

Northern Ireland Unreported Judgments

Clarke v Chief Constable of Northern Ireland and another

QUEEN'S BENCH DIVISION

KELLY J

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On the 13th October 1972 about 2.20 pm a patrol or "stick" of 4 members of the Security Forces were running to board an Army helicopter which was sitting with engines running and rotor blades revolving in a field beside Castleberg Police Station when one of the four, a Constable in the Royal Ulster Constabulary was struck by its tail rotor blade and suffered a most severe head injury.

His injury resulted in irreversible brain damage with dreadful consequences and he alleges it was caused by the negligence of the defendants or either of them in failing to instruct him adequately or at all in the safe boarding of a helicopter and he claims damages. Both defendants deny negligence and also plead contributory negligence.

The plaintiff, John Alexander Clarke, now 34 years, joined the Royal Ulster Constabulary on the 31st October 1966 and after serving in Londonderry and Omagh was transferred for duty to Castleberg Police Station on the 11th August 1971 where he still was on the day of his injury. For some months before this Army helicopters had been used to carry joint Army and Royal Ulster Constabulary search teams or "sticks" from Police and Army stations in Fermanagh and Tyrone to search farm houses and buildings in Border areas.

On the 13th October 1972 two "sticks" of 4 men assembled just before 2 pm at Castleberg Police Station for this purpose. The first "stick" consisted of 3 soldiers and 1 police constable and the second "stick", with which we are concerned, consisted of 2 soldiers, Lieutenant Walsh and Tropper Phillips and 2 police constables, from Castleberg station who were Constable Emo and the plaintiff Constable Clarke: All seven were given an operational briefing by Lieutenant Walsh in the Station and then their Army helicopter arrived shortly after 2 pm and landed in a field adjoining the Station. The first "stick" of 4 men embarked and were flown away. The second "stick" moved into position in the field and awaited the return of the helicopter, crouching ready in formation.

It was at this time and in this place that the members of this second "stick" were first given instructions as to when and how to enter the helicopter. The plaintiff who was a member of this group had never flown in a helicopter before. All this is common case but what is not is the nature and extent of the instructions given and it is this conflict that goes to the central issue of liability.

To resume the narrative of events, the Army helicopter returned about 20 minutes after its first take off, landed in the same field and manoeuvred itself into a position about 40/50 yards away from the men of the second "stick". It was broadside to them with its length and near side entrance facing them. The pilot gave a

"thumbs up" signal, Lieutenant Walsh shouted "Right" and all 4 men ran bareheaded in a crouched position towards the helicopter to board it. Its engines were still running and its main overhead and rear rotor blades were still revolving. The men ran together at the start in the same formation in which they had awaited the helicopter - Lieutenant Walsh was about one yard in front of Constable Emo and about three yards to their left and level with them was Trooper Phillips one yard in front of the plaintiff. Lieutenant Walsh and Constable Emo intended to board by the near side door space and the other two by the far side. The doors had been taken off. Lieutenant Walsh jumped into the near side door space and pulled Constable Emo in after him. Trooper Phillips ran towards the front of the helicopter intending to run round its front and enter the far door, but when a few feet away from the front he saw the plaintiff running towards the back end of the helicopter. He screamed a warning which was drowned by the noise of the aircraft and then to use the words of his written statement -

"I saw Constable Clarke run straight into the [rear] rotor blades as if there was nothing there."

Sergeant McGowan was able to see the same events from the front door of the police station and he described it this way -

"All four ran crouched down. All four ran together, Walsh and Emo straight into the near side door. The other two were approximately 15 yards from the helicopter when they veered off - Clarke round the back and Phillips round the front. Clarke seemed to strike the back blade - as he was going past he seemed to touch it."

Was this misfortune caused by the negligence of the defendants or either of them? Was the plaintiff given any or adequate warning of the dangers involved in approaching a helicopter? Was he given adequate instructions on how to board it with its rotor blades revolving? It is common ground that these blades when revolving were extremely dangerous, lethal in fact, especially the tail rotor blades which revolved when the helicopter was on the ground at a much lower level than the main overhead rotor blades. The latter when in motion were 10 feet above ground level and out of danger to a person on the ground but not so the tail blades which revolved vertically over an area very much lower. The rear of the helicopter was therefore the place of real danger in this situation. It is not denied either that instructions and warnings were necessary for the safety of persons like the plaintiff who were required to board the helicopter in these conditions.

The defence of the second named defendants is that the plaintiff was given clear and adequate instructions on how to board the helicopter safely by Lieutenant Walsh, in the field as they waited the helicopter's return, and if these instructions had been carried out by the plaintiff, what happened would not have happened. Lieutenant Walsh (or Mr Jonathan Walsh as he now is, although I shall refer to him as Lieutenant Walsh for clearer identification) in evidence before me said he gave the following instructions, to the members of his "stick" (which included the plaintiff) in the field in the presence of each other before the helicopter returned -

(1) to all of them, that in entering the helicopter they should always be forward of the beam position:

(2) to Constable Emo, that he was to follow him (Walsh) and run straight to the near side door and enter the helicopter after him:

(3) to Trooper Phillips, that he was to run on Walsh's left to the helicopter and go round the front of the helicopter and enter by the far side door:

(4) to the plaintiff Constable Clarke, that he was to follow Trooper Phillips exactly and to run round the front of the helicopter and likewise enter the far door:

(5) to all, that none of them would move until he (Walsh) moved and that he would only go when the pilot gave the "thumbs up" signal when he was sure the helicopter was appropriately positioned and when he knew all were ready to go.

Lieutenant Walsh said that all these instructions were given in the hearing of each member of the "stick". He said he had previously inquired at the operational briefing into the experience of the plaintiff and had learned that this was his first flight. He admitted in evidence that he did not instruct the plaintiff or any of the men in express terms not to go into the area at the back of the helicopter and he did not warn them of the danger that existed there.

Trooper Phillips as he then was agreed where and when Lieutenant Walsh gave the instructions. His recollection was that Constable Emo was told to follow Lieutenant Walsh and the plaintiff was to follow him (Phillips), that Constable Emo was to enter by the near side door and he (Phillips) and the plaintiff were to go to the off-side door via the front of the helicopter. Trooper Phillips made a statement to the police on the day of the accident which contained this passage -

"Mr Walsh who was in command of the flight detailed Constable Emo to go with himself and Constable Clarke with me. The Scout arrived at approximately 14.20 hours and the last thing that second Lieutenant Walsh said was that Constable Clarke was to follow me."

The plaintiff's injuries, were of such a nature that he was not fit to give any evidence. Constable Emo the fourth member of the "stick" did. He said that he was told to follow Lieutenant Walsh and they were to board the helicopter from the near side and the other pair were to board it from the far side. But he said that no instructions on how to board it were given other than that the plaintiff was to go along with Trooper Phillips and he was to accompany Lieutenant Walsh. When it was put to him in cross-examination that they were told not to go round the back of the helicopter, he denied this.

If Lieutenant Walsh's recollection is correct then he told the plaintiff in clear and unambiguous terms not only to follow Trooper Phillips, but to follow him all the way and in particular to follow him round the front of the helicopter. If so, why did the plaintiff act quite contrary to these instructions? No emergency arose on this way to the plane to deviate him, nothing unexpected happened to distract him. Running in his crouched position did he gradually lose touch with the path of Trooper Phillips? But his deviation appeared to be sudden, not gradual - this I take from Sergeant Magowan's evidence - and it was marked because the distance between the front and the tail of the helicopter is considerable. It seems unlikely he would forget instructions so recently given. It seems unlikely he would have misunderstood them when so clearly given. Was it perversity on his part plain stupidity? This leads me to ask what sort of man was he? Chief Inspector Elliott said he had been admitted to the Traffic Branch of the Royal Ulster Constabulary - which demands a constable above average ability, and he described him as very amenable to discipline - very efficient in his work and he required the minimum of discipline. He felt he would have reached the rank of Inspector in the Royal Ulster Constabulary - at least. Chief Superintendent Ford, who had known the plaintiff also, assessed him as sharp, alert, keen, dedicated and conscientious - a man of common sense who obeyed instructions. If these judgments of the plaintiff's ability and character contain any grain of accuracy, it seems more than likely he would be the sort of man to absorb clear and definite instructions and carry them out to the letter and pay sober attention to warnings of danger. Hardly the sort of man, one would think, who would run almost straight to the very place of danger he had been expressly forbidden to go.

My conclusion on the balance of probabilities is that Lieutenant Walsh's instructions at the time fell very far short of what he recalled in the witness-box and that what instructions he gave were inadequate in all the circumstances. I believe that his instructions to the plaintiff amounted in sum to no more than to go with Trooper Phillips to the far door, but that he was not told that the route to the far door should be round the front of the helicopter and not the back and that he was not told to follow the precise path of Phillips to the far door. At best, the instructions were ambiguous in that their effect was that the plaintiff and Phillips were told

to enter by the far door, Trooper Phillips first and then the Plaintiff. I do not accept either Trooper Phillips' recall of the instructions, in the witness-box. I think that the reference to them in his written statement made on the day of this occurrence -

". . . the last thing that second Lieutenant Walsh said was that Constable Clark was to follow me."

is nearer the truth and was the essence and the near totality of the instructions given. I am satisfied that the plaintiff was not instructed expressly or by clear implication to go round the front of the helicopter and was not warned not to go to the back end. And it is common case that he was not warned about the danger that existed there. Such omissions in all the circumstances of this case, including the magnitude of the risk, the seriousness of the injury risked, the inexperience of the plaintiff and the crouched running manner which they were obliged to adopt in approaching the helicopter constitute negligence on the part of the second-named defendants.

What of the liability of the Royal Ulster Constabulary authorities in this? It is common ground that they knew for some months prior to the plaintiff's injury that some of their men stationed in country police stations took part with the Army in searches in border areas and that Army helicopters were used to transport these joint patrols. Clearly this took place with their consent. And it is admitted that they gave no training in or instructions about helicopters to their men. Did they leave this to the Army? There is no evidence that they did or inquired what training and instructions (if any) the Army were giving to their police constables. They seem to have done nothing at all. Yet they must have realised that some if not most of their constables on duty in country stations would have had little or no experience of helicopter flying and they must have realised that their men would be expected to play their part in these joint operations in the same set-up and under much the same conditions as the Army ie they would be boarding helicopters with Army personnel in combat and terrorist conditions, - boarding helicopters whose engines and rotors would be kept running when picking up a patrol for speedy take off and for the minimum of vulnerability.

I think that although Army personnel made up the majority of these "sticks" and although police constables were seconded to them on an informal and ad hoc basis that the Royal Ulster Constabulary authorities had a duty to issue instructions to their men, convenient by written copies of Force Orders exhibited in police stations, on the proper precautions to be taken by police approaching, embarking or leaving helicopters. Even if they did know that verbal instructions were being given by the Army to their men just before take-off, they should not have been content to accept this as adequate having regard to the lack of experience of their men and their absence of formal training in helicopters. It would have been reasonable, in my opinion, for the Royal Ulster Constabulary to supplement the verbal Army instructions by issuing and having displayed written warnings in these country police stations. I find that the omissions on the part of the Royal Ulster Constabulary authorities amounted to a failure to take reasonable care which constituted negligence and which caused or contributed to the injury sustained by the plaintiff.

Was the plaintiff guilty of contributory negligence? Having found that he was not warned of the dangers at the rear-end of the helicopter and not instructed not to go there, I find it difficult to make such a finding. There was no disobedience of orders on my findings and I do not think he was aware he was running into a place of danger. It can not be said in all the circumstances that he disregarded an obvious danger. I am not satisfied on the balance of probabilities that the plaintiff was at fault.

This leads me to the question of damages. This plaintiff sustained a severe compound comminuted depressed fracture of the left side of his skull, there was a large wound on the left fronto-parietal region and he was left with a very considerable area of underlying brain damage. This caused a mixture of motor and intellectual impairment. More specifically it has resulted in paralysis of his right arm (he is right handed), a very spastic right leg, an inability to speak more than a word or two, an inability to read or write and a limited understanding.

He is permanently unemployable - indeed he will never be able to look after himself. He will always need family care and help and almost constant supervision and he will not be able to manage his own affairs.

His residue of understanding is frustrated by his inability to communicate and even this subject to the condition of nominal aphasia. He has retained some insight and appears to be aware at times of his handicaps. This may be partly responsible for his episodes of depression, irritability and tearfulness but he has also been emotionally impaired.

He is single and is looked after almost all the time by his mother who helps him to dress, prepare his food and supervise his leisure. He has to be almost always under her eye or that of a relative. He is liable to lose balance and fall and the concern is if he does whether he can right himself or call for help. He is taken to Church sometimes and occasionally, on car trips and for week-ends with relatives. He appears to enjoy smoking a pipe, having an occasional glass of beer and going for short walks.

Attempts at rehabilitation have not been successful. There will be no improvement in the handicaps mentioned. His expectation of life is normal.

In the difficult task of translating all these matters into damages I have received much assistance from counsel who have been able to agree what headings of damages should be considered and how some of these headings should be calculated.

It is agreed that I should consider damages under the following headings (1) loss of pay to date; (2) future loss of pay until probably 57 years of age; (3) loss of pension; (4) loss of earnings after retirement from 57 years to 65 years; (5) cost of family care and attendance; (6) pain and suffering and loss of amenities.

(1) Loss of pay to date

This loss has been agreed at £11,000.00

(2) Future loss of pay

But for this injury it is probable that the plaintiff would have gained promotion to Sergeant and very possibly to Inspector with consequent higher pay and pension. He probably would have served in the Royal Ulster Constabulary until retirement age - in his case, 57 years. Counsel have agreed that future loss of pay taking promotion prospects into account might be reflected in a net annual loss of £4,715.00 and actuarial calculations produced by counsel for the defendants suggest that the appropriate capital sum to produce this annual figure by using some capital as well as investment income each year, is a figure in the region of £68,827.00 although this precise figure is not agreed.

(3) Loss of pension

This may be assessed by multiplying £1,250.00 by 5 and the resultant figure of £6,250.00 is not in dispute.

(4) Loss of earnings between 57 years and 65 years

If the plaintiff retired at 57 years from the Royal Ulster Constabulary it is likely he would have found other employment - probably until 65 years. This situation is well into the future and a small multiplier and multipli-

and should be used to arrive at a capital sum to be awarded now. The sum of £1,250.00 multiplied by 3, making £3,750.00 is I think about right.

(5) Cost of family care and attendance

This will be necessary for the rest of the plaintiff's life. The degree of care required will not be so skilled, intensive or constant as professional nursing care. Since the date of this accident 5 1/2 years ago it has been provided by his mother, an admirable lady of 63 years and no doubt she will continue to do this with love and devotion for as long as she is able. After that his brothers and sisters and their spouses will probably share this burden. But there will be times when an outside home help will be needed to relieve them and will have to be paid.

Counsel in this case have agreed that damages on a finding of negligence should include compensation for the family care and attention of the kind I have mentioned. The law has not always accepted that a plaintiff's award of damages can include compensation for attendance and care rendered without charge unless the benefactor has sacrificed a paid job to do this. (See *Schneider v Eisovith* [1960] 2 QB 430, 440, [1960] 1 All ER 169 and the discussion in par 1136 *McGregor on Damages* (13th Edition)). But recently Lord Denning MR said in *Cunningham v Harrison* [1973] QB 942, [1973] 3 All ER 463 at p 469 of the latter report:

"It seems to me that when a husband is grievously injured and is entitled to damages, then it is only right and just that, if his wife renders service to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. On receiving such an amount the husband should hold it on trust for her and pay it over to her. She cannot herself sue the wrongdoers (see *Best v Samuel Fox & Co Ltd* [1952] AC 716) but she has rendered services necessitated by the wrongdoing and should be compensated for it. Even though she had not been doing paid work but only domestic duties in the house, nevertheless all extra attendance on him calls for compensation."

(See also *Donnelly v Joyce* [1974] QB 454, [1973] 3 All ER 475 and *Davies v Denby Corporation*).

Fortified by these recent authorities I include in the plaintiff's damages, compensation for past and future care and attendance by his relatives, with occasional assistance from a paid home help. I have been asked to especially measure the plaintiff's mother's contribution to date which I do at £5,500.00 and I use a multiplier of 15 to represent future years of similar attention for the rest of the plaintiff's life and a multiplicand of £1,250.00 - making a total sum under this heading of £24,250.00. No doubt his mother will continue these services for many years yet and a significant part of the future sum would represent compensation for this.

(6) Pain and suffering and loss of amenities

In this case the element of physical pain is not very great - he suffers occasional pain in his leg and foot. The degree of insight and understanding he has retained must produce distress and suffering at the hopelessness of his state and probably contribute to his episodes of depression and frustration. The hampering effect of his mental, physical and emotional handicaps on his enjoyment of life must be formidable. There are a few simple leisure activities he can enjoy. But he has been deprived of so much - normal family relationship, probably marriage, the pursuit of an interesting and enjoyable occupation, the association and friendship of his police colleagues, normal social relationships with men and women and children, of all sporting activities and of the valued pursuits of reading and travelling. I think that damages under this heading must be in the region of £30,00.00

In considering total damages in a case of this size by means of the addition of a number of headings some of which by themselves attract large sums of money, I think it is wise before pronouncing the total award to pause and look carefully at the addition of the headings to see that no overlapping of damages has occurred,

that all proper allowances and contingencies have been reflected and that the end result accords with one's experience of what is fair and reasonable. This course has been suggested by the Court of Appeal in England in *Fletcher v Autocar and Transporters Ltd* [1968] 2 QB 322, [1968] 1 All ER 726 and it seems to be followed there in non-jury trials. Lord Denning MR said at p 336 of the former report -

"There is to my mind a considerable risk of error in just adding up the items. It is the risk of overlapping . . . There must of course be an allowance made for the fact that even if he had not been injured there would be many contingencies which might upset his future prospects, such as illness, accident, bad trade, and so forth . . . At the end we must look at the overall figure to see that it is fair compensation."

Mr Justice Kilner Brown referred to this approach in *Haskisson v Holmes* (Kemp + Kemp Vol 2 p 1402) as "This is what is sometimes called the technique of the second look, the object of which is to ensure that the final result is fair." In this jurisdiction, this technique would embrace those matters referred to by MacDermott J, in *Davis v McClean* (May 1977 Blue Book) as making up the "judicial view" -

". . . the sum of one's experience at the Bar (adjusted, one hopes, to accommodate the explosive effect of inflation) one's experience of jury verdicts in cases which one tries oneself and one's information regarding the verdicts in other cases; one's consideration of the evidence in cases which are reviewed on appeal, one's experience of settlements and especially minor settlements where the medical evidence has to be studied; and one's assessment of compensation in cases under the Criminal Injuries code."

Allowing for the purposes of addition the maximum sums in those headings where there is controversy, the addition of the headings amounts to a total figure of £144,077.00. On a second look I think this is on the high side.

In my opinion a fair and reasonable award of damages in this case is £125,000.00.

Order accordingly