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Judgment: approved by the Court for handing down | *Delivered:* **25/6//09**
*(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

Appellants/Appellants

-and-

CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY

Defendant/Respondent

LEAD CASE OF LINDSAY BOAL

Before Kerr LCJ, Girvan LJ and Sir Anthony Campbell

KERR LCJ

Introduction

[1] This appellant was born on 11 January 1958 and served as a constable in the Royal Ulster Constabulary from 16 January 1977 until 22 February 2005 when he was medically retired after being certified medically unfit for further service by reason of PTSD/cumulative stress, post-hemicolectomy and mechanical back pain.

[2] After completing his initial training at Enniskillen, the appellant was posted to Pomeroy police station on 23 April 1977 where he remained until his transfer to North Queen Street on 14 November 1978. During his service

at North Queen Street he was assigned to the neighbourhood policing unit from 9 March 1981 to 1 March 1982. The appellant's second application for a transfer to traffic branch was successful and he was transferred to that branch based in Castlereagh Police Station on 10 May 1982. He was further transferred within traffic branch from Castlereagh to Antrim on 3 January 1984. On 13 October 1986 he was transferred to Andersonstown Police Station where he remained until his eventual medical discharge. During his service at Andersonstown police station the appellant again spent some time working in the neighbourhood unit.

[3] During the course of his twenty-eight years' police service the appellant was exposed to a large number of traumatic incidents. These are summarised in paragraph 4 of Coghlin J's judgment. As the judge there pointed out, in some of these the appellant was involved in the aftermath rather than the event itself and, in others, he was unaware that the incident had taken place until after it had occurred.

Medical issues

[4] The first significant incident in which the appellant was involved was his arrival as part of a police patrol at the scene of the murder of three police officers near Carnan on 2 June 1977. The appellant and his colleagues were the first to respond to the incident. When they arrived at the scene one police officer's body had been removed but the bodies of the other two officers were still present. The body of a reserve constable was partially in the vehicle while that of another constable was slumped over the dashboard. Both had been sustained multiple gunshot wounds and the vehicle was riddled with bullet holes.

[5] The appellant claimed that since this incident he has suffered from significant persistent psychological symptoms. These have varied in intensity but they have been continuously present since then. The symptoms have included nightmares, sleep disturbance, constant thoughts of traumatic events, extreme fatigue, difficulty in concentrating and focusing, irritability, anxiety, a fear of parked cars, recurring intrusive images of traumatic events, a withdrawal from social life, flashbacks, hyper-vigilance and mood swings. He said that he has also drunk to excess as a result of the problems associated with his psychological symptoms.

[6] The respondent accepted that the appellant may well have experienced some short-lived stress reactions to a number of traumatic events. He also accepted that, at the time of the trial, the appellant suffered from significant symptoms of mental disorder. The defence of the appellant's claim rested on two principal propositions. First, that the symptoms from which the appellant suffered were of much more recent vintage than he had claimed

and secondly, that he was a witness whose credibility had been utterly destroyed.

[7] The judge conducted a meticulous – not to say, painstaking – analysis of the appellant's evidence and of the testimony of the two principal medical witnesses, Dr Turner for the appellant and Professor Fahy for the defence, and cogently explained why he concluded that the appellant had indeed been guilty of gross exaggeration in his account of his condition and the date of its onset. Of particular persuasive power in this analysis was the judge's reason for preferring Professor Fahy's view as to the "crude exaggeration" of the appellant's account over the somewhat benevolent opinion of Dr Turner who clearly had reached a diagnosis of PTSD at an early stage and thereafter engaged in a process of rationalisation to explain away any inconsistencies with that in the appellant's account in order to preserve his pre-emptive diagnosis.

[8] The judge considered that it was possible that the appellant suffered psychological symptoms subsequent to a number of the traumatic events to which he was exposed. These might even have amounted to some form of acute stress reaction. He was satisfied, however, that the symptoms were not as significant or as persistent as the appellant had claimed. Coghlin J accepted that, at the time of trial, the appellant was suffering from significant mental disorder/disorders and that his exposure to traumatic events was likely to have contributed to this condition. Because of the unreliability of the appellant's evidence, however, and the degree of exaggeration, the judge said that it was difficult, if not impossible, to accurately estimate the extent of that contribution or to arrive at any meaningful assessment of the intensity and persistence of any symptoms from which he did suffer.

OHU

[9] The appellant accepted in evidence that he knew of OHU and its general purpose from the time that it had originally been established. He said that he might well have read the implementing force order when preparing to sit his sergeant's exam in January 1987. He remembered having being shown the stress awareness video by his inspector in Andersonstown. He accepted that he might well have received leaflets although he was unable to remember if those were the leaflets shown to him during cross examination

[10] His first attendance at OHU was on 3 October 1986. This followed a period of absence from work because of a back injury sustained as a result of a road traffic accident in January 1985. He had been referred by senior officers who had been monitoring his sick leave. He accepted that he might well have been told by Dr Courtney on that occasion that OHU was confidential and that he could use the self referral facility. The judge concluded that while, initially, the appellant may have shared the perception

of some other officers that there was a lack of confidentiality to consultations in OHU, he did not continue to hold that view.

[11] The appellant had been present at the scene of an explosion on 21 August 1987 and he claimed that he had experienced persistent severe psychological symptoms following this. He attended his GP on 2 September. The doctor made a note that the appellant was complaining of tinnitus and that he had developed an anxiety state. Medication for that was prescribed. Some nine days later the appellant again attended his GP who recorded that he was feeling slightly better, sleeping better and not quite as anxious. The appellant remained off work until 29 September. He provided the police authorities with medical certificates from his GP. These stated that he was suffering from an acute anxiety state. As the judge observed, this was the clearest evidence that he had no qualms about disclosing that he suffered from such a condition.

[12] On 14 October 1987, the appellant completed a self appraisal form. He provided a frank assessment of his experience while working in the Andersonstown area. He said that he was happy to perform the duty on which he was engaged. He felt that he needed little or no supervision. This positive report was confirmed by his supervising inspector's assessment given on 20 October 1987 where it was said: -

> "He recently escaped a murder attempt when a bomb was detonated as his patrol passed by. He is fully recovered and shows no ill effects, proof of his strength of character. Always respectful and well turned out, he is well liked by his fellows. He has good control over and rapport with the army. There are no problems with this man".

[13] The appellant made a claim under the Criminal Injuries Compensation legislation in relation to his involvement in the explosion on 21 August 1987. His solicitors arranged for him to see a psychiatrist and a report was duly submitted. But he received no compensation in respect of any alleged psychiatric symptoms. This is perhaps not surprising when one considers that in his statement to his authorities about the incident the appellant said that he had felt extremely shocked and had severe difficulty sleeping with constant nightmares for a period of two weeks. There was no suggestion of symptoms persisting beyond that time.

[14] On 13 October 1987 the appellant was referred to OHU because of his involvement in the explosion. This was in accordance with the procedure observed prior to the implementation of Force Order 14/88. An appointment was made for him to see Dr Courtney on 4 November 1987. The appellant's

evidence was that at that time he had been drinking very heavily and that he was continuing to suffer from severe shock after the explosion. He claimed that he had reached a very low point in his life and that, during the interview with Dr Courtney he broke down in tears.

[15] According to the appellant he "opened his soul" to Dr Courtney. He told him about the explosion and gave a history of being involved in previous shootings and bombings. Dr Courtney's notes recorded that the appellant had said that he had difficulty in sleeping; he experienced nightmares on an almost nightly basis and he was now very security conscious. The notes also referred to the fact that he had been prescribed medication by his GP but that the appellant was no longer on treatment at the time of his consultation with Dr Courtney. The doctor gave the appellant a relaxation tape and suggested a review in two months time. Dr Courtney clearly did not consider that it was necessary for him to have the medication that had previously been prescribed. After this consultation Dr Courtney wrote to the Chief Superintendent in Personnel Department indicating that a review of the appellant should take place in two months' time. Unfortunately, no review took place.

[16] The appellant was clearly dissatisfied with his meeting with Dr Courtney and the provision of the relaxation tape but, Coghlin J observed, he was quite unable to explain why, given the fact that he felt that he had been treated badly, he did not again visit his GP who, according to the appellant, had previously treated him sympathetically and provided medication. The judge was not prepared to accept that the appellant gave an account of any symptoms other than those recorded by Dr Courtney. He rejected the appellant's evidence that he broke down during the course of the interview. We are not in the least surprised that the judge reached this view. It appears to us to be the only tenable conclusion in the circumstances.

[17] Dr Turner did not criticise Dr Courtney for omitting to record more detail about the duration of the appellant's symptoms or whether he had any symptoms relating to the earlier shootings and bombings to which he referred, although he thought that such details might have been helpful. Nor did Dr Turner criticise Dr Courtney for the decision to review the appellant in two months time. He was not prepared to accept that the provision of the relaxation tape was an adequate intervention. This was not a view that was shared by Professor Fahy who expressed himself to be "frankly amazed" at the degree of criticism that provision of this tape to the appellant had attracted both from the appellant and Dr Turner. He accepted that it was not a definitive treatment for PTSD or any other complex psychiatric condition but, in his opinion, it constituted a sensible caring response and a reasonable preliminary action. Professor Fahy was fairly scathing in his response to Dr Turner's suggestion that the provision of a relaxation tape might induce in an individual a state of relaxation so that he or she would become flooded with intrusive memories, a view which he castigated as "…. a fairly obtuse and

highly theoretically driven criticism that doesn't really sit sensibly in day-to-day clinical practice, either in a psychiatric clinic or certainly Occupational Health Clinic." He agreed with Dr Turner, however, that the failure to review the appellant as arranged amounted to bad practice.

[18] The judge expressed himself as satisfied that, at most, the appellant had suffered from an acute anxiety state as a consequence of the explosion but that the symptoms of this were already receding before he went to OHU. He further concluded that such symptoms as persisted were unlikely to have been of any real significance by the intended review date.

[19] The judge found that the appellant should have been referred to OHU in accordance with relevant Force Orders but he concluded that it was unlikely that such referrals would have resulted in interventionist treatment, given the absence of any relevant complaint by the appellant to his GP after September 1987, the relatively short-lived nature of such symptoms prior to 2000/2001 and his clear reluctance to seek any treatment even when he had been diagnosed as suffering from a mental disorder.

The appeal

[20] The appellant claimed that, although the judge had found that OHU's failure to review the appellant in 1987 was bad practice, he failed to address the questions whether that failure amounted to a breach of duty, and whether it contributed to the continuation of appellant's psychological symptoms. The respondent countered this argument by pointing out that, while the judge found that the appellant should have had a follow-up appointment, any failure to review him did not cause him any loss. The judge had found that the appellant was suffering an "acute anxiety state" at the time, which was already improving.

[21] The appellant challenged the judge's finding that the appellant "may" have suffered symptoms of an acute stress reaction at various points but that they were as significant or as persistent as the appellant had claimed. The appellant reviewed medical evidence which it was suggested demonstrated that the appellant was indeed suffering from post-traumatic psychiatric symptoms from 1977. It was submitted that the appellant's propensity to exaggerate, while damaging his credibility, was part of his condition. In response the respondent contended that there was a dearth of contemporaneous, case-specific evidence of the appellant's symptoms. His case therefore depended on his credibility. It was argued that the evidence of Professor Fahy, which the judge rightly preferred, flatly contradicted the appellant's claim to have suffered from a recognised psychiatric disorder from 1977. The appellant had not established that he would have secured any measurable benefit from treatment from 1977 onwards.

[22] Finally, the appellant argued that the judge had failed adequately to articulate his reasons for preferring the evidence of Professor Fahy to that of Dr Turner.

Conclusions

[23] We consider that the argument that the judge omitted to consider whether the failure to arrange a review appointment amounted to a breach of the duty of care cannot possibly survive a careful reading of the judgment. At paragraph 18 of his judgment, the judge said that the symptoms "were likely to have been of little real significance by the intended review date". It can readily be inferred from this that the judge had concluded that a review two months from the date of the first consultation was not likely to have made a measurable difference to the appellant's condition. This observation must be seen in context. The appellant had been treated by his GP and had been prescribed medication but that particular form of treatment had expired and there was no suggestion that it ought to have been renewed. Dr Courtney considered that the only treatment that the appellant required was to be provided with a relaxation tape. Professor Fahy, whose evidence the judge was perfectly entitled to prefer to that of Dr Turner, (and whose evidence we also consider to be conspicuously more convincing) believed that this was an appropriate response to the appellant's condition at that time. In all these circumstances, it is not in the least surprising that the judge decided that a review two months after the consultation with Dr Courtney is unlikely to have made any appreciable difference.

[24] We find the appellant's second argument to be equally implausible. The judge carried out a detailed review of the medical evidence. We have summarised that evidence briefly above. There was ample material for the judge to make the findings that he did upon that evidence, not least the authoritative and strongly expressed views of Professor Fahy. We would have reached the same conclusions as did the judge on that evidence.

[25] We do not accept that the judge failed to express clearly his reasons for preferring the medical evidence tendered on behalf of the respondent. On the contrary, he examined this issue at great length. It is entirely clear to us why he reached the view that he did upon it. We reject the appellant's arguments on this issue also.

[26] None of the arguments advanced for the appellant has succeeded. The appeal is dismissed.