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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

STANISLAUS CARBERRY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STAN CARBERRY (DECEASED)

Plaintiff

and

MINISTRY OF DEFENCE

Defendant

Mr Frank O'Donoghue KC leading Mr Eugene McKenna (instructed by KRW Law Solicitors) for the Plaintiff
Mr David Dunlop KC leading Ms Julie Ellison (instructed by the Crown Solicitor for Northern Ireland) for the Defendant

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McALINDEN J

Introduction

[1] The plaintiff was born in April 1964. He brings this claim on his own behalf and on behalf of other dependants of the deceased who was shot dead by the British army on the Falls Road in Belfast on 13 November 1972, over fifty years ago. The deceased was born on 19 October 1938, and he was thirty-four years of age at the time of his death. Following a grant of probate on 21 February 2014, the writ of summons in this action was issued on 16 May 2014, some forty-one and a half years after the shooting of the deceased. The statement of claim was served on 18 May 2015. The defence was served on 17 July 2015 and a limitation defence is pleaded. The plaintiff's reply dated 12 April 2016 relies upon provisions now incorporated in Article 50 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order"). At the time of his death, the deceased worked as a heating engineer. He was survived by his widow and six children. The widow of the deceased, Sarah Gemma Carberry, was born in May 1935. In her later years, she developed a form of dementia and now lacks capacity. The other children of the deceased are Donna Carberry, born in January 1962, Stanislaus Carberry, born in April 1964, Joseph Carberry, born in June

1965, Elizabeth Carberry, born in September 1967, Pauline Carberry, born in January 1969 and Christine Carberry, born in December 1970. A forensic accountancy report prepared by Mr Ciaran McCavana of Quarter Chartered Accountants dated 20 April 2015, which was served with the statement of claim, quantified the loss of dependency claim in this case as lying the region of £860,000 to £1.06M. Bearing in mind that the youngest of the children of the deceased was born in December 1970, the primary limitation period for any proceedings brought by or on her behalf would have expired on 20 December 1991. The primary limitation period in respect of any proceedings brought by or on behalf of the widow of the deceased would have expired on 12 November 1975. The primary limitation period in respect of any proceedings brought by or on behalf of the plaintiff would have expired on 14 April 1985.

[2] Where a claim is brought under the Fatal Accidents (Northern Ireland) Order 1977, it must be brought within three years from either the date of death of the deceased or within three years of the date of knowledge of the person for whose benefit the claim is brought, whichever is the later. Where there are several potential Fatal Accident Order claimants, then the limitation period runs separately against each of them. In this case, there is no issue as to the date of knowledge of any of the persons for whose benefit the claim is brought. Therefore, for each of the dependants in this case, the primary limitation period expired on various dates between 12 November 1975 and 20 December 1991. If a dependant's Fatal Accidents Order claim is statute barred, the dependant can ask the court to exercise its discretion to disapply the primary limitation period and allow the claim to proceed under the provisions of Article 50 of the 1989 Order. In this case, the plaintiff seeks to persuade the court to disapply the primary limitation periods applicable to each of the dependants, to proceed to determine the liability issues on the basis of the evidence before the court and then to provide a judgment on these two aspects of the case; leaving the parties to resolve the issue of quantum, if that is possible. If it is not possible to resolve this outstanding issue by way of negotiations, it is proposed that the evidence relating to quantum can then be heard and a further judgment dealing with this aspect of the case can then be given.

[3] The defendant, on the other hand, argues that the court should not exercise its discretion to disapply the primary limitation periods in respect of each of the dependants and, as a backup proposition, the defendant argues that the plaintiff's claims are without merit, as the shooting of Mr Carberry was clearly and demonstrably justified in law.

[4] Following the setting down of this action for trial on 17 December 2018, the matter came on for hearing in 2021 and on 24 February 2021, the court heard evidence from Mr Brian Murphy, Consulting Engineer. On 25 February 2021, the court heard evidence from Richard Stanley Rudkin, the plaintiff and Mrs Rosetta McGlinchey. On 3 March 2021, the court heard evidence from Mrs Elizabeth Tierney (nee Carberry) and Mr Michael Ritchie. On 26 May 2022, the court heard the evidence of Soldier B. Finally, on 9 February 2023 the court heard

final oral submissions in this case, having previously been provided with numerous sets of comprehensive and erudite written submissions assiduously prepared by the legal representatives of both parties. I have been greatly assisted in my task of adjudicating upon this matter by the quality of the forensic advocacy deployed senior counsel in this case and by the high calibre of written submissions provided to the court.

[5] In this judgment, I propose to set out the evidence presented to the court relating to the events surrounding the death of the deceased and then to set out the evidence presented to the court which is relevant to the limitation issue. I will then set out the issues of law arising out of and relevant to the claim made by the plaintiff that his father was shot dead without any legal justification. I will then set out the issues of law arising out of and relevant to the case made out by the plaintiff that the primary limitation periods should be disapplied in this action. I will then determine the issue of whether I should exercise my discretion in favour of any or all of the claimants under Article 50. Finally, if, in the exercise of my discretion under Article 50 of the1989 Order, I do decide to disapply the primary limitation periods for any of the dependants, I will go on to consider the liability aspect of this case and in doing so I will determine whether or not the shooting dead of the deceased was justified in law.

Evidence relating to the death of the deceased

[6] At 12:05pm on 13 November 1972, a blue Vauxhall Viva, registration number 1922TZ, was hijacked by two males on Donegall Avenue in Belfast. Mr X, the elderly male owner, was sitting in his vehicle, waiting for traffic lights to change. The passenger door was opened by a youth (16-17 years old) and this youth told Mr X to get out of the car. This youth then got into the car. The driver's door was opened by a man who was holding what looked like a Luger pistol. The barrel of this pistol was pressed against Mr X's neck behind the right ear. The man told Mr X to get out of the car or he would blow his brains out. As he was getting out of the car, the man struck Mr X on the back of the neck, and he was dazed by this blow. The man then got into the car and reversed it along Donegall Avenue before turning into Pembrook Street. The following day at 11:00am, Mr X was requested to go to Belfast City Mortuary and there he identified the body of a male as the man who had threatened him with the pistol, had struck him and had stolen his car. The body identified by Mr X was the deceased, Stan Carberry senior.

[7] At the time of this incident, Mr Y was standing at the junction of Donegall Avenue and Donegall Road. He saw a dark-haired, unshaven man, five feet seven inches in height, wearing a green coat standing outside Campbell's shop on the Donegall Road. This man was joined by a younger man. The first man then took a gun out of his jacket pocket, did something with the gun and then put it back into his pocket again. The two men then went over to a Vauxhall Viva that was stationary on Donegall Avenue and hijacked this vehicle. The younger man got into the front passenger seat and the older man with the gun got into the driver's seat.

The vehicle was reversed along Donegall Avenue and then driven along Pembrook Street. Mr Y ran after the vehicle. He saw the vehicle being driven into Kitchener Street and then into Broadway. Mr Y ran to Broadway and told an army foot patrol what he had witnessed. Mr Y also identified the deceased in the Belfast City Mortuary the following day as the man with the gun who had hijacked the Vauxhall Viva and had driven off in it with the younger man. The body identified by Mr Y was the deceased, Stan Carberry senior. I should make it clear at this stage that these eyewitness accounts are contained in statements made by two individuals to the police in November 1972. These two individuals were given the cyphers Mr "X" and Mr "Y." Apart from the fact that "Mr X" was the owner of a Vauxhall Viva 1922TZ and was elderly in 1972, nothing more is known about them.

[8] At this distant remove, today's reader might wonder what the deceased, a heating engineer with a wife and six children was doing with a gun, hijacking a car on Donegall Avenue in Belfast on a Monday lunchtime in November 1972. As Mr Carberry was killed within thirty minutes or so of this hijack taking place, one will never know for certain what the deceased intended to do with this hijacked car. However, there are a few pieces of evidence which cast some light on a motive for this act.

[9] There is a memorial plaque on the wall of a building on the Falls Road, near the junction with La Salle Drive, close to where the deceased was shot. This plaque reads as follows:

> "In memory of … Vol Stan Carberry killed in action 13th Nov. 1972 aged 34 … of "A" company, 2nd Batt Belfast Brigade."

There were a number of sympathy notices in the death notice section in the Irish News on 14 November 1972 which referred to the deceased as an IRA volunteer. These were from the brigade staff, officers and volunteers of Cumann na mBan, the officers and volunteers of "A" company, 2nd battalion, Oglaigh na hEireann, the officers and volunteers of "B" company, 2nd battalion, Oglaigh na hEireann, the officers and volunteers of "C" company, 2nd battalion, Oglaigh na hEireann, the officers and volunteers of "D" company, 2nd battalion, Oglaigh na hEireann, the officers and volunteers of "E" company, 2nd battalion, Oglaigh na hEireann, the officers and volunteers of "F" company, 2nd battalion, Oglaigh na hEireann, and the Gerard O'Callaghan and Albert Kavanagh Sinn Fein Cumman. The deceased was given a military style funeral with four uniformed men armed with revolvers firing shots over his coffin and six girls wearing black berets and black glasses marching on either side of the hearse. See page 484 of the trial bundle.

[10] The book "Lost Lives" refers to Mr Carberry as a member of the 2nd battalion of the Belfast brigade of the IRA. The next entry in "Lost Lives" relates to the shooting of a soldier, Private Stanley Evans of the 1st battalion of the Queen's Regiment at Unity Flats in Belfast, also on 13 November 1972. Private Evans, who

was from Greenford in Middlesex and who was aged 19 years at the time, was shot in the head by a sniper while guarding a search team carrying out a search of a house in Stanhope Street, Belfast. Private Evans was rushed to hospital but died a few hours later on 14 November 1972. The IRA claimed responsibility for this shooting in retaliation for the "cowardly murder" of Stan Carberry. It is safe to conclude that the deceased was a member of the IRA who was "killed in action" and whose death provoked a swift and deadly response from the organisation of which he was a member.

[11] Following the hijacking of the Vauxhall Viva and the reporting of this hijacking to an army patrol, the available evidence indicates that details of the incident were circulated by the army's Broadway Operations Room to army patrols in the area at 12:15pm. The information provided was that a blue Vauxhall Viva registration number 1922TZ had been hijacked at the junction of Donegall Avenue and Donegall Road by two armed men. The instructions from the Operations Room were to patrol the area and to stop and detain all occupants of the vehicle. If seen, the vehicle was to be approached with caution as two armed men had apparently hijacked the vehicle in question.

[12] At about the same time, two Saracen armoured personnel carriers, transporting members of the Royal Green Jackets regiment who had been on a foot patrol in the area, were travelling along the Falls Road from the direction of Andersonstown towards the Royal Victoria Hospital. The only available eye-witness accounts of what happened thereafter are contained in statements made by four of these soldiers who were given the cyphers "A", "B", "C" and "D" when making their statements to the Royal Military Police in November 1972; an interview of soldier "A" conducted by a HET investigation team in 2013 and a statement made by soldier "A" at that time and a statement made by Mrs Rosetta McGlinchey in June 2014. Soldier "B" and Mrs McGlinchey also gave evidence at the hearing of this matter.

[13] Solder "A" was seated in the rear of the leading Saracen, on the driver's side, closest to the back door. Traffic was heavy on the Falls Road at the time. Near the junction of Iveagh Drive, another soldier (soldier "E") shouted: "there's the stolen car". The occupants of the Saracen were ordered to deploy and stop the stolen car. Soldier "A" looked out one of the side observation ports and saw the car moving out of Iveagh Parade with two male occupants in the front. The vehicle turned towards Andersonstown. Soldier "A" immediately deployed and ran towards the rear of the car which was now on the Falls Road. He got to within a couple of feet of the driver's door and shouted halt. The driver's window was open. The driver looked at the soldier and appeared to panic. The car engine was then revved, and soldier "A" shouted "halt" again. The passenger leaned down to the centre of the car and the car sped off. The passenger door of the car then opened, and a shot was fired from a pistol. Soldier "A" readied his Lee Enfield . 303 rifle which was fitted with a telescopic sight. Soldier "B" shouted an order to fire at the tyres. The car was about 45 yards away at this stage. Soldier "A" fired one shot at the nearside rear tyre, and

he heard the tyre burst and the car then swerved as if it was out of control. The vehicle did not stop.

[14] Soldier "A" then heard two high velocity rounds being fired from behind his position and he saw the rounds strike the rear windscreen of the vehicle. He identified soldier "C" as the soldier who had fired these rounds. The passenger door then opened again by a distance of about two feet and soldier "A" saw movement in the gap and fired one .303 round at the movement in the gap. He then saw a male figure fall out of the door space onto the road. The car continued on and the male lay motionless in the middle of the Falls Road opposite 300 Falls Road. Soldier "A" then heard two further high velocity shots that passed above his head and a further two high velocity shots that came from behind him, aimed at the stolen car. The car then stopped in the centre of the road opposite La Salle Drive and freewheeled into the junction and came to rest against the kerb. As the vehicle was still freewheeling, the driver got out on all fours and crawled towards the northside of the mouth of La Salle Drive. He had a rifle in his right hand and a pistol in his left hand. He made his escape down La Salle Drive. Soldier "A" described the passenger of the vehicle as being aged 38 to 40, 5'8" to 5'9", of medium build, short black hair, unshaven, wearing a blue anorak and dark trousers. The driver was between 20 and 25 years old, stocky build, medium long blonde hair and wearing a dark suit.

[15] Soldier "A" in his HET interview in 2013 described the event in the following manner:

> "We got a radio message through from the RUC to say there's been an armed hijack … And a number and a description of the car and all that came up. As I was going down the Falls somebody spotted and said: 'That's the hijacked car' (inaudible) and then the car just went blasting through us and then that's when the rounds came down. A couple of the lads went and said: 'halt, halt' you know blah, blah, all that. A couple of rounds gone down and that's when the shit hit the fan."

Soldier "A" confirmed that the first couple of rounds fired emanated from the vehicle towards the soldiers and that the soldiers then returned fire. Soldier "A" stated that it was the passenger in the car who fired the first shots. When interviewed in 2013, he was not 100% sure whether the passenger window was opened to allow the passenger to fire at the soldiers or whether the door was opened. Soldier "A" thought he fired at the vehicle from 30 or 40 yards distance, maybe more. The passenger fell out of the car 5, 6 or 7 seconds after soldier "A" fired at the car; maybe longer. The car then swerved off the road and the driver "scarpered." He jumped out the driver's side and disappeared into the crowd. A hostile crowd gathered, and it was not possible with such a small number of soldiers to pursue the driver. Soldier "A" was of the opinion that the driver had a weapon in his left hand as he made his escape.

[16] Soldier "A" was questioned as to whether things could have been done differently and his answer was quite telling:

> "Well, I suppose it could have been done if I'd let a couple of our guys get killed in the process, it might have done, yeah. But other than that, no I can't see how it could have been done differently."

As to what was going through his mind when he fired the shot, soldier "A" stated:

> "Well, I thought there was a bomb in the back of the car. I thought that's why it had been hijacked. Put a bomb in, take it down to the city centre and blow up the Europa Hotel again. So, I put a round and it knocked the tyres out so that it couldn't get away to plant a bomb or anything and that's what was going through my mind at the time."

Soldier "A" was of the view that he had complied with the Yellow Card when he opened fire.

[17] In a formal statement made to the HET investigators in 2013, soldier "A" stated that he could recall seeing a hand holding a gun and being shot at. He heard at least one low velocity shot. It may have been that a second shot was fired. He could not remember the door of the car being opened but he did remember the passenger falling out of the car some time afterwards so the passenger door could have been opened to fire the shot or shots that emanated from the car. He stated that it was possible that the shot that he fired did not strike the rear passenger tyre but struck the rear passenger-side light cluster and then deflected through the car and burst the front driver-side tyre instead. Soldier "A" remembered high velocity shots being fired from a position to the rear of him. He recalled movement on the passenger side of the car. He could not remember whether this movement was through an open window or whether the passenger door was opened at that stage. He definitely saw movement and fired at that movement. After this, a crowd swiftly gathered. The driver got out of the car and escaped into the crowd. Soldier "A" stated that he believed that he used reasonable force in all the circumstances and that he acted within the rules of engagement.

> "The first shot came from the passenger in the vehicle and when I returned fire, I considered my life to be in danger. It was therefore appropriate and within the rules of engagement to return fire at the gunman, without having to give a warning."

[18] Soldier "B" in his statement indicated that he was section commander of the patrol. He recounted in his statement how he had received instructions from the Operations Room via the radio concerning the hijacked vehicle. He was in the lead APC going along the Falls Road. While the vehicle was stationary at or about the junction with Islandbawn Street, soldier "B" saw the highjacked vehicle at or about the junction of Iveagh Drive. There were two occupants in the car dressed in civilian clothing. The driver was between 28-30 years old, broad build, collar length fair hair with broad long sideburns and appeared to be about 5'8" tall. The passenger was wearing a royal blue anorak. The vehicle appeared to be waiting for traffic to pass the junction before pulling out onto the Falls Road. Soldier "B" immediately ordered the soldiers in the lead APC to deploy and detain the vehicle with caution. There were approximately five vehicles between the two APCs at that stage. When soldier "B" got out of the lead APC he heard soldier "A" shout: "halt, halt." He then heard the screech of tyres followed by the sound of a low velocity shot. The vehicle was near the junction of Fallswater Drive when soldier "B" first saw it, about 50 metres away. It was being driven in an erratic manner by that stage, swerving from side to side, almost out of control. Soldier "A" aimed his .303 rifle at the vehicle. At that stage soldier "A" was about five metres behind the rear of the APC and on the crown of the Falls Road. He then fired one round at the car. This round struck the rear passenger-side light cluster of the Vauxhall Viva. This bullet must have been deflected through the vehicle because the front driver-side tyre then burst. The vehicle then meandered in an odd way. Two high velocity shots were directed towards the swerving vehicle by members of Soldier "B's" unit. The rounds struck the rear window of the car. It was located near 290 Falls Road at that stage. The front passenger door opened and the male wearing the blue anorak slumped out onto the road. The car then moved into the right-hand lane and its tyres bounced off the pavement opposite La Salle Drive. Two more low velocity shots were fired from within the car, presumably by the driver. Two high velocity shots were then fired by a soldier who was opposite the La Salle Gardens junction near the entrance to Our Lady's Hospital. The car appeared to cruise very slowly and turn left towards the junction of La Salle Drive where it came to rest with its front wheels resting up against the kerb to the left of the junction.

[19] Soldier "B" and other soldiers from both APCs then ran along the Falls Road towards the vehicle. When the soldiers reached the vehicle, soldier "B" deployed his men in defensive positions around the vehicle and the body. Soldiers "B" and "C" went to the vehicle. By this stage a large mixed crowd, composed mainly of school children had surrounded the car. These people were ordered away from the vehicle by soldiers "B" and "C". Soldier "B" noted that the rear and front windscreens of the vehicle were shattered. The front right tyre was burst, and the inside of the car was littered with fragments of glass. By this stage, a crowd of approximately 120 people had gathered around the car and body. This crowd were becoming abusive and violent. Women in the crowd were attempting to punch and kick soldiers in the unit whilst they secured the area. A civilian ambulance arrived, and the casualty was removed from the scene. The army drove the Vauxhall Viva to the Broadway base. The driver of the vehicle could not be seen and due to the presence of a

militant crowd, no follow up action could be carried out in the area in an attempt to trace him. Soldier "B" stated that he could not recognise the driver of the hijacked vehicle again.

[20] Soldier "B" gave evidence to the court by videolink on 26 May 2022. He confirmed that at the time of this incident he was a serving lance corporal in the Royal Green Jackets on a tour of duty in Northern Ireland, having joined the army in 1969. This was his second tour of duty in Northern Ireland which appears to have commenced in late August 1972. He left the army in 1973. He is now aged in his early seventies. Soldier "B's" evidence in examination in chief largely mirrored the evidence contained in his statement made to the RMP in November 1972. In cross-examination, he confirmed that he was first approached about giving evidence in this case at the end of 2021 which would have been after the case was part-heard. He confirmed that at that time he was provided with his own statement, the statements of soldiers "A" and "C." and a copy of the "Yellow Card" rules. He also received a copy of the statement of Rosetta McGlinchey and copies of the maps and photographs prepared by Mr Murphy, Consulting Engineer. It would appear that all this documentation was sent by post to soldier "B" by Devonshires Solicitors. He confirmed that he had read over his own statement and the statements of soldiers "A" and "C" prior to giving evidence and he had also consulted with counsel on a number of occasions.

[21] Soldier "B" confirmed that he as a lance corporal was directly in charge of the soldiers in the lead Saracen APC and it was likely that a corporal would have been in charge of the soldiers in the second Saracen. Soldier "B" confirmed that he was operating the radio in the first Saracen and he had a unique callsign and there would have been another soldier with a radio in the second Saracen (presumably the corporal) with another unique callsign. Both radios would have been operating on the same frequency, so they would have been in radio contact with each other as well as being in radio contact with the Operations Room. Soldier "B" confirmed that he was seated in the rear of the lead Saracen, on the driver's side. There were three observation hatches on each side of the APC, and each one was approximately 4" x 6." There were two other observation hatches in the rear of the APC, one in each back door. Soldier "B" stated that when he first saw the Vauxhall Viva, it was on the Falls Road, travelling towards Andersonstown and it was passing the APC he was in. When giving his evidence, he could not recall seeing the vehicle in a side street or turning out of a side street. His recollection in 2022 was seeing the vehicle for the first time on the Falls Road as it passed his APC, travelling in the opposite direction at approximately 20mph. This evidence contrasted quite markedly with the contents of soldier "B's" statement made in November 1972. Soldier "B" also stated in his evidence that the message that came through from the Operations Room alerting the patrol to be on the lookout for the hijacked Vauxhall Viva was received only a matter of minutes before he saw the vehicle. Again, this was in marked contrast with what was recorded in his earlier statement.

[22] Soldier "B" confirmed that he did not communicate by radio with the other APC once he had spotted the vehicle. He was then asked why he did not make a radio call to the corporal in the other Saracen that was some distance back down the Falls Road, alerting him that the Vauxhall Viva was passing the first Saracen so that the driver of the second Saracen could have driven onto the Andersonstown bound lane of the Falls Road in order to block the Vauxhall Viva; especially when the vehicle would have been well past the lead APC by the time the soldiers in the lead APC had deployed? Soldier "B" was initially unable to answer that question but at a later stage in his evidence he stated that he didn't think there would have been enough time for the second Saracen to take action to form a roadblock. In questioning from Mr O'Donoghue KC, he agreed that it wouldn't have taken very long for the second Saracen to have pulled across the road or for the soldiers to get out of the second Saracen to deploy and call on the vehicle to halt but nothing like this occurred because there was no contact between the first and second Saracens.

[23] In relation to the significant discrepancy between his oral evidence and the evidence in his statement relating to where the vehicle was when he first saw it, it was suggested to soldier "B" that he had either discussed what he was going to put in his statement with soldiers "A" and "C" before he made his statement or he had spoken to RMP officers about what should go into his statement before he formally made his statement. Soldier "B" did not accept either of these propositions. He went on to state: "Everything happened so quickly, I just had a glance at the car. Misjudging speed is very easy to do, so maybe I did misjudge the speed of the car, everything else I saw – that's what I saw." At a subsequent stage of his cross-examination soldier "B" stated he did not speak to soldiers "A" or "C" before making his statement because he had been ordered by his platoon sergeant not to do so and that the three soldiers were not allowed to sit in a group before their statements were taken. Mr O'Donoghue KC inquired of soldier "B" how it was that all three soldiers said that the vehicle emerged from Iveagh Drive onto the Falls Road if they had not discussed what happened in advance of giving their statements. No direct answer was offered by soldier "B" to Mr O'Donoghue's inquiry.

[24] When the court pointed out to him that what Mr O'Donoghue KC was questioning him about was the significant discrepancy between his oral evidence and his statement as to where he first saw the Vauxhall Viva, soldier "B" then stated as follows:

> "Well, I saw the car. It was parked at the junction, but it had started to move. Although he was giving way to traffic, he was starting to move at that point."

The court then asked the witness whether he had the vaguest recollection of this particular incident or whether he was just going on what he had read in his statement in respect of events that happened fifty years ago and the witness answered:

> "No … I was actually mistaken…It's so long ago. I don't know … It was the first incident that we'd been involved in where someone had been shot dead …"

[25] Soldier "B" then went on to state that as a result of this being the first incident during which someone was shot dead it did stick in his mind "a bit." When asked what bits stuck in his mind he answered: "the crowds gathering at the top of the road." When asked about which side of the car the person fell out of, soldier "B" replied that he was positive that it was the passenger side. He went on to state that: "by the time we got near the car, a crowd had gathered between the car and the soldiers, to stop us getting near the car or the person who fell out … Well, it's just a bit of – it was just a bit of mayhem after the shots were fired … but as far as I can recall, he came out of the passenger side."

[26] In relation to the issue of who fired first and sequencing of who fired thereafter or what type of rounds (high or low velocity) were fired in what order and by whom, soldier "B" stated he had no independent recollection beyond his statement. At this distant remove, he stated that he could remember low velocity shots being fired that day. "The sound … yeah well it was very similar to low velocity shots if it wasn't." In answer to a question from Mr O'Donoghue KC, soldier "B" stated that he did not see a gun in anybody's hand that day … "but the noise – the sound came from the car … It came from the area of the car." However, this was in conflict with evidence that he had given in examination in chief when he had stated that at the time he did not know where the low velocity shots had emanated from and that he had asked the other soldiers after the incident, and they had told him where the shots came from.

[27] Soldier "B" was then asked whether he gave an order to other soldiers to fire that day and he answered that he did not but that "we don't have to give orders for men to open fire." He stated that during his entire time in the army he had never given a soldier an order to open fire. He then went on to say that if any other soldier said that he had given such an order then that would be a lie and that soldier "A" was wrong when he made a statement alleging that he (soldier "B") ordered soldier "A" to fire. Soldier "B" was adamant that he did not give an order to fire even to the extent of firing to shoot out a tyre.

[28] Soldier "B" was then asked whether he, as the soldier in charge of the section that had opened fire on the car had taken any steps at the time to positively identify any soldiers other than soldier "A" who had fired shots at the vehicle. He was unable to answer that question. Mr O'Donoghue KC put it to soldier "B" that as section leader, it would have been important for soldier "B" to establish at the earliest opportunity the identity of each soldier who had fired any shots at the car and then to ascertain whether each soldier who opened fire on the car was justified in doing so. Soldier "B" stated that he knew soldier "A" but he did not know soldier "C" and had not been told who soldier "C" was and noted that soldier "C" had set

out in his statement that he had opened fire on the vehicle, but he (soldier "B") had never directed any soldier to open fire.

[29] Mr O'Donoghue KC put it to soldier "B" that the version of events set out in his statement was a complete untruth and that what happened that day in 1972 was that the vehicle was spotted as it was established on the Falls Road and that "two of the soldiers got out and simply started firing at the back of the vehicle … shots were fired into the back of this vehicle … with one of the soldiers – as you know, one of the soldiers deliberately aiming at one of the occupants in the vehicle and firing with lethal force, in circumstances where you never ordered it. Do you understand?" Soldier "B's" answer was: "Yes. That could well be yes." It was put to soldier "B" that the version of events which indicated that the vehicle came out of a side street was simply a concoction and that his oral evidence was the first time that a true account of what happened that day had been given. Soldier "B" then answered: "Yes, it could have been like that." Mr O'Donoghue KC pressed home with the following question: "Yes it was like that Mr B, that is the truth of the matter." But soldier "B" answered: "No."

[30] Soldier "B" was then questioned by the court as to his actual recollection in relation to where the Vauxhall Viva vehicle was when he first saw it and in answer to this question, he stated: "… first time I saw it, it was pulling out of a junction. It was pulling out slowly and heading onto the Falls Road." It was again pointed out to soldier "B" that this was different from the account given earlier in his oral evidence and he was asked whether the oral evidence he gave earlier was wrong and he replied: "Yeah, driving along after pulling out of the junction and being on the Falls Road I would say, yeah, that's driving along. Probably my assumption of the speed could have been a bit fast."

[31] Mr O'Donoghue KC then reminded the witness that his oral evidence was that he first saw the Vauxhall Viva as it was driving along the Falls Road at 20mph, and he had then altered his evidence to indicate that 20mph might have been a bit of an over-estimate of the vehicle's speed. Mr O'Donoghue KC then asked the witness the following question: "When you saw the vehicle through the hatch, was it on the Falls Road, having come out of a junction, or was it still at a junction?" Soldier "B" answered: "It was on the Falls Road, having come out of a junction." He accepted Mr O'Donoghue's proposition that it was travelling at between 10mph and 20mph at that time and that there was no traffic impeding the progress of the vehicle along the Falls Road towards Andersonstown. He also accepted Mr O'Donoghue's proposition that soldiers then got out of the rear of the APC and they then fired. He stated that approximately four to five seconds passed between soldier "A" getting out of the rear of the APC and soldier "A" opening fire. Soldier "B" stated that he thought there was a gap of about three to four seconds between soldier "A" firing the first of his shots and soldier "C" firing his two shots. He also accepted that in that time he also remembered hearing the sound of two low velocity shots. He remembered the vehicle zig-zagging away from the Saracens." He accelerated slightly, but not very fast … There was a screech of tyres…Yes, he put it down," (put

his foot to the board) "but the car just wouldn't move. It wasn't a fast car." He stated that he remembered the car: "mounting the kerb and then across the other side of the road and then …"

[32] Mr O'Donoghue KC then specifically put to soldier "B" that Mr Stan Carberry, the deceased, had been the driver of the car and that it was the driver of the car that fell out of the car onto the road and that it was the passenger of the vehicle who was able to make good his escape. Soldier "B" stated that the person who was shot was lying on the nearside of the car. Soldier "B" then agreed that it was an assumption on his part that the person who was shot was a passenger in the vehicle because he was found lying on the passenger side of the car. He agreed that he did not actually see the person fall out of the car. Again, this was in stark contrast to the statement made by soldier "B" in November 1972. He then accepted that the dead person was lying in the middle of the road and that he was lying in the road behind the car but to the nearside of it. He then accepted that the description in his statement of a vehicle swerving from one side of the road to the other, almost out of control before the person fell out of the vehicle was consistent with the driver having been shot.

[33] In re-examination, soldier "B" reaffirmed that the vehicle "was called on to halt" before the soldiers opened fire. He reaffirmed that what happened that day was that the Vauxhall Viva was spotted by the patrol on the Falls Road, soldiers then got out to stop the vehicle, the driver of the vehicle was called upon to halt, the vehicle did not do so, low velocity shots were fired from the vehicle and then the soldiers returned fire.

[34] During his oral evidence, soldier "B" repeatedly contradicted the oral evidence he had given just a short time earlier and also contradicted the contents of his statement which had been made just after the incident in question, 50 years earlier. Mr O'Donoghue KC repeatedly suggested that this was due to the fact that the version of events contained in the earlier statement was a fabricated version of events. However, at the close of soldier "B's" evidence, the overwhelming impression I formed of soldier "B's" oral evidence was that it was utterly and fundamentally blighted and impoverished by the absence of any cogent and coherent independent recollection of events on his part, due to the passage of a half a century between the date of the shooting and the date of him giving oral evidence for the first time about this incident.

[35] Soldier "C" in his statement dated November 1972, indicated that he was also in the lead Saracen APC. The APCs picked up the foot patrol in La Salle Drive and the APCs then proceeded onto the Falls Road, travelling towards the Springfield Road/Grosvenor Road junction. Traffic in this direction was slow moving. As the lead APC moved past Iveagh Drive, soldier "B" shouted: "Stop that car, it's wanted." Soldier "A" was the first to deploy. He ran towards a blue Vauxhall Viva and shouted halt. Soldier "C" heard a single shot which came from the passenger side of the car. Soldier "C" observed that there were two persons in the car; the

driver and the front seat passenger. Soldier "C" heard and saw soldier "A" fire his rifle. Soldier "C" saw the passenger of the car move from a slumped position to an upright one. The vehicle appeared to take evasive action by moving to the right of the road and then back to the left. Soldier "C" then cocked his SLR rifle which was fitted with a Trilux night sight. Soldier "C" then fired two shots at the passenger of the stolen car. Both rounds struck the rear windscreen. Soldier "C" saw the passenger slump to the left-hand side door. The door was open and as the passenger began to fall out of the door, soldier "C" heard another high velocity shot. Soldier "C" then saw a male person fall out of the car onto the road and lie motionless on the centre of the road opposite 300 Falls Road.

[36] Soldier "C" then heard shots coming from within the vehicle which by this time was at an angle on the Falls Road, freewheeling into the junction with La Salle Drive before coming to rest against the kerb on the south side of the junction. Both doors were open by this stage. Soldier "C" then saw movement at the rear side of the car and heard a further two high velocity shots which did not come from the car. Soldier "C" along with other members of the patrol began to move towards the body on the road. A crowd then began to gather around the body. A doctor arrived at the scene and examined the body. A civilian ambulance then arrived, and the body was put on a stretcher and taken away in the ambulance. Soldier "C" then withdrew to the lead APC and returned to the base at Broadway. The lead APC was followed by the stolen car and then the second APC. Soldier "C" gave a description of the passenger of the stolen car. This individual was between 27 to 30 years old. He was 5'8" in height, slim build, short dark black hair, unshaven, wearing a dark blue anorak, charcoal black trousers and a dirty white shirt. He also gave a description of the driver as being younger, aged between 20 and 25 years old. He was stockily built and had fair shoulder length hair. Soldier "C" was shown a post-mortem photograph of the deceased and he confirmed that this was the body that was removed from the Falls Road and placed in the rear of the civilian ambulance.

[37] Soldier "D" was positioned in the rear of the second Saracen APC next to the rear doors on the side nearest the footpath. At the entrance to Our Lady's Hospital opposite the junction with La Salle Gardens, the driver of the APC ordered the soldiers to debus. There were seven members of the unit in the rear of this APC. Soldier "D" opened the rear doors of the APC and jumped out onto the road. He heard a low velocity shot which appeared to have been fired from a point along the Falls Road in the direction of Broadway. This was followed by the sound of high velocity shots from the same area. Soldier "D" ran to the back of an articulated lorry which was stationary behind the APC he had debussed from. He saw a blue Vauxhall Viva driving at a slow pace along the Falls Road from the direction of Broadway towards the Donegall Road. The vehicle was moving from one side of the road to the other and when the vehicle had reached a point near 300 Falls Road, the passenger side door opened. A male person wearing a blue anorak appeared to hang out of the open door, twist towards soldier "D's" position and then this person fell from the vehicle onto the road.

[38] Soldier "D" then noted that the vehicle kept going and it crossed over onto the oncoming traffic lane where it collided with the kerb. The passenger door then opened wide and two low velocity rounds were fired from within the car towards soldier "D's" position. Soldiers from the lead APC came running towards soldier "D's" position and shouted "stop, gunman", pointing towards the car as they did so. Soldier "D" then fired two 7.62 rounds at the rear of the vehicle. He did not see where the rounds struck. The vehicle slowed down and crossed back onto the correct lane and appeared to be turning towards La Salle Drive. The vehicle collided with the left-hand kerb on La Salle Drive at the junction with the Falls Road. The vehicle came to rest there. Soldier "D" and other soldiers then ran towards the car and as he did so he saw a male person between 5'6" and 5'8" with long blonde hair and wearing a dark suit climb out of the driver's door which was open. The man was carrying a rifle in his left hand and a pistol in his right hand. The pistol looked bigger than a Browning 9mm pistol. The man appeared to stumble and dropped onto the ground on his hands and knees. In this manner, he moved quickly from the vehicle along the pavement by the side of the clinic wall and the then disappeared from sight into La Salle Park.

[39] Soldier "D" ran to where the body was lying on the road and took up a defensive position along with other soldiers. A large crowd gathered and began abusing the soldiers. Soldier "D" moved to a safer position near the Vauxhall Viva. Soldier "D" then heard the sound of a siren like that of an ambulance coming from behind him. Soldier "D" remained at the scene for a further 10 minutes. He was ordered to deploy to the rear of the lead Saracen and by that time the body of the male person had been removed from the scene. The car was driven back to the Broadway base by soldier "E."

[40] Soldier "E" made a statement in which he indicated that he drove the Vauxhall Viva from the junction of the Falls Road with La Salle Drive back to the Broadway base. Prior to getting into the vehicle, he noted that the front driver side tyre was burst, and the front and rear windscreens were shattered. There were two bullet holes in the rear right side of the vehicle.

[41] A fingerprint and forensic examination of the vehicle was carried out by a RUC Scenes of Crime Officer ("SOCO") on 13 November 1972, and it was noted that there were three distinct bullet holes just above the rear bumper. One was through the rear nearside tail light, another was just to the right of the rear number plate and the third was through the left edge of the rear offside tail light. The front and rear windscreens were shattered. The other windows were intact. One live round of .455 calibre ammunition was found on the floor between the front passenger door and the front passenger seat. Fragments of bullets were found in the driver's door, the dashboard and the passenger door pillar. There were bullet holes in both the driver's and passenger's door pillars. Fragments of bullets and metal were found in the boot area. The spare wheel in the boot was impregnated with bullet fragments. On forensic analysis, all the bullet fragments were considered to be consistent with fragments from 7.62 NATO rounds. Of importance, it should be noted that when the

car was examined by the SOCO, the intact windows were in the "upward position" when he examined the car. Further, "a fingerprint examination of the car met with a negative result." See page 384 of the trial bundle.

[42] The post mortem examination of the body of the deceased was carried out by Dr Derek Carson, Deputy State Pathologist, on 14 November 1972. The cause of death was (a) bilateral haemothorax due to (b) laceration of lungs and aorta due to (c) gunshot (7.62 NATO rifle) wound of chest. External examination revealed three gunshot wounds on the back of the left chest. The three wounds were in a horizontal line across the back at a level 25cm below the top of the shoulder. The innermost wound which was closest to the midline was a relatively superficial wound. It did not penetrate the chest cavity. It tracked to the right in the subcutaneous tissues for four cm. A fragment of metal (lead) and some fragments of clothing were extracted from the wound. The other two wounds communicated with the left chest cavity. These wounds were made by two bullet fragments (a piece of bullet jacketing and a piece of the lead core of the bullet). One fragment was found in the right chest cavity, and another was found in the hilum of the left lung. One of these fragments had penetrated the ninth rib on the left side and the thoracic spine. There was a through and through perforation of the ninth thoracic vertebra. There was a star shaped tear in the posterior wall of the aorta where it overlay the bullet hole in the mid thoracic spine. There was extensive damage to the posterior part of the left lung with many fragments of bone embedded in the lacerated lung. There was a circular perforation through the posterior part of the right lower lobe, just below the hilum. The pleural cavities were filled with fluid blood.

[43] It is important to note that all the bullet fragments passed from back to front and at an angle from left to right, on a more or less horizontal plane. It is impossible to say whether the wounds were all caused by the fragments of one bullet or the fragments of different bullets. It is undoubtedly the case that the bullet or bullets had shattered before striking the deceased's body. Swabs were taken from the hands of the deceased and all six swabs were heavily smeared with lead thus indicating contact with a lead object. There were other residues of lead to indicate exposure to firearms discharge.

[44] The inquest into the death of the deceased took place on 23 May 1974 before J H S Elliott, Coroner, sitting with a jury. The soldiers' statements and those of Mr "X" and Mr "Y" were read to the jury. An open verdict was returned. Long after the inquest and during the HET investigation into the death of the deceased, Mr Augustus Gerard Wright, a so-called eyewitness who was working as a black taxi driver on the Falls Road at the time, came forward in response to a media campaign for witnesses that had been launched by the plaintiff with the assistance of Relatives for Justice ("RFJ"). Mr Wright made a statement to RFJ dated 26 September 2011, in which he alleged that he had witnessed the car being shot at and then the two occupants getting out of the car with the driver standing with his back to the soldiers with his hands above his head. This witness then alleged that the soldiers shot the driver in the back. This account was ultimately demonstrated to

be completely without any foundation, but it did lead the HET to engage the services of a Consultant Forensic Pathologist, Dr Richard Shepherd, in order to review the pathological aspects of the death of the deceased. Dr Shepherd's report is dated 11 July 2012. Having considered all the relevant material, Dr Shepherd concluded his report in the following manner:

> "1. In my opinion the injuries and the fragments of bullet recovered are entirely consistent with Stanislaus Carberry being struck by a bullet or bullets that had been fragmented by intermediate contact with the bodywork of the car.
>
> 2. The pattern of damage to the car was entirely consistent with the bullets being fired from behind through the bodywork of the rear of the car.
>
> 3. The left to right orientation of the wound tracks within the body of Stanislaus Carberry indicates that the shots came from his left-hand side of his upper body. A person looking backwards out of an open passenger door would naturally rotate their upper body to the left and so the orientation of the tracks is entirely consistent with Stanislaus Carberry being struck by shots fired from behind the car, while he was looking backwards out the passenger door.
>
> 4. The injuries to the aorta, chest and the spine would be expected to result in an immediate collapse and rapid death. However, the injuries to the chest would not necessarily bleed externally in the seconds immediately after infliction and if Stanislaus Carberry had been looking out of the door and fallen out of the car immediately after receipt of the injuries then I would not expect there to be any blood staining within the vehicle.
>
> 5. In my opinion the injuries to Stanislaus Carberry have not been caused by shots fired directly into his body without an intervening object as suggested by Augustus Wright. Shots fired from a 7.62 NATO rifle at short range would undoubtedly have completely penetrated his body and resulted in significant exit wounds. No such wounds were present.
>
> 6. The injuries to his legs and arms were minimal. They may represent a fall from a slowly moving vehicle but their minimal nature renders interpretation difficult

and other possibilities such as simple collapse cannot be excluded."

Although this report was obtained by the HET in an effort to investigate the allegations made by Mr Wright, its relevance is wider than that in that it clearly has a bearing on the issue of whether Mr Carberry was the driver or the front seat passenger of the vehicle at the time he was shot, which is an issue brought to the fore in the evidence given by Mrs Rosetta McGlinchey.

[45] Mrs Rosetta McGlinchey who was born in 1957, provided a statement in June 2014. In November 1972 she was pupil at St Louise's Comprehensive College, and she lived at 5 La Salle Drive in Belfast. She was walking from school back home for lunch on 13 November 1972 and was at the junction of the Falls Road with St James Park when she heard a burst of gunfire. She dropped to the ground. There was another blast of heavy gunfire, and she crouched down and made her way towards St James Park Post Office and Doran's shop. As soon as the gunfire stopped, she immediately took off running towards home. When she reached the gate of the Brothers' House (West Club) she heard a man shout: "You murdering bastards" coming from down the road towards the Broadway Picture House and she heard another series of bangs. The witness then crouched down again at the gate in front of the Brothers' House. She heard another loud crash which was much closer to her. She looked in the direction of the sound and a man ran past her towards La Salle Park. She saw that a car had crashed into a tree at the top of La Salle Drive. The passenger door of the vehicle was wide open. The witness then saw that the driver's door started to open and a man attempted to get out of the driver's side of the car. He placed both hands on the top of the door and seemed to be pulling himself out of the vehicle. The man then collapsed on the ground and rolled two to three times ending up in the middle of the road at the top of La Salle Drive. Both car doors were lying open.

[46] Mrs McGlinchey then ran over to the man who was lying face down in the middle of the road and she got down on the ground beside him. She leaned into the man's face to see if he was ok. He was making gargling noises and she thought he was trying to talk. She told the man that she would get help. She then heard soldiers shouting as they ran towards her position. Mrs McGlinchey stated that the soldiers were from a Scottish regiment as each soldier's head dress had a tartan band on it. She was clearly wrong about this as the regiment in question was the Royal Green Jackets who do not wear any form of tartan insignia. That just goes to demonstrate how time plays tricks on the mind in terms of false recall. One of the soldiers who arrived at her location before the others then pointed his gun at Mrs McGlinchey and shouted at her to back off. Other schoolgirls gathered around as did a number of women. Mrs McGlinchey's father arrived, and they turned the man over and used his jacket as a pillow. The scene was chaotic, and the soldiers were very aggressive. Mrs McGlinchey's father then realised that the engine of the car was still running, and he went over to turn it off.

[47] There was a heated exchange between a man in the crowd and one of the soldiers which resulted in the soldier cocking his rifle and shouting: "I'll shoot you fucking fenian bastard, I'll shoot. I'll shoot." Mrs McGlinchey's father then intervened and forcibly deflected the barrel of the soldier's rifle up away from the crowd and struck the soldier a punch to the side of the face, causing a gash in the region of the eye. The soldier instinctively let go of his rifle to cover his face with his hands and Mrs McGlinchey's father was left holding the rifle. Mrs McGlinchey shouted at her father to drop the rifle and he gave it to another soldier and her father then went back over to help the injured man.

[48] Those around Mr Carberry tried to see what was wrong with him. At this stage he was struggling to breathe and was trying to say something. Mrs McGlinchey said to her father that there were no signs of bleeding and her father then pulled open Mr Carberry's shirt which revealed that there were no signs of injury on the front of the upper body. Mr Carberry was then rolled on his side and his shirt was pulled up at the back and it was then that Mrs McGlinchey saw three bullet holes across Mr Carberry's back. They looked like three cigarette burns. There were no other signs of injury and there was no bleeding. Mrs McGlinchey's father shouted at the soldiers: "There's your British justice." The mood of the crowd became more inflamed at that stage and some of the school girls surged towards the soldiers trying to push them back. In response, the soldiers shouted and screamed and threatened to use their weapons on the crowd. A man living at 300 Falls Road came over and exclaimed: "Oh Jesus Christ. That's Stan Carberry." The soldiers continued to order those around Mr Carberry to back off, but they refused to do so and began to pray for Mr Carberry, seeing how badly injured he was. The ambulance then arrived. The ambulance was parked facing south on La Salle Drive. As Mr Carberry was being placed in the ambulance, Mrs McGlinchey looked at the back of the Vauxhall Viva and saw three bullet holes in the rear window of the vehicle at the driver's side of the vehicle. Mrs McGlinchey's statement records that she wondered at the time why the entire window was not smashed. The bullet holes appeared to be in a straight row just like the holes in the middle of Mr Carberry's back. This vivid recollection after 42 years is again somewhat concerning in terms of what is actual recollection and what is false recollection. There were three wounds in Mr Carberry's back, but one wonders whether the recollection of seeing three bullet holes in horizontal line in the otherwise intact back window of the Vauxhall Viva is in fact a construct of Mrs McGlinchey's mind. It is clear that Mr Carberry was not struck by three intact bullets. He was struck by three fragments of a bullet or bullets; the round or rounds having fragmented when it or they struck a part or parts of the car which was relatively impact resistant. Further, the Court can take judicial notice of the fact that this vehicle did not have a laminated rear windscreen. It is difficult to imagine any circumstances in which the rear windscreen would have remained otherwise intact apart from three horizontal holes made by high velocity 7.62 NATO rounds. All other witnesses including the SOCO officer indicate in their statements that the rear windscreen was shattered as was the front. It is also difficult to imagine how a 7.62 NATO round would be shattered or would have fragmented solely by impacting with the rear windscreen of the 1970s Vauxhall Viva.

[49] Mrs McGlinchey's statement concludes with her recollection that as Mr Carberry was being carried to the ambulance, she noticed that he was still making gurgling sounds. In her opinion, the ambulance personnel did not seem very kind in their approach to their patient. She took his hand and squeezed it to reassure him as he passed her on the stretcher. The hand felt very clammy.

[50] In her oral evidence given by videolink from Canada on 25 February 2021, Mrs McGlinchey indicated that she is a married woman with four children, living in Canada since 1978. Her husband was seriously injured in an accident in 2008 and Mrs McGlinchey is now her husband's full-time carer. Mrs McGlinchey was first contacted about this case by RFJ who had been given her details by her brother who still lives and works in west Belfast. Mrs McGlinchey stated that having been contacted about this matter by RFJ, she prepared and typed up her own statement and sent it to them. She was asked whether she knew the Carberry family at all and she stated that she did not but that she had met the plaintiff in passing on one occasion when they were both in a lawyer's office in Belfast.

[51] Mrs McGlinchey stated that she was in her school uniform as she walked back home for lunch, and she expanded on what she meant by the Brothers' House and the West Club in her statement. This was the West Belfast Sports and Social Club which fronts onto the entire length of the Falls Road between the junction of La Salle Park and the junction of La Salle Drive and the gate at the front of the building was roughly half way between the two junctions. Mrs McGlinchey further expanded on her statement by indicating that the tree that the vehicle crashed into was a tree on the footpath of the Falls Road just beyond La Salle Drive junction in the direction of La Salle Park. She also stated that it was the front of the vehicle that struck the tree, but over towards the passenger side of the front of the vehicle. Mrs McGlinchey remembered this as a heavy, frightening impact. The vehicle did not gently roll against the tree and come to rest against it. There was a loud bang. This evidence is again problematic in that it is not supported at all by the photograph of the Vauxhall Viva taken at the time by the RUC SOCO. Page 670 of the agreed trial bundle shows the front the Vauxhall Viva and there is no evidence whatsoever of any damage to the front bumper, the grille, the lights or the front of the bonnet. The only visible damage to the front of the vehicle is the shattered front windscreen.

[52] Mrs McGlinchey's oral evidence was to the effect that the car crashed heavily into the tree and the man got out of the passenger side of the car and ran past her towards La Salle Park. She did not see this man's face as she was crouching down and not looking at him. She saw that the passenger door of the car was open, and it was then that the driver's door opened, and the driver pulled himself out of the driver's side of the vehicle and he took a couple of staggered steps away from the side of the car and then dropped to the ground and then rolled away from the car into the middle of the Falls Road. Mrs McGlinchey in her evidence asserted the following sequence of events. The vehicle crashed heavily into a tree located on the footpath on the Falls Road at the Andersonstown side of the junction with La Salle

Drive. The front seat passenger then got out of the vehicle and made his escape in the direction of La Salle Park, running past her in the process. The driver then dragged himself out of the driver's side of the vehicle, staggered, fell and rolled so that he lay face down on the middle of the Falls Road. This version of events contrasts markedly with the version contained in the soldiers' statements as outlined above where the sequence of events is that as the vehicle was swerving erratically on the Falls Road the front seat passenger fell out onto the road, the vehicle travelled further along the road and eventually came to rest against the kerb at La Salle Drive and the driver then got out and made his escape. In the court's legitimate quest for some objective evidence by which to assess the accuracy of one or other version of events, the photograph of the front of the Vauxhall Viva assumes significant evidential importance.

[53] In relation to her last encounter with Mr Carberry as he was being taken to the ambulance, Mrs McGlinchey stated in her evidence that she asked the ambulance man if someone could go in the ambulance with him and she was told that was not possible. She expressed herself in this manner." He gave a flat cold 'no' answer. I remember finding this very puzzling at the time given the seriousness of the situation. The indifference is something that has struck me all these years." Mrs McGlinchey stated that her father then told her to go home and she did so. The ambulance went down past her house as she reached her door and "it did not have sirens going."

[54] Mrs McGlinchey went on to describe other incidents she had been caught up in during the Troubles. She described being one of the first people on the scene after Peter Watterson was shot dead in La Salle Gardens. This shooting occurred at around the same time. Newspaper archives reveal that Peter Watterson was in his early teens and was standing outside his mother's shop when he was gunned down in a loyalist drive-by shooting on 29 January 1973. Mrs McGlinchey also recounted how she was one of the first people on the scene when a house exploded on the Donegall Road and children were injured. She recounted how she and her husband happened upon the scene of another bomb explosion in Belfast city centre in early 1979 in which there were legs and arms sticking out of the rubble. It transpired that these were the legs and arms of mannequins, but this experience was the last straw and they left Northern Ireland for Canada shortly thereafter. It was obvious that even with the efflux of so much time, the giving of this evidence caused Mrs McGlinchey intense emotional upset. Like so many others in this country, she has been deeply scarred by the horrible events she was caught up in during her formative years.

[55] Under cross-examination by Mr Dunlop KC, Mrs McGlinchey accepted that the bursts of gunfire she heard that day came from further down the Falls Road, from a location out of her line of sight due to the presence of a right-hand bend in the Falls Road. She then stated that the first burst of gunfire was low velocity gunfire, and the second burst of gunfire was high velocity gunfire. In relation to the third burst of gunfire which she heard when she was at the gates of the Brothers'

House (West Club), she could not be a certain about whether they were high or low velocity shots, but she thought that they were high velocity shots. She went on to state that she only saw the car come around the bend in the Falls Road towards her after the three bursts of gunfire. She stated that the gates where she was crouching down were only a matter of a few feet away from the tree that the car crashed into. She confirmed that as the man who got out of the passenger side of the car was running past her position, she only saw him from the knees down and she did not see whether he was carrying a gun or not.

[56] Mr Dunlop KC questioned Mrs McGlinchey about the soldiers wearing a tartan band on their head dress and he suggested that she was wrong about that. Her answer was telling:

> "Well, if you are telling me that that is the way that it is, then yes. It is hard to explain. I mean, when I was asked about this, you're talking flashes of memories from forty years ago, and there is all kinds of stuff that come in with that. So, I don't, I don't know if that it is the right regiment, I don't know that it is the wrong regiment. I really don't remember the regiments that were there."

Despite this, she went on to state that her recollection was that the first soldier she saw who was running along the Falls Road towards her position was wearing a head dress with a tartan band.

[57] Mr Dunlop KC also questioned Mrs McGlinchey about her recollection of seeing three bullet holes in rear windscreen of the car. She described them as three bullet holes a very short space apart and in a very straight line. She stated that the three holes in the back window of the car matched the three holes she saw in Mr Carberry's back." They certainly looked the same. There were three holes in a row." Mr Dunlop KC enquired whether Mrs McGlinchey and her father ever talked about this incident afterwards. She accepted that there was some discussion in the immediate aftermath of the shooting but then after the initial shock, incidents like that were not discussed. She said: "It wasn't just something you did. You know, things happened, you dealt with them and you kind of moved on."

[58] Mrs McGlinchey was then questioned about hearing the voice of a man shouting "You murdering bastards." She accepted that this man was out of her line of sight further down the Falls Road beyond the right-hand bend. Mr Dunlop KC put the following proposition to Mrs McGlinchey: "So, someone, a male, was standing on the Falls Road close enough to you to shout that you were able to hear him over any other noise that was taking place." Mrs McGlinchey answered as follows:

> "My belief at the time is that it was the person that was the passenger in the car … Not someone standing on the road."

Mr Dunlop KC pointed out that this could not be correct since Mrs McGlinchey, in her statement, indicated that she heard the man shout this before the car came round the bend and struck the tree. Mrs McGlinchey was adamant that the voice she heard must have been the passenger's voice. It was a loud, local voice. Mr Dunlop KC again suggested that this was very unlikely to be the case as it was difficult to understand how Mrs McGlinchey could hear the passenger of the car shout from inside the car when the car was still out of sight, further down the Falls Road with the engine still running at that time.

[59] Mrs McGlinchey then attempted to explain why she would have been able to hear a voice from inside the car. She stated that the passenger window was fully down when she first saw the passenger door. She also went on to say that the driver's door window was "cracked open maybe about an inch, because I noticed that when he put his hands up over the door frame to try to get out of the car." I am compelled to make the observation at this stage that this level of detail of recollection after 50 years is utterly remarkable. This lady was first approached in 2014 by RFJ to make a statement about this incident. In that statement she did not make any references whatsoever to the car door windows and yet in 2021, when giving oral evidence, she is able to remember that the passenger's window was fully open, and the driver's window was open but only by an inch or so. Whatever this might be, I have very grave doubts as to whether this is a genuine recollection. It is contradicted by the statement of soldier "A" who stated that the driver's window was down when he approached the vehicle and shouted halt. Both these accounts appear to be inconsistent with the account provided by the SOCO who examined the vehicle on 13 November 1972 and noted that both front door windows were in the up position. See para [41] above and page 384 of the trial bundle. This apparently remarkable ability to recall minute detail after such a long period of time, when combined with the issue of the lack of damage to the front of the car, the issue of the three bullet holes in rear window of the vehicle and the tartan band head dress issue, cause me grave concern that the accuracy of the testimony of this apparently genuine and honest witness is, with the passage of so much time, significantly degraded to such an extent that extreme caution must be exercised when determining what weight to attach to it.

[60] If Mrs McGlinchey's recollection of hearing a voice from further down the Falls Road is a genuine recollection and if, as seems more likely, this loud, local voice belonged to a bystander on the Falls Road, then the inescapable conclusion is that this man must have seen what he thought was a murder before the car came around the bend on the Falls Road and into Mrs McGlinchey's view and that would tie in with the soldiers' account of a body falling out of the passenger side of the car and Vauxhall Viva then continuing on before coming to rest against the kerb at the junction with La Salle Drive.

[61] Mrs McGlinchey was then asked when if ever she became aware of Mr Carberry's membership of the IRA. She was not sure whether she was ever directly told that Mr Carberry was an IRA volunteer. She was also asked whether she remembered soldiers shouting things like "where is the gun?" at people who had gathered at the scene and she stated that she did remember soldiers "screaming about where is the gun." On that last issue, the court was provided with a statement from Leila O'Neill dated June 2014 and it is to that statement that I now turn.

[62] This statement appears to have been given by a Ms Leila O'Neill to someone working for RFJ in 2014. In it the statement maker indicates that she worked in Dixon's shop which was on the Falls Road at the top of St James Park. There is no indication in the statement of the age of the statement maker either at the time of the incident or at the time she made her statement. No personal details of the statement maker are contained in the statement. Upon hearing what sounded like gunfire outside the shop, Ms O'Neill states that she ran out of the shop immediately and saw a person lying on the Falls Road. She saw that he had been shot. He was lying on his front with his shirt up around his back. She could see that he had been shot in the back. She saw soldiers running down the Falls Road towards the man lying on the ground." One of the soldiers started shouting and screaming at me where the fucking gun is." Ms O'Neill put her hands out to gesture there was no gun. She told the soldier that she did not even have a coat on and asked him where he thought she was hiding the gun. As other people gathered at the scene, she went back into the shop. For what it's worth, this account does lend support to the case that one or other occupant of the car had been observed by soldiers in possession of a gun.

[63] On 24 February 2021, which was the first day of evidence in this case, the court heard from Mr Brian Murphy, Consulting Engineer, instructed on behalf of the plaintiff in this case. Mr Murphy prepared a detailed large-scale map of the entire locus and also produced a large number of photographs of the various places referred to in the statements of other witnesses. Mr Murphy prepared three reports the first dated 13 April 2016, the second one dated 29 April 2019 and the third dated 25 February 2021. Prior to Mr Murphy giving his evidence, the court was only provided with the second report. The first report contained references to the statement of Augustus Wright and any references to this statement have been removed from the second report. That is the only material difference between the two reports. The third report was prepared after Mr Murphy in response to requests from the court to carry out further work and investigations. Following the provision of this report to the court and the parties, it was not considered necessary for Mr Murphy to return to give further evidence.

[64] At the start of Mr Murphy's evidence it became clear that he had been given a relatively poor copy of a map or plan of the locus, which he subsequently described as "a reduced copy of a map which originally was to a scale of 1:5000", which had a number of inserted boxes of text describing important aspects of the locus and a number of lines leading from these text boxes to a number of specific points. A poor

quality copy of this map appears at page 779 of the trial bundle and a slightly better quality copy appears at page 894 of the trial bundle. With careful study, it is possible to make out the writing in some of the boxes of text. One text box contains the wording: "Position of stolen vehicle after the shooting" and there is a line leading to a point at the junction of the Falls Road and La Salle Drive on the Andersonstown side of the junction. Another text box contains the wording: "Position of dead gunman" and there is a line leading from this text box to a point on the Falls Road directly in front of 300 Falls Road. Two other text boxes with associated lines appear to indicate the position of the Vauxhall Viva when first observed by the security forces (abbreviated to "SF" in the text box) at the junction of the Falls Road and Iveagh Parade and the position of the soldiers when they fired on the vehicle. There are two other text boxes at the top and top right of the plan, but it is impossible to make out what is typed in those two boxes. One of the boxes may contain the text: "Shooting Incident …" and the other may contain the text: "Position of the Saracen."

[65] The point indicated on the plan as the point where the vehicle came to rest clearly coincides with the location indicated by Mrs McGlinchey in her evidence. However, the point indicated on the plan as the point where the body was located on the Falls Road is quite a distance from the point where the vehicle came to rest and is utterly inconsistent with the evidence given by Mrs McGlinchey. The soldiers' statements referred to the body being found on the Falls Road in front of 300 Falls Road, and it is relevant to note that the plaque erected in memory of Mr Carberry is on the gable wall of 300 Falls Road.

[66] At a later stage in Mr Murphy's evidence the court asked Mr Murphy whether he would be able to superimpose the relevant text boxes and lines that appeared on the poor-quality plan onto a copy of his 1:1250 scale map. He agreed to do this and such an amended map was subsequently supplied to the court and the parties after he had completed his oral evidence. No issue was taken with this amended map. Another issue raised by the court with Mr Murphy at an early stage of his evidence was the likely age of the tree which is located at the mouth of La Salle Drive on the Andersonstown side of the junction. It is shown in several of Mr Murphy's photographs and is most clearly seen in photograph 22. According to Mrs McGlinchey's evidence, this is the tree that the car struck with some force. The query I raised with Mr Murphy was whether this tree was more than 50 years old and, if so, what size would the tree have been 50 years ago. I also raised the possibility of this tree being a replacement tree planted less than 50 years ago. Mr Murphy stated that he would research this matter further. However, his report dated 25 February 2021 indicates that he is unable to assist the court any further in respect of this issue.

[67] In his evidence in chief, Mr Murphy explained a number of red lines with associated letters (A to H) that had been marked at intervals along the Falls Road on a copy of his map. He stated that these lines on the road were intended to indicate where he, as the photographer, was standing when a number of the photographs

contained in the booklet of photographs presented to the court were taken during his inspection of the locus in 2016. He directed the court to a table in the "Comment & Opinion" section of his report dated 29 April 2019 in which photographs 1 to 22 are linked to lines A to H along with descriptions of what each photograph shows. This table also gives descriptions of what is depicted in the remaining photographs in the booklet, namely photographs 23 to 36.

[68] In the course of his evidence, it became clear that there was a disconnect between that which was depicted on his 1:1250 map and his photographs, particularly photographs 12, 13, 14, 15 and 23. The house most clearly shown in photographs 15 and 23 does not appear on any of the OS maps produced to the court. 300 Falls Road is the semi-detached house immediately to the cityward side of this new detached house. The plaque on the gable wall of 300 Falls Road is very clearly visible in photograph 23. What this means is that the area to the cityside of the La Salle Drive junction has changed significantly since the time of this incident and this revelation caused the court to raise a number of further queries with Mr Murphy including whether the perimeter wall of this new house which is depicted in the photographs existed at the time of this incident or whether another boundary wall existed at that time, and, if that was the case, what was the height of that wall.

[69] In his evidence regarding this new dwelling, Mr Murphy stated: "Sorry, my Lord, just looking at that and it might be actually in the garden of the previous area and then – so that that house would be a higher number than 300." This is clearly the case. 300 Falls Road with the plaque on the gable is the house beside this new house. This was confirmed by Mr Murphy in his report dated 25 February 2021 at section "E." No issue was taken by either of the parties in relation to Mr Murphy's confirmation that the new detached house was built in the garden of 300 Falls Road. Mr Murphy could not provide any further information about the perimeter wall of this new house and whether it matched in design and height any wall which previously bounded the garden of 300 Falls Road. This confirms that the sightlines and views from further down the Falls Road up to the La Salle Drive junction and from the Andersonstown side of the La Salle Drive junction down the Falls Road have significantly changed since 1972 and this is another matter that the court must take into account when considering whether any investigation into the events of 13 November 1972 has any remote prospect of getting to the truth of this matter.

[70] Mr Murphy then went on to deal with various issues arising out of the accounts contained in the statements of the soldiers. He asserted that soldier "A" sitting in the rear of the lead Saracen which was apparently stationary in traffic on the Falls Road, level with Iveagh Drive, could not have seen a vehicle emerge from Iveagh Parade through the observation port at the rear of the APC. However, he accepted that soldier "A" might have seen the vehicle emerging from this side street if the observation port that he used was located in the side of the APC near the rear of the vehicle. The precise port used by soldier "A" to make this observation is not identified in any of his statements and it would have been a matter for oral

questioning of soldier "A" during the hearing of this action. Unfortunately, soldier "A" is now deceased, but more will be said about that when setting out the evidence relevant to the issue of limitation.

[71] Mr Murphy, then commented on soldier "B's" account of where the second Saracen was located on the Falls Road at the time he got out of the rear of the lead APC. He noted that soldier "B's" statement recorded that there were about five vehicles between the two Saracens. Mr Murphy stated that if that was correct then that placed the second APC on the Falls Road in the vicinity of Fallswater Drive. He contrasted this with soldier "D's" account that placed the second Saracen at the entrance to Our Lady's Hospital opposite La Salle Gardens and noted that this was 110 metres from the Fallswater Drive junction and only 100 metres from 300 Falls Road. Again, this would have been a matter for oral questioning of soldier "D" during the hearing of this action. Unfortunately, soldier "D" has not been identified and cannot be traced but more will be said about that when setting out the evidence relevant to the issue of limitation.

[72] Mr Murphy then gave evidence that if the lead APC was positioned on the Falls Road level with Iveagh Drive, then the distance from that vehicle up to 300 Falls Road was 270 metres. He calculated the straight-line distance between the middle of the Falls Road in front of 300 Falls Road to the point on the far side of the La Salle Drive junction where Mrs McGlinchey stated that the vehicle struck the tree to be 47 metres. Mr Murphy then referred to the bend in the Falls Road which is left-hand bend as the soldiers approached it running up the road and a right-hand bend as viewed from Mrs McGlinchey's perspective. Mr Murphy's point was that the soldiers' description of the vehicle moving over onto the other side of the road could have been a description of the vehicle failing to negotiate the left-hand bend and in effect continuing straight on. Mr Murphy also give evidence, which was demonstrated by photographs 10 to 22, that an unobstructed view of the junction of La Salle Drive and the Falls Road for observer travelling along the Falls Road towards in a country wards direction is only achieved at a point quite close to the junction because of the bend. However, this evidence has to be considered in the light of the fact that the locus has significantly changed from 1972 with a new detached house being built in the garden of 300 Falls Road and there being unanswered questions about the wall which is now the boundary of this new house (ie whether that wall follows the same line and is the same height as any old wall that it replaced).

[73] Mr Murphy then commented on the statements of various soldiers and the references in these statements to them seeing the vehicle come to rest at the mouth of La Salle Drive and the driver then making his escape and he made the general observation that they would have had to have been quite close to the junction to have witnessed this and if they had been so close to junction then it is difficult to understand why they could not have taken effective and timely action to prevent the other occupant of the vehicle fleeing the scene. Again, the line of sight issue may

well be an issue which cannot now be properly explored and addressed due to changes in the locus in the time between the incident and Mr Murphy's site visit.

[74] When cross-examined by Mr Dunlop KC, Mr Murphy accepted that because of the distance involved between where the vehicle was hijacked and where it was first spotted by the army, in light traffic conditions, it would only have taken the vehicle approximately five minutes to have made that journey directly. He accepted that because the time interval was something in the region of thirty minutes, the vehicle either did not travel directly from one point to the other and/or it stopped for some time along the way. This would have allowed the two occupants to swop positions in the vehicle.

[75] Mr Murphy was then questioned about what statements he was provided with when preparing his reports. He confirmed that he had been provided with the statement of Augustus Wright but that, apart from the statement of Mrs Rosetta McGlinchey, he had not seen any statements from any school children who indicated their presence at the scene of the incident. Furthermore, Mr Murphy confirmed that he had not consulted with the plaintiff about this case at any stage. Mr Murphy then confirmed that photograph 3 in his booklet of photographs was taken from line A on his plan which was where the soldiers had placed the lead Saracen when it had stopped and they had debussed. Mr Murphy confirmed that in that photograph it was possible to see a vehicle (a Vauxhall Corsa) emerging and turning right from La Salle Drive onto the Falls Road. Mr Murphy stated that the vehicle did not appear to be travelling on either of the citybound lanes when the photograph was taken. He was of the opinion that the vehicle was still on the country bound lanes when photograph was taken. In answer to a subsequent question from the court, Mr Murphy confirmed that even from the photographer's location, it was possible to see part of a chevron road sign indicating a left hand bend behind the Vauxhall Corsa. This black and white chevron road sign is more readily apparent in photographs 5, 12 and 14 and it is located at the back of the citybound carriageway footpath opposite to and slightly country wards of the La Salle Drive junction.

[76] Mr Murphy agreed with Mr Dunlop KC that from the position of the first Saracen, a vehicle either moving out of the La Salle Drive junction onto the Falls Road or moving into La Salle Drive from the Falls Road would be visible for at least a portion of the time. He also confirmed that as one travelled along the Falls Road in the direction of Andersonstown, the tree which Mrs McGlinchey stated in her evidence was struck by the Vauxhall Viva comes into view. It is clear from careful study of a number of these photographs that the tree is partially visible in photographs 10 and 11. The top of the tree is partially visible in photograph 12, with the rest of the tree being obscured from view by the newly built detached house. Photographs 10, 11 and 13 were taken from a point in line with 284 Falls Road (Line E on Mr Murphy's plan) with photographs 10 and 11 being taken from a position on the citybound carriageway footpath and photograph 12 being taken from the centre line of the Falls Road.

[77] Mr Dunlop KC then raised the issue of the present view of the La Salle Drive junction and the base of the relevant tree afforded to the photographer in photograph 14. The photograph was taken from a point on line F shown in Mr Murphy's plan when the photographer was standing in line with 294 Falls Road, in the centre of the road, looking country wards. The point was made that there is no way of knowing whether there was a wall in the same locus in 1972 and even if there was whether it was the same height, higher or lower. Mr Murphy agreed with this. Mr Dunlop KC then put the following proposition to Mr Murphy: "… if the photographs were being taken in 1975 or 1976, or even as late as 1980, it would have been much easier to determine what the views were, because one could identify the changes in topography and in the height of the wall with precision, isn't that right?" Mr Murphy's answer to this key question was: "It would be much better of course."

[78] Mr Richard Rudkin was called to give evidence on behalf of the plaintiff. His statement which is undated dealt with the operational procedures and protocols in place and used by the Royal Green Jackets in 1972. This statement appears at pages 51A to 51E of the trial bundle. In his evidence, he also commented on radio logs and other discovery provided by the defendant which appear at pages 823A to 823S of the trial bundle. Mr Rudkin gave his evidence by videolink on 25 February 2021. Mr Rudkin was born in March 1954. He joined the army in 1971, aged seventeen, and commenced his training with the Royal Green Jackets in October 1971. He served with the 3rd battalion of the Royal Green Jackets until March 1975. During his time in the army, Mr Rudkin undertook a signals (radio operator's) course in 1973. He then worked in the NHS and in John Moore University in Liverpool. His first posting to Northern Ireland was in March 1972 when "he was posted to Derry/Londonderry for approximately 6 weeks." Following his return to England, in August of the same year the battalion was posted to Belfast for a fourteen-week tour. He was a member of "A" company and he was based in the Broadway base. After this tour he served two more tours in Northern Ireland in 1973 and 1974 and on both occasions, he was based at Broadway.

[79] "A" company consisted of three rifle platoons, each consisting of three sections. Operational duties were carried out between the three platoons on a three day rota. On day one, the platoon was engaged in mobile patrol and foot patrol duties. On day two, the platoon was engaged in guard duties and on day three, the platoon would be on standby duty. When the platoon was on standby duty, the three sections of that platoon assumed different roles every two hours. The first section was known as the immediate section and the soldiers in this section had to remain in a state of readiness to be deployed immediately once the need arose (the sighting of a gunman, a hijack taking place, a patrol coming under fire, etc). The second section was known as the immediate minus section and the soldiers in this section were allowed to rest but if the immediate section was called out then the immediate minus section had to achieve a state of readiness and, in effect take the place of the immediate section, ready to deploy, if needed. The third section was known as the standby section and this section was at the lowest state of readiness

and was free to rest up but had to be ready to step into the shoes of the immediate minus section, if required to do so.

[80] According to Mr Rudkin, the standard foot patrol at that time consisted of eight men, one of whom was the section commander who was a corporal and the second in command was a lance corporal. Both the corporal and the lance corporal carried Pye pocket radios to facilitate communications to and from the Operations Room and between sections. When a section came under fire, the section commander would initiate radio contact with all others on frequency with the message: "Contact. Wait out." Radio procedures required all others on frequency to refrain from broadcasting anything other than urgent communications. This period of radio silence would be preserved until the section commander gave the Operations Room more information about the incident in the form of a situation report or "sit … rep …" Following the provision of a "sit … rep …", the Operation Room would assess the situation and give the section commander instructions as to how to respond. In addition, the immediate standby section would probably be deployed to assist.

[81] Prior to commencing a foot patrol, the section commander was tasked with giving the section a briefing on the purpose of the patrol. Following the briefing, the members of the section would make their way to a designated loading area near the entrance to the base. There, they would load and cock their weapons, making sure that the safety catch remained on. In daylight hours, due to the high risk of sniper attack at or about the entrance to the base, it was normal for a foot patrol to be transported by APC to a designated drop off point before commencing their foot patrol and to be picked up at a designated pickup point before being transported back to the Broadway base. Upon return to the base at Broadway, the section commander would go to the Operations Room and be debriefed by the officer on duty on what, if anything, had occurred during the patrol. The section commander had to complete a written report on the patrol. If a major incident had occurred during the patrol, the entire section would be debriefed by a senior officer. A fatal shooting would have been considered to be a major incident. Any member of a patrol who fired any shots would have been required to make a statement. In the context of a fatal shooting, all soldiers involved in the incident would have been interviewed by the Special Investigations Branch of the Royal Military Police. Mr Rudkin in his statement observed that as there were eight men to a section, he would have expected that there would have been statements taken from every soldier in the section involved in this incident.

[82] Mr Rudkin's statement then dealt with need for all APCs involved in a mobile patrol to have a soldier on board who was equipped with a radio. If soldiers debussed in order to perform foot patrol duties, one of those soldiers would have a radio and one of the soldiers in the APC would also have a radio so that radio contact could be maintained between the mobile patrol and the foot patrol. Not every soldier could carry a .303 Lee Enfield rifle. Only those soldiers qualified at marksman level who had completed a sniper course could carry such a weapon on

patrol. Mr Rudkin was then asked about the documentation set out at pages 823A to 823S of the trial bundle which formed part of the Royal Military Police report into this incident. Mr O'Donoghue KC referred Mr Rudkin to page 823F (0018740TACV2).

[83] Mr Rudkin informed the court that in 1972 the radio logs that were created in the Operations Room were created by hand. They were formally known as "watch keeper's logs". A soldier in the Operations Room wearing a radio headset would keep a log of all radio transmissions by writing down which callsign transmitted any information or report and by summarising the information or contents of the report that was transmitted. The Operations Room logs were then sent to headquarters where they would be typed up. In relation to the document that commences at page 823F, Mr Rudkin was of the view that this was a typed up Brigade Log. Mr O'Donoghue KC referred to page 823J which contained entries from the day of the incident. Mr Rudkin confirmed that there was an entry timed at 12:15 on the day of the incident which referred to the hijacking of a blue Vauxhall Viva. He also indicated that it was his belief that references in these radio logs to "TAC" were references to Tactical Command or headquarters and that references to "BDE" were references to the brigade headquarters. References to "V3" were references to "A" Company. References to "V2" were references to "B" Company and references to "V1" were references to "R" Company.

[84] Mr O'Donoghue KC referred Mr Rudkin to entries in the radio log with a view to him confirming who was transmitting and who was the intended recipient of the transmission. He was specifically referred to the following records of transmissions. On page 823j of the trial bundle there is a transmission with the serial number 009 timed at 12:15 on 13 November 1972. It was sent by Bde to CC1. The log entry reads as follows: "Hijacked car. Blue Vauxhall Victor … on Donegal Road. Coys info'd." (Companies informed)."2 armed men with pistols, last seen heading towards Broadway." There is another relevant entry on the same page of the trial bundle relating to a transmission with the serial number 011 timed at 12:28 on 13 November 1972. It was sent by V3 to TAC. The log entry reads as follows:

> "Have got the hijacked car … we have this at La Salle Drive … we were fired on by occupants of car, no cas," (no casualties) "1x7. 62 round returned, hit claimed more details to follow. Cas taken to RVH."

[85] The next relevant transmission is set out in page 823k. It has been given the serial number 012 and it is timed at 12:50 on 13 November 1972. It was sent by V3 to TAC. The log entry reads as follows:

> "… a patrol was going east up Falls Road at junc Falls Rd/Iveagh Dve the Viva came up out of Iveagh Dve and turned onto Falls Rd, a Garrand rifle appeared from car window. Fired 2 shots at the patrol. No cas to SF"

(security forces) "car then went down Falls Rd west. The patrol returned fire 4x7.62 and 2x.303 returned car continued and swerved at about junc La Salle Dve/Falls, tyre burst, car crashed, body fell out other occupant jumped out and went down La Salle Dve. The traffic was so heavy, patrol went in on foot after car. When they got the car crowd formed (aggressive) and SF got cut over the eye. This crowd got more aggressive and attacked the SF patrol. Search produced no weapon, probably disappeared in crowd as with other man. Follow up still in progress with other occupant. Car in V3 location. DOA RVH" (dead on arrival Royal Victoria Hospital)."Stanislaus CARBERRY, 41 B'mount Pde, age 18, …GSW to back."

Three other relevant entries are contained in page 823k, one of which is the record of a transmission with the serial number 019 timed at 14:04 on 13 November 1972. It was sent by V3 to TAC. The log entry reads as follows:

"Dead man was the passenger."

[86] When cross-examined by Mr Dunlop KC, Mr Rudkin indicated that the training he received concerning how to react to being fired upon was: "you hear a bang, you get down, you change your location, you look around and if you are in a position to, you return fire." Mr Rudkin recounted that during his four tours of duty in Northern Ireland, the patrol he had been part of had been fired upon on three occasions, but he had never been in a position to return fire. The court then questioned Mr Rudkin on the "Yellow Card." Mr Rudkin gave evidence that this was updated in early 1972. According to Mr Rudkin, each soldier was given a copy of the "Yellow Card" but there would not have been regular refresher training as to its contents. In summary, Mr Rudkin's understanding of the "Yellow Card" was that "if you believed your life was in danger or the life of somebody else was in danger … then you could fire your weapon. It was Mr Rudkin's recollection that senior officers encouraged soldiers to return fire "in the direction of where you were shot at provided there was no civilians in that area." Mr Rudkin stated that he considered this to be in breach of the "Yellow Card" rules. A very poor copy of the "Yellow Card" was included in the trial bundle at page 820 and 821. Paras 1 to 4 and 16 to 21 are set out in page 820 and paras 5 to 15 are set out in page 821. The version included in the trial bundle was revised in November 1972, but there was no indication if that was the version that was the operative version on the day of this incident.

[87] Insofar as it can be deciphered, due to the poor quality of the copy enclosed in the trial bundle, the relevant portions of the "Yellow Card" are:

"**RESTRICTED**

Army Code No. 70771

Instructions by the Director of Operations for Opening Fire in Northern Ireland

1. These instructions are for the guidance of Commanders or troops either operating collectively or individually. When troops are operating collectively, soldiers will only open fire when ordered to do so by the Commander on the spot.

General Rules

2. Never use more force than the minimum necessary to enable you to carry out your duties.

3. Always first try to handle the situation by other means than opening fire. If you have to open fire:

   a. Fire only aimed shots.

   b. Do not fire more rounds than are absolutely necessary to achieve your aim.

……

Warning before firing

6. Whenever possible a warning should be given before you open fire. The only circumstances in which you may open fire without giving warning are described in paras 13, 14 and 15 below.

7. A warning should be as loud as possible preferably by loud hailer. It must:

a. Give clear orders to stop attacking or to halt if appropriate.
b. State that fire will be opened if the orders are not obeyed.

You may fire after due warning

8. Against a person you can positively identify as carrying a firearm* but only if you have reason to think that he is about to use of for offensive purposes

and

he refuses to halt when called upon to do so and there is no other way of stopping him.

…….

12. If there is no other way to protect yourself or those whom it is your duty to protect from the danger of being killed or being seriously injured.

You may fire without warning

13. When hostile firing is taking place in your area and a warning is impracticable:

    a. against a person using a firearm* against you or those whom it is your duty to protect

    or

    b. against a person carrying what you can positively identify as a firearm* if he is clearly about to use it for offensive purposes.

    *NOTE: "Firearm" includes a grenade, nail bomb or gelignite type bomb.

14. At a vehicle if the occupants open fire or throw a bomb at you or those whom it is your duty to protect, or are clearly about to do so.

15. If there is no other way to protect yourself or those whom it is your duty to protect from the danger of being killed or being seriously injured.

…….

19. The rules covering the circumstances for opening fire are described in paras 8 – 14. If the circumstances do not justify opening fire, you will do all you can to stop and detain the person without opening fire.

…….

Revised November 1972
RESTRICTED"

[88] The plaintiff in this action gave oral evidence by videolink on 25 February 2021. The bulk of the evidence given by Mr Stanislaus Carberry junior related to the

issue of limitation and his evidence will be considered in greater detail below when the court turns to deal with the evidence relating to the issue of limitation. However, a few discrete portions of his evidence related to the liability issues in this case and these portions will be dealt with now.

[89] In his oral evidence Mr Carberry recalled how he had a vague recollection of paramilitary trappings at this father's funeral and then much later in the 1990s, he was informed by a Ms Donna Fox who was then a neighbour of his at that time that she was the younger sister of the other person who was in the Vauxhall Viva vehicle on the occasion when Mr Carberry senior was shot dead. The other occupant of the vehicle was Mr Paul Fox, and he was subsequently killed in a bomb explosion on 1 December 1975. The online historical records relating to the Troubles reveal that Mr Fox who was 20 years old when he died, was transporting a bomb in a stolen car into Belfast city centre, accompanied by a woman, Laura Crawford, then aged 25. The bomb detonated prematurely in King Street and both occupants of the car were killed instantly. In the newspaper death notices published at the time, Paul Fox was described as a Lieutenant in the Belfast brigade of the IRA and Laura Crawford was described as a Staff Officer. Mr Carberry junior was subsequently able to provide the HET with information concerning Mr Fox and Ms Crawford when the HET began investigating Mr Carberry senior's death, although the information given was somewhat inaccurate in that he stated that Mr Fox and Ms Crawford died in 1973 and that Ms Crawford's christian name was Maureen. See page 403 of the trial bundle.

[90] Mr Dunlop KC, during cross-examination, questioned Mr Carberry junior about the swabs taken from the hands of his father after his death and the testing of those swabs that revealed the presence of lead and gunshot residues. In answer to this line of questioning, Mr Carberry junior stated as follows:

> "Well, on my defence of that, what I can turn around and say is there is a possibility also, my father being a plumber, that there is lead residue on him, there would have been lead residue on his hands, clothes, as being a plumber. So that is another – that is another reason behind it as well. They were able to take the lead, reading where they are on the files, able to read that they were able to take swabbing off his hands, but yet they weren't able to take fingerprints off the driver's side steering wheel. That to me doesn't add up a proper investigation."

[91] Mr Carberry junior was also questioned about other information that he had given the HET. He was questioned about the identity of the doctor who apparently attended the scene shortly after Mr Carberry senior was shot. Mr Carberry stated that he had been informed at some stage that this doctor was a general practitioner by the name of Donnelly from the Springfield Road, Belfast. Mr Carberry junior

stated that he had "found out since this man has Alzheimer's so I didn't approach to try to find anything out. I only heard there four years ago that he had Alzheimer's, but I didn't approach." Mr Carberry junior vehemently denied that he had told the HET investigators in 2011 that he knew the names of several people who witnessed the shooting of his father. He stated:

> "So, whatever in the HET has put that in, that is false information put in."

[92] The document entitled "Op Stanford – Note for File", dated 7 June 2011, which relates to a meeting between Mike Caton and Graham Dalzell from the HET and the plaintiff, and which is contained in the trial bundle at pages 403 and 404, records the following information: "Stan Jnr said he knew the names of several persons who witnessed Stan's death. Stan Jnr will speak to his mother … and the unnamed witnesses to ascertain whether they are willing to engage with HET." Mr Carberry junior also vehemently denied that he had told the HET team that a policeman and a soldier came to the house after the shooting and that the soldier apologised to his mother for shooting his father. The HET note referred to above at page 404 of the trial bundle contains the following information.

> "Shortly after Stan's death a police officer and a soldier visited the family home. The soldier apologised for shooting Stan.
>
> A week or so before Stan was killed, he was arrested by the RUC. When Stan was released from custody, he told his wife that the police said he would be dead within a week.
>
> The above information was told to Stan Jnr by his mother, he has no first-hand information."

[93] In his evidence Mr Carberry referred to reading a book published by the Beechmount Commemoration Committee in 1998 entitled "Green River ~ in honour of our dead~." Mr Carberry stated that he read this book in the very late 1990s. Some pages from this publication were subsequently produced to the court. Pages 33 and 34 of the book contain the following accounts:

> "Because he was such a good driver many Volunteers preferred Stan at the wheel of the getaway car …

On Monday 13th November 1972, Stan and Paul 'Basil' Fox were driving up the Falls Road in a hijacked car when they were spotted by a passing patrol of Royal Green Jackets. The soldiers opened fire without warrant and killed Stan instantly, at the wheel of the car. Basil was grazed and managed to scramble out and escape.

Bullet holes from the incident are still visible around the porch of the house at the junction of the Falls Road and La Salle Drive."

I will return to Mr Carberry junior's evidence when I come to deal with the evidence relating to the limitation issues in this case.

[94] On 3 March 2021, the court received evidence via videolink from the plaintiff's sister, Mrs Elizabeth Tierney. As with her brother, Mrs Tierney's evidence mainly dealt with issues relevant to limitation, but she dealt with one issue in her evidence concerning the information provided to the HET which has a bearing on liability issues in the case and which goes some way to explaining some of the notes made by the HET as set out in pages 403 and 404 of the trial bundle. Mrs Tierney stated that her mother, when faced with questions from the younger children of the family as to what had happened their father, would have made up stories:

> "to try to appease us, you know, by telling us like that oh, he was just in the wrong place at the wrong time, these things happen, and you know, don't yous be worrying about things like that. But you know, there was always kind of wee stories to try to make us feel as if; she even once told us that, you know, that the soldier came to the door and he apologised and he was only a wee young soldier, he didn't know what he was doing. I think her objective was, she was extremely protective of us in the sense that she didn't want any of us to be influenced in any way by the events that took place until we were much older and mature and were able to understand."

[95] Mrs Tierney stated that she remembered the HET team coming to her home to speak to her and her brother, the plaintiff, and she gave evidence that it was during this meeting that she told the HET team that her mother had told the younger children about a soldier coming to the house to apologise. She was clear in her mind that she had informed the HET about this story and she was equally clear that she explained to the HET team that she considered that her mother made this story up in an effort to fend off questions about what happened to their father. In her evidence, she offered the following explanation for the entries in the HET note:

> "That was me that had said that when the HET were in the house. I was explaining, they had asked what my knowledge was as a child and I had said that we were told stories that I think were designed to kind of appease the questions that we were asking about why do we not have a daddy and where is he and what happened to him and all the normal questions that I believe children would ask when they don't understand why their father isn't there anymore. So, I was just explaining to them that

> those were the stories that mummy would have told us, and they were just examples that I was giving them."

[96] Mrs Tierney was the last witness called on behalf of the plaintiff whose evidence touched upon the issues relevant to primary liability. Before moving on to set out the evidence which touches upon the issues relevant to limitation, I intend to provide a summary of the contemporary and subsequent newspaper coverage of the incident in which Mr Carberry senior was killed.

[97] At pages 337 to 338B of the trial bundle there are copies of the front page and page 20 of the Irish Independent newspaper published on 14 November 1972. The incident did not feature on the front page but there is an article about the incident on page 20. The headline reads: "MAN DIES AS ARMY SHOOTS UP CAR." The article continues:

> "A group of schoolchildren watched in horror yesterday as British troops pumped several bullets into a passenger of a hijacked car seconds after they had claimed shots had been fired at them from the vehicle.
>
> Eyewitnesses last night discounted army claims that a number of shots had been fired by the passenger, using a rifle, who fled from the vehicle after it crashed near La Salle Drive on the Falls Rd. They were adamant that no shots were fired at the soldiers who, they claimed, were travelling in unmarked Saracens.
>
> The dead man was named last night as Stanley Carberry from the Beechmount area, married with a family.
>
> The British Army, in their statement, said the occupants of the car, which had been hijacked half an hour earlier in the Donegall Rd area, opened fire after the vehicle drove out of Iveagh Drive.
>
> A British Army spokesman said:
>
> > 'A rifle appeared at one of the windows of the car and two shots were fired at a mobile patrol. Fire was returned and a wheel of the car burst. The car was seen to swerve to a halt near La Salle Drive.
> >
> > The second man in the car fled as the driver slumped out onto the roadway. A hostile crowd gathered after the shooting and thus

> prevented troops from capturing him. One soldier received an eye injury in the melee that followed.'

Claims that the second man turned and fired several pistol shots at the troops were denied also by eyewitnesses.

The army claimed that the shots were fired by a Garrand rifle and that the second man stalled and fired several pistol shots at the troops.

BULLET UNCOVERED

A British spokesman said that a search of the car uncovered a .45 live bullet but there was no rifle. The allegations that shots were fired by a second person were denied by school children who witnessed the shooting.

Last night three of the schoolgirls from St Dominic's and St Rose's schools, who were on their lunch break when the shooting started, agreed that no shots were fired from the car.

"Three unmarked Saracens were travelling down the Falls Road and the blue Viva was going up. As the car passed, the soldiers jumped out and a number of them started shouting 'That's the car.'"

According to the schoolgirls the soldiers were undecided as to what action to take to stop the vehicle:

> 'They were shouting shoot, shoot, and eventually they all started shooting together," said one of the girls who did not wish to be identified.
>
> 'The Saracen just backed up onto the footpath in front of me and the soldiers were yards away when they started shooting. Somebody grabbed me and pulled me out of the way. I remember nothing after that," she said.

A woman walking home from a nearby shop said she heard two or three shots and then what sounded like a burst:

> "I couldn't see what it was all about but I heard somebody shout 'The army's shot them in that car.' People gathered around the car and a man ran away with the soldiers after him," she said."

[98] A copy of the front page of the London Times published on 14 November 1972 appears at page 338c of the trial bundle. The relevant portions of the article contain the following account:

"In the Falls Road soldiers shot dead the driver of a hijacked car from which they said someone had fired at them … The Falls Road shooting was the culmination of an incident which began soon after midday when a car travelling down the Donegall Road was hijacked by two armed men. An army statement said that later a rifle was poked out of the rear window of the car and several shots were fired at the patrol. The soldiers then opened fire and when the car stopped the driver of the vehicle Stanislaus Carberry fell out onto the road.
The army said tonight that Carberry had been arrested by soldiers several weeks ago but had later been released. Nevertheless, they said that they believed he had been working for the IRA, even if only in a minor capacity."

[99] Documentation which appears at pages 339 and 340 of the trial bundle are described in the trial bundle Index as "Text of BBC NI news bulletin of 13/11/72" and "Note of information received by BBC NI timed 13:40 13/11/72." The document set out at page 339 contains the following account:

> "A man was shot dead after soldiers were fired on from a hijacked car in Belfast about lunchtime. It happened near Iveagh Drive on Falls Road about half an hour after the car was stolen on the Donegall Road, where two rifle shots were fired at soldiers. There were two men in the car, and it swerved when the patrol fired back. The car crashed at La Salle Drive after a tyre burst and the body of a passenger fell out. The driver managed to get away when a hostile crowd prevented the soldier from chasing him. The man who died has been named as Sean Carberry who lived at Beechmount Parade."
>
> "The army say at 13:35 that they have a first report on a fatal shooting of a civilian in Belfast. At 12:15 a car was hijacked on the Donegall Road by two armed men. At 12:40 a mobile patrol of the 3rd Royal Green Jackets saw the car with two men in it. It came out of Iveagh Drive onto the Falls Road, a rifle appeared at a window of the car and two shots were fired at the patrol who returned fire. The car swerved and at the junction of La Salle Drive/Falls Road, a tyre burst, the car crashed, and a

> body fell out. The other occupant of the car fled. A hostile crowd gathered and in a melee a soldier received a cut head. No weapon was recovered. The dead body of the driver was taken to the RVH."

[100] Another account of the incident was published in the Irish News on 14 November 1972 and this appears at page 822 of the trial bundle. The article asserts that the army's account of the shooting was challenged both by eyewitnesses and the Irish Republican Publicity Bureau and that soldiers were accused of the "cold-blooded murder of an unarmed man." The British army's version of events was that troops were fired on from a car which had been reported hijacked by two armed men and that Mr Carberry senior was killed when fire was returned. The paper reported that people at the scene were adamant that the only shots fired were fired by soldiers and it reported that the Irish Republican Press Bureau in Belfast said that Mr Carberry and the driver of the car, who escaped, were unarmed. A woman eyewitness claimed that Mr Carberry senior was "innocent and unarmed."

[101] The Irish News report continued:

> "The British Army in a statement said that 15 minutes after a blue Vauxhall Viva had been hijacked by two armed men in Donegall Road it was seen in Iveagh Drive at 12:30 pm by a mobile patrol of the 3rd Battalion Royal Green Jackets. The car sped off along the Falls Road when the patrol started to dismount, the statement said:
>
> *"Passenger fired."*

A line of the report is indecipherable due to poor quality of the copy of the report included in the trial bundle. The report then continues:

> "…. at the La Salle Gardens Falls Road junction" the statement said." The passenger opened the door and fired one shot at a patrol pursuing on foot. Fire was returned at the tyre and the back windows. The car swerved across the Falls Road and the body of the passenger fell out."
>
> The statement said the car started to turn into La Salle Drive but stalled and the driver fired two shots at the Green Jackets patrol when fire was again returned.
>
> "The driver got out and crawled round to the front of the car with rifle and pistol and disappeared into La Salle Drive," the statement added.

A hostile crowd gathered the Army said and a member of the patrol was cut above the eye by a punch from one of the crowd." During a detailed search of the car one live . 45 round was found" the Army said.

A spokesman for Provisional Sinn Fein said that Mr Carberry, who was a member of the Republican movement, was driving a grey Viva car and had a male passenger when two Saracens opened fire.

"The first burst of shots missed the occupants, but the car came to a halt and a crowd rushed forward, although they were fired upon by the Army", the spokesman said, "The crowd succeeded in getting the passenger away."

'Shot in back'

"Other shots were fired at the car and Mr Carberry was wounded. As he got out of the car and before he had time to raise his hands, he was shot through the back four times."

The Irish Republican Publicity Bureau "categorically denied" the British Army version of the shooting of Vol. Stan Carberry.

"No shots were fired from the car as alleged. Both volunteers were unarmed and were fired upon at point-blank range without any warning," the statement said.

"This is yet another attempt by the British Army to cover up what many eyewitnesses observed as yet another cold-blooded murder."

"The statements from British Army sources have long since ceased to have any credibility with the Nationalist people and we ask them to treat this as yet another example of the murder of an unarmed Volunteer."

The G O'Callaghan/Albert Kavanagh Sinn Fein Cumann expressed their "utter horror and condemnation of the murder of an unarmed man."

A woman who claimed to have seen the incident said shots were not fired at troops at any time.

> "The only shooting was done by the British troops," she said.
>
> The woman who works in the area, added: "The only hostile crowd was a group of hysterical schoolchildren who witnessed the shooting."

[102] Copies of two other press items from the Andersonstown News were included in the trial bundle. At page 823, an article published on 23 June 2011 appeared under the following headline and sub-headline: "STAN APPEALS FOR WITNESSES TO KILLING OF HIS DAD ON FALLS ROAD TO COME FORWARD … IRA volunteer gunned down controversially by British army." The article continued:

> "A local man is asking members of the public to help him in his efforts to discover the truth surrounding the killing of his father nearly 40 years ago by the British army.
> …
>
> Speaking to the Andersonstown News from the offices of victims' group Relatives for Justice, Stan said his family would welcome any new fresh information that could throw light on his father's death.
>
> "My family have been contacted by the Historical Enquiries Team but it appears that very little remains of the original investigation file," said Stan." There hasn't been a proper investigation up to this point …"
>
> Stan Carberry was driving a car along the Falls Road when the vehicle was fired upon by the British army and crashed outside the West Club. He was shot dead as he exited the vehicle.
>
> "Reports in the newspapers at the time are confusing with one saying he was shot in disputed circumstances and that shots had been fired at the soldiers," said Stan.
>
> "But we believe that the soldiers opened fire without being provoked and we need people who were on the road at this time to come forward to the RFJ offices."
>
> RFJ legal caseworker Shauna Carberry [no relation] who is working closely with the Carberry family, pointed out

> that the HET are merely carrying out a review of the files and not an in-depth examination of the shooting.
>
> "The HET do not meet the requirements for independence and do not appear to be meeting the standards required under Article 2 of the European Convention on Human Rights," she said.
>
> "It is clear in many cases that they have not made proper efforts to trace perpetrators within the British army, they have not spoken with civilian witnesses who have been identified to them and they are providing reports to families that are wholly inadequate."
>
> Shauna said that the Carberry family are particularly keen to speak to a woman who spoke to the press at the time stating that no gunfire had come from the vehicle being driven by Stan Carberry.
>
> "People from the community spoke out about the shooting, stating that the British army version of events was incorrect and that no fire had come from the vehicle. We would like to hear from them."
>
> Stan spoke about how important the help and support of RFJ have been to his family in their search for the facts behind the controversial killing.
>
> "We wouldn't have had a clue about the issues surrounding my father's death if it weren't for the help of Shauna and the people here at RFJ. Our family need closure in relation to our father's death …"

[103] Finally, on 5 April 2014, shortly before the writ of summons was issued in this case, another article appeared in the Andersonstown News, and this is set out at page 46 of the trial bundle. The purpose of this article was to alert the local population to the campaign being mounted by the plaintiff to have a second inquest into the death of his father and to request anyone with any knowledge of the incident in which his father was killed to come forward so that they could give evidence at any inquest which was directed. The thrust of the article was that there had been no effective investigation into the circumstances surrounding the death of Mr Carberry senior as the investigation had been carried out by the Royal Military Police. The article stated that:

> "Stan was shot three times in the back as he emerged from a blue Vauxhall Viva. The soldiers responsible fled

> the scene and a crowd began to gather in the area. The Carberrys backed by Relatives for Justice (RFJ), want anyone who remembers the incident, the car or anything else to contact them as their information could be crucial to them securing justice."

The article then goes on to inform the reader that the plaintiff was eight years old "when Stan was murdered, and he is committed to the pursuit of justice." There is then a direct quotation attributed to the plaintiff:

> "My father's death really affected me and we have never stopped trying to find out the truth … I remain hopeful that one day we will get it."

[104] The article then reported the comments of a RFJ case worker, Paul Butler, who indicated that RFJ had been supporting "the family over many years and want to assist them to discover the truth as to how their father was killed by the British Army." He also went on to comment on the HET investigation and indicated that even though the family engaged with the HET in good faith "it became clear when the family met the HET that they were not carrying out a proper or effective investigation into their father's death." The article went on to indicate that the Carberry family along with their solicitor Kevin Winters were seeking a fresh inquest into the death of Stanislaus Carberry senior. Anyone with any relevant information was encouraged to contact Mr Butler of RFJ and a telephone number and an e-mail address were provided.

[105] I have comprehensively quoted from the press coverage of this incident, including contemporaneous press coverage, in order to illustrate that from the very outset, the circumstances of the shooting were disputed. A number of hotly contested issues can be readily identified:

(a) Were the occupants of the vehicle armed or not?

(b) Did any occupants of the car fire a weapon at any of the soldiers?

(c) Was Mr Carberry the driver or the front seat passenger when the vehicle was progressing along the Falls Road?

(d) Was Mr Carberry shot whilst in the vehicle or was he shot after he got out of the vehicle whilst he had his back to the soldiers?

The determination of these and other related issues by the court would clearly have a very material bearing on the answer to the question of whether the shooting of Mr Carberry senior was justified in law. The ability to determine these and other related issues at this distant remove is a matter which has a very material bearing on the exercise of the court's discretion whether or not to disapply the limitation period

under Article 50 of the 1989 Order and the fact that these hotly contested issues emerged in the immediate aftermath of the shooting is also clearly relevant to the exercise of the court's discretion and it is to the issue of limitation that I now turn.

Evidence relating to the exercise of the discretion contained in Article 50 of the Limitation (Northern Ireland) Order 1989

[106] As stated in para [2] above, in this case there is no issue as to the date of knowledge of any of the persons for whose benefit the claim is brought. It has been specifically conceded that the limitation period has long since expired in respect of each of the dependants. In light of the evidence set out above, this concession is rightly made. In considering the evidence relating to the limitation issue in this case, the court's primary focus will be the examination of that evidence with a view to determining whether the discretion vested in the court under Article 50 to disapply the limitation period should be exercised in favour of any or all of the dependants of the deceased. In this section of the judgment, I will set out the relevant portions of the plaintiff's evidence, Mrs Elizabeth Tierney's evidence and Mr Michael Ritchie's evidence on behalf of the plaintiff and I will then deal with the affidavit evidence provided by Mr Clough on behalf of the defendant. Obviously, some portions of the evidence dealing with events surrounding the shooting of the deceased and, indeed, portions of Mr Murphy's evidence are also clearly relevant to the issue of limitation. Rather than laboriously repeat these portions of evidence, I intend instead to refer to them when I come to determine the limitation issue in this case.

[107] As stated above, the plaintiff gave evidence by videolink on 25 February 2021. Mr Carberry was eight years old when his father died. He was the second eldest of six children aged between nine and one. His mother is still alive. She is a lady in her eighties and she is in a nursing home as she has advanced dementia. Prior to the onset of her dementia, the plaintiff had spoken to his mother about his father's death over the course of many years and he was aware from the age of fifteen or sixteen that she had sought legal advice. He stated:

> "she'd went to a couple of solicitors, but they were unwilling to take the cases on due to the repercussions at the time because what was going on back then with the RUC intimidation and the army."

[108] Mr Carberry stated that he had asked his mother about his father's involvement with the IRA, and she had informed him that she did not know about this aspect of his life until after he was shot. Mr Carberry stated that although from his late teens onwards he would have regularly asked his mother about the circumstances of his father's death, she was never able to answer the questions he posed. He stated that:

> "the more you heard from people telling you stories in the street, the more you got to say to yourself, look, look, there's something not right here. All this grew until about twenty years ago, I sort of said to myself I am going to go to the Central Library here and look at the archive papers. So, I went to the archives in the city centre and searched through the papers and I seen all the paper cuttings and started reading about it. I then got in contact with the HET."

[109] Mr Carberry stated that he did not go to seek legal advice at this time because he did not know how the law worked and he did not know there were any legal proceedings that could be taken. He was more interested in trying to find out for himself what had happened, and he was also aware of how his mother had been unable to retain legal representation. Having contacted the HET, Mr Carberry stated that he received a letter informing him that the HET intended to investigate his father's death and a meeting was arranged at his sister Elizabeth Tierney's house. From Mr Carberry's perspective, the meeting did not go well as in his view the HET team came to the meeting with predetermined conclusions:

> "Your father was driving up the Falls Road, driving, hanging out of the car, shooting at the soldiers."

As set out above, the records of this meeting reveal that the meeting took place on 7 June 2011.

[110] The plaintiff stated that he was deeply disillusioned with the HET process following this meeting and a relatively short time after the meeting, he was speaking to someone who pointed him in the direction of RFJ. He then contacted RFJ by telephone and a meeting was arranged with a RFJ representative, Mr Mark Thompson, who, having listened to the plaintiff, stated that RFJ would take the case on. Mr Carberry was also referred to KRW Law. All this happened in the middle of 2011. There was a media campaign seeking information from witnesses to the shooting and it was at this stage that Mr Augustus Wright came forward and a statement was obtained from him on 26 September 2011. This was then provided by RFJ to the HET. Subsequently, the HET team interviewed soldier "A." In addition to interviewing soldier "A", the HET team also commissioned a report from Dr Richard Shepherd, Consultant Pathologist. This report is dated 11 July 2012 and I have set out the relevant contents of this report in para [44] above. This report conclusively established that the account given by Mr Augustus Wright to RFJ in September 2011 was completely detached from reality.

[111] The plaintiff recounted how there was then another appeal via the media for witnesses and it was as a result of this appeal that RFJ became aware of Mrs Rosetta McGlinchey as a potential eyewitness. RJF then contacted Mrs McGlinchey and she then typed up a statement which she sent to RFJ in June 2014. It is clear that the

contents of the statement of Mrs McGlinchey were not the decisive factor which led to the initiation of proceedings in this case as the writ of summons in this case was issued in May 2014. Further, the plaintiff indicated that an application for leave to apply for judicial review had been launched about the same time. The plaintiff in his evidence gave the impression that the application for leave to apply for judicial review related to a decision not to hold a fresh inquest into the death of the deceased. He stated:

> "The JR is sitting, the judicial review is sitting five and a half years now on stay, they won't let me in. An inquest, they won't give me an inquest."

[112] Mr O'Donoghue KC then clarified a matter for the court. He stated:

> "The judicial review was issued on 15 October 2014 … It is a judicial review effectively to seek an effective Article 2 compliant investigation into the circumstances of the death."

Subsequent to the hearing of this action, I was provided with a copy of the amended Order 53 statement of Mr Stan Carberry, as applicant, dated 14th November 2014, by the Judicial Review Office in the RCJ. It is clear that the Secretary of State for Northern Ireland ("SOSNI") is the proposed respondent and that the thrust of the application is to compel the SOSNI to set up a mechanism by which an Article 2 compliant investigation of the circumstances surrounding Mr Carberry senior's death can be conducted. It would appear that this application was stayed at some subsequent review, pending the handing down of the judgment of the Supreme Court in *McQuillan and Others* [2021] UKSC 55. Following the decision of the Supreme Court in *McQuillan*, Humphreys J then reviewed Mr Carberry's application for leave to apply for judicial review on 3 February 2022, when he removed the stay and directed that a further amended Order 53 statement should be served within 14 days, with the proposed respondent having a further 14 days to file a position paper. The matter was to be reviewed on 3 March 2022 but, on the application of the parties, that review was vacated, and the stay was reimposed until the conclusion of these civil proceedings.

[113] Mr Carberry junior was asked by Mr O'Donoghue KC what prompted him to issue proceedings against the MOD in May 2014, and he replied in the following manner:

> "Well, it was based on the evidence that I had from the witnesses, and I wasn't getting anywhere with any other form, any other mechanism that was set out in law by the courts, by the senior counsel. I wasn't getting anywhere. They seemed to be closing off every avenue on me. So, I asked my solicitor, I directed my solicitor is there any way

> we can go forward on the grounds of taking an action against the MOD for the killing of my father, which I believe that I have grounds to simply because it is their responsibility, and the right to life, my father's right to life."

[114] Evidence was given that prior to proceedings being issued, letters of administration had to be taken out and the plaintiff was appointed as personal representative of the estate of his late father in February 2014. Mr Carberry was asked what was he looking for out of these proceedings and out of this investigation" and he answered:

> "I want the truth as to why my father was shot, was killed, when I know deep down my father could have been arrested. And I – this is for me. I have no interest in the soldiers, absolutely no interest in it. I don't even want to think about them. I don't want – I just want the truth as to why they shot him that day in the back. The soldiers don't interest me whatsoever, they never did. I want the truth as to why my father was shot for my mother. My mother deserved the truth as to why her husband was shot. We deserve the truth as a family as to why my father was shot and robbed. They took my father away from me, my best friend. They robbed me of a childhood, they took my childhood away from me. They took my education away from me."

[115] In relation to the plaintiff's quest for the truth, the court then asked Mr Carberry if any family member had ever approached or considered approaching the IRA in order to find out about the operation that Mr Carberry senior was involved in that day, who was in the car with him that day and whether there were any guns in the car. He was asked: "… have you been able to make those types of inquiries to get a full picture as to what happened that day, or is your search for the truth directed solely at the MOD in this case?" Mr Carberry stated that he did not know anyone in the IRA, and he explained that he had found out who was in the vehicle with his father by reason of a chance encounter with the sister of individual concerned who lived in an estate where he used to live. He also explained that he had made approaches to Sinn Fein for information, but these approaches had not borne fruit. Mr Carberry stated:

> "… unfortunately, they said no. They don't know anybody that was involved in that; only the two, that is the two people that were – the one that was in the car and the driver, my father. Otherwise, they only knew it through papers and different things. They didn't know

> anybody within the Provisional IRA or the IRA or whatever it is."

[116] The plaintiff was then asked whether there ever was any discussion with his mother, or with any other members of the family, about what happened at the original inquest into Mr Carberry senior's death which was heard in May 1974. Mr Carberry junior stated that the inquest was never discussed at home. It would appear that the only family member who attended the inquest was the deceased's step-father who gave evidence concerning the identification of the body of the deceased. However, the plaintiff went on to state that all the children of the deceased had shown an interest in relation to the circumstances of their father's death although the children would not have discussed the subject amongst themselves until relatively recently. He stated that prior to that time: "everything would have been me asking my mother."

[117] It was then put to the plaintiff by Mr Dunlop KC that the plaintiff's belief that his father was shot without any justification was not a belief that he had formed in the "last five or six or ten years; that was something that was known at the time." The plaintiff replied: "Well it was known – it was known all my life." However, he went on to contradict this statement by saying that he did not have an appreciation of the disputed circumstances of his father's death until he commenced his research by studying archived newspaper articles in the Central Library in Belfast. He stated that prior to his perusal of the archive material in the Central Library, he had not been aware of the contents of the newspaper articles written in the days after the death of his father. He also stated that during his adolescence, due to his reaction to his father's death, he had mental health issues which would have hindered his pursuit of the truth into the circumstances in which his father had met his death.

[118] In his evidence, the plaintiff repeatedly asserted that he was unfamiliar with the legal process, was unaware of the possibility of making a claim and had no knowledge of how to go about initiating a claim in which the circumstances of his father's death would be scrutinised. However, it was pointed out to Mr Carberry junior by Mr Dunlop KC that in his early twenties, the plaintiff had gone to a solicitor to seek advice about making a claim for personal injuries arising out of an assault and it was suggested to the plaintiff that at the age of twenty or twenty-one, he was sufficiently informed about the legal process to go to see a solicitor in order to bring a claim for damages for injuries sustained when he was assaulted. Mr Carberry junior then informed the court that he had sought advice from DG McCormick on the Andersonstown Road about the assault because he and Mr McCormick were both members of the same judo club and he knew him through their common interest in this sport. It was suggested to Mr Carberry junior that as far back as 1985, "… there was a solicitor with whom you had a connection because you knew him socially; he was a solicitor with whom you had sought professional advice; he was someone who you could have raised issues about your father's death with and sought advice about." Mr Carberry junior's reply was, in essence, that he did not seek advice on such issues because he was not aware at that time that it

would have been possible to bring legal proceedings relating to such issues. He also stated that in addition to the mental health issues referred to above, he and the other family members had to cope with frequent targeting by the security forces with very regular search operations being conducted in the family home, causing great distress to the family.

[119] Having suggested to the plaintiff that west Belfast was a relatively close-knit community and having reminded him that a plaque had been publicly erected in the area to remind people of the circumstances in which his father was shot, Mr Dunlop KC went on to enquire of the plaintiff whether the circumstances in which his father was shot were ever discussed with him by his friends, neighbours and work colleagues, especially when he went to work in the same plumbing and heating firm that his father had worked for. Mr Carberry junior stated that the only information he ever received from the community was that his father had been shot dead in a car but he was not given any information about the actual circumstances of the shooting or the fact that these circumstances were disputed. Mr Carberry junior was then asked to confirm that approaches had been made by the family to the HET as far back as 2007 because the first correspondence from the HET to the Carberry family was dated August 2007. Mr Carberry accepted that this was indeed the case. See page 543 of the trial bundle. Mr Carberry junior was then asked about his subsequent involvement with the HET in the summer of 2011 and, following this, his involvement with RJF later that summer, including the publicity campaign which included the interview with the Andersonstown News. The plaintiff was then asked the following specific question: "You said 'We believe the soldiers opened fire without being provoked. ' Now, just so we're clear; Augustus Wright, he didn't make a statement until September 2011. The other witnesses who have been identified, Leila O'Neill, she didn't make a statement until June 2014; and then Mrs McGlinchey, she didn't make a statement until June 2014. So, before any of these witnesses had come forward, Mr Wright or Mrs McGlinchey, your belief was that the soldiers had opened fire without being provoked. Now what basis did you have for that belief, Mr Carberry?"

[120] After highlighting what he saw as the shortcomings in the investigation by the state into his father's death, Mr Carberry junior stated that he had formed that belief because: "I done the archives in the papers in the Belfast library." Mr Dunlop KC remined the plaintiff that he had said at an earlier stage of his evidence that he had carried out this research 20 years before giving his evidence which would have meant that he carried out this research in the early 2000s; so that Mr Carberry's belief must have been formed at that time. It was then put to Mr Carberry that he or other members of his family could have gone to search the archives long before the early 2000s in a quest to obtain information about their father's death. In response to this, the plaintiff indicated that part of the reason for the other family members not actively pursuing or pushing for an investigation into the circumstances surrounding the death of their father was that they were all in various forms of employment (with his sisters at different times being employed in various roles

within the NHS) where it would have caused difficulties for them if it had become widely known that their father had been killed on active IRA service.

[121] Mr Carberry junior was then asked about the history he had given to Dr Daly Consultant Psychiatrist, who had examined him on behalf of the defendant for the purpose of assessing the impact his father's death had upon his mental health. This examination took place on 5 May 2016 and his report is dated 23 June 2016. Mr Dunlop reminded the plaintiff that when examined by Dr Daly, he had informed the psychiatrist that at the age of seventeen or eighteen he had started to become depressed because "people were saying to me that my father was murdered." In answer to that question, Mr Carberry junior stated that even when he was at school, some people had told him that his father had been murdered.

[122] This brings me to the issue of the plaintiff's mental state in the years following his father's death. The court has been provided with a large volume of the plaintiff's medical notes and records together with two reports prepared by Dr Mangan, Consultant Psychiatrist, retained on behalf of the plaintiff, dated 2 October 2014, and Dr Daly, Consultant Psychiatrist, retained on behalf the defendant, dated 23 June 2016. Both of these reports were intended to deal with the issue of the impact which the plaintiff's father's death had upon the plaintiff's mental wellbeing. These reports do not directly address the issue of whether the plaintiff's state of mental health had any influence or bearing on his capacity or ability to commence legal proceedings for compensation arising out of his father's shooting. However, it has been confirmed to the court that Mr Carberry is not seeking compensation for any recognised psychiatric condition either as a primary or secondary victim as a result of the death of his father. However, Mr O'Donoghue KC did inform the court that the plaintiff's state of mental health in the years following his father's death was relevant to the issue of the exercise of the court's discretion under Article 50 of the 1989 Order.

[123] Both Dr Mangan and Dr Daly interviewed the plaintiff and both doctors considered the plaintiff's medical notes and records. Dr Mangan diagnosed the plaintiff as having suffered from a childhood emotional disorder, recurrent depressive disorder, panic disorder and alcohol dependence syndrome. He stated that the plaintiff had suffered a traumatic bereavement which was complicated by the development of a childhood emotional disorder which ran a fluctuating course through his childhood and adolescence. In adulthood, he has had problems with recurrent depressive disorder, panic disorder and alcohol dependence syndrome. Dr Mangan stated:

> "In my opinion Mr Carberry's life has been transformed following his traumatic bereavement. He reports that previously despite the civil unrest in Belfast he had enjoyed a happy life. On leaving school he showed strong identification with his father in his choice of occupation. His father had worked as a heating engineer. The plaintiff began to work as a plumber's mate in a

> plumbing and heating firm. In my opinion the plaintiff's problems with his mental health in childhood and adolescence have been the principal reason for his chronic problems with his mental health throughout his life. He reports significant difficulties taking on the role of a father figure for his children. He reports difficulties trusting others and discussing his feelings. These emotional problems had a significant impact on the breakdown of his long-term relationships. The records confirm other social problems including being the victim of assaults and housing problems. The breakdown of his long-term relationships and his additional social problems have also contributed to his depressive illness. In my opinion, Mr Carberry will continue to have lifelong problems with his mental health as a consequence of this traumatic bereavement."

[124] Dr Daly painted a somewhat different picture. In the concluding section of his report, Dr Daly stated:

> "The general practitioner's notes and records would indicate that Mr Carberry has attended for many years with anxiety, depression, and alcohol related problems. His first attendance was in 1997 at which stage he would have been 33. He himself would report having depressive symptoms from the age of 18. In the general practitioner's records, his symptoms of anxiety and depression are recorded as associated with chronic back pain and other musculoskeletal symptoms many of which are due to his involvement in various accidents, housing issues, a serious assault in 1988, marital problems, gastritis and problems with the police. There is a reference to his father's death in an Accident and Emergency record in 2000 but no connection made to his complaint of panic. Mr Carberry himself references his father's death in a letter to his general practitioner in July 2011 although it does not appear to be the primary preoccupation of Mr Carberry at that time. The reference is to the legal proceedings arising from his father's death rather than the death itself. The first reference by the general practitioner is on 1 June 2012 when he references the case itself and the current proceedings rather than Mr Carberry's father's death per se. Then, in completing a form for the Memorial Fund on 13 June 2012 the general practitioner did not reference Mr Carberry's father's death. Subsequent to this there appears to be an

> increased number of attendances with the general practitioner for treatment of psychological problems. Taken overall, the general practitioner's records would certainly confirm that Mr Carberry has had chronic anxiety and depression with alcohol dependence. However, there appear to be many reasons for his anxiety and depression, his father's death only really being mentioned in the last few years when legal proceedings were ongoing. This does not suggest that Mr Carberry's father's death played a major part in his adult depression. Although Mr Carberry complained about being depressed from aged 18, his first attendance with his general practitioner for psychological problems was some 15 years later."

[125] I have carefully studied the bundle of notes and records contained within the trial bundle from page 54 to page 333. The earliest references to any psychological issues or difficulties are contained in a number of records dated September 1997 which are set out at pages 69 to 74 of the trial bundle. In these records, which include notes relating to the assessment of the plaintiff by a community psychiatric nurse, the plaintiff's psychological upset is linked to his social circumstances. It would appear that his marriage had broken down, he was homeless, living in a hostel and he had little or no contact with his children. Mr Robb, the community psychiatric nurse who assessed the plaintiff on two occasions corresponded with the plaintiff's general practitioner on 26 September 1997 in the following terms:

> "He continues at Simon Community but has now achieved a priority status for rehousing. He is more optimistic re his future and appears in brighter spirits. He is to resume having access to his children. He continues to smoke heavily and to drink and is troubled with back pain. He is content not to be reviewed but should the need arise, I would be happy to see him on your behalf."

[126] The first reference to psychological difficulties in the bundle of records included in the trial bundle in which there is any direct or indirect linkage to the death of the plaintiff's father appears in a record dated 1 June 2012 which is set out at page 105 of the trial bundle. This record appears to be a note made by Dr Laura O'Connor a general practitioner who was reviewing the plaintiff in respect of abdominal complaints. It would appear that a referral for investigations had been made in February 2012 and the general practitioner made a note "to chase this." The note goes on to state: "dad murdered in troubles and case has been brought up again – stressful, going to attend wave counselling." It is worthy of note that the plaintiff was informing the general practitioner that his father was murdered when he attended with her in June 2012.

[127] In paras [87] to [92] above, I have summarised the evidence given by the plaintiff insofar as it relates to the liability issues in this case. However, there is an element of overlap in that some of that evidence also relates to the limitation issues in the case and that evidence will be taken into account when the court comes to consider whether or not to exercise its discretion in favour of the plaintiff under Article 50 of the 1989 Order. I will now set out the evidence relevant to this issue, which was given by the plaintiff's sister, Mrs Elizabeth Tierney.

[128] The first issue addressed by Mrs Tierney in her evidence was the makeup of the Carberry family. Mrs Tierney was born in 1967. She is the fourth eldest of six children. Her mother was born in 1935 and since January 2021, her mother has resided in a care home, following the onset of dementia in 2017, which has rapidly progressed. Mrs Tierney's eldest sibling is Mrs Donna Rooney who was born in 1962 and is employed in the NHS. Mrs Tierney was asked about her eldest sister's attitude towards the present litigation and in reply, she stated:

> "I think all the siblings have always wanted to know the truth, however, for varying reasons that wasn't straightforward. So, Donna was always interested in knowing the truth but didn't want to put herself through being retraumatised, because of her being the eldest and having probably experienced the most trauma, didn't really want to have to go through that all again, so she was quite happy to allow Stan to take the lead."

[129] Mr O'Donoghue KC then asked Mrs Tierney whether there was anything in relation to her elder sister's employment "that has affected her thinking in terms of her involvement in this case?" Mrs Tierney gave the following telling and candid reply: "I think that would kind of apply to all of us because we all worked in jobs that were in the community and we all worked with people from both sides of the community. So, it was always a worry that if people were to find out that our father had been involved in paramilitaries that would, you know, would have us all labelled and judged differently; so, that fear was always there. So, yes, that fear did come true then because, you know, Donna; unfortunately, someone did find out that information and sent a letter, a threatening letter into her, quite severe threatening letter and she had to be taken out of that post and put on paid leave until she was stationed in a different post that was safe for her." Further questioning of Mrs Tierney revealed that this incident occurred in 2015, after these proceedings had commenced.

[130] Mrs Tierney then gave evidence that the plaintiff is the second eldest child, and the third eldest child is Joseph Carberry who was born in 1965 and who runs his own business in Belfast. His approach to the litigation was described by Mrs Tierney in the following manner. Although he retained an interest in the litigation:

> "Joe's business is situated on one of the peace lines in Belfast so for security reasons, the fear of anything, repercussions, that he again didn't want to take a front seat in the case. He is quite happy to allow Stan and myself to take it forward and he then would just be informed of how we were getting on."

[131] In relation to her own circumstances and her attitude towards actively looking into the circumstances of her father's death in the years before and after she reached the age of majority, Mrs Tierney informed the court that after leaving school at the age of 16, she was employed by the Co-Op organisation, working her way up through that organisation by gaining various promotions. As a manager in that organisation, she stated that she supervised both Catholic and Protestant employees and she also had to travel to England regularly in the course of her work. She stated that her fear was that: "if it was to come out that my father was involved in paramilitaries, that would have an effect on my job … I had a young child. I was a single parent. I couldn't afford to lose my job and that being put into the public domain I believed would have had an effect on my career and an effect on my life and potentially risks our children not just us." She went on to state that after her father was killed, the family home was searched regularly by the army. On one occasion after she had commenced employment with the Co-Op, the house was searched and the family were not allowed to leave the house while the search was ongoing. As a result, she was late for work, and she felt compelled to say that she had slept in rather than tell the truth in case it harmed her employment prospects.

[132] Mrs Tierney then went onto inform the court that the fifth eldest child is Pauline Vink who previously worked in the health service but has now taken a career break to look after her young child on a full-time basis. Mrs Tierney described her sister as being supportive of the litigation but "doesn't want to be front or exposed for her own personal reasons." Mrs Tierney then gave evidence that Christine Carberry who was born in 1970 is the youngest child of the family. She was described as being "nervous of any repercussions but still wants to know the truth like we all do."

[133] Mrs Tierney then went on to describe the plaintiff's attitude towards his father's death. She stated that "he would have been the most vocal out of us all and from my memories of being a young child Stan always, always was asking questions, always, you know what happened, why, where, he just relentlessly all his life, it just haunted him." She stated that the whole process of taking this litigation has "taken a massive toll on his health. You know, last year he had a heart attack and so yeah, a very big impact on his health."

[134] Mrs Tierney then gave evidence that following the ceasefires in 1994 and the signing of the Good Friday Agreement in 1998, the family believed that there was going to be some form of truth and reconciliation process, and this gave them hope and from then on, the plaintiff started to actively investigate the circumstances

surrounding his father's death by delving through the archives. Mrs Tierney went on to describe how she had missed out on third level education in her earlier years and as a result, in her twenties she attended night studies in order to gain the qualifications needed for admission to university. In 2009, she commenced a part-time course in politics at university and subsequently obtained a degree in politics from Ulster University. She then proceeded to obtain a Master's degree in post-conflict transformation and social justice which included trauma studies with a special interest in transgenerational trauma.

[135] The court then asked Mrs Tierney whether the pursuit and continuation of this litigation was in a sense prolonging the trauma which had its origin in the shooting of her father, and she replied in the following manner:

> "I don't think its prolonging the trauma. I think that you know, the trauma is there and I think that this brings a wee bit of hope if it makes any sense, that by gaining the truth that we can maybe then put it to bed and the questions then can cease so we can all finally come together and knowing …why all these different things happened … it gives us a bit of closure and, hopefully, hopefully, it will then heal us and allow us to stop thinking about it all the time and stop letting it dominate our lives … I think most people want the truth but a lot of the time they don't want to go through the re-traumatisation to get it and I understand that."

[136] The court then asked Mrs Tierney whether going through what was a re-traumatising process was worth it when the likely result, with the passage of so much time, was, at best, the revelation of a partial truth; and she answered in the following manner: "For me, yes. I do believe it was worth it to get even partial truth because we didn't have any truth, we just had hearsay and, you know, people's old memories that maybe just weren't accurate and then you were getting misinformation as time went on and when you were asking questions, because people didn't really remember, so then they would have kind of just said things that you would find out well that weren't actually true. So, I believe that whether we like the truth or we don't like it, it is important that we have it because then we can all individually and collectively as a family … put it to bed and say look, we did our best to find out the truth." Mrs Tierney then went on to recount a conversation that she had with her mother when her mother received the original letter from the HET. She said that at the time she had asked her mother what she wanted to do. Her mother replied that Stan really "wants to do this process." Mrs Tierney then asked her mother: "What do you want?" Her mother replied: "I want the truth." Mrs Tierney then said to her mother: "That's fine then, that's what we'll get for you." Mrs Tierney then told the court: "As a family that's what we've tried to do."

[137] The court then posed the following question to Mrs Tierney:

> "Would you agree … especially in light of your studies that have been extensive in … this area that this process of taking a claim against the MOD in terms of the goal that you seek which is the obtaining of the truth … that there must be a better way in which we can deal with this case and we can deal with a lot of other cases and that a much wider process, some form of truth and reconciliation commission would be a much less traumatic way of dealing with these issues and dealing with the past conflict that we have lived through?"

Mrs Tierney answered in the following manner:

> "I completely agree with you. I don't think we have handled it well at all. I do believe the opportunity to create a process was lost. I think that … if everyone was willing to come on board and the process had been developed; I myself worked on a process within university … that I believe would have been really beneficial to victims … I think that it is bad that we have had to come through this process. Years and years and years of delay and obstacles and all doors being shut. I think that a lot of re-traumatisation comes from the process that's in place, and I do believe that there is a better way of doing it, absolutely, if the will was there."

[138] Mrs Tierney then went on to describe how the hopes and expectations of the Carberry family concerning the setting up of a process to effectively investigate the past which had been engendered by the signing of the Good Friday Agreement faded when the family came to perceive that the HET process was not going to deliver an independent, effective investigation. When she was questioned about the Carberry family's interactions with the HET and the HET investigation into the death of her father, Mrs Tierney stated that she was entirely dissatisfied with the HET process and those individuals who were specifically tasked with conducting the investigation into the circumstances of her father's death. She stated: "I had high hopes of a genuine … process that was there for us, designed to help the families who had lost someone in disputed circumstances, and it was just not like that at all." She then indicated that in terms of the family's quest for the truth, meaningful progress was only made when contact was made with RFJ who then put the family in contact with KRW Law.

[139] Going back to her childhood, and her state of knowledge concerning the circumstances of her father's death, Mrs Tierney described how her mother did her very best to shield her children by telling them that their father "was just in the wrong place at the wrong time" and that it would have been "the teenage years

before we kind of knew that he was actually shot by soldiers." She stated that she became aware that her father had been shot in a car by soldiers during her mid teenage years, but she did not know the precise circumstances surrounding his death. Her evidence in relation to how her mother shielded her children from the circumstances of their father's death has been set out above at paras [93] and [94]. Mrs Tierney gave evidence that she only found out that her father had been in the IRA when she was 20 years old. She stated that she was told this by a boyfriend she was going out with in 1987. She stated that this came as a "massive shock" to her. She subsequently asked her mother whether this was true, and her evidence was that her mother told her that she had not been aware of her husband's membership of this organisation during his lifetime and that she was not 100% sure that it was true. In any event, her mother told her that she never raised the subject with any of her children because she wanted to protect them.

[140] Be that as it may, at or about this time, it would appear that there was at least some discussion within the Carberry family to do with seeking legal advice about obtaining redress for the shooting of Mr Carberry senior because when Mrs Tierney was asked by Mr Dunlop KC whether she was aware that her mother had sought legal advice about a potential claim, she stated that she was made aware that her mother had sought legal advice and she volunteered that she remembered being told by her mother that Mr Carberry senior's mother regularly encouraged her to go to see a solicitor about her husband's killing.

[141] Following on from Mrs Tierney's evidence, the evidence of Mr Michael Ritchie of RFJ, insofar as it related to the issue of limitation, was that, in his view, the primary focus of the Carberry family was the pursuit of the truth and that the family's decision to issue proceedings against the MOD was, in a sense, a last resort which was only taken after the HET process had not delivered the truth and the fight for a fresh inquest or another effective truth recovery process had stalled.

[142] The court was provided with a considerable volume of material relating to the HET investigation into the death of the deceased, some of which contains information which is relevant to the limitation issue in this case. It would appear that the HET investigation got underway in 2011. It would appear that the HET team made efforts to identify the soldiers involved in this incident. A number of documents with the heading "Tracing Request" are contained in the bundle of HET documentation included in the discovery provided by the plaintiff. It would appear that on various dates between 19 September 2011 and 26 April 2012, the HET wrote to the MOD seeking information as to the contact details of a number of former soldiers. It would appear from a HET file note dated 13 May 2011, that the HET team were able to identify two of the soldiers involved in the shooting from "an exhibit label held on microfiche at Thiepval." This HET file note which is set out at page 390 of the trial bundle records that in September 2011, RFJ produced a statement from Augustus Wright "who claimed to have witnessed the shooting and gave a completely different version of the events to the soldiers. HET took a statement from this witness." The HET file note records that the HET decided to

interview the two identified soldiers under caution and to commission an independent review of the post-mortem findings. The file note went on to record that: "Both the soldiers have health issues. After many months of negotiations an interview date of 3/4/13 was agreed for soldier A. This was later cancelled as he was due to have an operation. A new date of 21/5/13 has now been scheduled. No date has yet been agreed for soldier B." The transcript of the interview of soldier "A" reveals that it took place in London on 22 May 2013. See page 411 of the trial bundle.

[143] It would appear that the Carberry family wanted the identified soldiers arrested and questioned under caution in light of the contents of Mr Augustus Wright's statement. The HET decided that it would not be appropriate to arrest the soldiers and KRW Law brought an application for leave to apply for judicial review of this decision. This application is referred to in a newspaper story which appeared in the Andersonstown News dated 25 September 2013, a copy of which is set out in para 476 of the trial bundle. As with so much of the discoverable documentation in this case, no direct reference was made to this document during the hearing of this action and, indeed, no direct reference was made to this judicial review application. In preparing a judgment in this case, the court was left to trawl through the voluminous discovery in this case in an effort to ensure that nothing of relevance was missed. The court's own investigations concerning the hearing of this application, revealed that this judicial review application was ultimately dismissed by Treacy J on 14 January 2014. It would appear that soldier "A" was the only soldier involved in this incident who was interviewed by the HET.

[144] There are a number of items of correspondence between KRW Law (formerly Kevin Winters & Co) and the HET included in the trial bundle but this application for leave to apply for judicial review is not referenced in any of the correspondence. The earliest correspondence I can find from Kevin Winters & Co, Solicitors, is dated 7 June 2012. It appears at page 516 of the trial bundle, and it informed the HET that this firm of solicitors now acted on behalf of Stan Carberry junior in relation to Stan Carberry senior deceased.

[145] The plaintiff's discovery includes a document described as "Historic Enquiry Team, Review Summary Report" which is set out between pages 341 and 369 of the trial bundle. This report is undated, and the copy included in the trial bundle appears to be incomplete in that no conclusions are included where one would expect to find stated conclusions. See page 368 of the trial bundle. Whether the report ever was completed or whether the report in the trial bundle represents the stage reached when the process was stopped either because the family sought to challenge the process or the HET process itself was brought to a halt is unknown. No evidence was adduced in respect of this issue.

[146] The evidence adduced by the defendant which addressed the issue of limitation included an affidavit sworn by Mr Stephen Clough, a claims handler in the Directorate of Judicial Engagement Policy, Common Law Claims and Policy in

the Ministry of Defence ("MOD"). Para 2 of this affidavit, which was sworn by Mr Clough on 8 October 2021, reads as follows:

> "The purpose of this affidavit is to update the court and set out the steps taken to identify and trace those soldiers believed to have been involved in the index incident occurring on 13 November 1972; a task complicated by the fact that the unit involved in the incident, 3rd Battalion, The Royal Green Jackets, ceased to exist as an entity in its own right in 1992 when the regiment was subsumed into the larger Rifles Regiment as 4th Battalion, The Rifles, following restructuring of the armed forces in 2005."

Even on the face of it, the last five lines of this paragraph do not make sense. How can an entity cease to exist in 1992 following a restructuring exercise which was carried out in 2005? This obvious error does not inspire much confidence in relation to the accuracy of the averments which follow on in subsequent paragraphs.

[147] The webpage for the regimental museum of the Royal Green Jackets informs the reader that in 1992 there was a restructuring exercise which resulted in the disbandment of the 1st battalion of the Royal Green Jackets and the redesignation of the 2nd battalion as the 1st battalion and the redesignation of the 3rd battalion as the second battalion. It is hard to understand how the redesignation of the 3rd battalion as the 2nd battalion could have rendered tracing operations more difficult. In 2005, a major restructuring exercise of the army was carried out and a number of smaller regiments were amalgamated into the larger Rifles regiment. On 1 February 2007, the 2nd battalion of the Royal Green Jackets (which prior to 1992 was the 3rd battalion) became the 4th battalion of the new Rifles regiment.

[148] Having regard to the contents of para 3 of this affidavit, it would seem that the MOD commenced their attempts to identify and trace soldiers "A" to "D" in August 2014, following the service of the writ of summons in this case. It would appear that the Legal Process Office of the 38 (Irish) Brigade had provided some information to the HET in November 2007 and October 2011, but the reader is not specifically informed what information was provided to the HET on these two occasions. However, it can be inferred from para 4 of the affidavit that the information provided was probably contained within the RMP case file and this information probably included seven cyphered statements provided by soldiers given the cyphers "A" to "G."

[149] In para 5 of the affidavit, Mr Clough avers that the original statements of the soldiers have been lost. The only copies of these statements that are now available identify the makers of the statements by cyphers and not by their names. Para 6 of the affidavit states that "Any other information held by the MOD concerning soldiers who did serve with 3rd Battalion the Royal Green Jackets was not sufficient

to identify the names of the soldiers present at the scene of the incident in which Stanislaus Carberry died." Enquiries were made of the Royal Green Jackets Regimental Association and the Regimental HQ of the 4th Battalion of the Rifles. These proved fruitless. The inquest papers were retrieved from the PRO in Northern Ireland. Unsurprisingly, these papers did not assist in identifying the soldiers as the cyphered statements were admitted in evidence without the need for the soldiers to attend and give evidence.

[150] The MOD did not seem to have access to the exhibit label that the HET has access to in Thiepval referred to in para [135] above. However, once the MOD became aware that the HET had written to six named individuals, the MOD made their own enquiries and directed letters described as initial letters of contact to the same individuals and these letters were dated 7 May 2015. Paras 11 to 25 of the affidavit set out the steps and investigations taken by Mr Clough to attempt to identify soldiers "A" to "D" in the period between May 2015 and August, 2021 and in para 25 Mr Clough avers that as a result of these protracted investigations, three of the four soldiers cyphered "A" to "D" have been positively identified. Those individuals positively identified are soldiers "A", "B" and "C."

[151] In para 26 of the affidavit, Mr Clough avers that the individual believed to have been identified as soldier "A" never engaged with or responded to the MOD and it would appear that this individual died on 3 July 2021. It would appear that this individual did engage with the HET, and it would appear that he was the only soldier to do so. Soldier "B" was positively identified in August 2021 and this individual subsequently gave evidence by videolink at the hearing of this matter on 26 May 2022. In respect of the individual identified as soldier "C", on account of the fact that this individual does not reside in Northern Ireland and did not wish to give evidence on the grounds of ill health, the MOD made an application for leave to serve a summons ad testificandum on this individual under section 67 of the Judicature (Northern Ireland) Act 1978 ("the 1978 Act") and this application was heard by the court on 4 April 2022 and was refused for the reasons set out in the following paragraphs.

[152] At the hearing of the application for leave to serve a Subpoena out of the jurisdiction on 4 April 2022, soldier "C" was represented by Mr Mulholland KC instructed by McCartan Turkington Breen, Solicitors as local agents for Devonshires, Solicitors. Mr Dunlop KC for the defendant moved the application and Mr McKenna for the plaintiff indicated that he did not intend to make any submissions on behalf of the plaintiff. The basis of the application was that the defendant, through its researches and investigations, considered that it had identified the former soldier who was the author of the statement with the cypher soldier "C" and if so, that individual was an important witness who could potentially give very relevant evidence at the hearing of this matter. On that basis, the MOD wished to call this individual as a witness at the hearing of this action and as this individual resided outside Northern Ireland and was refusing to co-operate

with the MOD, the MOD was left with no choice but to seek the leave of the court to issue a subpoena out of the jurisdiction under section 67 of the 1978 Act.

[153] The correspondence written by McCarten Turkington Breen to the court, dated 22 March 2022, enclosed a copy of a medical report from Dr McLaren, Consultant Psychiatrist, regarding soldier "C." This correspondence went on to state: "As stated previously, we use this cypher for convenience and make no admission that our client is the individual who gave a statement in 1972." However, the court proceeded to adjudicate upon this application on the basis that Mr Mulholland's client was the author of the statement attributed to soldier "C." In light of this, the court proceeded to determine the application on the assumption that Mr Mulholland's client's evidence was potentially of great relevance to the issues in dispute in this action. Further, as the application progressed, it became manifestly clear that the basis for opposing the application was not grounded in an assertion that this individual was not soldier "C" or on the assertion that the evidence that this witness could potentially give was not relevant to the issues in dispute between the parties. The basis for opposing the application was grounded in the contents of the report from Dr Paul McLaren, Consultant Psychiatrist, dated 5 March 2022 following an examination of soldier "C" on 23 February 2022. It was subsequently confirmed to the court on 25 April 2022 that Mr Mulholland's client did accept that he was the author of the statement bearing the cypher soldier "C."

[154] Before delving into the substantive findings set out in Dr McLaren's report, following on from his examination of soldier "C" and his consideration of some of this individual's medical notes and records, it is important to note that his General Practitioner's notes and records reveal that in April and August 2012, he attended his doctor with anxiety symptoms following the receipt of correspondence from the MOD (probably at the behest of the HET) which indicated that an investigation had been initiated into a shooting that occurred in 1972 and there was a request for him to make himself available for an interview under caution. It would appear that soldier "C" was the second soldier that the HET had planned to interview at one stage but there is no indication in the discoverable documentation as to why this interview did not take place.

[155] Turning then to the substantive findings of Dr McLaren, I note that his conclusions are based on his examination of soldier "C" and his perusal of soldier "C's" general practitioner's notes and records. Dr McLaren did not have access to any army medical or hospital notes and records, although it is clear from his medical history that such records would have been generated including those generated as a result of the referral of this individual to a psychiatrist during his childhood, as a result of his psychiatric inpatient treatment for four and a half months in 1988, his residential treatment for a six week period in a unit operated under the auspices of combat stress in 1991 and his admission to a unit for six to eight weeks in 2004 for "medically assisted withdrawal from alcohol."

[156] Dr McLaren at 5.4.2 of his report stated that this individual had a long and complex history of mental disorder. Of primary relevance, it would appear that this individual developed dissociative fugue (ICD 10 F44.1) two years before he left the army in 1988. When serving as a Colour Sergeant in the Royal Green Jackets in 1988, he disappeared from barracks in Colchester and was found after several days at Norwich station. He was then admitted to QEMH Woolwich for about four and a half months. Thereafter, he did not return to his former duties but was posted to support a Territorial Army unit. He did this for eighteen months before resigning from the army. There was a subsequent pattern of disappearing from home for periods of time, some or all of which may be further examples of this condition. This condition is usually triggered by stress, and he remains at significant risk of developing further dissociative episodes.

[157] In section 5.4.3 of his report, Dr McLaren stated that this individual has had significant problems with alcohol and has an established diagnosis of alcohol dependence syndrome (ICD 10 F10.2). This has been relapsing. Although abstinent for ten months prior to Dr McLaren's assessment, in the absence of lack of engagement with peer support or professional help, the risk of relapse remains significant. Soldier "C" has also been diagnosed with bipolar affective disorder (ICD 10 F31). His stability is regarded as fragile and in the absence of prophylactic medication, the risk of relapse into depressive episodes or hypomania is high.

[158] Soldier "C" has also received a diagnosis of PTSD (DSM 5 309.81) arising from traumatic experiences during his military service in Northern Ireland. He is still experiencing flashbacks. Therefore, this can be regarded as a chronic condition now. Dr McLaren at section 5.5.1, 5.6.1 and 5.7 stated that:

> "Soldier C's current mental state is fragile, and he is at significant risk of relapse into Alcohol Dependence Syndrome, Dissociative Fugue and/or a Hypomanic or Depressive episode. This would in turn exacerbate the chronic PTSD. The risk of relapse would increase and would, on the balance of probabilities, become high if he were required to give oral evidence in the current proceedings. If he did relapse then he would, on the balance of probabilities, become unfit to give evidence.
>
> It is the prospect of giving evidence with the possibility of cross examination which would be the major stressor for Soldier C. The preparation for any hearing, rather than just the conduct of the hearing itself would be highly stressful for him and it is difficult to envisage any special measures which would alleviate that stress.
>
> Given the length of his history and the severity of his psychiatric disorders, there is a high risk of deterioration

> if he is asked to recall the events in advance or in the course of giving evidence in the current proceedings."

[159] Having carefully considered the medical evidence and the oral submissions of Mr Dunlop KC and Mr Mulholland KC, and having due regard to the importance of this case and the potential importance of soldier "C's" evidence, I concluded in an extempore ruling given on 4 April 2022 that as a result of the combination of the various conditions and diagnoses described in Dr McLaren's report, it was patently obvious that, in the case of this elderly and mentally frail individual, the pressure and stress that would be engendered by him having to give evidence in relation to this event, which happened some considerable time ago, which would probably involve him being cross-examined either in court or by remote link, with the backup and support of special measures, such as regular breaks, would give rise to a significant/high risk of relapse or deterioration of his mental health conditions. I concluded that in light of his medical conditions, the court had to adopt some form of proportionality assessment when deciding whether it is proper to compel this individual to give evidence in this particular case. I noted that soldier "C" had provided a statement at the time of this incident, and I queried to what extent soldier "C" with his present raft of mental health difficulties, could be expected to meaningfully and reliably expand upon the contents of that statement. Weighing up all these matters, I concluded that it would not be proper to compel this individual to give evidence in this matter and the application for leave to issue a subpoena out of the jurisdiction was refused. This concludes the section of the judgment which deals with the evidence adduced before the court which deals with the issue of limitation. I now turn to consider the issues of law arising out of and relevant to the claim made by the plaintiff that his father was shot dead without any legal justification.

Legal principles to be applied in a case involving the deliberate application of force

[160] The relevant legal framework is non-contentious and was set out with admirable clarity by Lowry LCJ in the case of *Farrell v Ministry of Defence* [1980] NI 55 at page 61C where he stated:

> "When a soldier deliberately applies force, by restraining or striking or shooting a person, that is prima facie an assault and battery for which the soldier and (if he is acting under orders or within the scope of his authority) his superiors are liable in tort at the suit of that person, unless the act of the soldier can be justified at common law or by statute … When the cause of action is framed in trespass and the assault in fact is proved, the defendants must then prove the defence of justification ..."

The rule at common law is that force used in self-defence or in the defence of others must be reasonable in the circumstances. As was pointed out by Hutton J in the case

of *Tumelty v Ministry of Defence* [1988] 3 NIJB 51, prior to 1967 under section 4 of the Riot Act (Ireland) 1787, peace officers were indemnified if rioters were "killed, maimed or hurt" in the "dispersing, seizing or apprehending" of them after the passage of an hour from the reading of the proclamation set out in that Act. But section 4 of the 1787 Act was repealed by the Criminal Law Act (Northern Ireland) 1967 and, under the present law, if the court accepts that the deceased was struck by fragments of a bullet or bullets deliberately fired at him by a soldier, the onus rests on the defendant to establish that the firing was justified in self-defence or in defence of other soldiers, in effecting or assisting in the lawful arrest of offenders or suspected offenders or in the prevention of crime.

[161] Section 3 of the Criminal Law Act (Northern Ireland) 1967 provides as follows:

> "1. A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
>
> 2. Sub-section (1) shall replace the rules of the common law as to the matters dealt with by that sub-section."

Therefore, the plaintiff is entitled to succeed and to recover damages in this case unless the defendant establishes on the balance of probabilities that the force used by the soldiers who fired upon the vehicle in the circumstances prevailing at the time and in the manner in which they did constituted the use of such force as was reasonable in the circumstances.

[162] How the court should approach the issue of justification set out in section 3 was helpfully explained by the Court of Appeal in the case of *Kelly and Others v Ministry of Defence* [1989] NI 341 where the judgment of the court was given by O'Donnell LJ.

Quoting from the headnote will suffice.

> "Section 3 of the Criminal Law Act (Northern Ireland) 1967 allowed a person to use reasonable force to prevent a crime or to arrest a suspected offender, and it provided a defence for the user of force in an action for trespass. The trial judge was correct in considering the question in two stages. The first stage was related to the facts and circumstances honestly and reasonably believed to exist at the time of the incident. The determination of this issue required the use of both a subjective test as to whether each soldier honestly believed that the occupants of the

> car were terrorists and an objective test as to whether there were reasonable grounds for the belief. The trial judge correctly held that the soldiers honestly believed the occupants of the car to be terrorists and that there were reasonable grounds for so believing. The second stage involved the issue of whether, given that honest and reasonable belief, it was reasonable to fire in the prevention of crime or to effect an arrest. This was to be determined by the court using an objective test, applying the judgment of the reasonable man and, in the light of the circumstances, it had been reasonable to fire."

[163] This approach was followed by Treacy J in the case of *McKeever v Ministry of Defence* [2011] NIQB 87. At para [14] et seq the Treacy J stated the following:

> "[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."

[164] It can be readily discerned from these authorities that in order to properly apply the law to the facts of this case, the court will be required to adopt this two-stage test and will have to analyse the evidence in the case in order to come to a determination on the balance of probabilities as to what was the honest belief held by each soldier who fired upon the vehicle in which Mr Carberry was travelling.

This is the subjective element of the analysis. The court will then have to analyse all the evidence in order to determine whether each soldier had reasonable grounds for the belief found to be honestly held by him. This is the first objective element of the analysis. The court will then have to go on to consider whether it was reasonable for each of the soldiers to open fire on the vehicle in the circumstances that prevailed at the time and in the manner that each soldier has been found to have done so. This is the second objective element of the analysis applying the judgment of the reasonable man. However, before addressing this issue, the court has to turn to consider the issues of law relating to the exercise of the discretion contained in Article 50 of the 1989 Order.

Legal principles to be applied in relation to the exercise of the discretion contained in Article 50 of the Limitation (Northern Ireland) Order 1989

[165] As stated in paras [2] and [105] above, in this case there is no issue as to the date of knowledge of any of the persons for whose benefit the claim is brought. It has been specifically conceded that the limitation period has long since expired in respect of each of the dependants.

Therefore, the defendant's limitation plea in its amended defence will succeed in defeating each individual dependant's claim unless the court is persuaded to exercise its discretion under Article 50 in each individual dependant's case.

[166] Article 50(1) states:

> "50. —(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
>
> the provisions of Article 7, 8 or 9 prejudice the plaintiff or any person whom he represents; and
>
> any decision of the court under this paragraph would prejudice the defendant or any person whom he represents,
>
> the court may direct that those provisions are not to apply to the action, or are not to apply to any specified cause of action to which the action relates."

[167] Article 50(4) of the 1989 Order directs as follows:

> "(4) In acting under this Article, the court is to have regard to all the circumstances of the case and in particular to –

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7, 8 or, as the case may be, 9;

(c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

[168] In the case of *Pearce and Others v Secretary of State for the Home Departments* [2018] EWHC 2009, Turner J explained how the court should approach limitation issues when raised in cases such as this. He stated at para [59] et seq:

> "[59] The issue of limitation should be determined before any consideration of the issue of liability.
>
> [60] In *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441 Auld LJ held at paragraph 74:
>
> > '(vii) Where a judge determines the section 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues, including liability,

causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. Much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him. To rely on his findings on those issues to assess the cogency of the evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would effectively require a defendant to prove a negative, namely, that the judge could not have found against him on one or more of the substantive issues if he had tried the matter earlier and without the evidential disadvantages resulting from delay.'

[61] In *B v Nugent Care Society* [2010] 1 WLR 516, Lord Clarke MR, who gave the judgment of the court, observed at paragraphs 21-22 that the judge who has to determine the issue as to whether the primary limitation period should be disapplied:

'[21] … may well conclude that it is desirable that such oral evidence as is available should be heard because the strength of the claimant's evidence seems to us to be relevant to the way in which the discretion should be exercised. We entirely agree with the point made at vii) that, where a judge determines the section 33 application along with the substantive issues in the case he or she should take care not to determine the substantive issues, including liability, causation and quantum before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. To do otherwise would, as the court said, be to put the cart before the horse.

[22] That is however simply to emphasise the order in which the judge should determine the issues. When he or she is considering the cogency of the claimant's case, the oral evidence may be extremely valuable because it may throw light both on the prejudice suffered

by the defendant and on the extent to which the claimant was reasonably inhibited in commencing proceedings. …'

[62] In *JL v Bowen* [2017] P. I. Q. R. P11 Burnett LJ (as he then was) held:

'[26] The logical fallacy which Lord Clarke MR was concerned with at [21] of the *Nugent Care Society* case and Auld LJ at [74(vii)] of the *Bryn Alyn* case was proceeding from a finding on the (necessarily partial) evidence heard that the claimant should succeed on the merits to the conclusion that it would be equitable to disapply the limitation period. That would be to overlook the possibility that, had the defendant been in a position to deploy evidence now lost to him, the outcome might have been different. The same logical fallacy is most unlikely to apply in the reverse situation, especially when the case depends upon the reliability of the claimant himself. That may be illustrated by a simple example. A claimant sues for personal injury ten years after an alleged accident and seeks an order to disapply the limitation period of three years. The defendant has lost its witnesses and records, but advances a defence that the accident did not occur. The judge concludes, without the lost evidence, that indeed the accident did not occur. The burden is on the claimant to prove that it would be equitable to disapply the limitation period having regard to the balance of prejudice. In those circumstances he would not be able to do so. There would be no purpose in extending the limitation period and it would not be equitable to do so. Similarly, a full exploration at trial of, for example, the claimant's reasons for delay may enable the judge to reach firm conclusions which could have been no more than provisional had limitation been resolved as a preliminary issue.

[27] There is clear authority for this approach in the judgment of Thomas LJ (as he then was) in *Raggett v Society of Jesus Trust of*

> *1929* [2010] EWCA Civ 1002. The complaint made by the appellants was that the judge had decided the abuse in question had occurred and had then disapplied the limitation period. They advanced a literal argument based upon the words of Lord Clarke MR that because she structured her judgment by dealing with her findings of fact first and only then considered limitation, she had erred. Unsurprisingly, that argument did not prosper. It is not realistic to shut one's eyes to findings and conclusions reached following a full trial. It is what is done with them in the context of the substance of the reasons for the limitation decision that matters. Thomas LJ, with whom Toulson and Mummery LJ agreed, indicated at [19] that the judge "did not adopt the approach … that she was satisfied that Father Spencer had in fact sexually abused the claimant and therefore there could be no prejudice. He continued:
>
> > '[20] When this court observed that the judge must decide the issue on the exercise of the discretion under s.33 before reaching the conclusions on liability, it was enjoining a judge to decide the s.33 question on the basis, not of the finding that the abuse had occurred, but on an overall assessment, including the cogency of the evidence and the potential effect of the delay on it.'
>
> [63] I will therefore proceed on the basis that my first task is to determine the issue of limitation and then, only if the matter is resolved in favour of Mrs Nicholls, go on to consider the question of substantive liability."

[169] I intend to adopt the same approach in this case. First of all, I will determine the issue of limitation which in this case involves considering whether it is appropriate to exercise the court's discretion under Article 50 of the 1989 Order in favour of the plaintiff and each of the other dependants, and then, only if the Article 50 issue is resolved in favour of the plaintiff and/or any of the other dependants, will I go on to consider and adjudicate upon the substantive factual disputes in this case in order to determine whether the shooting of Mr Carberry senior was justified in law.

[170] Turning then to legal principles to be applied in relation to the exercise of the discretion contained in Article 50 of the 1989 Order, Sir Terence Etherton MR in the England and Wales Court of Appeal case of *Carroll v Chief Constable of Greater Manchester Police* [2018] 4 WLR 32 sets out a very helpful summary of the general legal principles and their proper application at para [42] et seq. It should be noted that section 33 of Limitation Act 1980 is the England and Wales equivalent to our Article 50:

> "[42] The general principles may be summarised as follows.
>
> (1) Section 33 is not confined to a "residual class of cases.". It is unfettered and requires the judge to look at the matter broadly: *Donovan v Gwentoys Ltd* [1990] 1 WLR 472 at 477E; *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307, at [9] (approving the Court of Appeal judgments in *Finch v Francis* unrptd 21.7.1977); *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, at [45], [49], [68] and [84]; *Sayers v Lord Chelwood* [2012] EWCA Civ 1715 [2013] 1 WLR 1695, at [55].
>
> (2) The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1), as is made plain by the opening words "the court shall have regard to all the circumstances of the case", but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: *Donovan* at 477H-478A.
>
> (3) The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: *Donovan* at 477E; *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2005] 1 AC 76, at [55], approving observations in *Robinson v St. Helens Metropolitan Borough Council* [2003] PIQR P9 at [32] and [33]; *McGhie v British Telecommunications plc* [2005] EWCA Civ 48, (2005) 149 SJLB 114, at [45]. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.

(4) The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: *Sayers* at [55].

(5) Furthermore, while the ultimate burden is on a claimant to show that it would be inequitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant: *Burgin v Sheffield City Council* [2015] EWCA Civ 482 at [23]. If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant: *Hammond v West Lancashire Health Authority* [1998] Lloyd's Rep Med 146.

(6) The prospects of a fair trial are important: *Hoare* at [60]. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why: *Donovan* at 479A; *Robinson* at [32]; *Adams* at [55]. It is, therefore, particularly relevant whether, and to what extent, the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents: *Robinson* at [33]; *Adams* at [55]; *Hoare* at [50].

(7) Subject to considerations of proportionality (as outlined in (11) below), the defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount: *Cain v Francis* [2008] EWCA Civ 1451, [2009] QB 754, at [69].

(8) It is the period after the expiry of the limitation period which is referred to in sub-subsections 33(3)(a) and (b) and carries particular weight: *Donovan* at 478G. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: *Donovan* at 478H and 479H-480C; *Cain* at [74]. The disappearance of evidence

and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: *Collins v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 717, [2014] PIQR P19, at [65].

(9) The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: *Cain* at [73]. I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defendant the claim.

(10) Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context: *Corbin v Penfold Company Limited* [2000] Lloyd's Rep Med 247.

(11) In the context of reasons for delay, it is relevant to consider under sub-section 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period: *Hoare* at [44]-[45] and [70].

(12) Proportionality is material to the exercise of the discretion: *Robinson* at [32] and [33]; *Adams* at [54] and [55]. In that context, it may be relevant that the claim has only a thin prospect of success (*McGhie* at [48]), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (*Robinson* at [33]; *Adams* at [55]); *McGhie* at [48]), that the claimant would have a clear case against his or her solicitors (*Donovan* at 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (*Robinson* at [33]; *Adams* at [55]).”

[171] I also consider it important to a couple of authorities which emphasise the detrimental impact that the passage of a prolonged period of time can and usually does have upon the ability of a witness to provide cogent and reliable evidence to the court. In the case of *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066, Stewart J made the following observations at para [94] et seq:

> "**The approach to evidence**
>
> 95. In recent years there have been a number of first instance judgments which have helpfully crystallised and advanced learning in respect of the approach to evidence. Three decisions in particular require citation. These are:
>
> *Gestmin SGPS SA v Credit Suisse (UK) Limited* - Leggatt J (as he then was);
>
> *Lachaux v Lachaux* - Mostyn J;
>
> *Carmarthenshire County Council v Y* - Mostyn J.
>
> 96. Rather than cite the relevant paragraphs from these judgments in full, I shall attempt to summarise the most important points:
>
> **i)** ***Gestmin*:**
>
> We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.
>
> Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), ie memories of experiencing or learning of a particularly shocking or traumatic event.
>
> Events can come to be recalled as memories which did not happen at all or which happened to somebody else.
>
> The process of civil litigation itself subjects the memories of witnesses to powerful biases.
>
> Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial.

Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.

The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts." This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

ii) ***Lachaux*:**

Mostyn J cited extensively from *Gestmin* and referred to two passages in earlier authorities. I extract from those citations, and from Mostyn J's judgment, the following:

> 'Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance …'

… I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities …

Mostyn J said of the latter quotation, `these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty.'

iii) ***Carmarthenshire County Council*:**

The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.

However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of *Gestmin*, Mostyn J said:

> '… this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.'

97. Of course, each case must depend on its facts and (a) this is not a commercial case (b) a central question is whether the core allegations happened at all, as well as the manner of the happening of an event and all the other material matters. Nevertheless, they are important as a helpful general guide to evaluating oral evidence and the accuracy/reliability of memory."

Determination of the issue of whether the court should exercise its discretion in favour of any or all of the claimants under Article 50 of the Limitation (Northern Ireland) Order 1989

[172] In coming to a determination in relation to the exercise of discretion under Article 50, the court must have regard to the rationale underpinning the need for limitation periods in the first place. It is a fundamental principle of civil justice that wrongs should be righted as soon as is reasonably practicable and that disputes about the existence, nature, extent and breach of rights and/or duties should be

initiated and brought before a competent, independent and impartial tribunal and finally determined either by that tribunal or through an appellate process within a reasonable timescale. The fair and timely final determination of civil disputes is one of the hallmarks of an effective civil justice system which is fit for purpose. One of the accepted truisms that finds expression in this principle is that the passage of time often can and usually does have a significantly deleterious impact on the availability, quality and cogency of the oral evidence that can be placed before the tribunal in order for it to be able to properly and fairly adjudicate upon disputes. In any case involving a limitation argument, the court must keep at the forefront of its mind that fundamental principle and that truism.

[173] Paying due respect to the specific language of Article 50, the court must also have regard to two important concepts, namely: equity and prejudice. The concept of equity, to a very large measure, overlaps with the concept of fairness; and fairness in this context relates both to the fairness of the outcome and fairness of the process by which that outcome is reached. In relation to the fairness of the outcome, if the plaintiff, on the face of it, has a good case and is able to adduce relevant, cogent and compelling evidence to support that case and the passage of time has not damaged, diminished or impaired the defendant's ability to adduce evidence in order to attempt to rebut the case being made by the plaintiff, then the elapse of the limitation period before the commencement of proceedings should not result in the tribunal refusing to hear the substance of the case and should result in it proceeding to determine the case on its merits. Such a determination on the merits is clearly a fair outcome.

[174] In such circumstances, irrespective of who ultimately succeeded in the case, a fair hearing of the substance of the dispute was achievable and was achieved. Prejudice to the plaintiff in the form of him or her being deprived of a right to a hearing on the merits is avoided and if a defendant should lose such a case on its merits, any prejudice occasioned to the defendant is of a largely immaterial and illusory nature in that the defendant received a fair hearing on the merits which took into account all relevant evidence and, indeed, prior to that, received a fair hearing of its application for the determination of the limitation issue. The prejudice that may be perceived to be suffered by the defendant is, when properly examined, the fact that it lost both arguments following a fair hearing and that, in reality, is no prejudice at all.

[175] However, matters are seldom that straightforward. For instance, what should happen in a dispute where, on the face of it, the plaintiff has a good case and is able to adduce relevant, cogent, and compelling evidence in support of that case but due to the passage of time in the period between the expiry of the relevant limitation period and the date on which proceedings were issued, the defendant's ability to adduce relevant, cogent, and compelling evidence has been damaged, diminished or impaired? Should the court just do its best and determine the dispute on the basis of the evidence that it available? This is where the issue of the fairness of the process comes into play. A tribunal should only determine disputes of fact on the basis of

relevant, cogent, and compelling evidence as to the facts in dispute and on the basis of reasonable inferences to be drawn from those facts and that means that both parties to the dispute must have the opportunity to present such evidence to the tribunal. If, as a result of the passage of time, a defendant's ability to adduce relevant, cogent, and compelling evidence in relation to the facts in dispute has been damaged, diminished or impaired, the fairness of the process would be seriously jeopardised if that defendant was forced to meet the claim as best as it could by putting before the court whatever limited evidence it could then adduce.

[176] Ensuring that the process is fair might, in some instances, be viewed as compromising the fairness of the outcome (the plaintiff with an arguable case and with relevant, cogent and compelling evidence to back it up being deprived of a hearing on the merits) but fairness of process is such an important and fundamental concept underpinning any system of civil justice that any departure from fair process should not be seriously contemplated for the reasons that experience tells us that fairness of process *generally* gives rise fairness of outcome and a departure from fair process runs the high risk of the introduction of arbitrary decision-making into the civil justice system, thus bringing the justice system into disrepute.

[177] In this example, the accrual of prejudice to the plaintiff in the form of him or her being deprived of a right to a hearing on the merits was unavoidable; but a greater prejudice which would otherwise have accrued to the defendant resulting from the adoption of an unfair process with its concomitant risks to the integrity and reputation of the civil justice system was avoided.

[178] Another example will serve to illustrate the interplay between fairness of outcome, fairness of process and the prejudice accruing to parties to the dispute arising out of any decision made under Article 50. What should happen in a dispute, where on the face of it, the plaintiff has an arguable case but due to the passage of time, the plaintiff's ability to adduce relevant, cogent, and compelling evidence has been damaged, diminished or impaired and due to the passage of time following the expiry of the relevant limitation period, the defendant's ability to adduce relevant, cogent and compelling evidence has also been damaged, diminished or impaired? In such circumstances, there is even less justification for arguing that the court should just do its best and determine the dispute on the basis of the evidence that it available. Fairness of the process including the requirement that a tribunal should only determine disputes of fact on the basis of relevant, cogent and compelling evidence as to the facts in dispute and on the basis of reasonable inferences to be drawn from those facts with both parties to the dispute having the opportunity to present such evidence to the tribunal means that such a case should be stopped in its tracks on the basis that a fair hearing of the issues of substance between the parties cannot be achieved. The reason why a fair hearing cannot be achieved is because of delay on the part of the plaintiff. Therefore, the outcome is fair. The prejudice accruing to the plaintiff is insignificant on the basis that due to the passage of time, the plaintiff's ability to adduce relevant, cogent, and compelling evidence has been damaged, diminished or impaired and the significant prejudice

which would otherwise have accrued to the defendant resulting from the adoption of an unfair process with its concomitant risks to the integrity and reputation of the civil justice system has been avoided.

[179] The broad-brush approach illustrated by the three examples set out above, in which the concepts of equity and prejudice form the basis of any decision under Article 50, is always subject to the legislative steer provided by Article 50(4) of the 1989 Order. Under this provision, the court must have regard to all the circumstances of the case and, in particular, it must have regard to a number of specific issues which are set out therein. It is easy to see why the court is enjoined to have regard to these issues as they clearly relate to matters affecting fairness of outcome and fairness of process. For example, if one considers the issues set out in Article 50(4)(a): "the length of, and the reasons for, the delay on the part of the plaintiff;" one can readily see that the issue of the "length of … delay" is relevant to fairness of process and the issue of the "reasons for … delay" is relevant to fairness of outcome. The same analysis can be performed in respect of the issues set out in the other five sub-paragraphs of Article 50(4).

[180] Finally, although guidance contained in the caselaw steers the court towards addressing the issue of limitation and to reaching a decision on this issue before going on (in an appropriate case) to make a determination on the substance of the dispute between the parties; in order to properly come to a determination on the limitation issue, it is usually appropriate and, in a good number of cases, it may be necessary, to hear all the available evidence prior to determining the limitation issue. By adopting such a course, the court gains a clear insight into the evidence that is now available, and the quality and cogency of that evidence and it also gains an appreciation of the nature and extent of the evidence which previously would have been available but is no longer available due to the passage of time. The evidence is carefully examined at that stage not for the purpose of making a determination on the substance of the dispute between the parties but rather it is examined in order to ascertain whether such a fair determination can be made on the basis of both parties being able to present relevant, cogent, and reliable evidence to the court.

[181] I now turn to consider whether to exercise the discretion set out in Article 50 in this case, applying the principles and guidance set out above. The first issue to address is the issue of the appropriate range of dates that the court has to concentrate on when considering the defendant's argument that the passage of time has blighted the defendant's prospects of adducing cogent evidence on the key issues in dispute in this case. Obviously, the range of dates is different for each dependant. In the case of Mr Carberry senior's widow, the period which is primarily relevant is the period between 13 November 1975 and 15 May 2014, inclusive. In relation to all the other dependants, the end date is the same in each and the start date is the date of each dependant's twenty-first birthday. In Donna Carberry's case, the start date is 10 January 1983. In Stanislaus Carberry's case, the start date is 15 April 1985. In Joseph Carberry's case, the start date is 21 June 1986. In Elizabeth Carberry's case, the start date is 28 September 1988. In

Pauline Carberry's case, the start date is 13 January 1990 and in Christine Carberry's case, the start date is 21 December 1991.

[182] The primary importance of these start dates is that, in respect of each dependant, if it is clear that the defendant's prospects of adducing cogent evidence on the key issues in dispute in this case were blighted before that dependant's start date, then the mere fact that proceedings were not issued in time in respect of that dependant will not materially assist the defendant in mounting an argument that the delay in issuing proceedings has caused prejudice to the defendant because all the blight was occasioned before the limitation period expired and the delay in issuing proceedings after that date has not caused or contributed to the defendant's difficulties. It is the impact of delay after the expiry of the limitation period that is of primary importance. See *Donovan v Gwentoys Ltd* [1990] 1 All ER 1018.

[183] However, where there has been delay after the expiry of the limitation period which has had some impact on the defendant's ability to adduce cogent and reliable evidence on the key issues in dispute, the impact of the passage of time during the limitation period on the defendant's ability to adduce cogent and reliable evidence on the key issues in dispute can, and, in appropriate circumstances, should be taken into account. See para [66] of Jackson LJ's judgment in *Collins v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 717. The rationale for this is clear to see. If the efflux of time within the limitation period partially blights the defendant's ability to adduce cogent and reliable evidence on the key issues in dispute and further, additional or more severe blight occurs after the limitation period has expired, that additional element cannot and should not be viewed in isolation but has to be viewed in the context of it being suffered by a defendant who has already being hampered in the presentation of any defence to the case being made by the plaintiff.

[184] Although the court is required to decide whether or not to exercise its Article 50 discretion in the first place and only if it decides this issue in the plaintiff's favour should it go on to determine the substance of the dispute between the parties, it is clear that the court has to look at the limitation issue in the context of facts that are agreed and in the context of facts that although not formally agreed are clearly established on the basis of relevant, cogent and compelling evidence. In this case, it cannot be disputed that Mr Carberry senior was shot by soldiers. His death resulted from the deliberate application of force. Having regard to the pathology evidence, it cannot be disputed that Mr Carberry senior died as a result of being struck by three fragments of a bullet or bullets. The forensic evidence, although not conclusive on this issue, strongly suggests that the three fragments that struck Mr Carberry senior were fragments of one or more NATO 7.62 rounds. The evidence in the case indicates that soldiers "C" and "D" were the two soldiers that fired NATO 7.62 rounds at the vehicle in which Mr Carberry senior was present. Soldier "A" only fired . 303 rounds at the vehicle. Soldier "B" did not fire any rounds at the vehicle. This is the factual context within which the issue of the exercise of the Article 50

discretion must be examined and the central importance of this factual context will become apparent later in this judgment.

[185] The central issue in dispute between the parties in the substantive action is the issue of justification. Paras [159] to [163] of this judgment set out the legal principles to be applied in a case involving the deliberate application of force. It is clear from those paragraphs that three issues are at the heart of the defence of justification. These are:

(a) the honest belief of those who fired the shots (the subjective element);

(b) the existence of reasonable grounds for holding that belief (objective element); and

(c) the determination of the question of whether, given that honest and reasonable belief, in the light of all the circumstances, it was reasonable to fire at the vehicle in self-defence, for the prevention of crime or to effect an arrest. This is an objective test, applying the judgment of the reasonable man.

[186] In relation to the evidence available to the court at this stage, the statement that soldier "A" gave to the HET does contain a reference to his belief at the time of the shooting. His earlier statement does not. The contemporaneous statements of soldiers "C" and "D" do not contain any references to their states of mind at the relevant time and do not set out what their beliefs were at the time they opened fire. The plaintiff's case, in a nutshell, is that as the defendant cannot now adduce any evidence to discharge the burden that rests upon the defendant to establish justification, the plaintiff must succeed. But it cannot be that simple. If this were the case, then a claim could be initiated some seventy years after a shooting and unless the defendant could adduce relevant, cogent, and reliable evidence at that time to establish that the shooting was justified, the plaintiff would succeed. Not only might that result in an utterly unfair outcome achieved through an utterly unfair process, it would risk the court being complicit in the complete re-writing of history and the creation of a narrative which may not bear any close relationship to the historical truth. It would risk the system of civil justice being brought into disrepute. The court cannot allow that to happen and a just and proportionate measure to prevent that happening is relatively straightforward to devise and implement.

[187] If it transpires that the defendant cannot adduce relevant, cogent and reliable evidence at this stage in order to establish that the shooting was justified and this inability is primarily as a result of the long passage of time from the date of the incident and, in particular, the delay on the part of the plaintiff in bringing proceedings after the expiry of the limitation period then, subject to the court's consideration of all the circumstances of the case and, in particular, the matters set out in Article 50(4), the court can refuse to exercise its discretion under Article 50, thus bringing the case to an end.

[188] Before delving into the issue of why the defendant cannot at this distant remove from the incident adduce relevant, cogent, and reliable evidence in relation to elements that make up the defence of justification, it is appropriate at this stage to highlight the court's deep concerns about the cogency and reliability of the oral evidence that was adduced at the trial.

[189] The evidence given by Mr Murphy in relation to lines of sight and views from various locations is unreliable in that it is clear that a new detached dwelling has been erected in what appears to have been an area of ground between 300 Falls Road and the mouth of La Salle Drive. The existence, nature, location and height of any boundary fence or wall at the edge of this area of ground at the relevant time is another factor which adds to this element of unreliability. The tree shown at the top of the La Salle junction shown in Mr Murphy's photograph is of unknown vintage. It appears to be a relatively mature tree in the photographs but what was the size and appearance of this tree some forty-four years prior to the photographs being taken? Is it even the same tree that was present at that time?

[190] This then brings me to the reliability and cogency of Mrs McGlinchey's evidence. I am sure that Mrs McGlinchey believed that she was telling the truth when she gave her evidence but for a number of reasons, I am convinced that her evidence in a number of respects lacks cogency and reliability. She stated that the car crashed into the tree with such force as to frighten her. This simply cannot have been the case. The photograph of the front of the Vauxhall Viva taken a matter of hours after the incident reveals that there is absolutely no damage to the front of the car. Mrs McGlinchey's recollection was that the soldiers were wearing headgear that incorporated a tartan band. Again, this simply cannot have been the case. Similarly, I cannot accept that Mrs McGlinchey's recollection of seeing three bullet holes in a horizontal line in an otherwise intact rear window of the Vauxhall Viva is a reliable recollection. Further, I cannot accept that her evidence relating to the raised or lowered state of the two front door windows is a genuine and intact recollection of anything she observed on that day in 1972. I stated at para [61] above that these matters cause me grave concern that the accuracy of the testimony of this apparently genuine and honest witness is, with the passage of so much time, significantly degraded to such an extent that extreme caution must be exercised when determining what weight to attach to it. I reiterate that Mrs McGlinchey when giving her evidence impressed me as a genuine and honest witness. I do not believe that she was deliberately giving a false account to the court. But that means that there must be another reason why her evidence lacks cogency and reliability, and I can only conclude that the passage of such a lengthy period of time has robbed Mrs McGlinchey's evidence of its cogency and reliability.

[191] It must be remembered that her evidence was the only oral evidence adduced by the plaintiff which touched upon the actual shooting of Mr Carberry senior. The only other eyewitness to ever come forward in response to a number of public requests for witnesses to the shooting to come forward was Mr Augustus Wright and it transpired that he was a complete fantasist. I have set out in detail the

evidence given by soldier "B" at paras [18] to [34] above. It is clear that soldier "B" did not and could not give evidence in relation to the beliefs held by the other three soldiers when they opened fire. His evidence, if considered to be cogent and reliable, was clearly relevant to whether there were reasonable grounds for any beliefs held by the other soldiers and whether, in the light of all the circumstances, it was reasonable to open fire on the vehicle. However, having listened carefully to the evidence of soldier "B" and having observed his demeanour albeit over sightlink and having carefully read and digested the transcript of his oral evidence, I am firmly convinced that soldier "B's" oral evidence was utterly and fundamentally blighted and impoverished by the absence of any cogent and coherent independent recollection of events on his part, due to the passage of a half a century between the date of the shooting and the date of him giving oral evidence for the first time about this incident. The evidence of Mrs McGlinchey and the evidence of soldier "B" was the sum total of the oral eyewitness testimony given in this case.

[192] I now turn to examine the reason or reasons why the defendant was unable to adduce oral evidence as to the beliefs held by soldiers "A", "C" and "D" at the hearing of this action. In the case of soldier "A", the HET was able to identify this witness and he was interviewed by the HET and he provided a statement to the HET. His HET statement and interview addressed the issue of his honest belief when he opened fire. Soldier "A" died on 3 July 2021 after the initiation of proceedings and, in fact, during the hearing of this matter. The court knows nothing about his state of health in the years leading up to his death. However, he appears to have been in reasonable health and was able to give an account of the events of 13 November 1972 when interviewed by the HET in May 2013. The defendant attempted to engage with soldier "A" after the initiation of proceedings, but this individual did not co-operate with defendant at all. Why this individual did not co-operate with the defendant when it reached out to him in 2015 is unknown. It appears that he did co-operate with the HET just two years earlier. In respect of this individual, the court can readily assume that his ability to give a cogent account of the events in question would have been enhanced the closer in time to the event that the account was given. The court can also reasonably assume that if this individual had been contacted about a claim arising out the death of Mr Carberry senior prior to 2013, he is more likely to have co-operated as is evidenced by his co-operation with the HET. If proceedings had been issued on or before 20 December 1991, and the case had been progressed to a hearing in a timeous manner, I am satisfied that the evidence of soldier "A" could have been adduced at such a hearing. In the circumstances, the court can readily conclude that the primary reason why soldier "A's" oral evidence could not be adduced at the hearing of this matter is the delay in issuing proceedings in this case.

[193] In the case of soldier "C", it is important to remember that the evidence indicates that he fired 7.62 NATO rounds at the vehicle, and it was this type of round that was implicated in the death of Mr Carberry senior. His honest belief at the time of the shooting is, therefore, of central importance to any defence of justification. The unchallenged medical evidence in relation to soldier "C" is set out

in paras [153] to [158] above. The date of onset of PTSD symptomology is not specifically stated but the onset of such symptomology is usually reasonably proximate in time to the precipitating traumatic events. A diagnosis of dissociative fugue was first made in 1988. Following his release from hospital after four and a half months of treatment, soldier "C" appears to have been able to return to work with a TA unit for a period of eighteen months and then he resigned from the army. He was then admitted to a unit operated under the auspices of combat stress, and the court can reasonably assume that this was for treatment in respect of PTSD. This was a six-week residential course. There was a subsequent admission for treatment for alcohol dependency symptoms in 2004. This admission lasted between six to eight weeks. It would appear that soldier "C's" alcohol issues were not brought under control by this course of treatment. On top of this, there is a diagnosis of bipolar affective disorder.

[194] In soldier "C's" case, the first significant manifestation of mental illness in adulthood occurred in 1988. He was able to work for a while after his initial period of inpatient treatment and one can assume he would have been able provide cogent evidence following his treatment and return to lighter duties. However, the admission to the combat stress facility in 1991 raises doubts in the court's mind about him being able to assist the defendant in its defence of this claim from that time onwards. Be that as it may, by 2004 it is very doubtful if soldier "C's" fragile mental state would have enabled him to give cogent evidence by that time. Having carefully considered this issue, I am satisfied that if proceedings had been issued on or before 20 December 1991, and the case had been progressed to a hearing in a timeous manner, the evidence of soldier "C" could have been adduced at such a hearing. That opportunity was lost by 2004. In the circumstances, the court can readily conclude that the primary reason why soldier "C's" oral evidence could not be adduced at the hearing of this matter is the delay in in issuing proceedings in this case.

[195] In soldier "D's" case, it is also important to remember that in his statement which was written in November 1972 he indicated that he fired 7.62 NATO rounds at the vehicle after the person fell from the passenger side of the vehicle onto the road. If that is correct, then he could not have shot the deceased. However, 7.62 NATO ammunition was implicated in the death of Mr Carberry senior and, as a result, soldier "D's" honest belief at the time he shot at the vehicle is clearly a matter of some importance to any defence of justification. Soldier "D" cannot be traced or identified. The HET were unable to identify or trace this soldier ten years ago and the MOD have not been able to trace or identify him following the commencement of proceedings by the plaintiff. It would appear that regimental restructuring may have had an impact on the ability to the defendant to identify and trace this individual and the affidavit of Mr Clough alludes to these difficulties although the nature and extent of the restructuring could have been set out in clearer terms. It is clear from the affidavit that approaches have been made to:

(a) the Legal Process Office 38 (Irish) Brigade;

(b) 4th Battalion, The Rifles, Regimental HQ;

(c) the Royal Green Jackets Regimental Association;

(d) the Northern Ireland Public Records Office;

(e) the Provost Marshal (army);

(f) Veterans UK; and

(g) the MOD's Army Personnel Services Group.

[196] None of these approaches over the course of the last ten years or so have resulted in the identification or tracing of soldier "D." At this stage, one does not know whether the individual given the cypher soldier "D" who provided a statement in November 1972 relating to his involvement in the incident when Mr Carberry senior was shot and killed, is alive or dead and, if alive, whether he is able to give cogent and reliable evidence of the incident at this distant remove. Apart from the general assumption that if steps had been initiated to identify and trace soldier "D" at a time much more proximate to the incident, then the chances of identifying and tracing him would have been somewhat better, nothing can meaningfully be said as to when the ability to identify and trace him was lost. This may have occurred before December 1990. The court simply does not know. However, there is one thing that the Court does know and that is that the delay in initiating proceedings in this case by the plaintiff certainly did not help matters and has probably stymied any chance the defendant ever had of identifying and tracing soldier "D" and securing his attendance to give evidence at the hearing of this matter.

[197] I turn now to address the issues of equity, prejudice and the specific matters set out in Article 50(4) of the 1989 Order in this and the following paragraphs of this judgment.

The length of, and the reasons for, the delay on the part of the plaintiff

[198] Having carefully considered the matter, I conclude that in respect of each of the dependants, no good explanation has been proffered as to why proceedings were not commenced at a much earlier point in time. In relation to the children of the deceased, the plaintiff and all his siblings were clearly aware of the controversy surrounding the deceased's death from the various times that they reached the age of majority. The widow of the deceased was clearly aware of this controversy from the very outset. It would appear that the widow sought legal advice but was told by those approached by her for such advice that they were not prepared to take on her case. The suggestion made by the plaintiff and his sister was that these lawyers were in some way afraid to take on such a case. It was never stated in evidence that they

were given formal advice that they did not have a case worth pursuing. Therefore, even if unidentified lawyers did state that they had concerns about taking on such a case in the early to mid-1970s, that should not have prevented further approaches being made to obtain legal representation prior to the second decade of the twenty-first century.

[199] All the plaintiff's siblings have been content to let things sit without taking any action or seeking any advice. They were reluctant to do so because this might have revealed the fact that their father was a member of the IRA killed on "active service." This is entirely understandable, but it does not constitute a good reason in law for not bringing proceedings within the relevant limitation period. Similarly, the widow of the deceased was content to let things sit without ever invoking the legal process. The plaintiff gave evidence that he started actively looking into his father's death in the early 2000s, but he was in his late 30s at that stage and there was absolutely no reason or justification given for not commencing this quest for the truth before that time. He was familiar with the legal process and from the age of majority he knew about the controversy surrounding his father's death. The time to start this quest was when he was in his early 20s not his late 30s. Even then, another 14 or so years passed before proceedings were eventually issued.

[200] Nothing contained in the two medical reports and the bundle of medical notes and records, which were included in the trial bundle, but which were neither specifically opened to the court nor relied upon during the hearing of this matter, provides anything by way of a valid reason for the plaintiff not issuing proceedings at a much earlier stage. The first references to the plaintiff attending his general practitioner with complaints of anxiety, depression and alcohol issues are contained in entries dated September 1997, when the plaintiff was thirty-three years old.

[201] In summary, there has been very significant delay in initiating proceedings in this case. No good or valid reasons have been proffered which would go towards explaining or justifying this lengthy period of delay.

The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7 of the 1989 Order.

[202] I have already dealt with this issue above. Having heard all the available evidence and having that oral evidence tested in cross-examination, it is abundantly clear that delay has resulted in a significant diminution in cogency which jeopardises the prospects of a fair trial.

The conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant

[203] There is no aspect of the conduct of the defendant after the cause of action arose that has any material bearing on the delay in bringing proceedings in this case. Any issues which the plaintiff has concerning the quality of the investigation into his father's death in terms of its independence and adequacy are the subject of a judicial review application also commenced in 2014 and which is still extant. The plaintiff has chosen not to pursue any claim for breach of the procedural limb of Article 2 in these proceedings. Even if the issue of the state of mind of each soldier when he opened fire had been specifically addressed in that soldier's statement made in 1972, the admission of that statement in evidence during subsequent proceedings arising out of the death of the deceased would have been a very poor and inadequate substitute for oral evidence from the soldiers on this point with such evidence being subjected to cross-examination. The inability of the defendant to adduce such oral evidence results from the plaintiff's delay in bringing proceedings.

[204] Following the initiation of proceedings, there was a long and detailed process of discovery in this case. Many of the disputes in relation to discovery did not engage the defendant, but related to a series of section 32 applications issued by the plaintiff against other government bodies. The court accepts that the defendant has engaged with the plaintiff and cooperated fully in the preparation of this case. The court also accepts that the Covid pandemic also played a part in delaying the hearing of this matter, although every effort was made to ensure that a hearing proceeding using a hybrid hearing model. The defendant cannot be held to be in any way to blame for the passage of time between the initiation of proceedings in this case and the date on which the hearing of the case commenced.

The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action

[205] Apart from the plaintiff's mother, none of the dependants can raise any form of disability issue after the expiry of the limitation period. It goes without saying that in relation to the children of the deceased, time did not start to run in respect of each child until that child reached the age of majority. In the case of the plaintiff's mother, she now lacks capacity, having developed Alzheimer's disease in the last few years. However, this sad state of affairs has no bearing on the limitation issue in this case as this disability developed after proceedings had been issued by the plaintiff.

The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages

[206] The plaintiff and each of the other dependants, had clear knowledge that the acts of the soldiers (shooting his father) resulting in the deceased's death (attributable injury) might be capable of giving rise to an action for damages from a very early stage of their adult lives in the cases of the children and from the time of

the shooting in the case of the widow of the deceased. It is patently obvious that each of them failed to act promptly and reasonably thereafter.

The steps, if any, taken by the plaintiff to obtain medical, legal, or other expert advice and the nature of any such advice he may have received

[207] None of the plaintiff's siblings ever sought legal advice. They chose not to go down that road. The plaintiff did not seek any legal advice until such times as he became involved with RFJ and then this organisation directed him to a firm of solicitors. It would appear that the advice he received was supportive of his claim. The plaintiff could and should have sought legal advice many years before the services of a firm of solicitors were offered to him by RFJ. The deceased's widow's engagement with the legal profession is dealt with in para [194] above. It has never been suggested that the plaintiff's mother was advised that she did not have an arguable case. Therefore, it is reasonable to conclude that greater efforts should have been made to obtain legal representation and to take proceedings in the years following the death of the deceased.

Conclusion in relation to the exercise of the discretion contained in Article 50 of the Limitation (Northern Ireland) Order 1989

[208] The court must never lose sight of its primary function which is to fairly and impartially adjudicate upon the substance of disputes properly brought before it. However, in the context of this case, it is important to emphasise the word fairly. The statutory references in Article 50 to the concepts of equity and prejudice, as explained above, are inextricably bound to the concept of fairness of outcome and fairness of process. There is something innately unfair about the plaintiff and the other dependants waiting with no good reason for such an inordinately long period of time before presenting the court with the outline circumstances of their father's/husband's death and then requiring the defendant to identify, garner and call evidence justifying the split-second decisions of soldiers who were presented with the presence of a hijacked car on the Falls Road on 13 November 1972. The historical context of that time cannot be ignored and that involves an acknowledgement of the uses to which hijacked vehicles were being put in those, the darkest days of the Troubles. To proceed to a determination of the merits of this claim on the basis of the limited evidence before the court would undoubtedly infringe principles of fair process (to the prejudice of the defendant) and would, in the carefully considered view of this court, give rise to a very significant risk of an unfair outcome (again to the prejudice of the defendant). The court is acutely aware that the plaintiff has belatedly embarked on a quest for the truth in relation to the shooting of his father on the Falls Road in November 1972. But the court, in a misguided effort to provide Mr Carberry junior and the other members of the Carberry family with the truth, cannot embark on a flawed and unfair process which risks delivering historical untruths, constructed from incomplete evidence which patently lacks cogency. In the circumstances of this case, the court is of the view that it would be entirely wrong for it to exercise its discretion in favour of the plaintiff or

any of the other dependants under Article 50 of the 1989 Order. This claim is statute barred and the defendant shall have judgment accordingly. I note that the plaintiff is legally aided and I therefore direct that the defendant shall have costs against the plaintiff not to be enforced without further order of the court. I also direct that the plaintiff's costs are to be taxed as the costs of an assisted person.