

**Neutral Citation No. [2009] NICA 33**

Ref: **KER7563**

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

Delivered: **25/06/09**

**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 ROBERT HEPBURN**

**Before Kerr LCJ, Girvan LJ and Sir Anthony Campbell**

**KERR LCJ**

*Introduction*

[1] The appellant served in the RUC part-time reserve from April 1975 until April 1977. He then became a full time member of that force. In December 1977 he joined the regular RUC and was posted to Waterside station, Londonderry in April 1978. He served in police stations in Derry (and briefly Strabane) throughout his career. He was appointed to the rank of Detective Aide in March 1985 and Detective Constable in March 1986. He was transferred to Shantallow in Londonderry in 1996. He served there for two years. This transfer was the cause of great bitterness and frustration to

him. He regarded it as a punishment. He retired under the "Patten" voluntary severance scheme in April 2000.

[2] The appellant was examined by Dr Poole at the PRRT in 2001. Dr Poole concluded that he was suffering from PTSD. It was considered that he had suffered from this condition "for some considerable time".

#### *Traumatic incidents*

[3] Eight separate traumatic incidents are recorded in Coghlin J's judgment. The appellant was shot in the chest at close range in 1976 in a terrorist murder bid. He lost part of his right lung and spent three weeks in intensive care under armed guard. Apart from this, the incidents either involved the murder of people known to him or occasions where he was present in the aftermath of a terrorist murder or atrocity. He was the police observer at Altnagelvin mortuary in 1984 during the identification of the victims of the Droppin' Well bomb. He also attended the scene of a human proxy bomb attack on an army check point on the Buncrana Road in 1990.

[4] The appellant was targeted by terrorists on a number of occasions and he was compelled to move house in January 1990. He became a member of the Key Persons Protection Scheme when he was again targeted in 1991.

#### *Medical issues*

[5] The appellant complained of psychological symptoms including nightmares, irritability, flashbacks, poor concentration, insecurity and depression following the attack in 1976. He said that he suffered panic attacks and attributed physical symptoms such as hypertension, sciatica, and chest pain to stress.

[6] A joint statement by the two experts retained, Professor Davidson for the appellant and Professor Fahy for the defence, was produced. The experts agreed that the appellant gave a broadly reliable account of his psychiatric history. He had attended his general medical practitioner and a consultant psychiatrist (Dr Kane) at Altnagelvin in Derry for anxiety and stress following the 1976 shooting. He had also gone to see his GP with stress related symptoms on three occasions between 1980 and 1990. He was off work for a fortnight in 1981 as a result of stress. Curiously, however, there were no GP attendances at the time of a number of incidents which the appellant described as "major". The judge found that he had no inhibitions about attending his GP or any other medical adviser regarding psychological problems.

[7] The medical experts agreed on a diagnosis of post traumatic stress after the shooting incident in 1976. This fluctuated in incidence and levels of

intensity. The experts differed as to the frequency and severity of the fluctuation. Professor Fahy characterised the condition as a fluctuating mild adjustment order, while Professor Davidson was more inclined to view the condition as a moderately severe disorder which never completely resolved and was fuelled by subsequent traumatic incidents. The experts agreed that the appellant had other stressors in his life and that there was a flare up in a major depressive disorder after his transfer to Shantallow in 1996.

#### *Detection*

[8] The appellant claimed that his psychological symptoms arising from the 1976 attack should have been detected during the recruitment process for the full-time reserve and the regular police force. He gave evidence, however, that he had been determined to conceal these symptoms from the police authorities, and that he had told the Force Medical Officer during his medical interview for the full time reserve that he felt well at that time, despite the fact that he was attending a psychologist at Altnagelvin hospital. Similarly, when he was preparing his application for the regular force, he told his psychologist's registrar during a review appointment that he was doing well. The registrar had written to his GP, and received a reply from the doctor to the effect that the appellant did not suffer from depression or anxiety at that point.

[9] In early 1978, during his claim for criminal damage arising out of the shooting, the appellant advised his solicitor that he had been attending a psychiatrist but did not pursue a claim for psychological damage as he was advised that the Superintendent of Personnel, who was present to give evidence at the hearing of the application, would advise the court that this rendered him unemployable. He confirmed that it was his own decision not to pursue this aspect of his claim.

#### *Contact with OHU*

[10] The appellant was not invited to attend OHU at any stage. Only two of the traumatic incidents occurred after Force Order 14/88 came into effect. The appellant's involvement in these had been peripheral. He did not attend his GP after either of the incidents, and the judge concluded that he had not been suffering symptoms sufficient to warrant his seeking medical help at that time.

[11] Mr Hepburn underwent a routine health screening with a travelling occupational health unit in 1994. This was part of what was known as 'the Wellscreen Health Programme' administered by OHU. The programme included basic physical health checks and a stress questionnaire. The health officer would then discuss any aspects of the checks that gave rise to concern. The appellant recalled speaking to the health officer about his weight, alcohol

consumption and lifestyle, but not about his stress scores. These scores were above the normal. The health officer, Ms Donna Andrews, said that it was her practice to draw raised scores to an officer's attention and to ask if he had any concerns. The officer would be given follow-up material. Initially Mr Hepburn denied having read such material but later conceded that he might have skimmed it. The material explained the significance of raised stress scores and suggested professional help. The appellant had a review appointment and attended his GP to follow up with some physical tests but the judge considered that it was unlikely that he raised the issue of stress with his GP. The appellant telephoned Ms Andrews after the review appointment and stated that he did not consider it necessary to attend OHU again.

[12] Following his transfer to Shantallow, the appellant was on sick leave for eight weeks, and is reported to have told OHU that he believed his transfer had caused an increase in his blood pressure. He attended OHU on 15 August 1996, and Dr McCaughan took a detailed history. He noted that the appellant was not fit to return to work and that the transfer seemed unwise. At a review appointment in December 1996, however, Mr Hepburn was in a more positive frame of mind and expressed a desire to return to work. The doctor recorded that he was fit for CID duties and that he wished to be transferred to Limavady. The notes stated that he was suffering from high blood pressure, but no psychological symptoms were recorded.

[13] Mr Hepburn's next contact with OHU was a home visit on 10 November 1999, followed by treatment from Dr Pollock, a consultant psychologist. The appellant attended Dr Pollock for nine sessions using various strategies including cognitive therapy, stress management and coping systems. Under cross-examination as to why he had not included any trauma-focussed treatment such as CBT or EMDR, Dr Pollock maintained that the symptoms and information provided by the appellant did not indicate that his condition was trauma induced. He had been aware that the appellant had been exposed to traumatic incidents, but he was emphatic in his view that these did not automatically lead to PTSD. He characterised the appellant's symptoms as a circumstantial or reactive stress reaction producing a mixture of anxiety and depressive symptoms. These had been triggered by his sense of grievance at having been transferred to Shantallow in 1996.

[14] Dr Pollock was cross examined about the diagnosis of PTSD made by Dr Poole in 2001. The latter had observed that the appellant appeared to have suffered from the condition "for some considerable time". Dr Pollock stated that the interesting question to be considered was why the appellant appeared to have been making a positive connection between his symptoms and trauma only after leaving the RUC. He explained that, in his experience, a number of officers had been unable to address their PTSD until after they left the organisation because of a fear that by "becoming well", they would

have found themselves returned to uniform duties and exposed to further trauma, a fear which Dr Pollock considered reasonable and rational.

[15] The judge was not persuaded that any negligence was established on the part of OHU in relation to its contact with and treatment of the appellant. He concluded that information had not been given to OHU at any stage that would have alerted them to a possible diagnosis of PTSD.

#### *Culture*

[16] The appellant's claim that he felt inhibited from seeking help for stress related symptoms due to organisational culture was unsurprisingly rejected by the trial judge. The appellant had attended his general practitioner a number of times with complaints about psychological symptoms. That unquestionable fact made an assertion that RUC culture prevented him from seeking help for his condition impossible to sustain.

[17] Mr Hepburn had said that he was unaware of the existence of OHU before his Wellscreen interview in 1994. The judge did not accept this evidence. In any event, it was clear that he would prefer to resort to his GP rather than consult OHU. He had gone to his GP to certify for his absence with a stress related illness in 1981. Even after his Wellscreen interview in 1994, he again chose to visit his GP rather than OHU. The only other time when he made a clear connection between the traumatic events and his psychological symptoms was in his attendance upon Dr Poole at PRRT after he left the RUC and shortly before the issue of the writ in this case. In short, the judge was not persuaded that RUC culture prevented the appellant from seeking help. Had his symptoms been sufficiently significant, he was satisfied that the appellant would have consulted his GP.

#### *Treatment*

[18] The medical experts agreed that the appellant presented a complex and difficult case and that over time he had often made it difficult for health providers to do their job. The optimal treatment for him would be multi-disciplinary, and his depression would need to be dealt with before the significance of any post-traumatic symptoms could be established. Neither expert was completely unequivocal about the benefits of earlier treatment, but it might have been more effective if administered before the transfer, and then before his depression became significantly more intense.

#### *The Shantallow transfer*

[19] In February 1996, the appellant was transferred from Waterside RUC station in Londonderry to Shantallow. He felt that the transfer represented an unjustified punishment. He arranged an interview with Chief Superintendent

McVicker, who had recommended it. The appellant and the Chief Superintendent gave conflicting evidence about this interview. The appellant claimed that he had voiced concerns about health, stress and returning to the area in which he had been shot. The Chief Superintendent denied this. Subsequently, in November 1996, in a report to senior officers, the appellant was very critical of the Chief Superintendent. The judge held that neither party emerged from the episode with particular credit. He did not believe the appellant's account of the initial interview. The report of November 1996 was the first time in which, the judge found, the appellant had articulated the reasons for his sense of grievance at the transfer. The judge was satisfied that the appellant's main cause of concern was not any increase in symptoms resulting from trauma but his sense of humiliation and resentment about being transferred unfairly. These feelings had resulted in real symptoms and an extended period of sick leave but those were unrelated to trauma.

*The issues on appeal*

[20] The appellant challenged directly Coghlin J's finding that Mr Hepburn did not suffer significant psychological symptoms that were sufficiently troubling to warrant him seeking medical help. It was submitted that this finding ignored and was inconsistent with the weight of the expert psychiatric and psychological evidence including the joint statement of the experts and findings of Dr Poole in 2001. Indeed it was claimed that there was an internal inconsistency in the judgment as the final conclusion contradicted the judge's earlier observations at paragraph 41 of the judgment, where he said, "It seems clear that he actively suppressed symptoms in 1977. He may also have done so at the Wellscreen examination in 1994 and when seen by Dr. McCaughan in 1996 and by Dr. Pollock in 1999 although I think it is less likely". It was submitted that in these remarks the judge had accepted that Mr Hepburn was suffering psychological symptoms, because otherwise there was nothing to suppress.

[21] In support of the claim that Mr Hepburn had indeed suffered psychological symptoms, the appellant relied heavily on the evidence of the expert for the defence, Professor Fahy. In evidence he had confirmed that Mr Hepburn had suffered from PTSD for 3 to 4 years after the attempted assassination in 1977, thereafter his symptoms were classified as a mild adjustment disorder. Relevant extracts from Professor Fahy's evidence on this point include the following: -

"My opinion is that Mr Hepburn developed PTSD after the assassination attempt ... I think he developed PTSD probably lasting three or four years after the incident and gradually improving over that length of time. My opinion is based on what he told me, plus my review of his records and the fact that he

managed to get back to work and function well. We then have a period from the beginning of the 80's to, in my view, about '96 when there is an element of uncertainty about the prominence of his symptoms. What he told me is that his symptoms improved but there were periods, especially after events, when his symptoms came back or deteriorated. In fact, I have to say I didn't get a very coherent account from him, a very precise or detailed chronological account of his symptoms. That's part of the reason that I feel I have to rely on other documents, including his GP notes and his work performance. So my view is that he may have had some residual symptoms. I have classified those as an adjustment disorder, probably mild in severity. The symptoms that I think he most likely experienced during those years would have been occasional or episodic intrusive phenomena mainly, possibly some nightmares or flashbacks of the incident, and perhaps an almost of hypervigilance. Then my understanding of the situation is that by really around 1996 there is an acute deterioration clearly related to the transfer, clearly related to the deterioration in his physical health - he has put on weight, his blood pressure is up; clearly also related to family stresses - his wife suffers an MI. Then there is a whole series of additional family stresses. Those symptoms, which were very prominently depressive symptoms, I think that is important to understand rather than predominantly post traumatic symptoms, haven't really fully remitted since then. There have been periods of improvement with his depression.

[22] The appellant also claimed that the judge failed to give reasons for his decision not to accept the evidence that had been given that the appellant had suffered from significant psychological symptoms. At paragraphs 14 and 29 of his judgment in Mr Hepburn's case Coghlin J had declined to accept that the appellant had been suffering from any sufficiently troubling or significant psychological symptoms. But in neither of these paragraphs, nor elsewhere, did the judge provide sufficient reasons for rejecting the expert psychiatric and psychological evidence in this lead case, the appellant argued.

### *Conclusions*

[23] We intend no discourtesy to counsel when we say that the outcome of this appeal is easily determined and does not demand any meticulous scrutiny of the evidence. The judge made three critical findings which make

the disposal of the appeal inevitable. None of these relates directly to the criticisms that were made of his judgment. None was challenged by the appellant.

[24] The first finding was that the appellant was adamant in his determination not to reveal to police authorities that he suffered from psychological symptoms. The second was that Mr Hepburn would not have been deterred by cultural influences from disclosing that he suffered from such symptoms. The third finding was that the appellant's later symptoms were entirely unrelated to trauma but stemmed from his conviction that he had been harshly and unfairly treated by being moved to Shantallow.

[25] The inescapable conclusion from these unchallenged findings is that the appellant did not complain to OHU that he suffered from symptoms that might have alerted them to the possibility that he required to be investigated, and if necessary, treated. The occasion for OHU intervening simply did not arise. He was not one of those individuals, however, who would find giving evidence of his mental health problems difficult. He cannot, therefore, make the case that he was deterred from revealing his symptoms by the RUC 'macho' culture or apprehension about the effect on his career.

[26] Whether or not the judge failed to give full effect to the evidence of the appellant's psychiatric or psychological symptoms, therefore, and whether or not he adequately expressed his reasons for finding that the appellant had not suffered from symptoms that were sufficiently serious to warrant his seeking medical help ultimately can make no difference to the disposal of the appeal.

[27] The simple truth is that the appellant did not complain of the symptoms that would have alerted the medical authorities within the RUC to the possibility of PTSD in his case. This was not because of any inherent reticence on his part, so the culture of the RUC cannot be indicted in this instance. Finally, the conclusion that his later symptoms were unrelated to trauma to which he was exposed during his service as an officer in RUC or the reserve force make the failure of the appeal inevitable. It is dismissed.