have resort to the facilities of the OHU or that he should take his own medical advice. In the absence of establishing evidence pointing to the duty to do something a generic failure to tell everybody of the existence of the OHU and what it could do would not in itself give rise to an actionable breach of duty. In the present case the evidence pointed to the existence of the many ways in which officers could learn of the existence of the facilities available at the OHU. These included (a) the requirement of GP certificates if there was an absence from duty in excess of 7 days from work and the requirement of attendance for assessment by the OHU if the absence was protracted; (b) the monitoring of sickness of personnel by Sub-Divisional Commanders in accordance with Force Order 64/86 with a requirement to refer any illness identified as being associated with stress, depression or allied conditions to the OHU; (c) the system of confidential self referral to the OHU; (d) the publicising throughout the RUC of the existence of the OHU, its services, confidentiality and opportunity it provided for self referral; (e) the provision for management referrals to the OHU based on "the know your man" approach; (e) proactive outreach to enable OHU to make contact with police officers exposed to traumatic incidents (by way of informal contact, monitoring of duty officers reports, Force Order 14/88, Force Order 16/95, telephone calls and letters); (f) primary assessment of those attending the OHU and, if necessary, onward referral to specialists in cases where symptoms were more severe and not resolving; (g) further assessment by respondents of cases referred to them; (h) special provisions for officers involved in firearms incidents; and (h) referrals of officers to the OHU by welfare. Notwithstanding the miscellany of ways in which a plaintiff could know about the existence of the OHU and the facilities it provided it may be that some individual did not know about the OHU in circumstances where, had he known about it, he would have self referred. The failure of the defendant to bring the existence of the OHU and its facilities to the attention of such a plaintiff would not in itself mean the plaintiff has a cause of action for that failure alone. It would still be incumbent upon him to establish that in the circumstances of his case a reasonable employer would have realised from his symptoms and from the signs in his actions that action was called for.

The issue of training superior officers

[25] The duty which was described in Hatton as a duty "to do something" about the indications of harm or impending harm to the mental health of an employee is an objective duty which arises if a reasonable employer should have noted the indications that point to the need to do something. It arises whether the employer acting through his servants and agents has been trained or not and the nature of such objective duty cannot be dependent on whether the employer has properly equipped himself to fulfil the objective standard. The imposition of that duty should itself lead a wise employer to equip himself and his relevant servants and agents to adequately fulfil the objective duty imposed upon them by law since failure to do so will provide him with no defence. From a plaintiff's point of view it is unnecessary for him to establish a lack of training by the employer of supervising officers. A finding of systemic failure to ensure that supervising officers were trained to identify signs and symptoms of post traumatic stress does not mean that in any concrete case that systemic failure gives rise to an actual breach of duty to the individual plaintiff. For this reason the judge's finding of systemic failure in the failure to train superior officers adds nothing to individual plaintiffs' claims. The evidence adduced before the trial judge did point to the conclusion that in many instances supervising officers were not trained and were likely to have failed to note indications that should reasonably have triggered a duty to take steps. In that sense there was a failure in the system. That failure may well have resulted in some or perhaps many superior officers failing to note objectively discernable signs of stress in individual officers which should objectively have triggered the duty to do something. In such cases the individual plaintiff would have to satisfy the court that he would have followed up the advice which the supervising officer ought reasonably to have given in the circumstances to consult the OHU and use its facilities. He would further have to show that if he had done so the harm that he suffered would have been reduced or cured.

The issues of training officers and culture change

[26] The issue of the training of officers to deal better with post traumatic stress, to identify within themselves signs and symptoms of such stress and as to the steps to take when these are identified raises a different and distinct set of questions. It is closely connected with the issue of whether the employer had a duty to try to counteract the culture within the RUC which militated against officers facing up to mental health problems flowing from exposure to trauma. The question arises as to whether the duties of care of an employer such as the defendant include a duty to give advice before the event to a plaintiff employee to help that plaintiff to cope with potential traumatic events and to identify the existence of signs and symptoms which call for action by the individual plaintiff himself to seek help and to deal with the potential damage to his mental health. Neither Hatton nor the other authorities in relation to work related stress establish the existence of such a duty on the part of an employer.

This case calls for a consideration of whether the law imposes such a duty in a case such as this.

[27] In the context of omissions as opposed to acts of commission on the part of the employer exposing a plaintiff to a foreseeable risk of injury it is necessary to bear in mind the principle stated by Lord Dunedin in Morton v. Williams Dixon Limited [1909] SC 807 at 809. The Lord President stated a principle which subsequently was approved by the House of Lords:-

> "I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances or to show that it was a thing which was so obviously wanted that it would be a folly in anyone to neglect to provide it."

In Paris v. Stepney BC [1951] AC 367 at 382 Lord Normand stated:-

> "The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances but it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it."

In Morris v. West Hartlepool Steam Navigation Co Limited [1956] AC 552 at 579 Lord Cohen stated:-

> "When the court finds a clearly established practice "in like circumstances" the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence which the plaintiff has to discharge is a heavy one."

Although the word "folly" has been somewhat qualified by subsequent judicial interpretation as unreasonable or imprudent (see for example Cavanagh v. Ulster Weaving Co Limited [1951] NI 109) the weight of authority points to a relatively heavy onus on a plaintiff to show that the defendant was negligent if

he was doing what was common practice by employers in like circumstances and failing to do something that was not commonly done.

[28] The evidence did not point to a common or constant practice amongst employers such as the defendant to provide the kind of training and education proposed by the plaintiffs and as found necessary by the judge. There was clear evidence from some of the experts that there were persuasive reasons why such training and education might be inappropriate, unhelpful or counter productive. At the height of the plaintiffs' case the proponents of such training and education considered that it would or could be "helpful." An analysis of the evidence points away from the conclusion that it was something that a reasonable and prudent employer would think was so obviously appropriate that it would be inappropriate to omit it.

[29] The fact that the defendant had by 1991 concluded that such training should be provided but provided it in an incomplete manner does not of itself mean that he was thereby in breach of duty to those to whom it was not adequately provided. An employer who sets out to achieve a higher standard than that of other reasonable employers could not logically be considered to be guilty of a breach of the objective duty of care if he has failed to achieve that higher standard in all cases but has nevertheless not been shown to be in breach of a duty of care in failing to provide it at all.

[30] The trial judge concluded that training and education of the kind proposed would have ensured that probably by 1988/89 there would have been a much more widespread understanding amongst both management and other ranks of the risks of post traumatic psychiatric damage and the relevant exposure to trauma together with the availability of the OHU and the services which it provided. He concluded that it would have served to provide an additional factor in the matrix of cultural change. While the evidence may support the view that it may have been helpful to create a better understanding of the issue of post traumatic stress it did not show that this would necessarily be the case either generally or in relation to individual plaintiffs. It could not be possible in relation to any given individual to conclude that the outcome of his case would probably have been different if the employer had pursued a different policy in relation to training and education. In relation to any individual plaintiff it would always be a matter of speculation whether the failure to educate and train the plaintiff to recognise his symptoms to be such as to call for self referral to the OHU or to other medical advice resulted in the suffering of symptoms which could have been avoided or reduced. Any attempted modification of cultural attitudes within the RUC to post traumatic stress would have to contend with the strong societal culture of resistance to recognising and facing up to mental health problems. The best that could be said of the proposed duty to train and educate officers in this context is that it might in individual cases have made a difference but it could never be said that it would be likely to have made a difference in an individual case. The judge

recognised that these issues presented real difficulties for plaintiffs and in none of the lead cases did the court find that this systemic failure as the court described it resulted in individual plaintiffs establishing any actionable breach of duty.

[31] For these reasons it cannot be concluded that the defendant's failure to provide training and education to officers to identify signs and symptoms triggering a need for referral to the OHU or to other medical advice was a breach of the defendant's duty of care to individual plaintiffs. What the judge has in this context categorised as a systemic failure accordingly does not in itself provide any ground on which a plaintiff could establish an actionable breach of duty by the defendant. Individual cases will have to be decided on their own facts, as in fact has happened in relation to the individual lead cases.