

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

AIDAN McKEEVER

Plaintiff:

v

MINISTRY OF DEFENCE

Defendant:

TREACY J

Introduction

[1] On or about 16 February 1992 the Plaintiff, who was unarmed, was shot by members of a specialist undercover military unit in the car park of the Church at Clonoe, Coalisland, Co Tyrone. The Plaintiff suffered gunshot injuries and the same incident resulted in the fatal shooting of four men, Daniel Vincent, Kevin O'Donnell, Sean O'Farrell and Peter Clancy.

[2] The Plaintiff (now 41) was 21 at the time and, in consequence of being shot, sustained serious injuries.

[3] The particulars of assault and battery in the Statement of Claim alleged that the soldiers opened fire without warning on the Plaintiff who was neither armed nor in the immediate vicinity of any person who was armed. It was further claimed that he was given no warning nor was any opportunity to surrender afforded to him. The claim was also pleaded in negligence.

[4] There was no claim for special damage and general damages have been agreed between the parties at £75,000 net of CRU, subject to liability.

[5] Since there is no dispute that the Plaintiff was shot and injured by soldiers the onus of proving justification rests with the Defendant.

[6] The Defence, inter alia, pleads that the force used was justified in that the soldiers reasonably believed that the Plaintiff and the other terrorists intended to kill or seriously injure them and that it was necessary to open fire and that the force used was reasonable in self defence and in defence of others. The Defendant also relied on Section 3 of the Criminal Law Act (Northern Ireland) 1967 contending that the force used was reasonable in the prevention of crime and/or in effecting or attempting to effect the lawful arrest of persons engaged in serious terrorist crime and was authorised by statute. The Defendant also relied upon the defences of *volenti non fit injuria*, *ex turpi causa non oritur actio* and alleges contributory negligence.

Background

[7] The Plaintiff was the driver of a getaway car for members of a Provisional IRA (PIRA) group who, earlier on the same night, had attacked Coalisland RUC Station using a "DshK" anti-aircraft gun, an extremely powerful and lethal weapon, which had been mounted on the back of a stolen lorry for the purposes of this attack. It is accepted that the police and army had prior warning that this attack would take place on that police station on that date. No injuries were sustained by any RUC officer or other user of the police building or by any member of the public in the course of the PIRA attack.

[8] Because of the intelligence they possessed, the army anticipated that the car park of Clonoe Chapel would be used in the course of the attack. Knowing this, a 12-man special operations unit of the army had been deployed along the southern boundary of that car park behind a hedge. That hedge was fronted by a space some 2-3 paces in width. While the army was so positioned they observed a number of vehicles entering the car park and remaining there for several hours prior to and during the PIRA attack on the police station. The Plaintiff was the driver and sole occupant of one of these vehicles.

[9] Shortly after the attack on the police station a car, closely followed by the armed lorry and its PIRA occupants, drove into the car park. At that time the waiting vehicles took up or already were in a position to drive out of the car park. The soldiers began firing at the lorry and then at the cars soon after the lorry entered the car park. No warning was given before the soldiers opened fire. Four members of the PIRA team were killed.

[10] In relation to the Plaintiff in this case the Defendant has accepted in Replies to Interrogatories that four soldiers shot at this Plaintiff. These were:

- Soldier A who said in a statement to the police that he had fired at the Plaintiff;
- Soldier I who told police he had "fired a couple of rounds" at the Plaintiff's car and further that he fired "12 aimed shots" at the Plaintiff;
- Soldier J who told police he had fired "approximately 5 rounds" at the Plaintiff which, he added, he believed "had hit him"; and

- Soldier L who, in his police statement, said he had fired “about 8 rounds at the passenger window” of the Plaintiff’s car.

[11] Arising out of these events the Plaintiff was charged and ultimately pleaded guilty to assisting offenders for which he was sentenced to three years imprisonment, suspended for three years.

[12] Since the shooting of the Plaintiff by the soldiers is not denied the main issue is whether or not this trespass to the person has been justified.

[13] It is trite law that the onus of proving justification rests with the Defendant – see *Clarke & Lindsell on Torts*, 20 Ed at para15-49 – “in an action of trespass to the person, once the trespass is admitted or proved, it is for the Defendant to justify the trespass if he can, to show he acted with lawful excuse”.

[14] This onus will be discharged if the Defendant proves the shooting was justified as either:

- (a) Reasonable force used in self-defence or the defence of others; or
- (b) Reasonable force in preventing crime or attempting to apprehend the Plaintiff in accordance with Section 3 of the Criminal Law Act (Northern Ireland) 1967.

[15] There are both subjective and objective elements in the legal defence of justification. The subjective element involves the Court examining the state of belief of the soldiers at the time they discharged their shots. The objective element involves deciding whether, from a purely external objective standpoint, the force used by the soldiers was reasonably necessary in the circumstances of the case.

[16] To discharge the subjective element of its burden the Defendant must prove, on the balance of probabilities, that the soldier(s) who shot the Plaintiff was/were justified in doing so on the basis of what they believed were the relevant facts at the time of the shooting.

[17] In this case four soldiers admitted firing shots at the Plaintiff. The forensic scientist, Collette Quinn, testified that the Plaintiff’s car was hit by at least 15 bullets. The medical evidence establishes that the Plaintiff sustained a number of bullet wounds.

[18] However it was not possible to determine which bullets from which soldiers actually struck the Plaintiff.

[19] Only one soldier, Soldier J, said in his statement to the police that he believed some of his shots had hit the Plaintiff. Other soldiers said they fired “aimed shots” at the Plaintiff which, given their training and experience, might reasonably have been expected to have hit their target. However, there is no evidence from three of the

four soldiers who shot about their subjective states of belief at the time they fired their rounds.

[20] As I have said once trespass to the person is admitted or proved it can only be justified if the Defendant calls sufficient evidence to discharge its onus to establish this defence. In the circumstances of this case I would have expected the Defendant to call each of the soldiers who are known to have shot at the Plaintiff to give evidence about his subjective state of belief at the time of the shooting, unless there was some acceptable reason why an individual soldier could not be called. In this case no such reason was advanced. On the contrary, all the soldiers involved were initially available to give evidence and the Court was told that a certain number of days would be required to hear all their evidence. In fact, however, only *one* of the soldiers who fired rounds at the Plaintiff, namely Soldier A, was called by the Defendant.

[21] There are no grounds whatsoever for conjecturing that all the rounds that hit the Plaintiff came from Soldier A's gun. If anything this is contra indicated by the written statement of Soldier J, who said he believed some of his rounds did strike the Plaintiff but Soldier J did not give any evidence about his subjective state of mind at the time he fired those shots. Neither did Soldiers I or L each of whom was, quite possibly, the source of the shots which caused the Plaintiff's injuries.

[22] I do not accept Soldier A's account of the circumstances in which he claims to have shot at the Plaintiff. For the reasons given briefly below I found his account utterly implausible. After his evidence was given the remaining soldier witnesses, who had been available to give evidence the week before, were no longer prepared to give evidence. This was despite the fact that special measures had been secured and were in place in the court room for these witnesses to protect their anonymity and to allow them give their evidence from behind a screen.

[23] It is open to the Court to draw an adverse inference from the failure or refusal of witnesses to testify in circumstances in which they might be expected to give relevant and important evidence. Three highly material witness soldiers very belatedly declined to go into the witness box having previously signalled their intention to do so. They were aware that part of the case being made on the Plaintiffs behalf was that this military operation was not, as the Defendant claimed, an arrest operation but a "shoot to kill" operation. Their decision not to give evidence was only communicated after soldier A had given evidence and been cross-examined. They were fully aware and had been independently advised of the legal implications of the case being made on the Plaintiffs behalf. No explanation was furnished for their dramatic *volte- face* in refusing to give evidence. Nor did the Defendant take any steps to compel them to do so. I infer from these circumstances that their evidence is likely to have been unhelpful to the Defendant. The Defendant has failed to call in these proceedings evidence to satisfy this court that the shooting of the plaintiff was justified. It has failed to discharge the onus placed upon it that the soldier(s) who fired the shots which caused the Plaintiff's injuries subjectively

believed that he/they were justified in so doing. Given this finding it is not necessary for me to proceed to consider the objective justification as the defence of justification cannot be made out if, as I have held, the subjective element is not proved by the Defendant to the requisite standard.

[24] Soldier A told the Court that he shot to kill when he opened fire on the Plaintiff's car which at that time was trying to flee. It was, and was believed to be, part of the overall IRA operation which undoubtedly involved a determined attempt to kill as many police officers as possible using a prestige weapon namely the Russian anti aircraft gun.

[25] A's statement to police and interview (after having been seen by the "flying lawyer") does not *mention* A shooting at the Plaintiff's fleeing car. Indeed, the Defendant's expert, Mr Hayes as per the final paragraph in his "expert" report, considered that the Plaintiff had been shot in *crossfire*. A's initial account therefore provides for no justification for shooting at the Plaintiff at all. Moreover there was *no crossfire* since the only party to discharge weapons at the scene in the Church car park were the army.

[26] Soldier A's account in evidence of what he says transpired in the car park is in some respects incredible. The idea that, as he claimed, a man who was unarmed and whose car had just been shot at and who may well have been (and probably was already shot) should have got on his knees at the bonnet of the car and presented his head and shoulders above the bonnet and adopted a firing stance is simply not credible. Soldier A tried to justify his account by referring to the fact that *he* didn't know that the Plaintiff was unarmed but of course the *Plaintiff* knew that he was unarmed and it would have been insane for an unarmed man, whether wounded or not, to have presented himself in the way described by Soldier A. For the Plaintiff to have behaved in the way alleged by Soldier A was contrary to reason and the instinct for self preservation.

[27] In light of the above I find that the shooting of the Plaintiff has not been justified. I do not propose, in light of the overall state of the evidence, to reduce the recoverable damages. I reject as wholly unmeritorious the claim for aggravated and exemplary damages.