Neutral Citation No: [2020] NICA 9	*Ref:*	**McC11180**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**06/02/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

BETWEEN:

DESMOND JAMES DOHERTY
AS EXECUTOR OF THE ESTATE OF
BRIDGET MCGUIGAN GALLAGHER (DECEASED)

PLAINTIFFS/RESPONDENTS;

-and-

MINISTRY OF DEFENCE

DEFENDANT/APPELLANT.

Before: McCloskey LJ, Colton J and Sir Richard McLaughlin

_____

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal in a fatal case in which there are two parties, namely Desmond James Doherty, executor of the estate of Bridget McGuigan Gallagher (deceased), whom we shall describe as "*the Plaintiff*" and the Ministry of Defence, whom we shall describe as "*the Ministry*".

[2] The appeal is against the judgment of McAlinden J ("*the judge*") delivered on 02 April 2019 (neutral citation [2019] NIQB 35) and ensuing order. By his judgment the judge determined one discrete and contentious aspect of the Plaintiff's claim relating to the quantum of damages recoverable. We shall explore in appropriate detail *infra* the nature and contours of the disputed issue. The judge made two principal conclusions. First, damages for this contentious aspect of the Plaintiff's claim were recoverable as a matter of law. Second, such damages fell to be assessed in the amount of £15,000. The Ministry appeals against this award.

[3] There were other aspects of the Plaintiff's claim for damages against the Ministry. This is reflected in the final order of the court whereby the Plaintiff had judgment against the Defendant in the global sum of £264,985, together with costs to be taxed in default of agreement. Having regard to the Ministry's appeal the order further recorded that enforcement of the judgment be stayed in respect of the discrete award of £15,000 and an unspecified "*agreed interest figure*". The judge was not required to adjudicate upon any of the other aspects of the Plaintiff's claim and these are not before this court in consequence.

Factual Matrix

[4] It is appropriate to identify at the outset the evidence upon which the judgment below was based. There was no *viva voce* evidence. There was, rather, a trial bundle containing documentary evidence. The only feature of this bundle with which this court is concerned is the section containing excerpts from the Report of the Bloody Sunday Inquiry (the "*Inquiry Report*") which was presented to both Houses of Parliament on 15 June 2010. The relevant excerpts are contained in Volume VII which is partly entitled "Sector 5: Events in the Area South of the Rossville Flats". This had the status of agreed documentary evidence. This status is reflected in the fact that no element of its content was contested or challenged either at first instance or upon the hearing of this appeal. It is abundantly clear from his judgment that the judge drew on this evidential source in his consideration and determination of the issues.

[5] The following synopsis is taken from the Plaintiff's skeleton argument and is uncontentious:

- "The Deceased was part of a group who took shelter at a gable wall near a telephone box at the south end of Block 1 of Rossville flats when the shooting started in this area;
- there was intense shooting by soldiers so that, for example, Paul McLaughlin, an Ambulance Corps volunteer had to shelter by the telephone box just before the Deceased moved out of the sheltered area and was shot;
- Hugh Gilmour was shot and killed close by;
- Patrick Campbell was shot and wounded close by, as he tried to run from the southern end of block 1 towards Joseph Place alleyway;
- Almost immediately after that Daniel McGowan was shot and wounded, after he had emerged from the gap between Blocks 2 and 3;
- Patrick Doherty was shot in the buttock and fatally wounded as he crouched or crawled from the front of Block 2 towards Joseph Place;
- when Patrick Walsh crawled out to assist the dying Patrick Doherty, he had to return due to the shooting;

- the soldier who probably shot Patrick Campbell, Daniel McGowan, Patrick Doherty and the Deceased was in a group of soldiers who took up position at the entrance to Glenfada Park North;
- these soldiers and their guns were visible to those forced to take shelter and the Deceased was just approximately 35 yards away from the soldier who aimed at him and shot him;
- when the Deceased moved out from the shelter of the gable wall either to help one of the victims or to signal to the soldiers to stop shooting, he was probably waving a piece of towelling, or maybe a white handkerchief. "

[6] The judge recounted the background in the following way. Mr Bernard McGuigan (hereinafter "*the deceased")* was born on 16th June, 1930. He was shot dead on 30th January, 1972. He was the last person to be shot dead on Bloody Sunday. At the time of his death he was 41 years old, he was a successful painter and decorator by trade, he was a respected member of the community and was married with six children aged between 6 and 16 years. The Plaintiff, his widow Bridget McGuigan Gallagher, initiated these proceedings by Writ of Summons issued on 28th May, 2014, claiming damages under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 on behalf of the estate of her late husband and under the Fatal Accidents (Northern Ireland) Order 1977. The Plaintiff died before this action came on for hearing and the action was continued in the name of the executor of her estate, Mr Desmond Doherty, solicitor.

[7] At [2] of his judgment the judge noted the following:

> "*The Defendant accepts that this Deceased and indeed all the victims were innocent victims and has admitted assault, battery and trespass to the person and has not sought to raise any matter or issue by way of attempted justification for the actions of the soldiers in question nor has it sought to avail of any limitation defence which might otherwise have been available to it."*

Next he rehearsed in a little detail the circumstances in which the deceased came to form part of a group of people who gathered at a specified location in an attempt to shelter from shooting in the near vicinity. One person in particular was shot dead in close proximity to him. The deceased was one of several men kneeling or crouching beside a telephone kiosk and surrounding the body of the said person. The deceased then determined to move from this location -

> "*…. either to tend to another man who had been shot or to signal to the soldiers to stop firing as no one in that group presented any form of threat to the soldiers.*"

[8] This latter passage is directly referable to paragraphs 118.284/285 of the Inquiry Report:

> "*There is some evidence to the effect that Bernard McGuigan's intention was to get away or seek better cover …*
>
> *Though we are sure that Bernard McGuigan was not attempting to go towards or into Rossville Street, and was waving the piece of towelling in an attempt to demonstrate, as we are sure was the case, that he (and perhaps also those huddled at the south end of Block 1 of the Rossville Flats) was posing no risk to anyone, it is not entirely clear why he moved out from the south end of Block 1 of the Rossville Flats. On our assessment of the evidence, we are of the view that Bernard McGuigan was unlikely to be simply trying to get away and more likely to have been moving out in an attempt to go to the aid of someone …. or, as well, to try and get soldiers to stop shooting.*"

The report continues at paragraph 118.289:

> "*In our view, based on where Bernard McGuigan fell and the fact that in view of his injury he must have fallen very close to where he was hit, he could not have been shot from further north along Rossville Street, nor by someone firing through the gap between Blocks 1 and 2 of the Rossville Flats …* [paragraph 118.290]…. *there were soldiers in Glenfada Park North. There is evidence, which we consider below, that there was firing by soldiers from the entrance to Glenfada Park North. There were no soldiers further south of this entrance. Since Bernard McGuigan fell close to where he had been shot, we consider that the bullet that hit him must have come from the direction of the entrance into Glenfada Park North, in other words from the same direction as the shots that hit the other casualties in Sector 5.*"

The Report stated further at Chapter 118, paragraph 280:

> "*There were a number of people in the area who we have no doubt were terrified at what had been happening; so it is possible that Bernard McGuigan was seeking to go to the aid of someone other than Patrick Doherty.*"

This court's insight into some of the relevant details and, in particular, the topography was considerably enhanced by a map extracted from the Inquiry Report and to which the judge specifically referred at [3] of his judgment.

[9] The narrative in the judgment continues at [6]:

> *"As he ventured out from this sheltered position, he was shot in the head and died instantly. The bullet that struck him was a 7.62 mm Nato round discharged from an SLR rifle. The bullet fragmented on impact. This was a direct strike with no intermediate strike or ricochet. The soldier who fired the fatal round was approximately 35 yards away from Mr McGuigan (Deceased) at the time at an entrance to Glenfada Park North. The Saville Inquiry determined that Mr McGuigan (Deceased) was the intended target of the soldier who fired the fatal shot and the Inquiry also raised the possibility that the round that struck the Deceased was either substandard or had been deliberately tampered with so that it was more likely to fragment on impact and cause more severe injuries to the target. The bullet entered the head of the Deceased behind the left ear and exited in the region of the right eye."*

We interpose here that the Inquiry Report specifically adopted the substandard alternative in preference to the deliberate tampering theory.

[10] The judge's rehearsal of agreed evidence ends at this point. At [7] of his judgment he embarks upon the exercise of making findings:

> *"The state of mind of the Deceased prior to being shot cannot be known with any certainty. No direct evidence as to his state of mind has been adduced. However, in the context of a wholly innocent individual who was attending his first civil rights march, who was caught up in the events of Bloody Sunday as they unfolded, who had witnessed soldiers shooting civilians, who had seen Mr Gilmore being shot, who had taken shelter in an area beside the telephone box with others and who had ventured out holding his orange towel either in an attempt to tend to another man who had been shot or in an effort to indicate to the soldiers that they should stop firing, the Court can safely assume that such a person of ordinary fortitude and lack of familiarity with such conditions as those prevailing in the immediate vicinity at that time, would have been filled with fear and dread, coupled with a strong sense of indignation and hurt at being the innocent victim of a blatant, unprovoked and unjust attack by members of the army. "*

The judge resumed this exercise at [24] and [25]:

> *"[24] Referring back to paragraph [7] above, having examined the events of the day in question, I conclude on the balance of probabilities that the wrongful actions of the servants or agents of the Defendant on the day in question would have filled the Deceased with fear and dread, coupled with a strong sense of indignation and hurt at being the innocent victim of a blatant, unprovoked and unjust attack by members of the army…*
>
> *[25] Further, I have no hesitation in finding as a fact that the behaviour of the servants or agents of the Defendant responsible for these wrongful acts was exceptional and contumelious and was imbued with a degree of malevolence and flagrancy which was truly exceptional. The Deceased was forced to take shelter from shooting directed by soldiers towards the area where he was present. He witnessed Mr Gilmore being shot dead in the close vicinity. He subsequently ventured out from the place of shelter either to help another man who had been shot or to indicate to the soldiers that they should stop shooting as no one in that area posed a threat to them. When he did so, he was shot in the head from a range of 35 yards. Having regard to the uncontroverted evidence in this case, the Court determines that the claim by the Estate for injury to the feelings of the Deceased resulting from the tortious actions of the soldiers culminating in him being shot dead is clearly established in law and that the compensation to which the Estate of the Deceased is entitled should include aggravated damages. However, bearing in mind that the Deceased was killed instantly, the appropriate level of award in this instance is the sum of £15,000."*

[11] Noting the extent of the monetary agreement between the parties on other aspects of the Plaintiff's claim the judge stated at [8]:

> "*The issues which could not be resolved and which require the adjudication of the court are (a) whether in the case of a victim who died instantly as a result of being shot it was possible in law to make an award of aggravated damages; (b) if so, whether an award should be made in this instance; and (c) if so, the appropriate amount, bearing in mind the guidance which was set out in the case of* ***Quinn v Ministry of Defence****."*

Next, at [11] – [12] the judge rehearsed in summary form the competing submissions of the parties:

> *"Mr Fee QC argues that in this case the manner of the commission of the tort is such as to warrant an award of aggravated damages even though the Deceased died instantaneously as a result of being shot in the head by a high velocity round fired from a distance of 35 yards. He argues that the actions of the soldiers in the period prior to the shooting constituted part of the tort of assault/trespass to the person and those actions were such as to cause significant injury to the feelings of the Deceased.*
>
> *Mr Ringland QC argues that aggravated damages are not recoverable in the case of a victim who dies as a result of the wrongdoing of the tortfeasor. The statute may expressly prevent an award of exemplary damages but the absence of any specific reference to the exclusion of an award of aggravated damages does not mean that such an award is permissible in law. He argues that it is not. He argues that no text book on fatal accident claims contains any reference to an award of aggravated damages being made in a fatal case and he asserts that no reported case has been adduced by either party which deals with this matter as it is taken for granted that no such claim could ever be mounted. "*

[12] The judge then considered certain decided cases which we shall outline in a later section of this judgment. This exercise led the judge to the following conclusion:

> *"Having regard to the weight of judicial opinion expressed in the cases of Shah and Ashley, I have no hesitation in concluding that in principle, an award of aggravated damages can be made even in circumstances where there is no claim for general damages for pain and suffering."*

Continuing, the judge stated:

> *"Having regard to the principles set out in the case of* ***Clinton v Chief Constable*** *[1999] NICA 5, I will now proceed to consider and assess the claim by the Estate for injury to the Deceased's feelings and to determine whether a compensatory award should be made for injury to feelings and if so whether the compensation awarded to the Estate of the Deceased should include any element of aggravated damages for mental distress suffered by the Deceased as a result of the exceptional or contumelious conduct or motive of the Defendant in committing the wrongs inflicted on the Deceased."*

Three features of the terminology in the passage just quoted are to be noted:

"*… a compensatory award … compensation … include …*"

[13] An observation is appropriate at this juncture. The foregoing passages from the judgment form part of a wider context the ingredients whereof include three elements. First, the judge's summary of the parties' respective submissions. Second, the absence of any controversy about the Plaintiff's pleadings (which, we accept, should have been more specific and explicit). Third, the uncontentious representation to this court by Mr Brian Fee QC (representing the Plaintiff with Mr John Coyle of counsel) that the presentation of the Plaintiff's case at first instance was not confined to the single fatal shot but extended to the wider factual context, embracing events in the vicinity during the immediately preceding period.

First Ground of Appeal: the Main Issue

[14] The central pillar of the argument of Mr David Ringland QC on behalf of the Ministry was that aggravated damages could not as a matter of law be awarded in circumstances where the death of the deceased was instantaneous. His secondary submission was that there was no, or no sufficient, evidence upon which the judge could find that the manner of the admitted trespass to the person of the deceased "*increased any injury to the deceased's feelings*". He based his primary submission on the following passage in Halsbury's Laws of England (5th edition), volume 97, paragraph 528:

> "*Assault is an intentional and overt act causing another to apprehend the infliction of immediate and unlawful force. The threat of violence exhibiting an intention to assault will give rise to liability only if there is a present ability (or perhaps a perceived ability) to carry the threat into execution. An assault may be committed by words or gestures alone, provided they cause an apprehension of immediate and unlawful force.*"

[15] It is common case that an award of aggravated damages is permissible only where two conditions are satisfied:

(i) There must be exceptional or contumelious conduct or motive on the part of the tortfeasor in committing the wrong or subsequent to its commission.

(ii) The Plaintiff must suffer mental distress as a result.

This formulation derives from the Report of the English Law Commission (Law Com No 247, 1997) at paragraph 2.4, cited with approval by Carswell LCJ in *Clinton v Chief Constable of the RUC* [1999] NI 215 at 222f, describing this as "*an accurate statement of the law*". Mr Ringland, while conceding that the first of the qualifying

conditions was satisfied, submitted that the second was not. In passing, the Report also employs the terminology "upset or outrage."

[16] The riposte of Mr Fee QC on behalf of the Plaintiff drew attention to the judge's analysis of events prior to the tortious shooting and instantaneous death of the deceased. Counsel emphasised the judge's findings relating to the mental state of the deceased in the phase preceding the actual shooting and death. Mr Fee stressed in particular the judge's clear finding that the deceased must have been imbued with feelings of fear, dread, indignation and hurt during the period under scrutiny. Mr Fee contrasted this case with that of (for example) a carefree law abiding civilian shot out of the blue in a public area.

[17] The first step in our analysis and conclusions entails consideration of the undisputed facts set forth in the judgment at first instance and the judge's findings based thereon. We refer to, without repeating, [4] – [10] above. This combination of agreed facts and judicial findings creates a matrix which extends considerably beyond the fatal shooting of the deceased. This wider matrix clearly formed part of both the express findings of the judge and his ensuing conclusions on the issue of recoverable damages. This we consider particularly clear from [3] – [7] and [24] – [25] of the judgment, together with [11] in which the judge rehearsed uncritically Mr Fee's submission that the conduct of the soldiers in the period preceding the fatal shooting formed part of the trespass to the person of the deceased and was such as to cause significant injury to his feelings. The judge clearly found, considering his judgment as a whole, that the deceased was the victim of an assault perpetrated by agents of the Ministry during the period prior to the fatal shooting. We shall examine the sustainability in law of this finding.

[18] It is appropriate to recall some basic dogma. Assault and battery are long recognised members of the parent family of the tort of trespass to the person. This tort is based upon the inviolability of every citizen's person. Where the notional line is traversed a trespass occurs in law. Assault and battery have always had distinct legal personalities. The fundamental distinction is that assault does not require proof of physical force, whereas battery does. Stated succinctly, the essence of assault is the victim's apprehension of the infliction of a battery. This is clear from the passage in Halsbury reproduced in [13] above and the further sources considered in [33] – [35] *infra*.

[19] Next we shall trace the case law path followed by the judge. In *Richardson v Howie* [2004] EWCA Civ 1127 the claimant sued for damages for assault and battery, including a claim for aggravated damages, arising out of a physical attack on her by the Defendant during a holiday. She was awarded £10,000 to include aggravated damages of £5,000. The ensuing appeal was on the issue of aggravated damages only. The Court of Appeal noted the Law Commission formulation of –

> "*… two elements relevant to the availability of an aggravated award, first exceptional or contumelious conduct or motive on*

the part of the defendant in committing the wrong and, second, intangible loss suffered as a result by the plaintiff, this is injury to personality."

Thomas LJ then stated at [17]:

> "*Even though this is an admirable summary it is, however, important to bear in mind Lord Devlin's observations at 1121, where after referring to the circumstances where aggravated damages could be awarded, he concluded:*
>
> > *'These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this kind, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed'.*"
>
> (In *Rookes v Barnard* [1964] AC 1129.)

Thomas LJ continued at [18]:

> "*It is, we think, clear since that decision that the compensatory principle has prevailed ….*"

[20] This is followed by the important passage at [23]:

> *"It is and must be accepted that at least in cases of assault and similar torts, it is appropriate to compensate for injury to feelings including the indignity, mental suffering, humiliation or distress that might be caused by such an attack, as well as anger or indignation arising from the circumstances of the attack. It is also now clearly accepted that aggravated damages are in essence compensatory in cases of assault. Therefore we consider that a court should not characterise the award of damages for injury to feelings, including any indignity, mental suffering, distress, humiliation or anger and indignation that might be caused by such an attack, as aggravated damages; a court should bring that element of compensatory damages for injured feelings into account as part of the general damages awarded. It is, we consider, no longer appropriate to characterise the award for the damages for injury to feelings as aggravated damages, except possibly in a wholly exceptional case."*

Continuing at [24]:

> "*Where there is an assault, the victim will be entitled to be compensated for any injury to his or her feelings, including the anger and indignation aroused. Those feelings may well also be affected by the malicious or spiteful nature of the attack or the motive of the assailant; if so, then the victim must be properly compensated for that, particularly where the injured feelings have been heightened by the motive or spiteful nature of the attack. In our view, damages which provide such compensation should be characterised and awarded therefore as ordinary general damages which they truly are.*"

The appellate court concluded that the trial judge had fallen into error by failing to apply this approach. He should have awarded compensatory general damages only. His award was reduced to £4,500 general damages "*… to cover the scarring, the injured feelings and other matters …*" (see [27]).

[21] The leading reported case in the jurisdiction of Northern Ireland is *Clinton and Others v Chief Constable of the Royal Ulster Constabulary* [1999] NI 215. These were cases involving arrests of the two Plaintiffs and alleged ill treatment on the part of the police service. At 221f/i Carswell LCJ considered the "*basic awards*" to be made in respect of wrongful arrest and detention (or false imprisonment). At 222a/c the court accepted that further compensatory damages could in principle be awarded for "*the suffering of distress and anxiety*". The issue of aggravated damages was then examined separately. Recalling the court's earlier decision in *McConnell v Police Authority* [1997] NI 244 at 255 the Lord Chief Justice reiterated:

> "*… aggravated damages are purely compensatory and do not contain any punitive element.*"

At 222f he described the Law Commission formulation (see [14] *supra*) as "*an accurate statement of the law*". The court then cited with approval the formulation of Lord Woolf MR in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 at 514 where the court instanced as factors justifying an award of aggravated damages –

> "*…humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high-handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution.*"

[22] *Shah v Gale and others* [2005] EWHC 1087 (QB) was a fatal case. It involved an unprovoked attack on a householder at his home involving bruising and severe stabbing injuries which proved fatal. The administratrix brought a claim for damages against a person who was not the assailant, rather an alleged joint tort feasor. This was not a fatal accident dependency claim. The court held, firstly, that the Defendant was a joint tort feasor: see [42]. The next question was whether the

Defendant was responsible in law for the death arising out of her joint enterprise with the assailant. The court held that, on the balance of probability, the knife attack lay outside the boundaries of the joint enterprise to which the Defendant was a part: [49]. The final issue considered was that of damages, at [51]ff. The judge stated at [56]:

> *"I am required to compensate Mr Shah's estate for the physical discomfort, distress and inconvenience of the assault committed in the very short space of time between the moment when his home was unlawfully entered and the knife attack without any reference to personal injury. Even making allowance for the terrifying features to which I have referred, I cannot put a figure on this small element of the attack in a sum greater than £750 and that is the sum I award."*

[23] The issue of aggravated damages was considered in the next three paragraphs [57]–[59]:

> *"57. Mr Jones also claims aggravated damages. This head of award is intended to provide a Claimant with additional compensation where there are aggravating features of the case such that the basic award would not be sufficient compensation. Aggravating features, which relate to the initial incident, can include malicious or oppressive behaviour or behaviour of a high-handed, insulting, malicious or autocratic manner. It can include the way in which the litigation has been conducted. In* ***Appleton v. Garrett*** *[1996] 5 PIQR P1, Dyson J adopted a summary provided by the Law Commission in these terms (paragraph 3.3):*
>
> > *'In* ***Rookes v. Barnard****, Lord Devlin said that aggravated awards were appropriate where the manner in which the wrong was committed was such as to injure the plaintiff's proper feelings of pride and dignity and gave rise to humiliation, distress, insult and pain. Examples of the sort of conduct which would lead to these forms of intangible loss were conduct which was offensive or which was accompanied by malevolence, spite, malice, insolence or arrogance. In other words the type of conduct which had previously been regarded as capable of sustaining a punitive award. It would therefore seem that there are two elements relevant to the availability of an*

> *aggravated award, first, exceptional or contumelious conduct or motive on the part of the defendant in committing the wrong and second, intangible loss suffered as a result by the plaintiff, that is injury to personality.'*

58. Because he was immediately murdered, there is no scope for injury to personality but it is difficult to think of behaviour which is more serious than the attack upon Mr Shah's home. I have no doubt that an award is justified although I must bear in mind the observation of Woolf J in W v. Meah [1986] 1 All ER 935 at 942d in rape cases that the award of aggravated damages "must be moderate" and his later comment in relation to police cases (when Lord Woolf MR) in ***Thompson v. Commissioner of Police of the Metropolis*** *[1998] QB 498 (at 516F):*

> *'In the ordinary way … we would not expect the aggravated damages to be as much as twice the basic damages except where, on the particular facts, the basic damages are modest. … [T]he total figure for basic and aggravated damages should not exceed … fair compensation for the injury which the plaintiff has suffered. … [I]f aggravated damages are awarded such damages, though compensatory are not intended as a punishment, will in fact contain a penal element as far as the defendant is concerned.'*

59. It is important to underline that these aggravated damages are not being awarded in respect of the murder of Mr Shah but only for the circumstances in which he was assaulted and no more. Nevertheless, when Lord Woolf MR expressed the view that the aggravated element should not be as much as twice the basic damages except where the latter are modest, he was considering actions against the police in which comparatively substantial basic awards would also be made. Notwithstanding that this incident was over very quickly, having regard to all the circumstances, I award £2,000. Thus, my total award for the assault alone is £2,750."

Thus there was an overall award of £2750.

[24] In *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25 the framework of the appeal to the House of Lords was set forth in the speech of Lord Scott of Foscotte at [5]:

> "*This is an interlocutory appeal in which your lordships must decide whether a civil case of assault and battery should be permitted to progress to a trial. Two issues of considerable importance are raised …*"

The two issues were (i) whether the belief of the armed police officer had to be reasonably as well as honestly held for the purpose of self-defence to a civil law claim and (ii) whether the assault and battery claims should be allowed to proceed to trial: see [15]. Two members of the estate of the deceased, who was shot dead in his home due to a tragic mistake on the part of an armed police man, claimed damages for loss of dependency and alleged post-shooting tortuous conduct, together with damages on behalf of the estate. In short the Chief Constable was conceding the negligence claim but contesting the assault and battery claims.

[25] Lord Scott noted at [23] that –

> "*…there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose. But it is difficult to see how compensatory damages could ever fulfil a vindicatory purpose in a case of alleged assault where liability for the assault were denied and a trial of that issue never took place.*"

At [23] he noted the claim for aggravated damages. Lord Carswell, dissenting, disagreed with Lord Scott's view that vindicatory damages could be awarded, continuing at [80]:

> "*In the present case the appellant has admitted liability for negligence and has undertaken to pay the respondent's damages, including any award for aggravated damages (though it is more than a little difficult to see how such damages can be in question, when it is very questionable whether the deceased was conscious and sentient for any significant period between the shooting and his death)*".

Lord Neuberger, aligning himself with Lord Carswell, dilated on the issue of aggravated damages at [101] – [102], but did so only in the narrow context of considering whether such damages can be awarded for negligence as well as battery. For the purposes of the present appeal the only passage of note is that at the beginning of [102]:

> "*Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way or*

> *circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the Defendant.*"

[26] No other decided case was brought to the attention of either the judge or this court. Our brief analysis of these cases is as follows. *Richardson v Howie* appears to be something of a stand-alone decision. It espouses the view that in cases of assault involving injury to the claimant's feelings, to include any anger or indignation aroused, this should be addressed in the award of compensatory damages (described in that case as "*ordinary general damages*"). In Clerk and Lindsell on Torts (22nd Edition) the authors state at paragraph 15-139:

> "*Any trespass to the person, however slight, gives a right of action to recover at least nominal damages ….*
>
> *Even where there has been no physical injury, substantial damages may be awarded for indignity, discomfort or inconvenience …*
>
> *Apart from any special damages alleged and proved, such as medical expenses, the damages are at large. The time, place and manner of the trespass and the conduct of the Defendant may be taken into account and the court may award aggravated damages on these grounds.*"

Having noted that in *W v Meah* [1986] 1 All ER 935 the damages awarded for rape and vicious sexual assault included aggravated damages, this passage continues:

> "*Since then, however, the appropriateness of aggravated damages has been questioned in* ***Richardson v Howie****.*"

[27] So far as this court can determine the decision in *Richardson v Howie* has not been the subject of extensive consideration by the English Court of Appeal since it was promulgated. Nor has it been previously considered by this court. In *Rowlands v Chief Constable of Merseyside* [2006] EWCA Civ 1773 the decision in *Richardson* was considered by a different division of the Court of Appeal in a context where the main issue examined was whether an award of damages for psychiatric harm in a case of assault, false imprisonment and malicious prosecution by the police precluded an award of aggravated damages. The court neither endorsed nor disapproved the decision in *Richardson*. Reversing the decision at first instance it made a free standing award of £6,000 aggravated damages, the rationale being the following, at [29]:

> "*In the present case the circumstances surrounding Mrs Rowland's arrest and prosecution were of a kind that were liable to induce feelings of humiliation and resentment which can only have been exacerbated by the willingness of*

the police to give false evidence in support of an unjustified prosecution."

While cautioning against the dangers of double counting, the court further held that damages for any proven psychiatric harm were to be compensated separately: see [28].

[28] Notably in *ZH v Commissioner of Police for the Metropolis* [2012] EWHC 604 (QB), where the disabled claimant received an award of damages for injury to feelings the court considered that the risk of overlap was such that a separate award of aggravated damages would be inappropriate. To like effect is another first instance decision, *R (Diop) v Secretary of State for the Home Department* where the approach of the judge was that of preferring a single global award of general damages to encompass the element of injury to feelings, observing that to draw a sharp distinction in respect of the latter claim would be an arbitrary exercise.

[29] The impact of the decision in *Richardson* in reported cases in England and Wales appears to have been muted. So far as this court is aware, it has had no impact in the jurisdiction of Northern Ireland. It is to be noted that while [23] of the decision purports to promulgate an absolute rule, in [24] the court recognises that an award of aggravated damages for injury to the victim's feelings, including any anger and indignation aroused, might still be appropriate, albeit in a "*wholly exceptional case*" only. There are two further considerations. The first is that the decision in *Richardson* is not binding on this court. The second is that there is a previous relevant decision of this court which is binding, namely *Clinton,* in the absence of any suggestion that any of the limited grounds for departing from it applies. There a different division of this court endorsed unequivocally the Law Commission's two preconditions for an award of aggravated damages: see [21] above.

[30] There is a strong general principle that the Court of Appeal in this jurisdiction is bound by its previous decisions. Our approach essentially mirrors that of the English Court of Appeal dating from *Young v Bristol Aeroplane* [1944] KB 718 at 729 – 730 especially (per Lord Greene MR). The two leading decisions in this jurisdiction are *Leppington v Belfast Corporation* (20 NILQ 308) and, more recently, *Re Rice's Application* [1998] NI 265. As noted above, neither party suggested that this court should decline to follow *Clinton* and we can identify no basis for doing so. The judge, correctly, adopted this approach.

[31] The next of the several cases considered by the judge was *Shah v Gale* (summarised in [22] – [23] *supra*). This is a first instance English decision of no precedent value. It is nonetheless of a little interest as it involved an award of aggravated damages for assault and battery in a context where the estate of the deceased made no claim for damages for personal injuries. The outcome was that on the particular facts of the case separate awards of compensatory damages and aggravated damages were considered appropriate. The debate before this court centred on whether the judge had correctly applied the two Law Commission

criteria. In the context of this appeal this is a sterile debate and we do not propose to consider it further.

[32] The last of the decided cases considered by the judge was *Ashley v Chief Constable* (summarised in [24] – [25] above). As our summary of this decision demonstrates, the central issues considered by the House of Lords were very different from those arising in this appeal. Both parties were agreed that Lord Neuberger's formulation, noted at [25] above, is unobjectionable. It is in proper alignment with the Law Commission's formulation and, hence, *Clinton*. Lord Carswell's observation, noted at [25] above, while attracting respect of course is a classic *obiter dictum*, which has the added features that it is expressed in qualified terms and was clearly not the subject of adversarial argument.

[33] We have described the passage in *Halsbury* reproduced in [12] above as the centre piece of the Ministry's case. It is appropriate to note the linguistic formulae in other leading text books. In Clerk and Lindsell (*ante*) it is stated at paragraph 15-01:

> "*It has long been recognised that the fundamental principle, plain and incontestable, is that every person's body is inviolate. As such, interference, however slight, with a person's elementary civil right to security of the person and self-determination in relation to his own body constitutes trespass to the person. Trespass to the person may take three forms, assault, battery and false imprisonment.*"

In *Collins v Wilcock* [1984] 1 WLR 1172 Robert Goff LJ stated at 1178:

> "*An assault is an act which causes another person to apprehend the infliction of immediate, unlawful force on his person; a battery is the actual infliction of unlawful force on another person.*"

The authors of Clerk and Lindsell draw attention to other distinctive features of the tort of trespass to the person. First it is actionable *per se*. Second, the consequences to be compensated are not subject to any requirement of reasonable foreseeability: all direct consequences of the tortious conduct, however unforeseeable, are compensatible. Finally the offending act must be carried out either deliberately or negligently: paragraph 15-04.

[34] In Salmond and Heuston on the Law of Torts (21st Edition) one finds the following classic statement at p 122:

> "*The act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery amounts to an actionable assault.*"

This formula derives from Fleming, Introduction to the Law of Torts, p 3. The authors continue:

> "*The tort* [of assault] *is remarkable, for it remains the only instance in English jurisprudence of a mere offensive sensation unaccompanied by any untoward psychosomatic symptoms, let alone external trauma, giving a cause of action for damages.*"

In Street on Torts (15th Ed 2017) one finds the following pithy statement at p253:

> *"The gist of the tort of assault is an act which would cause a reasonable person to apprehend an imminent battery."*

[35] We draw attention to one further text book passage, contained in The Law of Tort (Grubb *et al*, 2nd Edition) at paragraph 9.28:

> "*The civil tort of assault is an intentional act which creates a reasonable apprehension of an imminent battery upon another. Although assault is often used synonymously with battery, the two are quite distinct torts; battery prohibits the application of force whilst assault provides a remedy for conduct that threatens the non-consensual application of force. As in battery a positive act is required; one cannot be liable in assault for an omission. It is perfectly possible for an assault to be committed without a battery and vice versa.*"

Followed paragraph 9.29:

> "*As in battery, the tort does not require an intent to injure. It requires an intent merely to commit the trespassory interference, ie to do the act that causes the claimant a reasonable apprehension of an imminent battery … the scope of the tort is limited by the requirement that the apprehension of the claimant be the natural and probable consequence of the defendant's act.*"

And finally at paragraph 9.30:

> "*Assault requires that the claimant have a reasonable apprehension of an imminent battery. Unlike battery, the claimant must be aware of the act alleged to constitute the assault as apprehension is the gist of the tort. The question of reasonableness is one of fact and turns on how a reasonable person would have reacted to the defendant's act …*

> *No assault is committed unless the defendant appears able to carry out that threat imminently. Imminently does not mean immediately; if there is only a short period between the threat of force and the ability to carry out that threat this may still be an assault. Again, this question is one of fact.*"

[36] Mr Ringland's central submission was that the passage in *Halsbury* – noted at [17] above – requires that the requisite act on the part of the tort feasor be personal to the victim. We reject this submission. We do not construe the passage in Halsbury in this way, nor is support for the submission to be found in any of the other sources which we have consulted, outlined above. The submission is further weakened when one widens the framework of relevant legal principles.

[37] The Defendant in this case, the Ministry, is a corporate tortfeasor, an employer vicariously liable for the tortious conduct of its servants and agents in the course of their employment. In this case the offending conduct preceding the killing of the deceased included the killing and the wounding of other victims, the firing of other shots which did not result in killing or wounding and conduct which did not involve shooting, such as armed soldiers moving in various directions and taking up positions with their weapons available and pointed or other forms of overt aggression or threat. We consider that all of this conduct, graphically described in the Inquiry Report, was capable of generating in every person of normal mental fortitude in the area a reasonable apprehension of being shot or wounded. Whether it did so is a question of fact to be decided on a case by case basis.

[38] The risk of battery to the deceased was posed by every soldier who could potentially shoot him. The law does not require that this risk had to be posed by a specific, identifiable soldier. Nor does the law require that the deceased had to be singled out by either one of the soldiers or all of them as a shooting target. Furthermore there is no legal requirement of some kind of factual nexus between the deceased and the soldier who fired the fatal shot. In short, the necessary relationship, or connection, between the Defendant tortfeasor and the deceased was forged by the presence and conduct of multiple soldiers in the area and the presence of the deceased at the locations traversed and occupied by him from the beginning of the episode described by the judge in [2] of his judgment until its conclusion at the location ultimately occupied by the deceased at the moment of his shooting and death, namely the open, unprotected public area in the Rossville Street vicinity where he was shot dead by a soldier.

[39] We are satisfied giving effect to the foregoing analysis that as a matter of law the deceased was capable of being the victim of assault perpetrated by the Ministry's servants or agents throughout the entirety of the period under scrutiny. We further consider that the judge's self-direction on the law, founded as it was on the decision of this court in *Clinton*, is unimpeachable.

[40] The next question to be considered is one of fact, namely whether the deceased was such a victim or, alternatively phrased, whether the applicable legal test was satisfied. That question is not for this court. Rather it was a question for the trial judge who, as we have noted, determined it at [7] and [24] – [25] of his judgment. The principles to be applied in our determination of the Ministry's challenge to this finding are a reflection of the differing roles of a court of trial and an appellate court. They have been considered in recent decisions of this court: *Heaney v McEvoy* [2018] NICA 4 at [17] – [19], *Herron v Bank of Scotland* [2018] NICA 11 at [24] and *Kerr v Jamison* [2019] NICA 48 at [35] – [36]. We are mindful that the judge's finding did not involve the assessment of the evidence of any witness. Nonetheless, as emphasised in a decision binding on this court, *DB v Chief Constable of PSNI* [2017] UKSC 7, the case for reticence on the part of the appellate court nonetheless "*remains cogent*" (per Lord Kerr at [80]).

[41] We are mindful of the unique position of the trial judge not only through the narrow prism of the present case but from the wider perspective that he is the Queen's Bench Judge specially designated by the Lord Chief Justice to deal with all of the claims arising out of the Bloody Sunday atrocity. There are 33 such cases. *Quinn (supra*) was selected as a lead case. A written judgment has been given in another, *Campbell v Ministry of Defence* [2019] NIQB 114. Some two thirds of the group have been settled: some of these were listed for trial before the judge, others not.

[42] The finding which the Ministry challenges was the product of a classic first instance judicial exercise, namely making inferences from primary facts. Noting that there was no direct evidence of the state of mind of the deceased, the exercise undertaken by the judge was one of ascertaining whether this could be established by reasonable inference from other evidence (as to which see [4] – [10] above). It is clear that the other evidence considered by the judge was that contained in the Inquiry Report. The finding which this exercise yielded was that the deceased –

> "*… would have been filled with fear and dread, coupled with a strong sense of indignation and hurt at being the innocent victim of a blatant, unprovoked and unjust attack by members of the army.*"

We consider that the "*attack*" to which the judge is here referring was the threatening conduct of, and widespread shooting by, soldiers of multiple victims during the whole of the episode preceding the death of the deceased. This we consider clear from a reading of the judgment as a whole. We are satisfied that there was ample evidence justifying this finding.

[43] The foregoing analysis and conclusions expose the fallacy in the first of the grounds adumbrated in the Notice of Appeal. This contends that the judge erred in law in awarding aggravated damages "*in circumstances where the death of the deceased was instantaneous*". It neglects the case made by the Plaintiff, founded on the tort of

assault, relating to the preceding events, the wider circumstances. It also fails to engage with the related undisputed facts and the findings and conclusions of the judge. We refer also to our observations in [13] above. We conclude that this ground of appeal is unsustainable for the reasons given.

The Second Ground of Appeal: The Quantum of Damages

[44] The formulation of the Ministry's challenge on this ground was confined to comparing and contrasting the award of £15,000 in the present case with the award of damages for aggravated damages of £25,000 made by the same judge in *Quinn v Ministry of Defence* [2018] NIQB 82. Both *Quinn* and the present case belong to the same cohort viz they are claims for damages arising out of personal injuries and deaths perpetrated by soldiers on Bloody Sunday.

[45] The Plaintiff in *Quinn* was aged 17 years at the material time. His damages were assessed some 46 years later. He suffered severe facial injuries with long term *sequelae* including scarring, contour distortion, loss of bone, nasal damage causing obstruction and sinusitis, significant deviation of the nasal septum, drooping and uncontrolled twitching of the right lower eyelid, weakness of the right upper lip with a consequential distorted smile and loss of sensation in the right cheek. There was a prospect of some limited and belated cosmetic facial surgery. The court awarded damages of £125,000 for the Plaintiff's physical injuries. The judge concluded that the Plaintiff had not developed a compensatible psychiatric condition, adding at [34]:

> "*The Court has carefully considered the issue of whether the Plaintiff is entitled to compensation for the development of a recognised psychiatric disorder following the traumatic events of 30th January, 1972 and having listened carefully to the evidence of the Plaintiff and considered the contents of Dr Tanya Kane's psychiatric report, the Court is unable to conclude on the balance of probabilities that the Plaintiff did develop a recognised psychiatric condition which would be compensatible in law. However, it is clear that the Plaintiff was injured as the result of a deliberate act, a battery, perpetrated by a servant of the Defendant and the law is quite clear that unlike damages awarded for the tort of negligence, damages for the tort of assault/battery/trespass to the person can include damages for injury to the victim's feelings even in the absence of the development of a recognised psychiatric illness.* "

[46] The next section of the judgment in *Quinn* is entitled "*Injury to Feelings and Aggravated Damages*". The judge took as his cue McGregor on Damages (20th edition) at [35]:

"The first paragraph of Chapter 42 of McGregor on Damages states the law as follows:

> *'In so far as an assault and battery results in physical injury to the claimant, the damages will be calculated as in any other action for personal injury. However, beyond this, the tort of assault affords protection from the insult which may arise from interference with the person. Thus, a further important head of damage is the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation that may be caused. Damages may thus be recovered by a claimant for an assault, with or without a technical battery, which has done him no physical injury at all. There may be a basic award of damages for the injury to feelings and if the injury is aggravated by the defendant's conduct an additional award of aggravated damages or, as with many court awards, the two can be run together'."*

He continued at [36]: *"In this case, the Plaintiff alleges that he has suffered a severe, intense and enduring injury to his feelings resulting from the deliberate and unlawful infliction of physical injury to the Plaintiff on 30th January, 1972 and that this injury to his feelings was increased and was all the more severe and enduring by reason of the flagrancy, malevolence and the particularly unacceptable nature of the assaulting Defendant's behaviour both on the day in question and for many years thereafter. "*

Next, the judge noted the decisions in *Richardson* and *Clinton* (*ante*) before setting himself the following task, at [38]:

> **"***This Court is bound by the decision of Clinton v Chief Constable [1999] NICA 5 and the Court will now proceed to consider and assess the Plaintiff's claim for injury to his feelings and to determine whether a compensatory award should be made for injury to feelings and if so whether the compensation awarded to the Plaintiff should include any element of aggravated damages for mental distress suffered by the Plaintiff as a result of the exceptional or contumelious conduct or motive of the Defendant in committing the wrong and/or arising out of the Defendant's conduct thereafter."*

The judge expressed his conclusions at [39] – [40]:

> *"In examining the events of the day in question the Court has no hesitation in finding that the wrongful actions of the servants or agents of the Defendant on the day in question gave rise to emotions of extreme fear if not terror in the mind of the Plaintiff. While on Rossville Street, he saw a soldier raise a gun, place a bullet in the breach and aim the gun in his direction. He fled in fear of being shot and took partial cover in Glenfada Park North. While in that area he heard gunfire and he saw a man who had been shot being carried by others just a short distance from him. He saw a number of individuals rushing into Glenfada Park North and heard that soldiers were coming. He decided to run for safety. As he ran towards an alleyway, he was, without any justification or lawful excuse, shot in the face and saw a man running beside him shot dead…"*

He concluded at [40]:

> *"The Court has no hesitation in finding as a fact that the behaviour of the servant or agents of the Defendant responsible for these wrongful acts was exceptional and contumelious and was imbued with a degree of malevolence and flagrancy which was truly exceptional. In the immediate aftermath of this shooting, the Plaintiff aged 17 was aware of droplets of blood and fragments of bone and soft tissue exploding from his face. He was then met with the realisation that the facial injuries were such that two women who knew him did not initially recognise him. He encountered scenes of chaos on arrival at hospital. He was made aware that his vision may be at risk and his face and eyes were covered in bandages for a period of time. He received the last rites. He then had to witness the extreme distress of his mother when she came to see him in the hospital some days after his injury. Having regard to this uncontroverted evidence, the Court determines that the Plaintiff's claim for injury to feelings for the events of the day in question and the immediate aftermath is clearly established in law and that the compensation to which the Plaintiff is entitled should include aggravated damages and the appropriate level of award is the sum of £25,000."*

[47] Mr Ringland highlighted that, in contrast with the instantaneous death in the present case, the award of £25,000 aggravated damages in *Quinn* "*…. related to several days of aggravation and a number of particularly distressing and upsetting events*" (per his

skeleton argument). The essence of the replying submission of Mr Fee is encapsulated in the following passage in counsels' skeleton argument:

> "*It is submitted that the learned trial judge would have been fully justified if he had decided to award the same amount of aggravated damages in this case as in the Quinn case. However, he decided to award substantially less to take account of one factor, namely the shorter duration. Any lesser award than £15,000 would have been difficult to reconcile with the findings he made …*"

The limitations inherent in any exercise of comparing the facts of one case with another were also highlighted.

[48] A correct understanding of the judge's award of £15,000 in this case is essential. The key to this is the critical finding made by the judge and our analysis of this above. The deceased was the victim of both assault and battery. The assault was committed by multiple acts perpetrated by soldiers. The battery was the single act of shooting him dead. The compensation recoverable for both the assault and the battery was compensatory damages and aggravated damages. The discrete award of £15,000 was the judge's assessment of the compensatory damages and aggravated damages as the remedies for the assault and battery of the deceased. The judge was under no obligation to provide a breakdown. Rather his approach was clearly of the "stand back", or global, variety, which this court would not criticise in a case of this nature.

[49] The assessment of the appropriate amount of damages was within the sole domain of the trial judge. The restrained function of an appellate court in a challenge to an award of damages of this nature is apparent in certain decisions of this court belonging to recent era when personal injuries litigation dominated. They are noted in some of the cases quoted in [40] above. The *DB* principles outlined above also have some purchase in this context. Furthermore this court does not conduct a retrial.

[50] According to the submission of Mr Ringland the threshold for intervention by this court is the demonstration that the award of £15,000 was manifestly excessive. We are prepared to adopt this as the test. This submission was, of course, made on the basis that £15,000 represented an award exclusively for aggravated damages for the shooting and killing of the deceased. As we have demonstrated above, this is fallacious. The judge's award of £15,000 has a considerably greater reach. While this consideration of itself suffices to dispose of this ground of appeal, we add the following. The Ministry's contention is that the award of £15,000 is manifestly excessive. The replying submission of Mr Fee demonstrates the scope for a respectable view that the award could reasonably have been greater. In the narrow context of comparing and contrasting the award of £25,000 in *Quinn*, Mr Fee pointed to certain facts and features in support of this submission, based mainly on [39] –

[40] of that decision (see [46] above). This court finds itself in the middle, adjudicating on these forceful competing contentions. We consider that it is precisely in this kind of situation that reticence on the part of an appellate court is appropriate.

Omnibus Conclusion

[51] For the reasons given we dismiss the appeal and affirm the award of £15,000 in respect of compensatory and aggravated damages for the assault and battery perpetrated by the Ministry's servants and agents against the deceased.