Neutral Citation No. [2014] NIQB 54

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

Delivered: **11/04/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

THOMAS CROSSEY

Plaintiff;

-and-

THE CHIEF CONSTABLE OF THE POLICE SERVICE FOR NORTHERN IRELAND

Defendant.

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GILLEN J

Introduction

[1] The plaintiff in this matter claims damages for personal injuries, loss and damage sustained by him by reason of the unlawful entry to his apartment at 64 Henderson Avenue Belfast ,wrongful arrest, false imprisonment, unlawful detention, assault, battery , trespass to the person and negligence of the defendant, his servants and agents on 20 September 2006.

[2] After the termination of the case and after written submissions had been tendered by both parties, but before I had given judgment, Mr Kennedy QC who appeared on behalf of the plaintiff with Mr O'Hare, made a further submission. This was that the facts of the case gave rise to two related claims under the Human Rights Act 1998 ("HRA"). He relied on alleged breaches of articles 3 – the disproportionate use of force when police entered the plaintiff's house - and 8 - the unlawful force subsequently used to restrain the plaintiff - of the European Convention of Human Rights and Fundamental Freedoms 1950 (as incorporated in the Human Rights Act 1998), hereinafter called "the Convention ". Whilst Counsel conceded that these articles would add nothing to the damages sought at common law, he asserted the plaintiff was entitled to a declaration that his rights had been breached.

The plaintiff's case

[3] In evidence in chief and cross-examination before me of the plaintiff, the following points were made by him:

(1) In the early hours of 20 September 2006 the plaintiff was residing at an apartment at 64 Henderson Avenue, Belfast with his girlfriend and her daughter. A quarrel ensued between them in the course of which he asked her to leave. About 4.00 am she left but the child remained in her own room in the apartment.

(2) Soon thereafter police arrived outside the apartment. The plaintiff dressed the child and brought her outside to be met by police whereupon he handed the child over. The plaintiff indicated to the police that he felt that the girlfriend was not in a fit state to care for a child as she had been drinking alcohol and was under the influence of drugs namely cocaine.

(3) When he attempted to return to his flat, two policemen followed him and tried to prevent him entering by blocking the door and pushing him back asserting that they wanted to go into the flat. The plaintiff asked if they had a warrant but they said that they could come in if they wanted. Accordingly he thought that one police officer went in ahead of him and a further police officer behind.

(4) In the flat the plaintiff said he wanted to put some clothing on. At this stage the police were physically pushing him. He went to his bedroom and was moving to the wardrobe to get some clothing and footwear. There were approximately four door saddles resting there. They fell to the ground and made a loud cracking noise. He may have moved one of them.

(5) At this stage the police sprayed him with CS gas in the face. He had not been told he was being arrested or that they wished him to leave. There was no attempt to restrain him and there had been no fighting prior to the CS gas being sprayed at him.

(6) He was immediately placed in handcuffs with his hands behind his back. His hands were then placed in the air, he was pushed forward and he felt blows, namely punches, slaps and kicks on his torso, leg and head area. This attack happened entirely out of the blue. He then heard other officers coming in. He felt there were about four in total. It was a Constable Arbuthnot who had been leading the attack against him.

(7) He was taken downstairs from the apartment with a police officer holding each arm. In the course of that journey more blows were rained on him. An officer struck him on the head with a door saddle about two times.

(8) The police said that they were arresting him for assault.

(9) He was placed into the foot well of a police landrover being roughly treated and kicked in the stomach by the police officer who was in front of him.

(10) In the landrover a very aggressive woman police officer got hold of his ankles and kept twisting them. One of her male colleagues put his knee in the small of his back, raised his head and punched him in the right eye which immediately started to swell. He knew it was a black eye.

(11) Whilst lying on his stomach in the landrover blows were raining on him. There were strikes to his torso, back and head. He was not struggling because the area was too narrow.

(12) The vehicle arrived at Antrim Police Station. In the land rover the female police officer had said to him that he was further being arrested for possession of a class A drug. Whilst waiting at the police vehicle before being brought into the police station, a police officer had said to him "if you make a move big lad I'll shoot you in the chest". He purported to point out an officer that he thought was this officer in court. This officer later denied being at that scene.

(13) Once there, the custody sergeant was shocked at his condition and told him he would need a doctor.

(14) The police doctor observed that his thumb was swollen (it had been twisted as he was being led out) and there was blood in his spittle. She referred him to hospital where he was taken by other police.

(15) After he went home, he suffered severe consequences of the effects of gas on his face, neck and chest. It was similar to severe sunburn with the skin peeling off in large amounts. The injuries to his body affected him for 2-4 weeks. Psychological sequelae lasted much longer.

(16) The plaintiff admitted that he had a criminal record involving armed robbery over 20 years ago when he was aged 20/21.

[4] In cross-examination of Mr Crossey, the following points emerged.

(1) He did not recall telling his consultant psychiatrist Dr Mangan that he did not use illicit drugs. He did not think to tell Dr Mangan that he had a long history of cocaine use because he believed that he already knew about this from his records. His recollection in any event was that he only used cocaine sporadically in 2005 even though in that year he was assessed at the Belfast Community Addiction Service Centre and told them he was using cocaine 2 to 3 times per week investing £120 per week. He did not tell Dr Mangan that he had a previous psychiatric history save for an indication that he had problems with depression following bereavement in December 2005. In fact he did have treatment for depression in 1997, counselling for cocaine addiction in 2001 and in 2002 again treatment for the result of death threats. He did not tell Dr Mangan he had a long history of paranoia associated with cocaine use because "it was not a serious problem". He denied deliberately concealing from Dr Mangan that he had regularly used cocaine, and had suffered hallucinations, paranoia and sleeplessness prior to this incident. He also had no recollection of being referred for anger management and he asserted he had no trouble with anger and aggression.

(2) Crossey was unaware that the police had found three cut straws with traces of cocaine in his flat on the evening that the incident had occurred. He said that he knew nothing about it and he could not be responsible if someone else had been using it in his flat.

(3) He had been to his general practitioner on 3 October 2006, two weeks after the incident, but the general practitioner notes made no reference whatsoever to the aftermath of this incident. He countered this by saying the doctor must simply have given a summary of that visit in his notes.

(5) As well as his conviction for robbery, he had been convicted of threats to kill. He asserted this occurred when he caught his then girlfriend in bed with his friend many years before.

(6) Turning to the incident itself, the plaintiff asserted that his girlfriend had informed him that she had taken drugs earlier that night and accordingly he may said to have said to police that she was "off her head".

(7) The plaintiff denied that Section 23 of the Misuse of Drugs Act 1971 was ever mentioned to him by police when they entered his apartment

and he claimed that if it had been mentioned he would have let the police in instead of trying to stop them.

(8) He denied that in the bedroom he had said to the police "just you wait and I'll see you now" and then proceeded to walk to the cupboard, lift the saddle board above his head and move to the police in a threatening manner. The plaintiff claimed that at most he would have pushed the saddle board to the side and that he never lifted it above his head.

(9) He also denied that he was struggling violently, swinging his head and his legs as the police were attempting to extract him from the flat. He also denied ever trying to headbutt Constable Arbuthnot or any other police officer. Further he denied resisting himself being placed in the landrover by putting both feet on the rear steps of the vehicle and tensing up his body.

(10) The plaintiff was questioned as to why he had told the Ombudsman "I do not believe any female officer was involved in my being assaulted unless they did it silently". He said that he must have indicated this because the behaviour of the female police officer was not very much compared to the behaviour of the males.

(11) He accepted that in his Police Ombudsman statement he had made no reference whatsoever to the alleged threat of the police officer to shoot him in the chest. His reasons for this were that it was not unusual for him to be threatened by police. Moreover he made no mention of this to Dr Mangan when asked to describe the circumstances of the events, albeit he did mention it to Dr Fleming on 22 January 2013 when examined on behalf of the defendant.

[5] Dr Brendan Sinnott, who was called on behalf of the plaintiff, described the effects of CS gas on a person as a potent sensory irritant especially to the mucous membranes provoking watering of the eyes and nose and into the windpipe. So far as the plaintiff's other injuries were concerned (see below in account of Dr O'Kane at paragraph 6), Dr Sinnott recognised he was dependent on the history given to him by the plaintiff and he had not seen any statements of the police. He agreed that the injuries the plaintiff sustained could be caused if he was engaged in a struggle with police although they could also be consistent with the use of blunt trauma against him.

[6] Dr O'Kane a forensic medical officer was called to give evidence dealing with her examination of the plaintiff on the morning of 20 September 2006 at 8.38 am at Antrim Police Station. She found a number of bruises, abrasions and lesions on his right side of his back, right hand, left hand, lower back, upper back, left flank,

abdomen, right knee, right and left shins, left calf, right nose and left upper arm. His abdomen was soft with no tenderness and he had tenderness to his right thumb.

[7] In the course of her examination in chief and cross-examination Dr O'Kane made a number of points arising out of this examination.

(1) She did not document a black eye and would have recorded this if she had observed one. There was an injury below on the lateral side of his nose but it was not consistent with a punch to the eye. If he had been punched about the face she would have expected to see deeper bruising or swelling.

(2) The injury to his nose and eye could have been consistent with a police officer blocking an attempted headbutt by him with his hand pulled up to protect himself. The injury was consistent with either a blocking blow or a punch.

(3) Of the allegation that the plaintiff claimed to have been kicked in the ribs and stomach, there was some redness on his abdomen but there was no tenderness which she would have expected to have found if it had been the case he was kicked.

(4) There were signs on his wrist of having been handcuffed but not excessively tight as there were no abrasion.

(5) There was no particular definite pattern to his injuries necessarily consistent with him being manhandled down stairs or kicked.

(6) Of the allegation that he had been struck on the head with a saddle board, she would have expected some erythema or bruising or tenderness, none of which she found on his head.

(7) If he had been kicked with any force, she would have expected deeper bruising to be found on the various areas where abrasion/bruising were found.

(8) There were no toe-cap marks which would have brought about some deeper bruising if they had occurred as a result of kicking.

(9) There was no allegation made to her of ankle twisting and no gripping marks on the ankles suggestive of someone gripping his ankle and twisting it.

(10) The multiple areas of abrasion could have been caused by contact with stairs or being in a landrover. They could have been caused by coming into contact with walls/stairs or the side of a landrover.

(12) Her conclusions were that she would have expected more bruising to be found in light of his allegations and to have elicited more tenderness. If he was kicked in the ribs she would have expected for example to have found tenderness there. She would have definitely palpated his abdomen and he gave no complaint whatsoever of pain there or tenderness.

[8] Dr O'Kane said she had been doing this job for eight years and had observed injuries caused by struggling and contact with walls/floors/solid objects .The plaintiff's injuries were consistent with someone struggling for example in a landrover although some could also have been consistent with a punch or a kick although there was no pattern.

[9] On the quantum aspect of the case, counsel had agreed that the competing reports of Dr Mangan MRCP consultant psychiatrist on behalf of the plaintiff (reports of 1 March 2011 and 3 March 2011) and Dr Fleming FRCP (report of 22 January 2013) could be put before me. The contents were not agreed but nonetheless the parties agreed that reports be put before me without the necessity of calling the witnesses. Dr Mangan recorded that the plaintiff's medical records showed he was previously prescribed anti-depressant medication and hypnotics and confirmed an extensive past history of substance misuse. He was having significant problems with his mental health prior to this incident. In his opinion the plaintiff suffered serious and disabling psychological injuries following his traumatic experience with the police in the form of a generalised anxiety disorder.

[11] Dr Fleming recorded that the plaintiff had other chronic problems in terms of mental health which had been on-going for many years. It was his view that there was a strong likelihood that this particular incident had played a marginal role in his overall poor mental health because there was a wide range of other stresses in his life that had contributed over many years to his chronic poor mental health. However the incident had fuelled his very negative perception of an attitude towards the police service and the State but he said that was very different from attributing it to a diagnosis of recurrent depression and anxiety persisting over a six year period since the incident.

The defendant's evidence

[12] The defendant called a number of police officers who had been present at the scene. Some of their evidence overlapped. The following points emerged from their evidence.

Constable Arbuthnot

(1) He arrived on the scene and spoke to Ms Fricker, the girlfriend of the plaintiff who was very emotional and tearful.

(2) He then proceeded upstairs towards the flat where the plaintiff lived and met him on the stairwell. He was highly agitated, angry and shouting to the point that it was difficult to make him out. He claimed that Ms Fricker had been taking cocaine in her flat all night and demanded to know what the police were going to do about it. Their first instinct was the welfare of the child he was carrying and Woman Constable Wylie took the child downstairs to safety.

(3) The plaintiff was ranting at the police and said that if they were not going to do anything he was going to call the Ombudsman's Office. He "stormed back" upstairs to his flat and Constable Arbuthnot followed.

(4) He had made a serious allegation about use of drugs and the officer felt the police were duty bound to follow this up. The plaintiff was shouting expletives such as "fuck off" when the police tried to explain to him that in light of the allegations of drug use and the child in the flat the police wanted to go and see if drugs were there and the conditions in which the child was being kept. The plaintiff said "You stay the fuck out of my flat" and attempted to headbutt Constable Arbuthnot.

(5) At that point Constable Hann made his way up to that police officer. They attempted to go into the flat of the plaintiff through the front door but the plaintiff attempted to close himself inside with a metal gate.

(6) Constable Arbuthnot put his foot in the way of the gate so it could not be closed and the two officers were then able to push the gate open. Constable Arbuthnot believed that he quoted the Misuse of Drugs Act 1971 to the plaintiff and went into the hallway.

(7) The plaintiff was making a telephone call, demanded to know the names of the police and was very aggressive and angry. When the police suggested that he take a seat and they would talk about this matter he went into the bedroom.

(8) The two police officers claimed that they stood in the bedroom by the door and Crossey said "Okay we'll see how big you are. Just you wait" and he then put on some desert boots. He then reached to his left side and pulled out a large plank of wood which was similar in size

to a cricket bat. He raised it above his right shoulder and quickly walked towards the police.

(9) Constable Arbuthnot then claimed that he took a step back to the door, drew his CS spray, shouted "CS spray" and sprayed it at the face and body of the plaintiff for about three seconds. Constable Hann deployed his CS gas at about the same time. This was done because they both felt that they were going to be subjected to an immediate threat of assault.

(10) Constable Arbuthnot felt that his baton was not as big as the plank of wood held by the plaintiff and given the short distance between them he had no option but to use the CS spray. He did not feel he had time to retreat out of the room or to give a more explicit warning.

(11) The plaintiff was then handcuffed but he was resistant and struggling all the time. He was swinging his head, shaking his upper body and kicking out with his legs. Other police officers arrived and it took about four of them to bring him downstairs. There was a struggle while this was happening. He emphatically denied that the plaintiff was hit from above by a saddle board whilst being brought downstairs.

Constable Hann

[13] This officer gave broadly similar evidence to that of Constable Arbuthnot. In examination in chief and cross-examination the following points emerged:

(1) When he arrived on the scene he saw woman Constable Wylie bringing the child down from the flat from where she and Constable Arbuthnot had gone to speak to Crossey. He heard raised voices and shouting and thereupon ran up to the disturbance at the top of the stairs nearer to the flat of Crossey. He saw Crossey struggling with Arbuthnot and the plaintiff attempting to headbutt the police officer. He assisted Arbuthnot to try and force the metal gate open to allow them to enter the flat. He could not remember where Constable Wylie was but he could have gone past her as he went upstairs.

(2) Once inside the flat there was a torrent of abuse and name calling by the plaintiff. In a bedroom Crossey went over to the cupboard, lent into it, and produced a three foot plank of wood in his hand which was raised above his head and advanced towards the police officers. Hann was at the foot of the bed at that stage close to the doorway and he thought that the plaintiff was going to assault himself and Arbuthnot with the wood.

(3) Hann immediately drew his CS spray and sprayed the plaintiff. He had training on CS spray before the incident several times and was aware of the warning that was advisable. In the circumstances in this case it was not practical to give such a warning and the time spent in doing so would have resulted in the officers being seriously injured. He sprayed him when he was about five feet away. This officer had only used CS gas 1/2 times before. He believed Arbuthnot had said "CS spray. Stop."

(4) He considered that backing out of his small bedroom into a small confined hallway would have afforded them even less protection than they already had.

(5) The plaintiff was taken out of the flat and downstairs to a police vehicle. He was struggling all the way.

(6) He returned to the flat because Ms Fricker had stated that there was cocaine there. They found three straws and remnants of powder in them which were subsequently tested and found to contain cocaine.

(7) He next saw the plaintiff outside the custody suite at Antrim Police Station sitting on the back steps of the landrover. He was trying to get at his mobile phone. Constable Mann informed him that he could speak to the Custody Sergeant inside about that and Crossey said "I'll bite your fucking face off".

(8) Constable Hann recorded that at Antrim Road Police Station he had observed the plaintiff make a phone call from his mobile phone albeit he was handcuffed from behind. Whether this officer has confused precisely when he saw the plaintiff with his mobile I do not know .Indeed I see no reason to believe why Mr Crossey should not have had his phone in his clothing for example a pocket in his tee-shirt or that he should not have been attempting to use his phone notwithstanding that he was handcuffed. It is such an inconsequential detail that I do not believe Hann is fabricating it .What purpose would fabrication have served?

Woman Constable Hamilton

[14] Woman Constable Hamilton, formerly Constable Wylie, had also been at the scene of this incident. I make it clear from the outset that whilst I had no doubt that this witness was an honest person, I found her recollection of the incident to be so flawed as a result of the passage of the time that I have placed no reliance on what she said. She described arriving at the scene and speaking to Ms Fricker who was visibly shaking and crying. She and Arbuthnot had then gone up the flight of stairs

to meet with Crossey who was coming down the second flight with the child. He seemed highly agitated asserting that Ms Fricker was an unfit mother, that she had consumed cocaine and threatening the police with the Ombudsman. She then took the child back to Ms Fricker leaving Crossey with Constable Arbuthnot.

[15] This witness called for assistance using her radio and Constable Hann arrived on the scene. She saw Crossey attempt to headbutt Constable Arbuthnot at the time Hann was there. She also saw the heavy gates behind the door with Crossey pushing the gates to keep the police out.

[16] She witnessed Crossey being led out by Arbuthnot handcuffed to the rear. She was aware that CS spray had been used and he was struggling violently.

[17] After Crossey was taken away she went up to the flat and found a child's plastic toy with crystallised powder and also three cut straws and an inhaler with tinfoil and pricks in the tinfoil which were seized. Forensic testing later showed signs of cocaine on the straws. The powder was in fact sherbert. She also took control of the saddle board.

[18] After she returned to Antrim Road she saw Crossey at the rear of the landrover.

[19] A number of flaws emerged in this police officer's evidence during the course of cross-examination. First, her notebook recorded that "it looked as if (Crossey) was going to headbutt" the police officer. I regard this as significantly different from her evidence to me that she had seen Crossey attempting to headbutt the police officer. Secondly, she claimed before me that she heard the CS gas warning being given. That was not contained in her notebook and was not contained in the statement she made to the Ombudsman. Thirdly, she told me that she was standing above Crossey when he was taken downstairs by the police. In her statement to the Ombudsman she said she was waiting below the men bringing Crossey down. I consider that these inaccuracies may well have been caused by the passage of time because my impression of Constable Hamilton was that she was fundamentally an honest person doing her best to recall an incident that occurred so long ago. However such were the flaws that I paid no attention to her evidence.

Constable Dunlop

[20] This officer made the following points in the course of his evidence:

(1) When he arrived at the scene Constable Arbuthnot was coming down the steps from the flat with Crossey handcuffed. He saw him shaking from side to side and trying to break free from Arbuthnot's grasp. He also witnessed Crossey attempting to headbutt Arbuthnot and shaking his head in Arbuthnot's direction. This officer assisted by taking his

left arm while going downstairs .The plaintiff began shaking in the direction of Constable Dunlop and attempted to headbutt him, kicking out with his legs.

(2) Nobody hit the plaintiff over the head with a saddle board.

(3) This officer attempted to put Crossey into the landrover but he tensed his body and refused to bend over, was shaking his head from side and side and was kicking out with one of his feet. Accordingly this officer pushed him into the rear of the landrover by his back. This caused him to fall into the landrover onto his back.

(4) When Constable Dunlop got into the vehicle with him the plaintiff kicked him in the direction of his chest on 2 or 3 occasions. Accordingly the police officer restrained his legs so he could not kick him any further. Once he had stopped his legs kicking out, he lifted him onto the bench seat behind the passenger seat.

(5) At this stage Constable McConville got into the landrover and Dunlop had no further dealings with him.

Constable McConville

[21] Constable McConville made the following points in the course of examination in chief and cross-examination.

(1) When he arrived on the scene he observed Crossey being escorted out of the apartment building by other police officers. He was handcuffed but was struggling violently, flailing around "like a mad man" throwing his head about and kicking his feet out attempting to free himself from the grasp of the police officers.

(2) He was brought to the landrover in which Constable McConville had arrived on the scene. He refused to get into the vehicle rigidly fixing himself on the bottom step. Constable Dunlop had to push him into the landrover forcibly. He fell into the landrover and landed on the floor between the two benches.

(3) Once he had fallen, he turned and kicked out at Constable Dunlop connecting with him in the chest area. At this stage Constable Dunlop manoeuvred him into the bench onto the left hand side of the landrover passenger seat.

(4) Constable Dunlop got out of the vehicle and Constable McConville got in. Crossey attempted to get out and he had to be restrained. He

kicked Constable McConville's legs and attempted to headbutt him. This was a sudden movement and Constable McConville blocked the headbutt with his hand and his face connected with that hand.

(5) Constable Henderson came on to the scene and helped McConville take him off the bench and put him on the floor on his front. The rationale at this stage was to prevent more of the behaviour that he had been engaging in. Crossey threatened and shouted at the police officers.

(6) Whilst on the floor Crossey still had to be restrained. Constable McConville held him by the upper body and the female police officer held him by the feet at the lower end. He denied punching him at any time.

(7) Constable McConville suffered a slight injury to his leg and a cut below his elbow.

Constable Mulholland

[22] This was the female police officer in the vehicle with Constable McConville. In the course of her evidence in chief and cross-examination the following points were made.

(1) She saw Crossey being taken to the police landrover screaming, shouting and very aggressive. After he had been placed in the landrover she got in. Constable McConville was there with Crossey. He was placed face down on the floor.

(2) Once Constable Mulholland got in she was affected by the effects of the CS spray still on Crossey. She told him not to wipe his face and opened the windows to clear the crystals off his face.

(3) The plaintiff was thrashing around wildly with his feet and being restrained by Constable McConville. This police officer was afraid of being kicked on the face and hand. Crossey's feet were very close to her face.

(4) She knew the metal floor was quite rough. She held his feet because they had no leg restraints on board. She grabbed each foot in each hand and pulled his feet together. She did not twist his ankle and simply told him to stop moving about.

[23] Constable McCrea gave evidence of no consequence.

[24] Under the 1997 Civil Evidence Order (Northern Ireland) evidence was produced that cocaine had been found on the straws discovered in the house.

Conclusions

8 Unlawful entry

[25] It is clear that Constable Arbuthnot and Constable Hann on their own case intended to search the flat of the plaintiff under Section 23 of the Misuse of Drugs Act 1971. It was equally clear that they had no such power of entry and search because Section 23 of the legislation requires the grant of a search warrant by a court absent the consent of the occupier.

[26] Mr Aldworth seeks to counter this gap in the defendant's case by invoking statutory powers under the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE"). To that end he relies upon Article 18 which provides where relevant:

> "19.-(1) Subject to the following provisions of this Article, and without prejudice to any other statutory provision, a constable may enter and search any premises for the purpose –
>
> (b) Of arresting a person for an indictable offence;
>
> (3) The power of search conferred by this Article is only a power to search to the extent that is reasonably required for the purpose for which the power of entry is exercised."

[27] Mr Aldworth contended that having regard to the allegations that cocaine, a class A drug, had been used by the plaintiff and/or his partner in the plaintiff's flat, the police had reasonable grounds for arresting the plaintiff on suspicion of possession of cocaine albeit the assault on the police with a saddle board supervened leading to the plaintiff's arrest for that offence. He was subsequently arrested by Constable Wiley on arrival at Antrim Road police station on suspicion of possession of a Class A and possession of an offensive weapon.

[28] Counsel also invoked the common law power of entry for police to deal with or prevent a breach of the peace. Relying on R v Howell [1982] QB 416 at 426G, Mr Aldworth asserts that a breach of the peace take place when an act is done or threatened "which actually harms a person or in his presence, his property or is likely to cause such harm or put someone in fear of such harm being done." The power of entry applies not only in relation to a breach of the peace which is actually on-going but to an apprehended breach of the peace. Finally in this context, counsel

drew my attention to the fact that police have retained a common law power to search premises for evidence when someone has been arrested (see R (Rottman) v Commissioner of Police for the Metropolis [2002] 2 AC 692.

[29] Calling in aid these powers, Mr Aldworth contends that the behaviour of the plaintiff when he initially confronted Constable Arbuthnot (and subsequently that officer and Constable Hann outside his flat) constituted a breach of the peace or alternatively they had reasonable grounds for apprehending a breach of the peace given his behaviour. Either way they were entitled to exercise their common law power to enter the plaintiff's premises to deal with a breach of the peace.

[30] I am unpersuaded by this aspect of Mr Aldworth's argument. The fact of the matter is that the police purported to make this entry under the Misuse of Drugs Act and clearly at that stage were not choosing to invoke their powers under PACE or common law..

[31] It is well established that when police officers exercise powers which interfere with fundamental rights, they must if practicable, give reasons to the person. In O'Loughlin v Chief Constable of Essex [1998] 1 W.L.R. 374 the court held that when the police were exercising statutory powers of entry they were obliged to inform the occupier of the premises of the proper reason why entry was required, unless circumstances made it impossible, impracticable or undesirable to give the reason. In my view there was no reason why Constable Arbuthnot could not have given a proper reason to Crossey why they required entry before or during the time he was attempting to gain entry. Police officers cannot simply enter premises without more and later decide post hoc facto what the justification may have been. With the benefit of hindsight a number of possibilities have occurred to him which might well have justified a forced entry but he had not invoked these considerations, other than the 1971 Act, at the time when he actually gained entry.

[32] I am satisfied therefore that the initial entry to Crossey's flat was unlawful.

Wrongful arrest, false imprisonment, unlawful detention, assault, battery, trespass to the person and negligence.

[33] On these issues the credibility of the witnesses was a crucial factor. I found the plaintiff to be a completely unreliable and disingenuous witness who clearly found difficulty distinguishing between fact and fiction. The grim truth is that his evidence was regularly punctuated with implausible assertions and self-evident lies. Some of the more obvious examples of this which have fuelled my conclusion are as follows:

(1) He concealed from Dr Mangan, his own consultant psychiatrist, his previous abuse of illicit drugs including cocaine and his psychiatric history. His records revealed a history of paranoia, anxiety,

hallucinations, adverse reaction to death threats etc. all of which he obviously intentionally withheld from Dr Mangan.

(2) In evidence before me he deliberately attempted to minimise his previous history of drug abuse notwithstanding that his medical records set out with compelling clarity a longstanding problem back to the mid-1990s.

(3) His version of events contained wholly implausible internal contradictions in circumstances where objective evidence often existed to challenge his account. Why would he have told the Ombudsman in 2006 that he did not believe any female had been involved in the assault if it was true, as he told me in evidence, that a female police officer had on a number of occasions twisted his ankles?

(4) It is also significant in this regard that Dr O'Kane found absolutely no mark on his ankles indicating any serious gripping by a police officer.

(5) Why did Dr O'Kane not find a blackened eye when she examined him shortly after his arrest if, as he emphatically told me, a police officer had lifted his head and punched him in the eye?

(6) Why did he not tell the Ombudsman about the threat by a police officer to shoot him in the chest if, as he told me, this clearly happened outside Antrim Police Station?

(7) Why, if he was struck on the head on two occasions by a wooden saddle board, did Dr O'Kane find no mark or tenderness on his head when she examined him at 8.30 am on the morning of the alleged assault. It is inconceivable that if he had been hit in this manner there would not have been such a mark or tenderness.

(8) Why would he not have told his GP when attending on 3 October 2006 (when attending with various psychiatric problems) about the impact of this incident? It is inconceivable that if he had told the doctor about the sequelae of this incident, that it would not have been recorded. These are all instances where one would have expected to have found some objective and independent evidence to back up his allegations. The absence of such evidence is indicative of where the truth lies.

(9) Dr O'Kane found no signs of tenderness in various areas where he alleged he had been kicked e.g. the abdomen. I have no doubt that if he had been beaten in the manner he described that such tenderness would have been obvious to Dr O'Kane.

(10) Why in his Police Ombudsman statement did he make no reference whatsoever to the twisting of his ankles by a female police officer and indeed specifically deny any assault by a female police officer.

(11) On the issue of credibility, a number of allegations he made were inherently implausible and highly unlikely to have occurred. A prime example of this is his assertion that for absolutely no reason two police officers simultaneously produced their CS spray canisters and sprayed him with CS spray. For this to be true, the two officers must have simultaneously decided to do this without the slightest provocation on his part and that at a time when he was innocently putting his shoes on and some saddle boards fell over. The contrasting story of the police namely that he attempted to assault them with a saddle board is all the more likely. I watched them carefully when he was giving this evidence and his demeanour betrayed the evident mendacity in which he was engaging.

[34] I consider the evidence of Dr O'Kane very important in this case. She was a forthright and informative witness. I find no basis for the suggestion by the counsel on behalf of the plaintiff that she evinced bias against the plaintiff. Her findings of 23 injury sites, including some crescentric bruising in the middle of the abdomen, were in her view consistent with contact with surface edges or corners was both credible and plausible. The absence of tenderness on various occasions was of significance in the face of allegations by the plaintiff of being kicked and punched. I accept her assertion that the injuries which she found on the plaintiff were equally consistent with a struggle of the type described by the police officers before me. I believe this suggestion rhymes with evidence that he was struggling violently on a number of occasions including coming down the stairs from his flat, outside the police landrover and indeed inside the police landrover. There was ample opportunity for him during such violent behaviour to sustain a number of injuries by coming into contact with hard surfaces. This was a plaintiff with a past record of criminal violence and I have no doubt that he exhibited his tendencies on the night in question.

[35] I find the evidence of the police officers, with the exception of Constable Hamilton, to be impressive, forthcoming and candid. I have carefully read the written closing submissions of the plaintiff's counsel highlighting alleged inconsistencies in the police evidence. Many of these points were not raised in cross-examination of the police officers, but notwithstanding that I have carefully considered them. I find none of them to be sustained in light of the overwhelming lack of credibility in the plaintiff's evidence and my careful assessment of these officers when giving evidence before me.

Use of CS spray

[36] I now turn to the discrete issue of the discharge of CS spray by Constables Arbuthnot and Constable Hann. Mr Aldworth rightly conceded that use of CS spray on an individual prima facie constitutes a trespass to the person. To be lawful the trespass must be justified. Counsel was correct to indicate that whether or not it is justified in a given case is determined in accordance with the general principles of self-defence and reasonable force. Those principles are well trammelled and do not require citation of authorities for the following propositions:

- Reasonable force can be used to defend a person himself or to rescue another person from attack.

- Action to repel an attack can be taken before a blow is struck.

- The person using such reasonable force must honestly believe that the circumstances were such that such force was required. Once that has been established i.e. the subjective test is passed, an objective test is then applied to determine whether the force used was necessary and proportionate in the circumstances which the person using such force believed to exist.

[37] Counsel correctly drew my attention to the fact that the courts must recognise that the decision relating to the use of force may have to be made in split seconds and in very difficult circumstances.

[38] At the time of this incident, the use of CS spray was subject to PSNI General Order 28/2004 (as amended). Section 3 of that Order provides that the use of such spray may be appropriate against:

> "(a) Those offering a level of violence which cannot be appropriately dealt with by lower levels of violence.
>
> (b) Violent offenders, other than those armed with firearms or similar remote injury weapons, where failure to induce 'immediate' incapacitation would increase the risks to all present."

[39] Paragraph (5) of Section 3 enjoins the police to give a clear warning of their intent to use that spray "unless to do so would compromise the safety of any person, or a warning would be clearly inappropriate or pointless to the circumstances of the incident". The wording for such a warning should be "I am police officer. If you do not comply with my instructions I will use CS spray".

[40] The Order also lays down some specific guidance on the need for accuracy and the relevant operating distances over which the gas should be used,

emphasising that police officers must be prepared to justify not only the use of the spray but also the decision to use it in the circumstances.

[41] I consider that the police officers in this case were entirely justified in invoking the use of CS spray albeit that the warning given was not as comprehensive as should be given in normal circumstances. I have no doubt that these officers were confronted by Crossey with a raised saddle board and that they were justified in concluding that they were in danger of being struck and injured. The decision as to how to handle this dangerous situation had to be made in seconds or indeed fractions of seconds. I consider that the decision not to retreat from the bedroom into a narrow hallway was justified and that Constable Arbuthnot gave the only warning that was available to him to issue in the limited time he had to consider the situation. The fact that both officers used the spray almost simultaneously is indicative of the grave danger that both felt that they were in. I do not believe that the level of violence which was being offered by Crossey at this stage could have been dealt with by a lower level of violence on the part of the police and that had they failed to induce immediate incapacitation then the risks of severe injury to either or both of them were all too real. In substance I consider that the use of CS spray in this case was not only appropriate but proportionate given the circumstances.

Articles 3 and 8 of the EC for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998).

[42] As indicated in paragraph 2 above an application was made at a very late stage indeed to amend the statement of claim to include these grounds under the Convention.

[43] A proposed amended defence by the defendant pleaded, inter alia, an averment that the plaintiff's claim pursuant to Section 7(1)(a) of the HRA for breach of Article 3 and/or Article 8 of the Convention was time barred by Section 7(5). Further the defendant averred that it would not be equitable having regard to all the circumstances of the case to extend time. In any event the defendant submitted that any cause of action pursuit to Section 7(1)(a) for breach of Convention rights added nothing substantive to the plaintiff's domestic law causes of action or the plaintiff's remedies and accordingly the plaintiff was not prejudiced by the operation of the primary limitation period provided by Section 7(5). In any event the defendant argued that a declaration in respect of any of the alleged breaches of Convention rights was a discretionary remedy provided by, and subject to, Section 8 of the HRA and cannot be granted "regardless" of any limitation issue. In any event the primary remedy sought by the plaintiff was damages and, if the court held that he was entitled to damages, the granting of that remedy would be sufficient acknowledgement of any infringement of his Convention rights.

[44] The fundamental principle of the HRA is that it is unlawful for a public authority to act incompatibly with Convention rights in breach of Section 6(1) of the Act. The rules concerning proceedings for breaches of Section 6(1) are contained in Section 7 of the Act which states where relevant:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by Section 6(1) may:
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

[45] This section therefore contemplates two ways in which a person may advance a Convention claim that a public authority has acted in a way which is incompatible with his Convention rights. Either by making a freestanding claim based on Convention rights in accordance with Section 7(1)(a) or by relying on a Convention right in proceedings in accordance with Section 7(1)(b).

[46] Section 7(5) of the Act sets out the time limits that will apply to any proceedings brought by a claimant against the public authority claiming a breach of Section 6(1) under Section 7(1)(a) of the Act. If however a person simply relies on Convention Rights in any legal proceedings under Section 7(1)(b), there will be no such time limits.

[47] Section 7(5) of the Act states:

> "Proceedings under subsection (1)(a) must be brought before the end of—
>
> (a) the period of one year beginning with the date on which the act complained of took place; or
>
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question."

[48] The twelve month period will be computed from the date the "act complained of" took place.

[49] The discretion to extend time is defined in very wide terms. The discretion to extend will only come into play where the complainant is able to identify a fact or circumstances which makes it equitable to displace the general rule. If there is such a fact or circumstance, then the court must ascertain the longer period for which it considers time should be extended. (See "The Law of Human Rights" by Clayton and Tomilson 2nd Edition Volume 1 at 22.69(hereinafter called "the authors").

[50] The authors record at 22.70:

> "In contrast to the position in discrimination cases it has been held that the word 'equitable' in Section 7(5)(b) has an obvious resonance with its use in Section 33 of the Limitation Act 1980 – which permits the court to extend the limitation period in personal injuries cases. It will be useful for the court to consider the Section 33(3) checklist when considering whether to extend time. "[*The authors invoke for this proposition London Borough Southwark v Alfolabi [2003] ICR 220 where it was said that this could be useful in a race discrimination case]*

[51] However it is important to appreciate in this context that there is a clear distinction in terms of objectives between civil actions at common law and Convention claims. This distinction was illuminatingly addressed by Lord Brown of Eaton-Under-Ehyood in Van Colle v Chief Constable of the Hertfordshire Police [2009] 1 AC 225 at (138) where he said:

> "… Convention claims have very different objectives from civil actions. Whereas civil actions are designed essentially to compensate claimants for their losses Convention claims are intended rather to uphold minimum human right standards and to vindicate those rights. That is why time limits are markedly shorter – the one year (albeit extendable) limitation under Section 7(5) of the Human Rights Act comparable to the one year permitted for defamation claims intended, analogously, to vindicate a claimant's reputation. It is also why Section 8(3) of the Act provides that no damages are to be awarded unless necessary for just satisfaction."

[52] In that context, I can find no equitable reason to extend the limitation period to allow these Convention rights to be invoked. There is no good reason put before me why they could not have been included in the earlier writ, statement of claim, at the outset of the trial or even during the course of the trial. Nothing would be added to the damages to be awarded if the plaintiff had succeeded at common law. I therefore refuse to extend the limitation period in this case in the absence of an equitable reason.

[53] Even if I am wrong in this conclusion, I am satisfied that a finding at common law against the defendant would have been more than sufficient to vindicate his rights and would have added nothing by way of extra damages to any award that I have made. This claim was essentially to obtain compensation. I find no basis at this late stage for concluding that a declaration that a breach of Article 3 or Article 8 had occurred would be of any benefit in validating his claim.

[54] I add further that in any event on the facts that I have found in this case, I do not believe that the plaintiff was treated in a manner that constituted torture or inhuman or degrading treatment contrary to article 3 of the Convention. Similarly, on the facts that I have found I find no breach of the plaintiff's right to respect for his private and family life or privacy contrary to article 8 of the Convention. Insofar as it was a breach of his right to respect for his home by virtue of the unlawful entry, I am satisfied that the findings I have made are sufficient damages and his rights would not be further vindicated in any material way by the declaration now sought.

[55] The only finding I therefore make in favour of the plaintiff is that the defendants had been guilty of unlawful entry to his property. I am satisfied that the police could have lawfully entered the property without the consent of the plaintiff had they given some thought to the matter or invoked the appropriate powers and informed the plaintiff accordingly .Hence although their entry was unlawful I find the outrageous behaviour of the plaintiff was such that there is no basis for aggravated or exemplary damages. So self-evident is this conclusion that it is unnecessary for me to burden this judgment with a recitation of the authorities on these topics. I award him £1250 as compensation for the unlawful entry. I now invite counsel to address me on the question of costs.