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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

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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

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Before Kerr LCJ, Girvan LJ and Sir Anthony Campbell

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KERR LCJ

Introduction

[1] These are appeals from decisions of Coghlin J concerning the Chief Constable's liability in respect of personal injury that the appellants claim to have suffered as a consequence of their service as members of the Royal Ulster Constabulary (RUC). That police force has now become the Police Service of Northern Ireland (PSNI). The case has been brought by 5,500 former and serving RUC and PSNI officers who claim to have sustained psychological/psychiatric disorder because of exposure to trauma during the course of the terrorist campaign in Northern Ireland. The claims principally involve allegations that these officers have suffered from post traumatic stress disorder (PTSD) but other psychological conditions are also alleged.

[2] The appellants do not contend that the respondent is liable for the fact that they were exposed to trauma. They have accepted that such exposure was on occasions a necessary and inevitable part of their duties. They assert, however, that their psychiatric and psychological injury is real and can be, in certain circumstances, as disabling as physical injury. The learned judge found this to be established in the individual cases that he dealt with and the findings that he made on that subject have not been challenged by either side in this appeal.

[3] There were two key questions to be determined by the judge at first instance, namely (i) the date on which the respondent ought reasonably to have foreseen that exposure to trauma was likely to cause police officers to suffer from recognisable mental disorders and (ii) the nature and extent of the precautions that it was reasonable for the respondent to have taken. The appeal has been concerned with the second of these issues.

[4] The evidence at the trial demonstrated, the appellants claim, that there were unreasonable failures of the respondent and his predecessors in relation to the treatment of officers suffering psychological and psychiatric injury as a result of exposure to trauma. These included a failure to implement a non-technical, jargon-free information exercise, as recommended by the committee on health and welfare for the force, and the failure to deliver a stress awareness package.

[5] The first appeal is the appellants' appeal on what was claimed to be the judge's finding on whether a lack of resources could have an impact on the respondent's liability for the psychological or psychiatric symptoms suffered by the plaintiffs. The second appeal is that of the respondent. This appeal centres on the generic issues of education, training and culture. There are then five appeals in what have been described as the lead cases. In order of

presentation these were the cases of Mr French, Mr Hepburn, an appellant who has been known as 'Mr A', Mr Beggs and Mr Boal.

The generic appeal of the appellants

[6] The grounds of the appellants' generic appeal have been articulated in this way: to the extent that the learned judge made a finding that the issue of resources might have an impact on the question of causation, he fell into error, firstly because of a deficiency in the respondent's pleadings in relation to this point and secondly because this was a non-delegable duty of care which required to be judged against the standard of a reasonable employer, rather than that of an employer "starved of resources by unresponsive, bureaucratic agencies".

[7] The judge ruled that all the parties would be bound by the findings of fact made in his generic judgment. That ruling is accepted by all concerned. The first issue on the appellants' generic appeal, therefore, was what the judge actually found. The second concerned the pleading point and the third the issue of whether the liability of the Chief Constable could, as a matter of law, be affected by the availability of resources.

What did the judge find?

[8] On the first of these questions, Mr Dingemans QC (who appeared for the appellants with Mr Gary Potter and Mr McMillan) submitted that the judge's core findings were contained in paragraph [155] of the generic judgment. Mr Dingemans had no quarrel with anything expressed in that paragraph, apart from its final sentence. One must first turn therefore to that paragraph of the judgment to begin the examination of what it was that the judge actually found. He was dealing in this passage with the treatment that the Occupational Health Unit (OHU) of the force provided to officers of the RUC for psychiatric and psychological conditions and this is what he said: -

> "[155] I am satisfied that, at all material times, the staff of the OHU, together with the retained sessional clinicians, provided appropriate interventions for the officers that they treated. Unsurprisingly, given the complex nature and multi-factorial causes of the disorders, in some cases the effect was much more limited than in others. Some cases may well prove unresponsive to all forms of intervention in the long term. However, that does not detract from the fact that the treatments available offered the potential to achieve a material improvement in the symptoms suffered. Ultimately, it will be for the individual

> plaintiffs to prove on the balance of probabilities that they would have gained a material improvement in their condition as a result of a particular intervention. Without pre-judging any particular case this may prove to be a formidable task should a substantial number of claimants seek to establish that they would have benefited from receiving one of the psychotherapies, given the evidence relating to resources."

[9] The essential argument of the appellants on this point was that the respondent was not entitled to raise lack of resources as an issue of causation. They therefore contend that, in so far as he did so, the judge was wrong to allow this factor to influence his decision on the liability of the Chief Constable. Furthermore, the question of a scarcity of resources was not relevant to the potential liability of the respondent in any of the outstanding cases.

[10] To set the findings of the judge in their proper context, it is necessary to say something about the background to the establishment of OHU. Although their genesis may be traced to the preceding year, it was early in 1982 that significant concerns began to be voiced by, among others, the Association of Police Surgeons, the Force Medical Officer and the chairman of the Police Federation about levels of stress within the RUC which, it was suggested, gave rise to suicide of some members of the force and to various other social problems. These concerns prompted the establishment of the Committee on the Health and Management of the Force (CHMF). In due course it recommended the setting up of OHU, and this came about in 1986. It was the first unit of its kind in Western Europe.

[11] Dr David Courtney was appointed as the head of OHU in February 1986 and he took up his post in April of that year. The purpose of the unit was stated to be the promotion and protection of the physical and mental health of serving officers of the force. A number of particular objectives, designed to achieve that purpose, were outlined in a force order issued in June 1986. These are set out in paragraph [70] of Coghlin J's judgment and need not be repeated in full here. They included (i) the health assessment of officers who have had serious illness injury or appear to have other health problems; (ii) monitoring the general health of the force and advising on protection against health hazards in the job; and (iii) providing health guidance and education generally in the force.

[12] From the beginning, OHU experienced what proved to be persistent staffing and resource problems. As a consequence its performance was affected. The judge found that there were difficulties in making suitable appointments. Those difficulties lay beyond the respondent's control. The

principal problem was a scarcity of applicants for what was regarded as a professionally isolated post with implications for the security of those appointed to the position.

[13] Following his appointment, Dr Courtney quickly became aware that one of the main reasons for the absence of officers on sick leave was that they were suffering from psychological or psychiatric symptoms. Perhaps inevitably, within this broad spectrum there was a wide variety of conditions and different causes were identified for the various symptoms from which individual officers suffered. One notable cause, however, was that a significant number of officers had been involved in a traumatic incident. On becoming aware of this, Dr Courtney carried out some background reading and, as a result, became familiar with the condition of PTSD. He soon became convinced that he would need to be assisted by a psychologist and a psychiatrist. He thought, at first, that these specialists would carry out an advisory role but before long he realised that they would need to be actively involved in providing a therapeutic service. Upon investigation, however, it rapidly became clear that the provision of this would not be easily secured.

[14] The efforts made by Dr Courtney and his staff to overcome those difficulties have been comprehensively set out in Coghlin J's judgment in paragraphs [73] *et seq*. A number of problems were encountered but, significantly, Coghlin J found that there could be "no doubt about the experience, industry and ability of the staff of the OHU." A clinical psychologist, Dr Lumsden, and a consultant psychiatrist, Dr Browne, were recruited to provide care on a sessional basis. They were available at least once, and sometimes twice, per week for some three to four hours per session. In October 1986 a Mrs Sally Meekin was appointed as an occupational nurse. She served in OHU for approximately six years. During that time she obtained a diploma in occupational health nursing and an honours degree in advanced nursing studies. As part of her diploma course Mrs Meekin's dissertation was on 'the effectiveness of counselling by an occupational nurse in the post–trauma situation'. After Mrs Meekin left she was replaced by Margaret Bennett. Mrs Bennett held a similar diploma to that of Mrs Meekin and obtained a degree, with distinction, in community nursing in 1998. Joseph McCloskey, who joined OHU at the same time as Mrs Bennett, held qualifications both as a registered general nurse and as a registered mental nurse and went on to complete a degree in occupational health. Coghlin J held that OHU provided "a close and stimulating environment in which there was a free and productive exchange of advice, opinions and information amongst all the practitioners … they had regular weekly contact with specialists in psychology and psychiatry".

[15] The judge discussed exchanges between Dr Courtney and the Police Authority for Northern Ireland (PANI) and the Northern Ireland Office (NIO), the funding department, regarding the engagement of a clinical

psychologist in paragraph [76] of his judgment and it is clear that some initial resistance to this proposal was encountered. It is also unmistakably clear, however, from the judge's review of the evidence on this issue that this was not the cause of any failure to engage the necessary staff. When efforts to recruit began, they proved unavailing for the reasons earlier given, namely the scarcity of suitably qualified experts and their reluctance to apply for this particular post. The acute difficulty – indeed, the impossibility – of attracting suitably qualified applicants for the post is extensively reviewed by the judge in paragraphs [78] to [80] of his judgment.

[16] Eventually, Dr Desmond Poole was appointed to the position of clinical psychologist in May 1993. Within a few years of his appointment it became clear that he would not be able alone to carry the burden of the demand for psychological therapeutic treatment. In December 1996 the support of the Deputy Chief Constable for the appointment of another clinical psychologist was obtained and in October 1997 it was proposed that an advertisement seeking applicants for the post be placed. There was a dispute among the witnesses as to whether that advertisement appeared at that time but this does not seem to be us to be material because, ultimately, when the post was advertised, it once again proved impossible to fill it. The position was, in the words of the judge,'re-advertised' in 1998; interviews were held in 1999 but no suitable appointee emerged. Dr Poole resigned in 1999, citing, among other things, "the pressure of an ever-increasing workload". The post of clinical psychologist was again advertised in 2001. There were no applications. Eventually, Dr Reid was appointed in 2003.

[17] Coghlin J set out the case made by the plaintiff on lack of resources at paragraph [89] of his judgment as follows: -

> "The plaintiffs have concentrated their allegations of negligence in relation to the provision of resources for the OHU upon the two periods during which they allege that no real attempt appeared to have been made to actively recruit a clinical psychologist or an additional clinical psychologist. The first of such periods ran from the unsuccessful advertisement of January 1989 to early 1992 when Dr Courtney noted in his letter to PANI dated 13 March 1992 that "… the post for Clinical Psychologist will be re-advertised within the next 3-4 weeks." The actual appointment was further substantially delayed by the deliberations about grading and remuneration. The second period commenced with the approval by PANI for the post of an additional clinical psychologist in September 1997 until the advertisement that

> secured the appointment of Dr Tracy Reid in 2003. During this period two, possibly three, advertisements were placed each of which proved fruitless, namely, December 1998, 2001 and, possibly, according to the recollection of Miss Burnett October/November 1997. There is no doubt that, upon various occasions, both Dr Courtney and Dr Poole sought to encourage and secure the making of these appointments."

[18] The judge expressed his conclusions on this case at paragraphs [91] and [92] where he said: -

> "It is not difficult to sympathise with Dr Courtney when reading the prolonged debate by correspondence between PANI and the NIO the two bodies responsible for resources. In my view, the first period is accounted for by a combination of the scarcity in the market of appropriately qualified individuals and the debates about the appropriate job title, grade and level of remuneration which ultimately included the report from MMRD. The latter difficulties were resolved with the appointment of Dr Poole in 1993 and, therefore, should not have given rise to difficulties during the second period. The lack of response by suitably qualified candidates to either one or two advertisements in 1997/98 or for the further advertisement placed in 2001 suggests that the lack of suitably qualified and available candidates continued to be a significant problem.
>
> [92] I am satisfied that the difficulties faced by the OHU in obtaining necessary resources, including clinical psychologists, were significantly compounded by the unyielding bureaucratic procedures operated by PANI and the NIO, the relevant civil service authorities. As Dr Crowther said in evidence, even with the support of the defendant and, in particular, B Department, these structures produced a slow, inflexible and bureaucratic process of recruitment. Dr Courtney's concerns about the need to increase staff had to be set out in a paper relating the increase to the original concept which was then forwarded to the Establishment Officer who in

turn forwarded it to MMRD to draw up terms of reference for an inspection. At a meeting with Dr Courtney in November 1989 Mr Morrison, the Establishment Officer, explained that even if an inspection and report from MMRD recommended additional staff he could not guarantee that such staff would be forthcoming. The bid would have to "take its place along with others" and be subjected to a decision on priority within PANI. During the course of giving evidence Dr Crowther described this system as "not fit for purpose" an assessment with which it is difficult to disagree. On the 19th March 1991 Senior Assistant Chief Constable (Support Services) McAllister wrote to the Assistant Secretary of PANI referring to serious staff shortages at the OHU which were inhibiting its ability to deliver its services and observing that:

> 'It bears repeating that OHU staff needs to be increased incrementally i.e. (a) to cope with the present workload, (b) to cope with the desired extension of workload, and (c)to cope with civil service element; and in that order.'

In the same letter Mr McAllister pointed out that among other OHU services that were suffering from staff shortages were the assessment and treatment of officers with stress and other psychological problems and post trauma counselling. Mr McAllister left PANI in no doubt as to the seriousness of the situation as he wrote:

> 'Post-trauma counselling is an important service, however many incidents have to be 'selectively ignored' and it is not possible to provide counselling to all our members. The assessment and treatment of officers with stress and other psychological problems is time consuming and stressful to the OHU staff. At present it is proving impossible to provide follow-up and adequate care and demand on the OHU is resulting in steady and

> remorselessly increasing demands on staff'."

[19] Coghlin J made no express finding that, had the "bureaucratic procedures" been more yielding, successful recruitment of staff would have occurred. This is entirely unsurprising since the evidence that he reviewed had clearly indicated a contrary conclusion. There was ample testimony from experts as to the shortage of qualified persons in this field generally and potential recruits to fill the advertised posts were unlikely to find them attractive for the reasons already discussed. And, of course, there was the unmistakable evidence of the experience of the lack of success in the various recruitment exercises, even on one occasion to the point of having no applicants at all for the position. None of this was challenged by the plaintiffs nor has it been suggested on the appeal that the judge's review of the evidence was other than complete and accurate. It appears to us to be impossible to conclude therefore that the attitude of the various civil servants or the bureaucracy which was found to have been unresponsive actually contributed to the problem of recruitment.

[20] In any event, the judge, although obviously critical of the 'bureaucratic procedures', does not appear to have reached a final opinion on this for he completed his review of the problems in paragraph [96] of his judgment with these words: -

> "Apart from difficulties relating to supply and demand, which played a significant role in relation to the recruitment of clinical psychologists, the main problems faced by the OHU seems to have been the unresponsive bureaucratic structures of PANI and the NIO. I am satisfied that the defendant and relevant senior command did all that was reasonably practicable in the circumstances to make those structures respond. In my view a situation in which men and women are regularly called upon to put their mental and physical health, and, indeed, their very lives at risk in the service of the State places that State under a formidable duty to ensure that such risks are reduced as far as practicable by the timely provision of appropriate and adequate support, equipment and services. I heard evidence from a number of employees of PANI but since neither PANI nor the NIO are parties to the present proceedings and have not had an opportunity to make detailed submissions about matters that may well turn on complex budgetary considerations I

> do not consider that it would be either fair or appropriate to make any further observations."

[21] The statement that "detailed submissions [might have been made] on complex budgetary considerations" was not developed further and it is perhaps a little difficult to discern what the judge had in mind on that issue. But his comment that it would not be "fair or appropriate to make further observations" appears clearly to indicate his acceptance that he may not have received a full picture on the matter and that it would be imprudent to reach hard and fast conclusions on it. Whatever interpretation one places on this comment, however, we are firmly of the view that the judge was not in a position to conclude that the bureaucratic procedures, which he had appeared earlier to criticise so roundly, had in fact played any part in depriving the OHU of the necessary resources.

[22] The term 'resources' has been used in the appeal to cover the scarcity of available experts; the unwillingness of those who might have been eligible to apply for the posts; and the withholding of resources by "unresponsive, bureaucratic agencies". It is important not to conflate these three factors as possible contributors to the problems experienced by OHU. A dearth of experts is an objectively verifiable fact. It cannot be regarded as the responsibility of the agency that seeks to employ them. Likewise, the Chief Constable cannot be criticised for the security dimension to the position which operated as a disincentive to potential applicants – or, at least, no criticism of him on that account has been made by the appellants. The question whether bureaucratic procedures can be relevant to his duty to those who require psychological therapy must be approached from an entirely different perspective. In the event, however, for the reasons that we have given, we do not consider that the last of these played any part in the judge's provisional conclusion expressed in the final sentence of paragraph [155]. When seen in its overall context, we are satisfied that this observation must be taken to allude to the first two of the factors that we have set out in the opening sentence of this paragraph.

[23] We have reached that conclusion notwithstanding the judge's contrast between the provision of resources to OHU and the speed at which resources were obtained for the Police Rehabilitation and Retraining Trust (PRRT) which had been set up as part of the government's response to the Patten report on the RUC. The judge dealt with that in paragraph [94] of his judgment. We do not consider it necessary to set out the detail of his consideration of the issue. As Mr Hanna QC (who appeared with Mr Montague QC and Mr Donal Lunny for the respondent) has pointed out, the validity of the contrast essayed by the judge is open to some question. The Patten Report was published in September 1999, so the contrast, if one exists at all, is referable only to the final part of the period on which the plaintiffs had made their case about a lack of resources. The judge had said that, by

2002, PRRT had obtained the assistance of some 18 psychology clinicians including both clinical psychologists and cognitive behavioural therapists but, in fact, the vast majority of these individuals were not qualified clinical psychologists, but psychotherapists, and most were not full-time employees. One must, we believe, regard the judge's comments on the supposed contrast as incidental to his ultimate findings which, for the reasons that we have given, we consider to be confined in the manner described in the preceding paragraph.

The pleading point

[24] In their amended statement of claim, at paragraph B7, the plaintiffs made the following averment: -

> "The plaintiffs say that even after the establishment of the RUC's Occupational Health Unit in 1986 the defendants were in breach of their duty of care to the plaintiffs as the unit was not adequately resourced. There was a continuing failure to make adequate mental health provision within the unit."

[25] The defendants pleaded to this in their amended defence in a paragraph headed B13 as follows: -

> "As to paragraph B7, the defendants deny that the Occupational Health Unit was not adequately resourced or that there was any failure to make mental health provision within the unit. The defendants say that the duty of the first defendant did not require him to make any mental health provision beyond assessment of those attending the Unit and onward referrals to specialists on a voluntary basis only if and when necessary."

[26] On 5 September 2005, Coghlin J gave one of a number of pre-trial rulings. In paragraph 11 of the Order it was stated: -

> "If the defendant is to plead lack of resources in relation to individual cases the court is to be informed forthwith. The defendant shall contact Dr Courtney on this point on his return from his holiday on 16th September 2005. The judge shall issue no timetable as it is not recognised yet as an issue. If the issue of funding is going to be raised it needs to be openly pleaded."

[27] No amendment was made of any of the defences in the lead cases to make the point on behalf of the defendant that a lack of resources from PANI, NIO or other agency mitigated his potential liability. Mr Dingemans therefore submitted that such a defence was no longer available to the defendant and invited this court to declare that the issue of resources could not be raised in any of the outstanding cases.

[28] Mr Hanna relied on the decision of this court in *McArdle v O'Neill* [2003] NI 32 in support of the proposition that Order 18 rule 8 (1) of the Rules of the Supreme Court (Northern Ireland) 1980 did not require a defendant to do more than enter a mere denial. Provided sufficient facts were pleaded to prevent a plaintiff from being taken by surprise, Mr Hanna argued that the defendant could not be precluded from raising any defence. In any event, he said, the defendant did not rely on a lack of resources (in the sense that he was not adequately funded by NIO or PANI) in any of the individual cases that the judge had dealt with. Finally, he pointed out that the issue had been extensively considered in evidence and counsel for the plaintiffs had raised no objection to this in the course of the hearing before Coghlin J. There could be no question, therefore, that the appellants were in any way disadvantaged by the introduction of material on this issue before the trial judge.

[29] It would be ironic if the judge's ruling had the effect of precluding consideration of a possible defence which seems to have occupied the attention of all the participants in the trial of the generic issues to a significant extent. Quite apart from this, if the ruling were to have this effect, it is difficult to understand why the judge should have spent so much time on it in his judgment. But we consider that the appellants' arguments on this question can be disposed of simply and briefly by concentrating on the terms of the ruling itself. It was to the effect that, if a lack of resources was to be pleaded *in individual cases* the court was to be informed and that *if* the issue of funding was to be raised it required to be openly pleaded. In the event, this was not an issue that was raised as a defence in individual cases and we are satisfied that the judge made no generic ruling in relation to it. On that account, the pleading point fails.

Can lack of funding, as a matter of law, ever be a defence?

[30] It is important to recognise at the outset that the appellants' arguments in relation to the non-availability of the defence were confined to the issue of funding rather than the question whether it was impossible in practice to obtain the necessary resources to provide the therapeutic service required. In other words, this was a purely financial issue. Mr Dingemans argued that a restriction on the availability of those resources brought about by financial stringency cannot afford a defence.

[31] The first observation that must be made on this submission is, of course, that it was not raised before the trial judge. In effect, therefore, we are being invited, for the first time, to give a generic ruling on the issue. Since we have ruled that the judge did not make any finding in relation to funding as a possible defence, this can no longer be said to be an appeal against his ruling.

[32] Counsel relied on the classic exposition of the principle that an employer's duty of care to his employees is non-delegable which is found in *Wilson & Clyde Coal v English* [1938] AC 57 in the speech of Lord Wright at page 78: -

> "In *Rudd's case* [1933] 1 KB 566, the Court of Appeal … held that the employers could escape liability by showing that they had appointed competent servants to see that the duty was fulfilled. This House held that, on the contrary, the statutory duty was personal to the employer, in this sense that he was bound to perform it by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill. The obligation is threefold – 'the provision of a competent staff of men, adequate material, and a proper system and effective supervision' …"

[33] In *McDermid v Nash Dredging* [1987] AC 906 at 919, Lord Brandon explained what was meant by non-delegable in this context: -

> "… the duty concerned has been described alternatively as either personal or non-delegable. The meaning of these expressions is not self-evident and needs explaining. The essential characteristic of the duty is that, if it is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant,

> whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for the non-performance of the duty."

[34] Mr Dingemans argued that it could be no defence for the Chief Constable to say that NIO and PANI were slow in giving him money or approving appointments. If he was under a duty to provide the services of a psychologist is engaged, he was obliged to discharge that duty irrespective of any lack of funding or of bureaucratic difficulties created by those other agencies. For his part, Mr Hanna accepted that, if there was a duty owed by the Chief Constable to supply therapeutic services, it was non-delegable. His essential riposte to Mr Dingemans' argument was that lack of funding did not create the problem for OHU. Its predominant difficulty was that it could not attract suitable candidates for the post. That this had always been the Chief Constable's position was, he said, made clear not only by the pleading in the defence but also by the answers to interrogatories served by the appellants. In the interrogatories the appellants had asked whether there were difficulties and/or restrictions in terms of resourcing the OHU. Dr David Courtney provided the following answer on 16 May 2005: -

> "(a) In the early phase when the OHU was establishing itself and because of the progressive growth in the number of referrals, I recognised the need to recruit additional staff and to purchase psychological/psychiatric services. Unfortunately, due to the general shortage of clinical psychologists, it was not until 1991 that the OHU was able to appoint its first full-time clinical psychologist, such service until then being supplied on a contractual basis. (b) I am not aware of any financial restrictions in terms of resourcing the OHU and as far as the provision of a dedicated secure unit for police officers was concerned, this was simply not a realistic proposition nor was it ever contemplated."

[35] In light of this answer we find it difficult to conceive how the Chief Constable could raise a defence that he was unable to provide services that were considered to be necessary because he could not obtain funding from PANI or NIO. Moreover, Mr Dingemans is unquestionably right, as a matter of general principle, that the Chief Constable's duty could not be mitigated by his dependence on other agencies for the supply of all that was necessary to ensure that a safe system of work and that proper protection for police officers was in place. This case has never been made on behalf of the Chief Constable, however, and for the reasons that we have given, the judge did not

suggest that it was a possible line of defence. In these circumstances, we decline to make the declaration sought of us by Mr Dingemans.

[36] The case made on behalf of the Chief Constable on the question of resources is not confined to the claim that it was simply impossible during the periods concerned to obtain the services of suitably qualified experts, however. It is also submitted that if all, or even a majority, of the approximately 5,500 appellants in this group action ought to have received psychological treatment of some kind, it is clear that the resources of the OHU would have been overwhelmed. It would not have been possible to treat everyone. A system of prioritisation would have had to be introduced. It would not be possible to say which of the appellants would have been in the highest priority category until all the cases had been assessed. This would be one of the circumstances relevant to a decision in relation to individual cases, Mr Hanna argued. In each case, it was suggested, the court would have to decide whether a failure to provide an individual claimant with psychological treatment of some kind amounted to a breach of the employer's duty of care. That question could only be answered if and when the total number of individuals needing treatment at any particular time was capable of being assessed.

[37] The judge made no ruling on this issue and we will refrain from making any observations on it as a possible defence. We agree with Mr Hanna, however, that this is not something that lends itself obviously to resolution as a generic issue. It appears to us likely that it would have to be addressed on a case-by-case basis. It seems probable that questions would arise as to whether OHU should have recognised that some form of general survey needed to be undertaken of the police force in order to inform a system of prioritisation but, in the absence of any finding on or evidence directed to the issue, we make no further comment.

The respondent's appeal

[38] In his written submissions for the appeal, Mr Hanna introduced the respondent's challenge to the findings of the trial judge with a number of prefatory remarks which proved on the whole not to be controversial and which we consider provide an admirable overview of the backdrop to the respondent's appeal. We therefore replicate them here in full: -

> "24. All of the approximately 5,500 appellants allege that they have suffered psychiatric ill health caused by their exposure to one or more severe traumatic incidents during the course of their service with the RUC. Their complaint against the defendant is not that he was legally responsible (through negligence or some other tort) for any of

those severe traumatic incidents, or for causing the appellants to suffer any resultant psychiatric ill health, but rather that, in breach of the duty of care which he owed them as their notional employer, he failed to take some action which would have prevented the development of, or would have alleviated, the psychiatric ill health which they suffered as a result of their exposure to those incidents.

25. No liability could arise unless, from the perspective of the respondent, psychiatric ill health was reasonably foreseeable as a consequence of the exposure of police officers to severe traumatic events. The respondent argued that this did not become foreseeable until, shortly after the OHU had commenced operation in 1986, police officers began presenting to its medical and nursing staff with symptoms which were identifiable as being trauma-related. The appellants had sought to persuade the court that such foreseeability on the part of the respondent should have been established sometime between 1977 and 1982. The learned trial judge concluded that the appellants had not persuaded him that foreseeability had been established at any date earlier than that for which the respondent contended.

26. However, merely because psychiatric ill health had become a reasonably foreseeable consequence of severe traumatic exposure after late 1986, it did not follow that the respondent would thereupon, and without more, become subject to any *factual duty* to take specific action of some kind, pursuant to his employer's notional duty of care to provide a safe system of working. This is because, among other things, an employer can only reasonably be expected to take steps which are likely to do some good, and the court is likely to need expert evidence on this.

27. As the Court will hear, both the treatment of post-traumatic psychiatric ill health (including the timing of its provision), and the identification of those likely to benefit from such treatment, are

matters of some complexity about which different views have been expressed, and expert knowledge and opinions have changed over the years since PTSD first entered the American Psychiatric Association diagnostic classification (then DSM-III) in 1980.

28. In March 2005, approximately 6 months before the trial of the action commenced, the National Institute for Clinical Excellence (as it was then known) (NICE) published the UK National Guidelines on PTSD ('the NICE Guidelines'). At paragraph 2.4.1 of the NICE Guidelines the aetiology of PTSD was summarised. Before PTSD entered the diagnostic nosology the predominant view had been that reactions to traumatic events were *transient* in individuals of normal disposition, and that only people with unstable personalities, pre-existing neurotic conflicts or mental illness would develop *chronic* symptoms. It was the recognition of a long standing psychological problems of many war veterans, especially Vietnam veterans, and of rape survivors that changed this view and convinced clinicians and researchers that even people with sound personalities could develop clinically significant psychological symptoms if they were exposed to horrific stressors.

29. Most individuals who have been exposed to a severe traumatic event will experience a reaction to it. It would be unusual for someone not to be disturbed or distressed in such circumstances even though that disturbance or distress may not amount to any recognised psychiatric illness. For many people the sense of distress will pass reasonably quickly. Some will experience a more significant short-term reaction such as an acute stress reaction (ASR) (ICD-10) which is, by definition, transient. Such reactions recover spontaneously without the need for treatment and there is no evidence that treatment will accelerate their recovery. Overlapping, to some extent, with acute stress reactions are Acute Stress Disorders (ASDs) (DSM-IV) which, if they continue, can develop into PTSD. Before PTSD can be diagnosed

> the disturbance must have continued *for more than one month*, and must cause clinically significant distress or impairment in social, occupational or other important areas of functioning (*functional impairment*). If the symptoms of PTSD *resolve within three months* the illness is regarded as *acute*, but *if they persist for a period of three months or more* the illness is regarded as *chronic*. In practice these time periods are not treated in quite such a strictly prescriptive way. It is also possible, though less common, for individuals to experience *delayed onset* PTSD, where the cluster of symptoms are not experienced *until at least six months have elapsed* following the traumatic incident. This raises the important questions of when treatment should be offered after a traumatic event, and how people *who are unlikely to recover on their own* can be identified. In general terms, there is no treatment capable of accelerating the recovery of *acute* reactions, including acute PTSD, or of alleviating their symptoms.
>
> 30. Accordingly, once foreseeability of psychiatric harm had been established in 1986, the question was what, if anything, the respondent's duty of care required him to do in order to prevent, or alleviate the suffering of those who had developed, or were likely to develop *chronic* PTSD or other *chronic* psychiatric ill health caused by severe traumatic exposure. This gave rise to two fundamental issues: (1) that of identifying, and affording the opportunity of treatment to, those individuals (detection); and (2) that of determining the nature of treatments to be offered and the time at which they should be offered (treatments)."

[39] Girvan LJ, in a judgment prepared with commendable celerity and whose delivery has had to await this more tardy one, has dealt with grounds 1 and 4 of the respondent's appeal, namely, the duty to provide training, education and/or information including stress awareness training. In light of his conclusions, with which the other members of the court agree, that the respondent's failure to provide training and education was not a breach of the defendant's duty of care to individual plaintiffs, it is no longer necessary to consider grounds 2 and 5 (the extent to which, if at all, and the respects in which the respondent was in breach of any duty of care in failing to provide training, education and/or information). The remainder of this judgment

therefore deals with the single outstanding issue – that of the alleged duty to treat (ground 7). Before turning to that issue, however, it is necessary to say something about a subject which occupied not a little time on the hearing of the appeal *viz* the approach that this court should take to findings of fact made by the trial judge.

Interference with findings of fact

[40] Mr Dingemans began his review of the authorities in this field with a quotation from the judgment of Sir John Balcombe, delivering the majority opinion of the Privy Council in *Saunders v Adderley* [1999] 1 WLR 884. This provides a useful summary of the relevant principles in this area: -

> "It is well established that an appellate court should not disturb the findings of fact of the trial judge when his findings depend upon his assessment of the credibility of the witnesses, which he has had the advantage of seeing and hearing — an advantage denied to the appellate court. However, when the question is what inferences are to be drawn from specific facts an appellate court is in as good a position to evaluate the evidence as the trial judge: see *Dominion Trust Co. v. New York Life Insurance Co.* [1919] A.C. 254; *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370; *Whitehouse v. Jordan* [1981] 1 W.L.R. 246, 249, 252, 263, 269. The cases to which their Lordships were referred by counsel for the plaintiff were all cases where an appellate court had sought to disturb a finding of primary fact depending upon the trial judge's assessment of the credibility of the witnesses. This was not what happened in the present case: indeed on the most important question — the circumstances of the accident — the judge rejected the evidence of the plaintiff and accepted the defendant as a credible witness."

[41] The principle against interference by an appellate court with findings of fact by a trial judge applies most critically when those findings have been arrived at after an evaluation of the veracity of a witness. It is not confined exclusively to that situation, however. Thus, in *Biogen v Medeva plc* [1996] 38 BMLR 149, 165 Lord Hoffmann observed: -

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is

> because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* [*Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370] as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved."

[42] Where a judge has to form an impression of, for instance, the authority of a witness on a particular issue, his judgment on this should be accorded respect, even if it does not involve an assessment of whether the witness is being honest and truthful. Therefore, on an appeal in an action tried by a judge sitting alone, the burden of showing that he was wrong in his decision as to the facts lies on the appellant and if the Court of Appeal is not satisfied that the judge *was* wrong, the appeal will be dismissed – *Savage v Adam* [1895] W. N. (95) 109 (11). On the other hand it is the court's duty to consider the material that was before the trial judge and not to shrink from overruling the judge's findings where it concludes that he was indeed wrong – *Coghlan v Cumberland* [1898] 1 Ch 704.

[43] Where the appeal focuses not on the judge's findings of primary facts but on his analysis of those facts and the drawing of inferences from them, the appellate court is generally in as good a position as was the trial judge to conduct its own analysis and to reach its own conclusions. The reason that I say that this is generally the case is that there will be occasions where the drawing of inferences and the reaching of conclusions on them will be dependent, to some extent, on subjective impression. Thus, whether a particular witness's opinion should be deemed to carry more weight than another's may depend not only on an analysis of the content of his evidence but also on the manner of its delivery. In such a situation, the trial judge enjoys an advantage over an appellate court which should be reflected in the latter's reticence in reversing the judge's conclusions. The Court of Appeal in England and Wales dealt with this issue in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577. At paragraph [16] Clarke LJ said: -

> "Some conclusions of fact are … not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number

> of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way [*i.e.* the appellate court should only interfere where the lower court has exceeded the generous ambit within which a reasonable disagreement is possible].

[44] In the present appeal, Mr Dingemans suggested that the respondent's appeal was predominantly concerned with issues of fact. This claim is true as far as it goes. We consider that the principal focus of the respondent's appeal has been on the judge's analysis of the evidence rather than on his factual findings. So, for instance, Girvan LJ's conclusion (that it was not possible to decide that the outcome of a particular individual's case would have been different if the respondent had pursued a different policy in relation to training and education) depends on a process of deductive examination of the facts which differed from that applied by the judge rather than any difference of view as to *what the facts were*. Likewise, a decision on the question whether there was a duty to treat (as opposed to a duty to refer for treatment) police officers identified as suffering from or vulnerable to psychiatric or psychological disorder does not depend on the view that one takes of the facts (which on this issue were largely uncontroversial) but on the conclusion that one reaches by analysing the facts.

A duty to treat?

[45] It is apparent that initially OHU was not seen as a facility for the treatment of psychological or psychiatric illnesses, at least in the case of more significant conditions. This is unsurprising. This type of facility (which is replicated in a number of public service and private employment contexts) is naturally geared primarily to the detection of illnesses among employees, whether as a result of epidemiological survey or individual referral. Before the establishment of OHU, the Society for Occupational Medicine had recommended that it should not be responsible for treatment. Treatment was a matter for an individual officer's general medical practitioner and the National Health Service. Dr Courtney, who came from a background of occupational health, having worked since 1975 with Standard Telephones and Cables, explained that the role of occupational medicine was seen normally as a preventative rather than a therapeutic service. It was unrealistic to try to emulate the National Health Service which had the primary responsibility for treatment.

[46] Such evidence as was given on this topic on behalf of the plaintiffs was remarkably slight. Dr Stewart Turner, a consultant psychiatrist called on their behalf, stated in a medical report prepared for the litigation that by 1980 or shortly thereafter the RUC should have been offering in-house treatment for emotional and drinking problems, or else *ensuring that appropriate services were in place elsewhere for the treatment of RUC members*. This certainly does not partake of an unequivocal assertion of a duty to treat as opposed to a duty to refer fro treatment. And Dr Turner's evidence must be set against the testimony of Dr Slovak, a consultant occupational physician called on behalf of the respondent. He said that, apart from the RUC, he did not know of any emergency service employer in the UK that provided treatment for the consequences of exposure to traumatic events.

[47] In *Multiple Claimants -v- the Ministry of Defence* [2003] EWHC 1134 (QB) the Ministry accepted, without argument, that it owed a duty of care to provide service men and women with treatments for psychiatric conditions, provided those treatments were available at the material time. The generic argument on treatments in that case therefore turned on whether or not there was systemic negligence on the part of the MoD in failing to *deploy* such treatments as were available. Mr Hanna submitted, however, that the reason that the existence of a duty to treat was not a controversial issue in that case was that the MoD had been sued in two different capacities: firstly as an employer, *and secondly as the provider of general and specialist medical services*. When service men and women enter the Armed Forces the MoD assumes responsibility to provide them with a full medical service in place of the medical services provided by the National Health Service for members of the civilian population. In this respect, Mr Hanna argued, their circumstances are different from those of civilian employees in the UK (including police officers).

[48] It appears to us that the question whether the respondent was under a duty to provide treatment cannot be addressed solely as a matter of general principle but must reflect practical experience as well. Before turning to examine the actual experience of OHU in tackling the problem of psychiatric and psychological conditions in the police force, however, it is useful to recall the nature of the duty of an employer as it has been described in recent authority. Coghlin J described as "perhaps the best [recent] statement of general principle" the well-known passage from the judgment of Swanwick J in *Stokes v Guest, King and Nettlefold (Bolts and Nuts) Limited* [1968] 1 WLR 1776 at 1783 and we agree that this provides a useful starting point for the identification of the approach to be followed. This is how Swanwick J put it: -

> "… the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a

> recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of commonsense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probability of effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent".

[49] Of particular relevance to this case from the catalogue of factors outlined by Swanwick J is what the employer knew or ought to have known; the obligation to keep abreast of developing knowledge; the effectiveness of proposed precautions and the feasibility of providing those.

[50] In the field of stress-related employment claims, Hale LJ provided (in *Sutherland v Hatton* [2002] EWCA Civ 76) what has been subsequently described as a valuable contribution to the development of the law where she listed in paragraph 43 of the judgment a series of "practical propositions". Not all are relevant to the issue under consideration but the following are, to varying degrees, pertinent: -

> "(8) the employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk;
>
> (9) the size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties;

> (10) an employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this;
>
> (11) an employer who offers a confidential advice service, with referral to appropriate counselling or treatment services is unlikely to be found in breach of duty;
>
> …
>
> (13) in all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care;
>
> (14) the claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm."

[51] Mr Hanna highlighted the statement contained in sub-paragraph (11) of this list and pointed out that it had not been suggested in that case, or in any other case relating to stress at work, that the employer was himself under a duty to provide counselling or treatment services. It would be bizarre, he suggested, to find that the respondent was under a duty to treat. But it is important to note the actual terms of the particular proposition in sub-paragraph (11) – it stipulates referral to *appropriate* counselling or treatment services. Different considerations arise if it can be shown that the employer was aware that appropriate services were not available. It is therefore necessary to consider in a little detail the evolving knowledge of OHU about the standard of service available to members of the RUC who were referred either to NHS or to private consultants and other professionals.

[52] In a letter to PANI of 26 October 1987, seeking the appointment of a full-time clinical psychologist, Dr Courtney said that, as the OHU service developed, it became increasingly clear that there were insufficient resources for the workload that the unit had to undertake. They were unable to provide appointments as often as they considered necessary and follow-up appointments had become difficult. Dr Courtney's letter then contained the following significant passage: -

> "Workload: we have analysed the workload within the Occupational Health Unit for the first six months of 1987. During that period 427 `new'

> cases were dealt with which involved in broad terms psychological/psychiatric problems. Clearly only a relatively small proportion of these require professional psychological assessment and treatment but there is a major requirement to provide such support and treatment. As very often the problems are specific to the police force it is inappropriate and, indeed impossible to get psychological assistance through the normal NHS channels therefore we need to provide such service ourselves."

[53] Dr Courtney then outlined what he conceived to be the only three possible strategies as: (i) extending the current service to provide more time – he pointed out that this was unlikely to be feasible because the psychologist who was then providing sessional assistance could not spare any further time; (ii) referring those who required psychiatric or psychological treatment to outside agencies. Dr Courtney considered this to be "unrealistic" because there was a dearth of suitable experts and because the nature of the psychiatric and psychological problems experienced by RUC officers made outside referral unsuitable; and (iii) the engagement of a clinical psychologist. This last was the course that he recommended. He expanded on his proposal in the following passage from his letter: -

> "The potential result of this strategy not being adopted is that the current service will shortly be unable to cope with the workload. Not providing the proposed service would result in a grossly inadequate counselling and psychological service leading to an ineffective provision of psychological assessment and treatment."

[54] Coghlin J reviewed this and other evidence about OHU's developing views about how treatment might be provided for those who were judged to require it and he then expressed his conclusions in paragraph 146 of his judgment: -

> "**Treatment**
>
> [146] In the course of his closing submissions the defendant has argued that the duty of care that he owed to police officers, as his employees, did not include a duty to provide treatment. Mr Hanna QC emphasised the distinction between police officers and soldiers in respect of whom the Ministry of Defence assumed a responsibility to

provide a full medical service in place of the medical services provided for other members of the population by the National Health Service. The defendant submitted that, in this context, his duty of care was limited to providing a competently staffed OHU to advise and assess officers on a confidential basis; disseminating information about the OHU and the ability of police officers to refer to it on a confidential basis; identification and referral to the OHU of police officers displaying obvious signs suggestive of post traumatic mental ill-health; the assessment of those police officers who presented at the OHU; and the subsequent onward referral, on a voluntary basis, of those persons presenting themselves and assessed by the OHU staff to be in need of referral to health care professionals where such assessment and treatment as might be warranted. However, notwithstanding this submission, the defendant frankly conceded that, in practice, the OHU had provided treatment and/or access to treatment by health care professionals who were either employees of the OHU or, in the case of the sessional therapist, independent contractors. Despite the initial conception of the function of the OHU as being preventative, in keeping with the usual role of occupational medicine, it seems to me that this was a realistic and sensible concession to make in the context of the evidence of Dr Courtney, Dr Crowther, Nurse Meekin and the other nurses and professionals working within the OHU. Indeed, one of the main reasons put forward by Dr Courtney for the transition from a largely advisory to a therapeutic facility was the disappointing inability of the National Health Service, which remained at all times the primary provider of health services, to offer timely and relevant treatment. Dr Reid's 2006 report indicated that the alternative options to the OHU were private consultations starting at an average cost of £75 a session or GP referral to one of a very limited number of NHS therapists with an average waiting list of 18 months. More up to date reports indicate that the current waiting lists are likely to be substantially longer. Consequently, in the circumstances of this particular case, I am satisfied

> that the defendant's duty of care included a duty to treat, when appropriate, consistent with available resources."

[55] This review of the evidence and the conclusions expressed on it seem to us to partake clearly of an "evaluation of the facts", to borrow the words of Clarke LJ in the *Assicurazioni* case. Coghlin J also touched on many of the factors outlined by Swanwick J in the *Stokes* case and Hale LJ in the *Hatton* case. It appears to us, therefore, that this court should only interfere with Coghlin J's view on this aspect of his judgment if we conclude that he "has exceeded the generous ambit within which a reasonable disagreement is possible". As it happens, however, we consider that there is much force in the reasons that he has given for the conclusions that he reached. The respondent was aware of the potential for police service in Northern Ireland to expose officers to the type of trauma that could precipitate psychological or psychiatric illness. He was likewise aware – or should have been – of the shortcomings of the treatment available other than through OHU. He had been told about this in fairly unmistakable terms by Dr Courtney. He knew – or should have done – that, if untreated, the damage to the health of officers suffering from various psychiatric or psychological conditions might become chronic or, at least, increase significantly.

[56] In these circumstances, we find it impossible to say that the respondent is entitled to assert a complete and comprehensive immunity from liability to provide treatment. True it is that the only instance where the duty of an employer to treat employees for stress-related work conditions has been accepted is in the *Multiple claimants v MoD* case. It is also unquestionably correct that the armed services occupy a unique position in relation to the provision of health care that distinguishes them from most members of the public. But these circumstances cannot be regarded as determinative of the issue and we have, in any event, reached the conclusion that we have arrived at without reference to any possible analogy with members of the armed forces.

[57] What makes the position of RUC members unique, at least in recent UK history, is that they have been a force exposed on a regular basis to a level of trauma not experienced elsewhere. At the time that treatment (as well as diagnosis) of psychiatric and psychological problems within the RUC was being undertaken, the respondent was being told by his OHU team of the inadequacies of referrals to outside agencies. A stark dilemma was presented to him. Should those who were at risk of developing these conditions (or, even worse, had already suffered from them) be further exposed to circumstances that would either precipitate or exacerbate those problems without the prospect of adequate treatment or should he ensure that treatment was available from the resources of the force itself? We consider

that a blanket exemption from a duty to treat cannot in those circumstances be justified.

[58] That is not to say that the duty arises in every case where a police officer complained of psychiatric or psychological symptoms and we do not understand the judge to have suggested that this was so. He was careful to note that this duty was activated only where it was "appropriate [and] consistent with available resources". Our conclusion on this aspect of the respondent's appeal is that we reject the claim that he is entitled to a compete immunity from liability on the question of a duty to treat. Whether that duty will in fact be triggered will depend, however, on an examination of the particular facts of each individual case.

Final conclusions

[59] The appellant's appeal on the question of the question of resources is dismissed for the reasons earlier given in this judgment. The respondent's appeal on the question of training, information and education is allowed to the extent that is defined in Girvan LJ's judgment. The appeal in relation to the question whether the respondent was in fact in breach of that duty is no longer relevant. The respondent's appeal in relation to the duty to treat 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

_____

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.