

Northern Ireland Unreported Judgments

**Copeland v Ministry of Defence and Another**

**QUEEN'S BENCH DIVISION**

**SHEIL J**

**18 19 20 JANUARY 19 MAY 1999**

**19 May 1999**

**Ryan v Fields [1938] 3 All ER 517;**

**Daniels v Whetstone Entertainments Limited [1962] 2 Lloyds reports 1;**

**Dyer v Munday [1895] 1 QB 742;**

**Petrigrew v Northern Ireland Office [1990] 9 NIJB 1;**

**Scullion v Chief Constable of the Royal Ulster Constabulary [1989] 6 NIJB 1;**

**Hamilton v Chief Constable of the Royal Ulster Constabulary [1986] 15 NIJB 56;**

**Adams v Chief Constable of the Royal Ulster Constabulary (unreported, Kerr J, February 1998);**

**Makanjuola v Metropolitan Police Commissioner, The Times 8 August 1989, (1989) 139 NLJ 468;**

**Armagas Limited v Mundogas SA [1986] 2 All ER 385;**

**Griggs v South Side Hotel Limited [1946] 4 DLR 73;**

**Deatons Property Limited v Flew (1949) 79 CLR 370;**

**Poland v John Parr and Sons [1927] 1 KB 236;**

**Lloyd v Grace Smyth and Company [1912] AC 716;**

**Riley v Ryan [1991] 2 IR 247;**

**Re Wright's application [1998] NIJB 176;**

**Vasey v Surrey Free Inns Plc [1996] PIQR 373;**

**Broome v Cassell and Company [1972] AC 1027;**

**Lavery v Ministry of Defence [1984] NI 99;**

**Thompson v Commissioner of Police [1997] 2 All ER 762.**

**Mr Comerton QC and Mr MacDonald for the Plaintiff; Mr Weatherup, QC and Mr McCloskey for the First-Named Defendant; Mr Donaldson QC and Mr Allister for the Second-Named Defendant.**

**SHEIL J**

On Tuesday 26 October 1993 at approximately 2.30 pm the plaintiff was attending the funeral of a Mr Begley, who had been killed a few days before by his own terrorist bomb, which also killed a number of other people, on the Shankill Road in the City of Belfast. The plaintiff was standing in the front garden of the deceased bomber's house at No 153 Brompton Park in the Ardoyne area of the city, awaiting the removal of the remains, when he was struck by two bullets; the first bullet struck him on the left side of his body, passing through it and exited by his abdomen, while the second bullet struck him a glancing blow on the top of his left shoulder. At the outset of the trial general damages were agreed between the parties at the sum of £27,500. There was no claim for special damage. The plaintiff does however seek in addition to the sum of £27,500 an award of exemplary damages against the Ministry of Defence, the first-named defendant.

It is clear that the two bullets which struck the plaintiff were fired by the second-named defendant, Andrew Brian Clarke, who was a serving soldier in the army in Northern Ireland. At the material time he was in uniform on duty in an army land rover which was on patrol in that area of the city, having regard to the Begley funeral which was taking place that afternoon. He was standing up in the army land rover protruding through the hatch together with a colleague, Trooper Potter; both were holding standard army issue SA80 weapons.

On 30 January 1995 Clarke was convicted at Belfast Crown Court of the attempted murder of the plaintiff and of related offences, arising out of the said shooting. He did not give, or call, any evidence on the trial of this action. At the conclusion of the evidence his counsel, Mr Donaldson QC who appeared with Mr Allister, conceded that he was not in a position to oppose judgment in favour of the plaintiff against Clarke, the second-named defendant, in the sum of £27,500.

The issue now for determination by this court is whether or not the first named defendant, the Ministry of Defence, is liable in law for the personal injuries sustained by the plaintiff as a result of the criminal actions of the second-named defendant in shooting the plaintiff on that afternoon. The claim is pleaded on behalf of the plaintiff by way of trespass to the person and/or negligence as appears from paragraph 4 of the amended statement of claim. It is alleged by way of negligence that the Ministry of Defence failed to give any or adequate training to the soldiers on duty on that afternoon and that Clarke's fellow soldiers in the land rover were negligent in failing to prevent Clarke acting as he did.

As appears from the amended defence served on behalf of the first-named defendant, the Ministry of Defence denies any negligence and denies that at any time material to this action Clarke was acting under its direction or control or in the course of his employment with the Ministry of Defence and asserts that at all material times he was acting outside the course and scope of his employment with the Ministry of Defence.

The plaintiff in the course of his evidence stated that on that afternoon, while he was standing in the garden of No 153 Brompton Park, he saw two army land rovers pass close by on two occasions and that on the third occasion when they passed he was shot. He stated that on each occasion as the land rovers passed by he saw two soldiers with weapons protruding from the top of each land rover, which was a common sight in that area of the city.

Trooper Potter, who was protruding through the top of the land rover with Clarke, stated that nothing unusual had happened prior to Clarke opening fire. He didn't hear any single shots being fired by Clarke; he heard 4-5 bursts of automatic fire. He stated that as Clarke fired he was shouting "You f-ing bastards". He stated that before Clarke opened fire he was unaware that Clarke had cocked his weapon and that Clarke hadn't said anything to him prior to opening fire. He denied that Clarke had descended into the land rover to speak to Corporal Derbyshire, who was the front seat passenger and in charge of the personnel in the land rover,

prior to coming back up and subsequently opening fire on the plaintiff. He doesn't know at what stage Clarke cocked his weapon. He stated that he was unaware of Clarke doing anything suspicious prior to opening fire. It was then put to him in cross examination by Mr McDonald on behalf of the plaintiff that in a written and signed statement made by him to the police on 3 November 1993 he had stated that "I can remember Trooper Clarke had his back turned to me. I can remember trying to look to see what he was doing but he turned away. I didn't really think anything of this at the time". He stated in reply to Mr McDonald that he thought Clarke was trying to hide something from him and that he thought perhaps he might be having a cigarette or having a sweet, which was not allowed by the army when soldiers were in that position in the land rover. He accepted in cross-examination that he was suspicious of what Clarke was doing and that he knew he was doing something irregular. Unlike Corporal Derbyshire, to whose evidence I will refer later, Trooper Potter accepted that he personally was repulsed by the Shankill bombing and that most of the soldiers were upset by it. He stated that prior to going out on tour that afternoon he had been briefed that the Ardoyne was a high risk area and that he was to keep alert as there might be IRA in the area for the funeral, but that he was to ignore them.

Private Tarr, the driver of the land rover from which the shots were fired by Clarke, stated that he heard only automatic fire and initially thought that the shots were being fired at their land rover. He stated that from his position in the land rover he did not hear anybody speaking to Corporal Derbyshire. He stated that if Clarke had come down from the top of the land rover to speak to Derbyshire he would have been aware of that and that Clarke had not in fact done so. He stated that if Clarke had said "I am going to get them when we go round next" he would not have taken it seriously as things like that are said on occasions as a joke. He, like Trooper Potter, but unlike Corporal Derbyshire, accepted that there is, understandably, hostility between the army and the IRA and that hostility had been heightened by the terrorist bombing on the Shankill Road a few days earlier. He stated that he had heard comments by soldiers on occasions that they would "Like to get their hands on them". He accepted that some soldiers are frustrated at not being allowed to do so. He further accepted that following the shooting, some soldiers may have approved of what Clarke had done and that it is a common attitude among the soldiers that a tougher line should be taken with terrorists, although as soldiers in the army they are trained to deal with these feelings and to act only in accordance with their instructions for opening fire in Northern Ireland, as set out in "the yellow card".

Corporal Derbyshire, who was the front scat passenger and in charge of the personnel in the land rover from which the second-named defendant fired the shots which struck the plaintiff, stated that while on patrol on that afternoon they had passed No 153 Brompton Park approximately every 15-20 minutes. He stated that nothing in particular had happened on that afternoon prior to the plaintiff being shot by Clarke. When he first heard the shooting, he thought that the army was under fire but he then saw cartridge cases falling from above and realised that the shooting was coming from his own vehicle. Derbyshire described what he heard at the time of the shooting as being two shots followed by bursts of automatic fire. He ordered the driver of the vehicle, Private Tarr, to stop and on going to the rear of the land rover and opening the door, which was approximately 10-15 seconds after the shooting, he saw Clarke and Porter seated down inside the land rover. At that stage he saw that Clarke was trying to load a second magazine into his rifle and on being asked "What are you doing?", Clarke replied "Nothing". Derbyshire told Potter to take the SA80 off Clarke which he did, while he himself took the magazine from Clarke. He then called the police on his radio. The police arrived soon afterwards and took Clarke into custody. Mr McDonald put it to Corporal Derbyshire that the second-named defendant in the course of his second interview with the police had stated that prior to the shooting he had come down from the top of the land rover and had said to Derbyshire, "I am going to get them when we go round next" and that he cocked his weapon as he did so. Derbyshire denied seeing any such action on the part of Clarke and denied that Clarke had said any such thing to him. He stated that if Clarke had cocked his weapon or made any such statement, he would have got Clarke out of the land rover and made him clear his weapon.

At this point I set out the transcript of the relevant part of Clarke's second interview with the police, which interview was recorded on tape and subsequently transcribed and which reads as follow:

"Q Okay, now the obvious question is why did you crash the slide; again you know to be fair I should have said that last night you said it was sorta for bravado. Can you expand on that. What do you mean by bravado?"

Subject's Solicitor asked 'Or are you still saying that or can you just answer what you feel, why you did it?'.

A I don't really know why I did it.

Q Okay, well was there any discussion, Andrew, from you went by the house to you crashed the slide between yourself and any of your colleagues?

A Yea.

Q What was it?

A I went down into the wagon, into the Rover. I said to my Team Leader 'I'm going to get them when we go round next'.

Q Who was your Team Leader?

A Corporal Derbyshire.

Q Sorry?

A I'm going to get them when we go round next. Hm Hm. Something like that.

Q Now had you the round up the breech at that stage?

A I think I did. I cocked it as I said.

Q Well did your Team Leader or anybody else see you cocking the gun?

A I don't think the Team Leader did I don't know (unable to make out words) the top cover.

Q Well would the chap who was on top cover with you, was that Trooper Potter?

A Potter.

Q Well whenever you made this comment, 'I am going to get them when we go round next', was there anything said back to you?

A I think Corporal Derbyshire said, 'I am happy with that'.

Q Sorry he said what?

A 'I'm happy with that'.

Q Who was that - Corporal?

A Derbyshire.

Q Any anything else said?

A No I don't think so.

Q Well what did you take by 'I'm happy with that'?

A He obviously thought I was joking.

Q He obviously thought you were joking?

A He obviously thought I was joking but soldiers wouldn't mind if all them terrorists died tomorrow, so he means nothing by 'I'm happy with that'.

Q So that comment that he made to you.

A It was a generalisation.

(1049 hours - cigarette accepted by subject)

Q So what in essence you're saying is that his reply to that was more or less what you would have expected from a fellow soldier?

A Yes.

Q Okay Andrew, then well at that stage when you make the comment 'I am going to get them when we go round next' and there's another comment back to you, what were your feelings?

A I don't know.

Q Sorry?

A I don't know.

Q Well had you intended next time round to shoot?

A No.

Q No? There was nothing playing on your mind or had you decided more or less next time round well I am going to shoot?

A I wanted to like any other soldier would, but I wasn't going to, but it's like I've just done now putting me in a Police Station, career down the drain, life down the drain.

Q You said you wanted to right, the obvious question Andrew would be why?

A Because they are terrorists.

Q Do you wish to expand on that there?

A Terrorists. They shoot and blow up squaddies, policemen, prison officers, innocent women and kids".

Corporal Derbyshire accepted that Clarke was a very good friend of his and that he got on well with him. Although Derbyshire had been in the army for fourteen years, he had had only one tour of duty in Northern Ireland. He stated that he had no animosity towards the IRA and that he was completely unaffected by the bomb on the Shankill Road a few days earlier. He stated that while in the army he had never heard any such hostile comments against the IRA as were stated by some of his fellow soldiers who gave evidence. I found Corporal Derbyshire, who gave his evidence in a robot-like manner, to be a most unimpressive witness.

Colonel Everard, who was the regimental training officer and second in command of the unit of which the soldiers were members, gave evidence of the training courses given to soldiers before leaving for duty in Northern Ireland, which included a thirty minutes presentation under the circumstances in which a soldier could open fire in accordance with the provisions of "the yellow card". He also gave a demonstration to the court of the way in which the SA80 is loaded, prepared for firing and fired. He demonstrated to the court a selector on the weapon, which was moved from one position for single shots to another position for automatic fire. He stated that in an urban environment, such as the City of Belfast, the weapon should never be set at automatic. He stated that on this particular afternoon his soldiers had been asked to patrol the area where the funeral was taking place and that they were acting in support of the Royal Ulster Constabulary. He accepted that prior to going out on patrol Clarke and the other soldiers in the patrol would have been shown a montage of photographs of IRA suspects, of whom the plaintiff was one, although the plaintiff had never been convicted of any terrorist offence. He stated that when one cocked the SA80, known as "crashing the slide", that usually could be heard by those close by although one can do it fairly quietly. He stated that no noise would be heard as one moved the selector switch from single to automatic fire although visually, if one looked, one would see the selector button in a different position. He accepted that on occasions such as this, where the IRA have been responsible for setting off a bomb and are then walking freely around the city, soldiers can be frustrated and that on occasions soldiers may have said that it was time "to take the gloves off", although he himself had never heard that said. He stated that that if the army had considered that Clarke was under any kind of psychological pressure he would not have been allowed out on duty. It was agreed between the parties that prior to this incident the Ministry of Defence, its servants and agents, had no reason to believe that Clarke was suffering from any psychological problem or any drugs or related problem. He further stated, in cross-examination by counsel for Clarke, that the army had no specific training as to how one's fellow soldiers should deal with a soldier who started to fire his weapon in circumstances which were not justified, other than trying to disarm him as soon as possible.

I am satisfied on the evidence in this case that the plaintiff was shot by Clarke, the second-named defendant, in the course of a discharge by him of his SA80 weapon. I do not accept the evidence of the other soldiers in the land rover that Clarke did not descend into the land rover just before the shooting and say to Corporal Derbyshire that "I am going to get them when we go round next", as stated by Clarke in the course of his second interview with the police. Having heard and seen the witnesses, who gave evidence on this point, and while appreciating that Clarke could not be cross-examined on this matter as he was not called to give evidence on the trial of this action, I am satisfied on the balance of probabilities that Clarke did descend into

the land rover and make that comment before going back up again and opening fire on the plaintiff and others attending the Begley funeral. Clarke's fellow soldiers probably thought that Clarke was joking but they ought not to have taken the chance that that might not be the case and I consider that they, and in particular Corporal Derbyshire, ought to have disarmed Clarke immediately and restrained him inside the land rover and that they were negligent in failing so to do. For that negligence the Ministry of Defence is vicariously liable at the suit of the plaintiff. I do not find any negligence in any other respect on the part of the soldiers in the patrol, such as their failure to be aware that Clarke had cocked his weapon and had moved the selector switch to automatic, nor do I find them, the Ministry of Defence, its servants or agents, guilty of negligence in any other respect.

Apart from negligence, the question arises whether or not the Ministry of Defence is liable in trespass to the person for the assault and battery carried out by Clarke on the person of the plaintiff in deliberately shooting him. It is clear that this was an intentional and not a negligent act on or the part of Clarke. Mr Weatherup QC, who appears with Mr McCloskey for the Ministry of Defence, accepts that the mere fact that the act was a criminal act on the part of a servant or agent will not of itself take that conduct outside the scope of the employee's employment: see Street on Torts 10th Edition (1999) at 521. In the instant case, however, Mr Weatherup submits that no liability in trespass attaches to the Ministry of Defence for the shooting of the plaintiff by Clarke for the reasons set out in its amended defence, to which I have already referred earlier in this judgment.

Where the relationship of employer and employee exists, as it does in the present case, the employer is clearly liable for the torts of the employee which are committed in the course of the employee's employment. The question whether a wrongful act is within the course of employment is ultimately a question of fact and no simple test is appropriate to cover all cases: Clerk and Lindsell on Torts, 17th Edition at paragraph 5-21. Reference is then made in Clerk and Lindsell to Salmond and Heuston on the Law of Torts, where at page 443 in the 21st Edition it is stated:

"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master . . . A master is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside. As is often the case, the principle is easy to state but difficult to apply . . . In a borderline case the plaintiff may be helped by the onus of proof. Once it is conceded that the servant was doing something in his working hours, on his employer's premises, and that his act had a close connection with the work which he was employed to do, then the onus shifts to the employer's to show that the act was one for which they were not responsible. It should also be noted that the courts today are reluctant to dissect the servant's employment into its component parts - eg loading, driving and unloading a vehicle. A broad approach is now preferred".

Returning to Clerk and Lindsell on Torts it is stated at paragraph 5-22:

"Lord Wilberforce in *Kooragang Investment Property Limited v Richardson and Wrench Limited* [1982] AC 462 at 471H noted that in recent years the tendency has been toward more liberal protection of third parties. So, in establishing a particular employee's 'course of employment' the court should not dissect the employee's tasks into component parts but should ask in a general sense: 'What was the job at which he was engaged for his employer?' . . . Sometimes the court will use the phrase 'was the employee on a frolic of his

own?', to conclude that the tort was not committed during the course of employment. This involves a finding that the employee has so clearly departed from the scope of his employment that the employer will not be liable for his acts".

Further on at paragraph 5-34, having stated that many of the cases dealt with in an earlier paragraph were cases of assault, the learned authors continue:

"It is submitted that in the majority of such cases (assault) the correct approach is by consideration of the discretion, if any, which is vested in the employee. It is, in general, the case that the employer will not be liable for an assault committed by his employee unless done in the wrongful exercise of a discretion vested in the employee. Personal acts of vengeance or spite, though generated by employment will not render the employer vicariously liable. Thus in *Warren v Henlys Limited* [1948] 2 All of ER 935, a garage attendant, as an act of personal vengeance, assaulted a customer of the garage. It was held that his employers were not liable. On the other hand, in *Dyer v Munday* [1895] 1 QB 742, the defendant, a hire purchase furniture dealer, sent his manager to recover back some furniture hired to X and upon which several instalments were unpaid. X had pledged the furniture to his landlord as security for his rent, and the landlord's wife sought to prevent the manager from removing the furniture. Thereupon the manager assaulted her, and for this assault the defendant was held liable. Though the case may be susceptible to analysis on the basis of a discretion vested in the manager, it is probably simpler to hold that since the assault was committed in furtherance of the employer's business, and not for the employee's private purposes, the employee remained within the course of his employment".

Many of the decided cases deal with questions of fraud which have developed along a somewhat different track to torts such as negligence or trespass: see *Armagas Limited v Mundogas SA* [1986] 1 AC 717 at 779H-780A.

In deciding whether or not the Ministry of Defence is vicariously liable in the present case for trespass to the person, I do not consider that anything is to be gained by setting out examples of the many cases which are referred to in the text books as falling on one or other side of the dividing line of what is and what is not "in the course of employment". In an article entitled "Liability for an Employee's Assault" by FD Rose in *The Modern Law Review*, Volume 40 (1977) 420 at 424 it is stated with regard to the borderline cases:

"Once we step outside those cases in which the use of force is clearly authorised and in which the employer's liability is seen to be extensive, we have to cross something of a no-man's land before we can say that an employee is acting entirely outside the realm of his employment. As in other areas of the law, the courts have to rely to some extent on their instinct in deciding whether or not to impose vicarious liability on an employer and, it is felt, if this instinct were directed more to asking 'Is this the sort of situation in which an employer should be answerable for his employees assaults?' than 'Is this the type of case in which we have previously said that the servant is acting in the course of his employment?', then we would achieve more universally acceptable decisions".

While counsel have cited to me a considerable number of cases both in this jurisdiction and outside this jurisdiction in support of their respective submissions, they have been unable to cite to me any authority which is directly in point in the present case. Bearing in mind the statement in *Salmond and Heuston on the Law of Torts*, to which I have already referred, that "once it is conceded that the servant was doing something in his working hours, on his employers premises, and that his act had a close connection with the work which he was employed to do, then the onus shifts to the employers to show that the act was one for which they were not responsible", I hold that the Ministry of Defence has not shown that the shooting was one for which they were not responsible in law.

Further, I consider that, as a matter of public policy, when the State sends out a soldier or police officer armed with a lethal weapon which he is authorised to use in certain circumstances and that soldier or police

officer, while on duty, intentionally or otherwise fires that weapon injuring a third party in circumstances which are not authorised and in which, as in the present case, there is no justification or defence for so doing, the State should be liable in damages at common law for any injury, loss or damage sustained by that third party.

The fact that the injured third party may have a remedy under criminal injuries legislation is not, in my opinion, a reason for refusing him his remedy at common law because there are certain restrictions in the criminal injuries legislation, which do not apply at common law, as to who may claim compensation, the amount of that compensation and the circumstances in which it may be awarded: see *Compensation for Criminal Injury* by Professor DS Greer.

While the circumstances of this case are such that it is open to the court to make an award of exemplary damages, I do not consider that this is a case which warrants any additional award by way of exemplary damages against the Ministry of Defence, having regard to the leading decisions on this point: *Broome v Cassell and Company* [1972] AC 1027; *Lavery v Ministry of Defence* [1984] NI 99; *Thompson v Commissioner of Police* [1997] 2 All ER 762. I refer in particular to the judgment of Kelly LJ in *Lavery v Ministry of Defence* at pages 103E-107D. I consider that the award of £27,500 is adequate in the present case as compensatory and punitive damages.

Accordingly there will be judgment in favour of the plaintiff against both defendants in the sum of £27,500.

*Judgment for the Plaintiff in the sum of £27,000*