Neutral Citation No: [2023] NIKB 39 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **ROO12109** *ICOS No:* *Delivered:* **23/03/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION

_____

Between:

WILLIAM (LIAM) HOLDEN

Plaintiff:

and

MINISTRY OF DEFENCE

First Named Defendant:

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Second Named Defendant:

_____

Mr Brian Fee KC and John O'Hare BL (instructed by Hart, Coyle Collins, Solicitors) for the Plaintiff
David Dunlop KC and Andrew McGuinness BL (instructed by The Crown Solicitor) for the Defendants

_____

ROONEY J

Background

[1] On 17 September 1972 at approximately 2:00pm Private Frank Bell, 2 Parachute Regiment, B Company, was shot whilst on foot patrol at the junction of Springhill Avenue and Springfield Crescent, Belfast. The section commander was Corporal Joseph Hill. As Private Bell commenced to cross the said junction, Corporal Hill heard a high velocity gunshot which appeared to come from the vicinity of Ballymurphy. Corporal Hill immediately ran to Private Bell and pulled him across the road towards 59 Springhill Avenue for better cover. On examination, he noticed a gunshot wound to the left side of Private Bell's head, which was bleeding heavily. He immediately placed a shell dressing to the wound.

[2] Private Bell was placed in the rear of a Saracen ambulance and conveyed to the Royal Victoria Hospital. He was admitted at 2:20pm. According to a report from Mr Crockard, Senior Neurological Registrar, on examination there was a small entrance wound and a larger exit wound to the left side of the skull. On 25 September 1972 Mr Crockard, Senior Neurological Registrar, produced a report for Detective Constable Warnock stating that, in his opinion, "the missile track was from the left posterior area." Mr Crockard confirmed this opinion in his Deposition, stating that the track of the bullet was from behind Private Bell.

[3] Tragically, Private Bell died on 20 September 1972. No post-mortem was carried out. The bullet or a fragment of the bullet that caused the fatal wound was not recovered. No forensic or pathological evidence was obtained to ascertain the calibre of the fatal bullet and the make of the weapon that could have potentially discharged the bullet.

[4] There was no forensic examination of the scene of the shooting or a ballistic evaluation of the potential firing points from which the fatal bullet may have been discharged.

[5] On Sunday, 1 October 1972, 1 Parachute Regiment, D Company, carried out a search of the home of Patrick McManus inWhiterock Parade, Belfast. During the course of the search, a ·303 Lee Enfield Rifle was found with a bag containing assorted rounds of ammunition. The rifle was fitted with a magazine containing seven rounds of ·303 ammunition. An examination of the rifle by Mr Victor Beavis, Forensic Scientist, revealed that the barrel was fouled due to discharge and that the rifle was in good condition. Mr Beavis confirmed that the magazine contained seven cartridges. There was no evidence that the said ·303 Lee Enfield Rifle was the murder weapon.

[6] On 1 October 1972, intelligence was received from an unidentified source. The intelligence contained within the source report document has been heavily redacted. The reliability of the source has not been ascertained. The report alleges, inter alia, that the shooting of Private Bell was carried out by Liam Holden. It is accepted that this intelligence was within the knowledge of the Parachute Regiment.

[7] On 3 October 1972, the plaintiff was arrested by a member of the Parachute Regiment pursuant to regulation 11 of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 – 1943 (the 'Special Powers Act') and handed over to the RUC. The name of the soldier who carried out the arrest has not been disclosed. The plaintiff was detained at Castlereagh Holding Centre until his release on 6 October 1972.

[8] On 16 October 1972, at 12:45am the plaintiff was arrested by Private Lockhart, 1 Para Regiment, pursuant to the Civil Authorities (Special Powers) Act (Northern Ireland) 1922-1943 on suspicion of being a member of the IRA. The original statement prepared by Private Lockhart disclosed that the plaintiff had been arrested under regulation 11 of the Special Powers Act and that he was being taken

to the Black Mountain base because "the Army at Black Mountain wished to see them." This original statement was never provided to the Prosecution. In Private Lockhart's Deposition prepared for the criminal trial, the reference to the plaintiff and his brother being taken to Black Mountain because the "Army wished to see them" had been removed.

[9] Following their arrest, the plaintiff and his brother were brought to the Black Mountain School, Belfast, which was the base for the Parachute Regiment. The plaintiff was interviewed by Sergeant Rowntree of the 1st Battalion Parachute Regiment between 0130 and 0430 hours. According to an account provided by Sergeant Rowntree, the plaintiff was asked about his activities at the time Private Bell was shot and initially the plaintiff gave an alibi. Sergeant Rowntree then stated that the plaintiff voluntarily confessed to shooting Private Bell and being a member of B Company, 2nd Battalion, Provisional IRA. Between 0430 and 0445 hours, this confession was allegedly repeated to Captain Milton who made a note of the interview.

[10] The plaintiff admits to making a confession but claims that the contents thereof are untrue. The plaintiff alleges that during his detention, he was assaulted, water boarded, hooded and threatened that he would be killed. The plaintiff claims that Sergeant Rowntree and three other soldiers brought him in a car along a country road and the car stopped at a farmhouse. The soldiers informed the plaintiff that they had previously been involved in assassinations in or about the Glencairn area of Belfast. The plaintiff claims that he was terrified he would be assassinated.

[11] The plaintiff remained in military custody until 0545 hours. He was then taken by the Royal Military Police (RMP) to Castlereagh Holding Centre at 0635 hours.

[12] At Castlereagh the plaintiff was cautioned and interviewed between 11:20 and 11:50am by Detective Sergeant Fitzpatrick accompanied by Detective Sergeant Caskey. During the interview, it is alleged that the plaintiff dictated a statement which he signed in the following terms:

> "On Sunday afternoon, 17 September 1972 about 2:30pm I shot a soldier in Springhill Avenue. I was in an alleyway at the side of shops opposite Corpus Christie Church and I fired one shot from a ·303 rifle. After I shot the soldier I ran away, and I hid the rifle at the back of Corry's wall. At that time, I was a member of the Provisional IRA, and I was ordered by the OC to carry out a sniping job on the soldiers. A fellow from the Fianna told me that there was a patrol walking up Springhill Avenue. A girl brought the rifle to me to the alleyway beside the shops where I was positioned. The gun was loaded and had 8 rounds in it. They left me to do the shooting. I don't know the names of these people, but I know them to see. Since I

> shot the soldier, I got out of the IRA as his death annoyed me. If I had not carried out these orders, I would have been shot myself."

[13] Detective Sergeant Fitzpatrick made a statement (undated) and a Deposition on 22 December 1972. It was recorded that after the plaintiff had signed the confession statement, Detective Sergeant Fitzpatrick asked him whether he had been ill-treated in any way. The plaintiff replied that he had been "roughed up a bit by the army, but received no injuries." Detective Sergeant Caskey, in his Deposition dated 22 December 1972 stated that he asked the plaintiff to identify the OC that ordered the shooting. It is alleged that the plaintiff replied, "Jim Bryson of Ballymurphy. It was the soldier or me."

[14] At 2200 hours on 16 October 1972, the plaintiff was charged with murder by Detective Sergeant Fitzpatrick and Detective Constable Hill. After caution and in reply to the charge, the plaintiff is reported to have said, "I was ordered to do it. If I had not done it, I would have been shot myself. It was him or me." Detective Sergeant Fitzpatrick further reported that the plaintiff stated that the rifle he used was found by soldiers in a house of Mr McManus of Whiterock and that, "Mr McManus is innocent as the IRA forced him to keep the gun."

[15] On 17 October 1972, Detective Sergeant Fitzpatrick and Detective Constable Hill showed the plaintiff a ·303 rifle and magazine containing seven rounds. The plaintiff was alleged to have replied, "My Solicitor told me to say nothing."

[16] On 21 December 1972, a charge of murder contrary to common law was substituted by a charge of capital murder. The plaintiff was further charged with possession of a firearm and ammunition with intent and also carrying a firearm in a public place.

[17] Between 16 April and 19 April 1993, the plaintiff was tried by a jury before Lowry LCJ. During a *voir dire*, in the absence of the jury, the plaintiff's defence team applied to have the plaintiff's confession statement excluded from evidence on the basis that it had been obtained by oppression resulting from the unlawful treatment of the plaintiff while in the custody of the army.

[18] A comprehensive summary of the evidence given by Sergeant Rowntree, Captain Milton and the plaintiff during the *voir dire* is detailed by Morgan LCJ in the decision of the Court of Appeal in *R v William Holden* [2012] NICA 26 at paras [8]-[13]. For the sake of completeness, I consider it appropriate to repeat the said paras below:

> "[8] … The prosecution called evidence relating to how the confession was obtained. Sergeant Rowntree stated that:
>
> (i) He saw the appellant in a cubicle and took with

him a screening pro forma and the file on the appellant;

(ii) The file contained a source report indicating that the appellant was responsible for shooting a soldier on 17 September 1972 and that he was top snipe in his area;

(iii) He asked the appellant what he was doing on Sunday 17 September and found that the appellant was surprisingly quick in his answers and remembered exactly what he was doing. The appellant stated he was playing cards with friends and was able to provide names and addresses;

(iv) Intelligence showed that a large number of shootings had taken place on a Sunday. He asked Mr Holden what he was doing on other Sundays and was told that Sunday was Mr Holden's day off;

(v) Mr Holden had an instantaneous memory of what he had been doing on particular Sundays;

(vi) He told the appellant that he had a file on him and that it contained information that the appellant was responsible for the shooting of Private Bell. Mr Holden denied this;

(vii) He read extracts of the file to the appellant and showed him two extracts from the file. He stated that the appellant then realised that they knew more about him than he expected;

(viii) The appellant then admitted to being a member of the IRA and named other members. Sergeant Rowntree then left the cubicle to check the names in the intelligence office and was away for about 30 minutes;

(ix) He read the appellant extracts from the files of others to show him the types of people the appellant was associating with;

(x) He told the appellant about another shooting and the appellant denied he was responsible;

(xi) The appellant admitted that he had done two

snipes but stated he had not shot;

(xii) He asked the appellant again if he was responsible for the shooting of Private Bell and the appellant denied it;

(xiii) The appellant was becoming more apprehensive and gave the names of "Fianna boys" who had been lookouts;

(xiv) Sergeant Rowntree left the cubicle again;

(xv) When he returned the appellant stated "I shot a Para" and mentioned Private Bell's name. The appellant stated that for a "long time now it had been preying on his mind and conscience and that he wanted to get it off his chest";

(xvi) He left the appellant for 5-10 minutes and went to see Captain Milton who was writing weekly reports in his caravan. While Captain Milton finished reports Sergeant Rowntree tasked the arrest team to take the appellant to Castlereagh;

(xvii) He went with Captain Milton to the cubicle and Captain Milton interviewed the appellant in his presence;

(xviii) The appellant was then handed over to the RMP;

(xix) The appellant's brother, Patrick, had been held in the cubicle next to the appellant and it was impossible to overhear noise from the next cubicle.

[9] During cross-examination Sergeant Rowntree stated that:

(i) He had not cautioned the appellant, his job was to question people to gain intelligence to be used against subversives and not to interrogate them. The information he obtained could not be used in court;

(ii) He had not known Private Bell, who was in the 1st Parachute Regiment, while he (Sergeant Rowntree) was in the 2nd Parachute Regiment;

(iii) He could not remember whether Private Bell had

been the first soldier from the Parachute Regiment to die in Northern Ireland and felt no particular anger or resentment at the death of Private Bell;

(iv) The appellant had been arrested on 3 October 1972 and questioned, but he did not know if a source report implicating the appellant in the shooting was available then or if the appellant had been questioned about it, he may not have been. The appellant had been released at 20.15 on (sic) 6 October 1972;

(v) He had scruples about using threats against suspects in the IRA and would not use violence;

(vi) He had not put a lighter close to the appellant's trousers, nor hit Mr Holden's brother, Patrick, in front of him;

(vii) He had not sent for a bucket of water and a towel;

(viii) He had not put a towel on Mr Holden's face nor poured water onto it and had never seen a bucket of water and towel so used;

(ix) He did not produce a hood at any time nor take Mr Holden out of the Army post;

(x) He did not tell the appellant that he was being taken out to be shot;

(xi) He did not accuse the appellant of shooting Private Bell nor say this would never stand up in court;

(xii) He "thought it was unlikely that the appellant would tell the police";

(xiii) He had made rough notes of his interview which he later burnt, and he made no report based on those notes.

[10] Captain Milton stated that his role was that of Regiment Intelligence Officer and also of complaints liaison. He stated that he briefed his section as to procedure, behaviour and the treatment of people to be questioned. The latter should not be humiliated or attacked in any way. In cross-examination he stated that his section serviced the rest of the battalion with

intelligence. Capitan Milton gave evidence stating that the appellant had given him an account of shooting a soldier whom the appellant stated he believed was Private Bell. Captain Milton stated that the appellant's account included the information that:-

(i) He was at the flats at Westrock Road;

(ii) No scope was used on the gun;

(iii) That Private Bell had been the last soldier in the line and was turning around.

In cross-examination Captain Milton stated that he knew of the appellant prior to his arrest of 16 October and had seen him, but not interviewed him, on 3 October. He had instructed that the appellant should be picked up, but did not know who gave the order to arrest him on 16 October 1972. He also stated that he had not known of the appellant's arrest until Sergeant Rowntree told him of the admission, and that Captain Milton should have been informed when Mr Holden arrived at the post. Captain Milton also stated that he had made notes of his interview with the appellant and sent a copy of these to Castlereagh. When re-examined Captain Milton stated that the source report implicating the appellant in the shooting of Private Bell was received on 1 October 1972, 48 hours before the appellant was brought in on 3 October 1972. There was nothing on the pro forma from 3 October 1972 to indicate that they were aware of the source report on 3 October 1972.

[11] The appellant gave evidence in which he asserted:

(i) He had been arrested with his brother Patrick and taken to Blackmountain School;

(ii) He was placed in a room facing the wall and his brother called to him;

(iii) A person who later identified himself as an SAS soldier was present and something was alleged relating to a lighter;

(iv) Sergeant Rowntree and the SAS soldier subjected the appellant to water treatment. The appellant said they nearly drowned him;

(v) It was put to the appellant that he had shot the Para but he denied it;

(vi) The appellant was hooded and taken out in a car to a farmhouse. When the hood was taken off he saw Sergeant Rowntree and the SAS soldier. They spoke about assassinations in Glencairn, the SAS man said they had done about eight of them and there was a discussion about whether to do it with a stick or a gun;

(vii) While this was going on Sergeant Rowntree questioned the appellant about guns and ammunition. There was discussion about whether to take the appellant back or to take him out of the car. Someone tried to pull him out of the car. The appellant then told him about a house and the SAS man said to take him back and show him houses on a map;

(viii) The appellant was taken back to Blackmountain School and pointed out a house on a map;

(ix) Six soldiers were then brought in to ask questions and the appellant said "Yes, I shot Bell." Then he repeated this to Captain Milton;

(x) Sergeant Rowntree told the appellant that he would take the appellant to Castlereagh and that if the appellant did not tell them he had an arrangement to come and get the appellant;

(xi) The appellant stated that he had confessed because he believed he would be shot otherwise.

[12] In his ruling on the question of admissibility Lowry LCJ considered whether there was any promise or favour or any menace or undue terror made to induce the accused to confess. If so, was the accused induced by any such promise or menace to make the confession sought to be given in evidence? The learned trial judge noted that the appellant did not make the allegations which he now made at trial to doctors or the police. He concluded that he accepted the evidence of the prosecution and disbelieved the evidence of the accused. He accordingly admitted the statement in evidence on the basis that it was free and voluntary.

> [13] Prior to the voir dire Private Lockhart had given evidence in relation to the arrest of the appellant. The notes of his evidence indicate that it was brief, merely confirming that he had arrested the appellant and his brother from their home and had taken them to Blackmountain School. There was no cross-examination. The evidence in relation to the interviews was largely repeated before the jury. The appellant stated that he had been playing cards with friends and three witnesses gave evidence at trial to confirm this. In cross-examination the appellant denied that he had stated how many rounds were in the gun or that he mentioned Mr McManus. He admitted that he had been in the IRA in January but that he did not know if the man he had mentioned was his OC. He stated that he had got out of the IRA in January because he did not consider what it was doing was right and his job was catching up with him. The jury found him guilty after deliberating for 1 hour 27 minutes."

[19] On 19 April 1973, the plaintiff was convicted of the capital murder of Private Frank Bell and was sentenced to death. The death penalty was subsequently commuted to life imprisonment by the Secretary of State for Northern Ireland on 17 May 1973. The plaintiff was also convicted of possession of a firearm and ammunition with intent contrary to section 14 of the Firearms Act (Northern Ireland) 1969 for which he received a sentence of ten years imprisonment.

[20] The plaintiff was subsequently released on licence in December 1989. The total length of time in custody from arrest to release was seventeen years and two months.

[21] Pursuant to the powers contained in Part II of the Criminal Appeal Act 1993 an appeal by way of reference from the Criminal Cases Review Commission (CCRC) was lodged. The reference was made on the grounds that there was a real possibility that:

(i) The court would be unable to conclude that the new evidence uncovered by the CCRC would not have made any difference to Lowry LCJ's ruling on the admissibility of the admissions to the army and/or the confessions to the RUC;

(ii) The court would be unable to conclude that the confessions to the army and/or the RUC, if admitted, would have resulted in a verdict of guilty had the jury been told of the new evidence; and/or

(iii) The court would consider that the new evidence and the circumstances of the appellant's arrest and detention provided prima facie grounds for concluding

that his convictions were unsafe and that there were no sufficiently substantial countervailing factors to displace this prima facie conclusion.

[22] The plaintiff's case was raised with the CCRC on 26 September 2002. During the course of its investigation, the CCRC gained access to a number of confidential Ministry of Defence documents. The documents included (a) the "Blue Card" which was issued by the Director of Operations to soldiers in making arrests under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922; and (b) a previously undisclosed statement from Private Lockhart who carried out the plaintiff's arrest. The significance of these documents is considered below.

The "Blue Card"

[23] The Blue Card was issued to soldiers engaged in making arrests under the Special Powers Act. The relevant version of the Blue Card was issued in April 1972, approximately six months prior to the plaintiff's arrest. The instruction contained in the Blue Card was that persons arrested under the Special Powers Act were to be handed over as soon as possible to the RUC at the nearest Police Station or Police Holding Centre.

[24] Significant concerns were expressed, not least by the Attorney General and various Ministers, that the instructions on arrest procedures contained in the Blue Card were not being followed and that regulation 7 of the Special Powers Act was unlawfully used to carry out systematic military interrogation to obtain intelligence.

[25] The nature and extent of the concerns regarding the instructions on arrest procedures contained in the Blue Card are discussed in detail a paras 73-83 below. Suffice to state at this stage that revised instructions on arrest procedures were drafted and issued on 27 July 1972, almost three months before the plaintiff was arrested. The practice of taking arrested persons to military command posts for preliminary questioning prior to handover to the RUC was to be discontinued.

[26] On 16 October 1972, Army Headquarters issued a letter to the Ministry of Defence stating that everything possible had been done to emphasise the importance of informing the troops as to the revised arrest instructions. It is stated that all units coming to Northern Ireland received instructions on the arrest procedures from the Northern Ireland Training Advisory Team. Presentations on the subject had been given by Company Commanders and were to be repeated to all new battalions. As stated by Morgan LCJ in *R v Holden (op cit)*, "these instructions ought, therefore, to have been known by Captain Milton and probably by Sergeant Rowntree."

Undisclosed Statement by Private Lockhart

[27] The CCRC uncovered a statement made by the arresting officer, Private Lockhart, which had not been disclosed to the PPS, Prosecuting Counsel or the Defence prior to or during the trial. In the original and undisclosed statement of Private Lockhart, he stated that the plaintiff had been arrested under regulation 11 of the Special Powers Act and that he was being taken to the Black Mountain base

because "the Army at Black Mountain wish to see them." However, in Private Lockhart's deposition which was presented at the criminal trial, reference to the plaintiff and his brother being taken to Black Mountain because "the Army wished to see them" had been removed.

Decision of the Court of Appeal

[28] The Court of Appeal observed that none of the material relating to the Blue Card and Private Lockhart's original statement was disclosed to the Defence prior to or during the trial. Indeed, none of the material was known to the PPS and Prosecuting Counsel. Prosecuting counsel indicated that if the material had been disclosed to him, he would certainly have ordered its disclosure to the defence. At paras [20]-[24] the Court of Appeal in *R v Holden* stated as follows:

> **"Discussion**
>
> [20] If the information which has now been disclosed had been available at the trial it would have enabled defence counsel to contend that the instructions in relation to the arrest, detention and questioning of prisoners by the army were known to Captain Milton and Sergeant Rowntree in light of the extent of the disclosure of those instructions recorded in the documents. There is, therefore, a real possibility that the learned trial Judge may have been persuaded that Captain Milton and Sergeant Rowntree were knowingly acting contrary to instructions which had been made explicitly plain to them when interviewing the appellant. Secondly, the defence may have persuaded the learned trial Judge that the questioning of the appellant was unlawful on the basis that the power of army personnel to lawfully question suspects was limited to establishing the identity of the suspect.
>
> [21] Thirdly, the disclosed second witness statement of Private Lockhart raised the real possibility that the purpose of the arrest was to enable the army to interview the appellant. As the disclosed documents demonstrate such a purpose was unlawful and that may, therefore, have led to the conclusion that the arrest was unlawful. In light of the detailed instructions issued to army personnel prior to this arrest it would have been arguable that the arrest was directed in spite of the fact that the person directing it must have known that it was unlawful to do so.

> [22] We consider that the non-disclosure was material. On the voir dire the first question posed to himself by the learned trial Judge was whether any promise or favour or any menace or undue terror was made to induce the accused to confess. In answering that question against the background of disputed circumstances at the trial he had to make a judgment about the credibility and reliability of Captain Milton and Sergeant Rowntree. If the disclosed documents had been available to the defence there is a real possibility that they would have enabled the defence to significantly undermine the credibility of those witnesses for the reasons set out above. If the defence had succeeded in undermining the credibility of the two army witnesses that would have affected the admissibility not just of the statements made to them but also the statement made to the police since on the appellant's account that statement was made because of fear induced while he was in the custody of the army. No allegation of ill treatment was ever suggested against the police. There is, therefore, a real possibility that if these documents had been disclosed the learned trial Judge would not have admitted into evidence the admissions.
>
> [23] If the statements had been admitted it would, of course, have been open to the appellant's counsel to explore these issues before the jury. For the reasons set out above we consider that there is a real possibility that this material might reasonably have affected the weight which the jury gave to those statements and thereby affected the decision of the trial jury to convict (see R v Pendleton [2001] UKHL 66).
>
> **Conclusion**
>
> [24] The case against the appellant depended decisively on the alleged admissions made to the army and the police. In light of the material now disclosed we consider that there is a real possibility that the admissions would not have been admitted in evidence and that if they had been admitted they may not have been considered reliable by the jury. Accordingly, we consider the conviction is unsafe and allow the appeal."

[29] On 12 February 2014, the plaintiff lodged a claim for compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988 (as amended by the Criminal Justice and Immigration Act 2008). The statutory scheme provides

for an application to the Secretary of State for compensation out of public funds for punishment resulting from a conviction where it has been reversed or there has been a pardon on account of a subsequently discovered miscarriage of justice. Section 133A applies in relation to the assessment of the amount of compensation.

[30] Pursuant to section 133(4) of the Criminal Justice Act 1988, in my capacity as Independent Assessor, I was appointed to assess the plaintiff's claim for compensation. The assessment of compensation was completed on 15 March 2017. In summary, following a detailed consideration of the relevant statutory provisions, guidance notes and case law I assessed compensation for non-pecuniary loss at £565,000. Following accountancy calculations provided to me by two specialised forensic accountants, I assessed pecuniary loss at £548,323. The pecuniary loss assumed a discount rate at 2·5%. The total compensation was assessed at £1,113,323·00. However, on the basis that the Criminal Justice Act 1988 had been amended by the Criminal Justice and Immigration Act 2008 to insert, inter alia, a cap on the total amount of compensation payable under section 133 of the 1988 Act, the plaintiff was awarded compensation at the statutory limit of £1,000,000.

[31] By Writ of Summons issued on 18 July 2014 against the Ministry of Defence and the Chief Constable, the plaintiff claimed damages for personal injuries, loss and damage sustained by him by reason of the unlawful arrest, false imprisonment, malicious prosecution, assault, battery and trespass to the person of the plaintiff by the Defendants, their respective servants and agents. The Writ of Summons specifically claimed aggravated and exemplary damages. It is unclear whether the Writ of Summons was subsequently amended to include a claim for misfeasance in public office. In a statement of claim dated 9 September 2016, it is noted that the claim now included an allegation of misfeasance in public office by the Defendants and each of them, their respective servants and agents.

[32] The statement of claim has been amended on a number of occasions. The nature of the claims and the amendments will be considered in more detail below. In summary, the plaintiff alleges that he is entitled to claim damages, including aggravated and exemplary damages, in respect of heads of claim which the Independent Assessor was unable to consider due to the lack of corroborating evidence. The plaintiff also claims for the amount allowed by the Independent Assessor over and above the statutory limit, depending upon whether the court applies a 0·25% discount rate or the current discount rate.

[33] The defendants deny each and every allegation of unlawful arrest and detention, assault, battery, torture and trespass to the plaintiff's person, malicious prosecution and misfeasance in public office. The defendants deny that the plaintiff has sustained any personal injuries and refute any claim for aggravated and exemplary damages. The defendants submit that, if the court decides to award damages, the plaintiff can only recover damages for those elements of his claim for which he has not already received compensation pursuant to the determination of the Independent Assessor.

My Role as Independent Assessor

[34] Prior to the hearing of this claim, I drew to the attention of the parties that, in my former role as Senior Counsel and Independent Assessor, I had made the assessment of compensation for miscarriage of justice dated 15 March 2017. Mr Fee KC on behalf of the plaintiff and Mr Dunlop KC on behalf of the defendants indicated that not only were they aware of my role as Independent Assessor in respect of the plaintiff's claim for miscarriage of justice, but also, they had no objections to me hearing the evidence and making a determination in respect of the plaintiff's claim. Accordingly, I will now proceed to consider the evidence regarding this claim under the following headings, namely the allegations of (a) unlawful arrest and detention; (b) assault, battery and trespass to the person, including waterboarding, hooding and threats to kill; (c) malicious prosecution; and (d) misfeasance in public office.

(a) Unlawful Arrest and Detention

[35] The plaintiff served a statement of claim dated 9 September 2016. At paras 2 and 3 of the statement of claim, the plaintiff makes allegations of unlawful arrest and detention on 3 October 1972 and 16 October 1972. The allegations of unlawful arrest and detention were specifically denied by the defendants in their defence served 29 November 2016 and the amended defence served on 19 September 2017.

[36] The plaintiff then served further amended statements of claim on 15 December 2017, 18 January 2019 and 22 May 2020. Paras 2 and 3 of the amended statements of claim make the same allegation, namely, that the plaintiff was unlawfully arrested and detained on 3 October 1972 and 16 October 1972. The defendants' undated amended defence admits that the plaintiff was arrested and detained on 3 October 1972 and 16 October 1972 but denies that the arrest and detention was unlawful. Para 26 of the defence pleads a limitation defence. The plaintiff did not serve a Reply to the Defence and, accordingly, did not address or take issue with the limitation defence.

Arrest and Detention - 3 October 1972

[37] The plaintiff alleges that he was unlawfully arrested on 3 October 1972 by a servant or agent of the Ministry of Defence and thereafter he was unlawfully detained at Castlereagh Holding Centre by servants or agents of the Royal Ulster Constabulary (RUC). The defendants' Notice for Particulars dated 25 November 2016 does not directly request further details from the plaintiff in respect of the arrest and detention on both 3 October 1972 and 16 October 1972. Replies to the defendants' notice for particulars do not specifically deal with the circumstances of the arrest and detention on 3 October 1972. For example, details as to the length of the alleged unlawful detention are not provided.

[38] The defence fails to specify or identify the name of the person who carried out the arrest of the plaintiff on 3 October 1972 and the statutory authority which

grounded the arrest. The defence also fails to particularise the legal basis on which the detention was authorised, the duration of the period of the detention and the basis upon which it is alleged that the detention was lawful.

[39] In his opening of the case on behalf of the plaintiff, Mr Brian Fee KC stated that on 3 October 1972, the plaintiff had been arrested under the Special Powers Legislation by members of 1st Parachute Regiment and brought to Castlereagh Holding Centre. The plaintiff was detained from 3 October to 6 October 1972 and was interviewed by CID and Special Branch Officers. Mr Fee KC stated that the interviews related to "general enquiries" and that he was not questioned about his involvement in the murder of Private Bell. Mr Fee KC further stated that, unknown to the plaintiff, the defendants had sought a detention order under the Special Powers Legislation, but this was refused. It was also claimed that the plaintiff expressed surprise that he had been arrested because any previous interaction with the police and army had involved only routine stops and searches. However, the plaintiff was aware that many young people in his neighbourhood had been brought in for questioning at that time and the plaintiff believed his arrest and detention was part of this security operation.

[40] In his examination in chief, the plaintiff stated that on 3 October 1972 he was arrested by soldiers and brought directly to Castlereagh Holding Centre. He said that he was subjected to two or three interviews. No specific allegation was put to him during the course of the interviews. Rather, according to the plaintiff, he was asked general questions to include his knowledge of IRA volunteers. The plaintiff stated that he answered every question asked and he was released without charge on 6 October 1972. His evidence was that he had no knowledge that an application for a detention order had been made.

[41] In an otherwise thorough cross-examination, Mr Dunlop KC made only fleeting reference to the arrest and detention of the plaintiff on 3 October 1972. The plaintiff confirmed in cross-examination that he did not tell the RUC that he had joined the IRA. The plaintiff also stated that he was not aware of Sergeant Rowntree or Captain Milton during the period of his detention from 3rd to 6th October 1972.

[42] Significantly, at no stage during the course of the cross-examination of the plaintiff, was it suggested that his arrest by the Military and his detention by RUC officers was lawful. The court was not referred to any documentation which purportedly raised an argument that the said arrest and the detention were lawful. Furthermore, no evidence was called on behalf of the defendants and I received no legal argument that the arrest on 3 October 1972 and the period of detention between 3 October to 6 October 1972 was justified in law.

[43] In cross-examination of the plaintiff, Mr Dunlop KC referred to a source report dated 1 October 1972. For the purposes of this hearing, the source report had been heavily redacted following a claim for public interest immunity (PII). In the unredacted parts of the said source report, it is alleged that the shooting of Private Bell had been carried out by the plaintiff.

[44] It is noted that the said source report was made available at the criminal trial, although the precise nature and extent of the disclosures made within the document are not known. I will return to this document further below.

[45] Leaving aside for the moment the reliability of the source that allegedly provided this intelligence, as alleged by plaintiff's counsel in their closing submissions, there was no evidence before this court that the soldier who carried out the arrest of the plaintiff on 3 October 1972 had been briefed prior to the arrest as to the contents of the source report or with information which would have allowed him to form a suspicion that the plaintiff was a member of the IRA.

[46] The notes from prosecution counsel at the criminal trial which were provided to the Court of Appeal suggest that, when questioned, Sergeant Rowntree stated that he was not sure whether the source report was available when the plaintiff was questioned on 3 October 1972. The said notes also suggest that Captain Milton, during examination in chief, stated that the source report was probably not available on 3 October 1972.

[47] This court acknowledges that the arrest of the plaintiff on 3 October 1972 took place almost fifty years ago. More particularly, the court is cognisant of the fact that the driving force behind the plaintiff's claim in these proceedings is the alleged unlawful arrest, detention and ill treatment of the plaintiff on 16 October 1972.

[48] During a review of the voluminous documentation disclosed, the court became aware of documents clearly relevant to the plaintiff's arrest on 3 October 1972. The documents include an apparently contemporaneous regulation 11 Arrest Notice signed by the arresting soldier, which provided that on 3 October 1972 the plaintiff was arrested at 7 Westrock Drive at 16.35 pursuant to regulation 11 of the Civil Authorities (Special Powers) Acts (NI) 1922 - 1943. It is specifically recorded that the arresting soldier suspected the plaintiff to be a member of the IRA. The name of the arresting soldier has been redacted, although his identity is clearly within the knowledge of the first defendant.

[49] The said apparently contemporaneous regulation 11 arrest notice is corroborated by the Royal Military Police (RMP) reports, RUC records and documents relating to the medical examination of the plaintiff. From the records, it appears that the plaintiff was handed over to the RUC at 2110 hours and detained until 6 October 1972.

[50] In light of the contents of these documents, in the interests of the administration of justice, I considered that the defendants should be given an opportunity to make further written submissions in respect of the alleged unlawful arrest and detention of the plaintiff from 3 to 6 October 1972. Written submissions were received from counsel on behalf of the defendants on 11 July 2022 and on behalf of the plaintiff on 5 August 2022.

[51] Having carefully considered the above-mentioned documentation and the

said further written submissions, it is my decision that the plaintiff was lawfully arrested and detained from 3 October 1972 to 6 October 1972. My reasons are as follows. Firstly, pursuant to the decision in McGonigal J in *Re McElduff* [1972] NI 1, an arrest under regulation 11 of the Special Powers legislation is lawful if the arresting soldier's suspicion was honest and genuine. The identity of the soldier who arrested the plaintiff on 3 October 1972 is plainly discernible from the original unredacted regulation 11 arrest notice. For some unexplained reason, the arresting soldier was not called to give evidence. The court was not advised as to the attempts made by the first defendant to ascertain whether the soldier was alive or deceased, and if still alive, the soldier's whereabouts and his physical and mental capacity to give evidence.

[52] Whatever the reason for the arresting soldier's non-availability, as stated above, I do not ignore the fact that the arrest took place almost fifty years ago. In coming to a conclusion as to whether or not the arresting officer had a genuine and honest suspicion as required by regulation 11, it is axiomatic that the court must consider the contemporaneous documentation. As referred to above, the regulation 11 Arrest Notice clearly states that the arrest was pursuant to regulation 11 of the Special Powers Act and that the arresting soldier suspected the plaintiff of being a member of the IRA. Accordingly, if the arresting officer had been available to give evidence, it would have been difficult (although admittedly not impossible) for the plaintiff to successfully challenge whether he held an honest and genuine suspicion.

[53] In addressing the weight to be attached to the relevant materials, I take into consideration Article 5 of the Civil Evidence (NI) Order 1997 which provides as follows:

> "5.—(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of the notice given.
>
> (3) Regard may also be had, in particular, to the following—
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

[54] In estimating the weight to be given to the regulation 11 Arrest Notice, I take into consideration that it appears to have been contemporaneously completed, dated and signed by the arresting soldier. Accordingly, I am prepared to draw a reasonable inference as to the reliability of the document which confirms that the arresting officer suspected that the plaintiff was a member of the IRA. It is my decision that the arrest on 3 October and the detention thereafter was lawful.

Arrest and Detention - 16 October 1972

[55] On 16 October 1972 the plaintiff was arrested by Private Lockhart, 1st Parachute Regiment. On 1 November 1972 Detective Sergeant Fitzpatrick took the following statement from Private Lockhart:

> "At 12:45am on 16 October 1972 I arrived at the home of William Gerard Holden … I knocked the door and William Holden's mother answered. I told her that I wished to speak to her two sons, William and Patrick. She got them out of bed and both of them came to the door. I spoke to them and informed them that they were being arrested under Regulation 11 of the Civil Authorities (Special Powers) Act 1922 - 43 for being suspected members of the IRA. I also informed them that the Army at Black Mountain wished to see them. I took both men to Black Mountain School and handed them over to the IO (Intelligence Office) section." (emphasis added).

[56] This statement was not disclosed to the PPS, Prosecution Counsel or the plaintiff's Defence team. Rather, a second statement was prepared and then signed

by Private Lockhart as follows:

> "On 16 October 1972 at 0045 hours I arrived at the home of William Gerard Holden … I arrested him under Regulation 11 of the Regulations made under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 on the grounds that he was suspected of being a member of the IRA. I informed him that I was arresting him as I suspected him of being a member of the IRA. I conveyed him to Black Mountain School arriving at 0100 hours where he was handed over to other military personnel."

[57] No date appears on Private Lockhart's second statement. The name of the person who took the statement is also not specified. As highlighted above, the main differences between both statements is that the original statement refers to Private Lockhart's assertion that he informed the plaintiff (and his brother) "… that the Army at Black Mountain wished to see them" and that he handed both men "over to the Intelligence Office section."

[58] In his signed deposition (undated) Private Lockhart stated that he arrested the plaintiff and his brother, Patrick, under the Special Powers Act on suspicion of being members of the IRA. Contrary to his previous statements, Private Lockhart deposed that he did not specify any particular provision of the Regulations. Furthermore, he did not state in his deposition that both men were informed that the Army at Black Mountain wished to see them and that they were handed over to the intelligence team.

[59] Regulation 11 of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 provides as follows:

> "Any person authorised for the purpose by the Civil Authority, or any police constable, or member of any of Her Majesty's forces on duty when the occasion for the arrest arises may arrest without warrant any person whom he suspects of acting or of having acted or being about to act in a manner prejudicial to the preservation of the peace or maintenance of order, or upon whom may be found any article, book, letter or other document, the possession of which gives ground for such a suspicion, or who is suspected of having committed an offence against these Regulations or of being in possession of any article or document which is being used or intended to be used for any purpose or in any prejudicial to the preservation of the peace or maintenance of order, and anything found on any persons so arrested which there is reason to suspect is being so used or intended to be used may be seized."

[60] It is clear that, whilst on duty, Private Lockhart would have the power to arrest the plaintiff if he suspected him of acting or having acted or of being about to act in a manner prejudicial to the preservation of the peace or maintenance of order.

[61] The ambit of regulation 11 of the Special Powers Act was considered by McGonigal J in *Re McElduff* [1972] NI 1. At p.10 of the judgment, McGonigal J stated as follows -

> "[Regulation 11] deals only with cases where the arresting person has a suspicion. The arrested man may have committed an act or an offence, but it is not necessary for this power to be exercised that that should be known. It is sufficient if there is that suspicion. It is not even necessary to suspect that he had actually done anything at all. It is sufficient if the suspicion is as to his immediate future conduct, one could say as to immediate future intentions … Regulation 11(1) deals only with a suspicion of certain things and clearly envisages a case where, although there are grounds for suspicion, there is no proof of any act and therefore the arrest is not for the purpose for charge and trial, but solely for detention in custody, which might be described as preventive detention in the public good."

[62] The question for this court is whether the power of arrest under regulation 11 can be exercised on any suspicion, however arbitrary, unfounded or unreliable, or whether it can only be exercised if the arrestor has a reasonable suspicion?

[63] Regulation 11 makes no reference to "reasonableness" as the standard test. The term "reasonable suspicion" is not used. Following the decision in *Re McElduff*, the only suspicion required for a valid arrest under regulation 11 is a suspicion genuinely existing in the mind of the arrestor; and the court, in enquiring into the exercise of the power, can enquire only as to the bona fides of the existence of that suspicion.

[64] As stated by McGonigal J, in *Re McElduff* at p. 19:

> "The test is, therefore, whether the arrestor suspected. That does not appear to me to be open to an objective test. It may be based on purely arbitrary grounds, on grounds which the courts, if this were an objective test of reasonableness, might consider unreasonable. But since reasonableness is not essential to the suspicion that is immaterial. What is required by the regulation is a suspicion existing in the mind of the constable. That is a subjective test. If that is correct, the courts in enquiring into the exercise of the power, can only enquire as to the

> bona fides of the existence of the suspicion. Did the constable in his own mind suspect? And in my view the only other question for the court is, "Was this an honest suspicion?"

[65] I agree with McGonigal J's interpretation of regulation 11 of the Special Powers Act. On the facts of this case, it follows that the court can only enquire into the existence of the suspicion in the mind of the arresting soldier and whether the suspicion was an honest one.

[66] In both the undisclosed statement and the disclosed statement, Private Lockhart stated that he arrested the plaintiff pursuant to regulation 11 of the Special Powers Act on the basis of a suspicion that the plaintiff was a member of the IRA. Unfortunately, Private Lockhart was not called on behalf of the defendants. I was advised by the first defendant, in an affidavit from Stephen Clough dated 28 January 2022, that it was not possible to positively identify or secure the contact details for Private Lockhart. I find this most surprising. The precise nature, extent and rigour of the attempts to trace this witness, and indeed other witnesses, were not explained to this court.

[67] It is submitted on behalf of the defendants that since the plaintiff, subsequent to the arrest, admitted that he was a member of the IRA, then the arrest was justified. Such a proposition is incorrect in law. If the arrestor did not have an honest suspicion that the plaintiff was a member of the IRA, the arrest remains unlawful.

[68] I remain conscious of the fact that the arrest in this case occurred fifty years ago. I have been told and must accept that Private Lockhart has not been traced. In the circumstances, the best I can do is make a judgment as to whether Private Lockhart had the requisite suspicion on the date of the arrest.

[69] It is my view that the arrest was lawful, and it is likely that Private Lockhart was briefed that the plaintiff was a member of the IRA. I come to this conclusion on two grounds. Firstly, it is likely that, on receipt on the intelligence received and contained in the source report dated 1 October 1972, an intelligence file would have been created in respect of the plaintiff. Prior to making the arrest, it is probable that Private Lockhart was, at the very least told, that the plaintiff was a suspected member of the IRA. Secondly, at the criminal trial, Captain Milton stated that he knew of the plaintiff prior to the arrest on 16 October and had seen him, but did not interview him, on 3 October 1972. Captain Milton also stated that he gave instructions that the plaintiff should be arrested, although he did not know the identity of the person who gave the order to arrest the plaintiff on 16 October 1972. It is reasonable to assume that Captain Milton, in his role of Regimental Intelligence Officer, would have been aware of relevant source information in respect of the plaintiff and that, at the very least, some of that information would have used to inform the briefing officer and to provide Private Lockhart with the requisite suspicion to make the arrest of the plaintiff.

The Detention of the plaintiff at Black Mountain on 16 October 1972

[70] In *Re McElduff* [1972] NI 1 at page 11, McGonigal J's interpretation of regulation 11 of the Special Powers Act with regard to detention was as follows:

> "There is no apparent limitation on the time a man arrested under regulation 11(1) may be held. He may be detained at any time if a detention order is made under regulation 11(2) but there is no time prescribed within which such an order must be made. He may be held indefinitely pending the making of a detention order, but if a detention order is not made, there is no limitation to the time he can be held in custody as an arrested person under regulation 11(1). The regulation is completely silent on this point and under it a man may be held as a person arrested on suspicion for hours, or days, or weeks, or months and, as I already indicate, his only remedy under the regulation is to apply to the civil authority for release on bail. The courts have no jurisdiction in the case of such an arrested man unless an application for habeas corpus is brought, but even then, as the regulations stand, the court is only concerned with the question of whether the powers conferred by the regulations have been validly exercised. If the powers have been validly exercised and the arrest properly made, the court cannot act as a court of appeal as to the ground of arrest nor as to the time the arrested man can be held under this power of arrest." (p 11-12)

[71] The defendants argue that if the arrest of the plaintiff is lawful, then provided the first defendant retains a suspicion that the plaintiff has acted in a manner satisfying the requirements regulation 11 of the Special Powers Act, then the detention of the plaintiff is also lawful.

[72] The plaintiff argues that, even if the arrest was lawfully exercised pursuant to regulation 11, the detention of the plaintiff was unlawful since it was plainly contrary to the instructions contained in the "Blue Card" which was issued by the Director of Operations to soldiers engaged in making arrests under the Civil Authorities (Special Powers) Act (NI) 1922. Instructions contained within the Blue Card provided that persons arrested under the Special Powers Act were to be handed over as soon as possible to the RUC at the nearest police station or police holding centre.

[73] As highlighted by the Court of Appeal *R v Holden* [2012] NICA 26, the investigation carried out by the CCRC unearthed the "Blue Card." The background to the origins of this document has already been considered briefly at para 22 above. This document had not been disclosed to the PPS, prosecuting counsel or to the

plaintiff's defence team prior to or during the trial. Failure by the first defendant to produce this document and other relevant materials was central to the decision of the Court of Appeal that the plaintiff's conviction was unsafe. Accordingly, it is necessary to consider in more detail the significance of the "Blue Card" and the relevant materials.

"The Blue Card"

[74] In April 1972, the Cabinet approved the text of the "Blue Card" which included instructions by the Director of Operations for making arrests under the Civil Authorities (Special Powers) Act (NI) 1922. For the purpose of the present case, the relevant version of the Blue Card provided that:

> "Adults arrested under the Special Powers Act are to be handed over as soon as possible to the RUC at the nearest police station or police holding centre."

[75] In correspondence dated 23 May 1972, a Ministry of Defence official informed other branches within the Ministry of ministerial concerns relating to allegations of brutality against the army and the adequacy of instructions given to the army regarding arrest procedures and the requirement to hand over the arrested persons to the police as soon as possible.

[76] A draft instruction on arrest procedures and questioning for soldiers in Northern Ireland was attached to the correspondence. Para 11 of the draft instruction provided as follows:

> "**Action After Arrest**
>
> 11. Adults arrested … are to be handed over to the RUC at the nearest police station or police holding centre at the nearest possible moment. They should not be taken to military Command Posts under any circumstances. As stated above, no questions are to be addressed to an arrested person by military personnel at any stage after an arrest has been made."

[77] On 5 June 1972, the Ministry of Defence wrote to the Chief of Staff in Northern Ireland in relation to the concern of Ministers, including the Attorney General, about the procedures for handling persons arrested by the army (and incidentally the RUC) and, in particular, a concern relating to the risk of unlawful arrest or treatment.

[78] Para 6 of the said correspondence is significant:

> "… when life is at stake, the niceties may have to go by the board, but <u>any use of Regulation 7 to carry out the systematic military interrogation to obtain intelligence (as</u>

> appears sometimes to have been the practice) is certainly outside the law as it stands. Logically, if such interrogation is vital, the only solution is to increase military powers under the Special Powers Act by amending the Regulation, a course which would clearly be politically difficult, given current policy and opposition to the Act. Coming to the second point, the instruction certainly does not intend that the arrested person should necessarily remain in the hands of the arrestor until handed over to the RUC. The "prisoner" should not, however, be held for longer than is essential at any point and certainly must not be taken to Command posts and questioned as this will amount to an unlawful arrest." (emphasis added)

[79] In a memo dated 5 July 1972 prepared for the benefit of the Attorney General's Office, it is stated that the "practice of taking arrested persons to military command posts for preliminary questioning prior to hand over to the RUC has now been discontinued (and) should not occur again."

[80] Revised instructions on arrest procedures were drafted and issued on 28 July 1972, almost three months before the plaintiff was arrested. The instructions included the following:

> "6. A terrorist on a wanted list is to be arrested under Regulation 11 of the Special Powers Act in accordance with paragraph 6 of the Blue Card. The words to be used, if appropriate, are, "I arrest you under the Special Powers Act, Regulation 11, because I suspect you have been a member of the IRA." Someone whose standing is in doubt, but is suspected of being a terrorist, is similarly to be arrested under Regulation 11. …
>
> 9. Anyone arrested is to be handed over as soon as possible to an RMP Arrest Team, who will ensure that he knows why and under what powers he has been arrested. The team will carefully document the arrest and then hand the person over as soon as possible to the RUC to be charged or for further questioning.
>
> 10. Someone whose identity is in doubt may, however, be questioned by the arresting unit at a Command Post before he is handed over to an RMP Arrest Team. Anyone found to have been arrested in error must be released immediately. The sole object of this preliminary questioning is to ensure that RUC Stations are not swamped with unidentified people; there is to be no

> systematic questioning by soldiers for the purpose of gathering intelligence. Arrested persons are to be held in military custody for the minimum possible period, which will never exceed a total of four hours without the authority of the Brigadier Commander." (Emphasis added)

[81] Correspondence from the NI Army Headquarters to the Ministry of Defence in London dated 16 October 1972 stated as follows:

> "On the matter of arrest procedures, I think it would be fair to say that everything possible is being done to emphasise the importance of current arrest instructions to troops. Initially all units due to come here receive instructions in arrest procedures from the Northern Ireland Training Advisory team. [Operations] has given presentations on the subject to all Company Commanders and SNCOs of 2439 Brigades and these will be repeated to all new Battalions. Additional impetus was given to the campaign to disseminate knowledge and eliminate unlawful arrest by the case of Ann Walsh which, as you know, caused considerable concern here."

[82] On the basis of the above disclosed and highlighted correspondence, it seems probable that the relevant instructions in arrest procedures, to include the Blue Card, should have been known to Sergeant Rowntree, Captain Milton, the person responsible for directing the arrest of the plaintiff and the arresting officer and Private Lockhart.

[83] Contrary to the said revised procedures, the plaintiff was taken to the Black Mountain School which formed the Command Post for the Parachute Regiment at that time. Leaving aside for the moment the plaintiff's allegations that he was assaulted whilst in the custody of the first defendant, it is clear that the plaintiff was detained for the purposes of questioning by both Sergeant Rowntree and Captain Milton. The plaintiff remained in military custody from 0045 until 0545 hours during which time he was interrogated regarding his involvement within the IRA and also in relation to the murder of Private Bell.

[84] The defendants argue that the first defendant's failure to comply with the Blue Card and the relevant instructions does not amount to an unlawful detention and false imprisonment. I reject this argument. Even if I was prepared to accept that the arrest by Private Lockhart was prima facie lawful pursuant to regulation 11 of the Special Powers Act, the arrest and detention became unlawful at the point when the plaintiff was subjected to questioning at the Black Mountain Command post. Advice from the Treasury Solicitor in 1972 stated that only questioning to establish identity was lawful. Correspondence from the Ministry of Defence to the Chief of Staff (NI) HQ on 5 June 1972 specifically stated that bringing a prisoner to a

Command Post for questioning would amount to an unlawful arrest and that systematic military interrogation to obtain intelligence is "certainly outside the law as it stands."

Unlawful Detention by the Second Defendant

[85] The plaintiff was handed over to Sergeant Thomas (RMP) at the Black Mountain Command Post at 5:45am by Private Lockhart. The plaintiff was then escorted to Castlereagh Holding Centre and handed over to Sergeant Armstrong (RUC) at 6:35am. Sergeant Armstrong was informed that the plaintiff had been arrested under regulation 11 of the Civil Authorities (Special Powers) Act 1922 - 143 on suspicion of being a member of the IRA. It is not recorded that the plaintiff was also suspected of involvement in the murder of Private Bell. At 7:00am Sergeant McKnight took over from Sergeant Thompson. At 11:25am Sergeant McKnight handed the plaintiff over to Detective Sergeants Fitzpatrick and Caskey for interview. Again, prior to interview, there is no record that the plaintiff had been re-arrested for the murder of Private Bell.

[86] At the commencement of the interview, Detective Sergeant Caskey told the plaintiff that he was making enquiries into the fatal shooting of a soldier at Springhill Avenue, Belfast at approximately 2:00pm on 17 September 1972. The plaintiff was cautioned. It is then alleged that the plaintiff made a written voluntary statement.

[87] The second defendant argues that in respect of unlawful arrest and false imprisonment of the plaintiff, it is in a very different position from that of the first defendant. It is submitted that, based on information provided to the second defendant, the RUC officers reasonably suspected that the plaintiff was involved in a serious criminal offence. Accordingly, they were entitled to detain him. It is relevant that the questioning of the plaintiff related to the fatal shooting of Private Bell and that during the interview the plaintiff admitted to the murder.

[88] The plaintiff seeks to persuade this court that from the outset the second defendant would have been aware of the illegality of the arrest and interrogation by the first defendant. The submission is made that it can be inferred that experienced police officers involved in murder investigations would have known about the prohibition on the military to carry out systematic interrogation of an adult arrested under the Special Powers legislation. In this regard, it is argued that Detective Sergeants Caskey and Fitzpatrick knew the detention was unlawful because they had received a report from Captain Milton which confirmed that the army had interviewed the plaintiff at Black Mountain School and admissions had been made. Furthermore, the plaintiff submits that Detective Sergeant Fitzpatrick is the police officer who took the statement from Private Lockhart on 1 November 1972 which was then deliberately not disclosed to the PPS, the Prosecuting Counsel and Defence Counsel. The implication is that the RUC were complicit in non-disclosure of the Private Lockhart's original statement.

[89] I have taken into consideration the submissions advanced on behalf of both the plaintiff and the defendants with regard to the alleged unlawful arrest and false imprisonment of the plaintiff by the second defendant. Clearly, the onus remains on the defendants to satisfy this court that the arrest and detention of the plaintiff was lawful. No evidence has been called on behalf of either defendant to discharge this burden.

Decision relating to allegations of Unlawful Arrest & Detention -16 October 1972

[90] For the reasons given above, I have concluded that the initial arrest by Private Lockhart was prima facie lawful pursuant to regulation 11 of the Special Powers Act on the basis that the plaintiff was a suspected member of the IRA. However, the arrest became unlawful at the point when the plaintiff was taken to Black Mountain Command Post. In coming to this conclusion, I take into consideration the following facts. Firstly, a sinister aspect of Private Lockhart's undisclosed statement was the inclusion of the sentence that "the Army at Black Mountain wished to see [the plaintiff and his brother]." No assertion had been made by the first defendant that the plaintiff and his brother were brought to Black Mountain simply to establish their identity. It is incontrovertible that, in contravention of the Blue Card instructions, the purpose or motivating factor for bringing the plaintiff to the Black Mountain Command Post was to interrogate the plaintiff. The detention and interrogation of the plaintiff at Black Mountain Command Post was plainly unlawful. The purported justification for the plaintiff's arrest and detention at Castlereagh Holding Centre emanated from the unlawful detention and interrogation of the plaintiff. Accordingly, it is decision of this court that the first defendant is plainly responsible for the entirety of the plaintiff's unlawful detention, namely from the point at which the plaintiff arrived at Black Mountain Command Post, continuing during his interrogation and thereafter to his period of custody at Castlereagh Holding Centre.

[91] The guidelines for the assessment of basic awards for wrongful arrest and false imprisonment in this jurisdiction are as stated by the Court of Appeal in *Dodds v Chief Constable* [1998] NICA 393 and in England and Wales by the Court of Appeal in *Thompson and Hsu v Commissioner of Police of the Metropolis* [1998] QB 498.

[92] In the course of assessing the plaintiff's claim for compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1998, I considered the significance of the decisions in both *Dodds* and *Thompson* and subsequent cases to include *AXD v Home Office* [2016] EWHC 1617 and the Court of Appeal in *MK (Algeria) v SSHD* [2010] EWCA Civ. 980.

[93] In arriving at my assessment of compensation for non-pecuniary loss, I took into consideration the period from the plaintiff's initial unlawful detention at Black Mountain Army Base and, thereafter, to include the period of detention at Castlereagh Holding Centre. The total amount of compensation paid to the plaintiff incorporated the basic award for unlawful detention and embraced a figure for loss of liberty itself, mental suffering caused by the detention and damage to reputation.

Accordingly, to guard against double counting, I do not intend to make any further award for the plaintiff's unlawful detention and false imprisonment on 16 October 1972.

(b) Allegations of Assault, Battery and Trespass to the Person, including Waterboarding, Hooding and Threats to Kill

[94] The major thrust of the plaintiff's claim relates to his allegations that he was subjected to assaults, threats of violence, including threats that he would be killed. Significantly, the plaintiff alleges that he was hooded and subjected to waterboarding by servants and agents of the first defendant. The plaintiff further alleges that the nature of the allegations, particularly waterboarding, fall within the definition of torture. In support of the allegations, the court heard evidence from Dr Grounds, Consulting Psychiatrist, Dr Bennett and the plaintiff. No evidence was called on behalf of the Defendants. In light of the serious nature of the allegations, I consider it necessary to review the evidence of the said witnesses in some detail.

Dr Grounds, Consulting Psychiatrist

[95] At the request of the plaintiff's Solicitors, Dr Grounds, Consultant Psychiatrist, was asked "… to examine [the plaintiff] and review all relevant documentation and provide a psychiatric report in relation to the psychological impact of the circumstances of [the plaintiff's] arrest, detention, interrogation (including water torture), wrongful conviction, incarceration of seventeen years and licence period of twenty-three years."

[96] Dr Grounds interviewed Mr Holden in Belfast on 7 and 8 January 2016 for a total of eleven and a half hours. Following the consultation, and having reviewed the documentation discussed below, Dr Grounds prepared a comprehensive psychiatric report dated 16 February 2016. Dr Grounds referred to the contents of his report during the course of his evidence to this court.

[97] The said psychiatric report was prepared in support of Mr Holden's application for compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988. As the appointed Independent Assessor, I gave careful consideration to the contents of this report in my analysis of the essential elements of the claim, to include an assessment of the basic award, various special and aggravating factors and the psychological injuries suffered by Mr Holden.

[98] Dr Grounds is an Honorary Research Fellow at the Institute of Criminology, Cambridge University. Prior to retiring in April 2010, he was a University Senior Lecturer in Forensic Psychiatry at the Institute of Criminology and Department of Psychiatry, University of Cambridge and an Honorary Consultant Forensic Psychiatrist in the Cambridgeshire and Peterborough Mental Health Partnership NHS Trust. Dr Grounds practiced forensic psychiatry for 33 years with many publications. Significantly, Dr Grounds had previous experience of assessing over 16 individuals who have been released following wrongful convictions.

[99] In my assessment of compensation for miscarriage of justice I awarded Mr Holden £75,000 for psychological injuries. Accordingly, within the ambit of this claim, Dr Grounds confined his evidence to a consideration of the alleged impropriety of soldiers following the plaintiff's arrest, to include physical assaults, water boarding, hooding and threats to kill.

Plaintiff's Personal Background

[100] The plaintiff was born in the Westrock area of Ballymurphy. He was one of twelve children. He had a good relationship with his parents. The plaintiff describes his mother as a strict disciplinarian. He attended schools near his home and describes good social relationships with other children. He left secondary school at the age of fifteen without academic qualifications.

[101] After leaving school, his father and uncle took him to the Chimney Corner Inn, Glengormley, where he met the chef and commenced employment. The plaintiff worked long shifts (10:00am – 11:00pm with a break from 3:00pm to 6:00pm or 10:00am to 6:00pm). He travelled to and from work by bus and continued to live at home. He was paid approximately £5 per week, some of which he contributed to his family's housekeeping. The plaintiff's ambition was to work as a chef on a boat and to travel. An older brother, Joseph, enjoyed this type of employment and the plaintiff reported that he was "mesmerized" about stories recounted by his brother following visits to America and Australia. Prior to his arrest, the plaintiff was attending the College of Business Studies one day per week training for qualifications as a chef.

[102] The plaintiff described himself as quiet, shy and with a happy personality at the time. He was involved in an ongoing relationship about a year prior to his arrest. He reported no criminal history or problems with the police before his arrest.

The allegations of ill treatment

[103] In his evidence, Dr Grounds referred to the detailed account provided by the plaintiff, particularly in respect of the allegation of water boarding or "water torture." The plaintiff gave a history to Dr Grounds that, following his arrest, a soldier punched him in the "solar plexus" which the plaintiff identified as his upper central abdomen. The plaintiff remembered that he buckled at the knees and slumped down against the wall, feeling winded, frightened and shocked. He was then dragged into a cubicle and placed on a chair when questioning commenced. The plaintiff recalled a soldier (Soldier A) angrily stating to him that "we believe you killed a soldier." The allegation was repeatedly put to the plaintiff, and he denied it.

[104] The plaintiff then told Dr Grounds that he was lifted off the chair and put on the floor. His arms and legs were held down. A towel was placed on his face and freezing cold water was poured slowly onto his face. Dr Grounds then recorded a verbatim account from the plaintiff:

> "The first thing I felt was the cold. Then the water on my face. Then, arrrgh! I couldn't breathe. I tried to breathe through my mouth but sucked water in. [I was] gagging. I tried to breathe through the nose. I felt water going up my nose. You can just feel yourself sinking away."

[105] The plaintiff said he could not remember how long this lasted. He felt he was passing out. He next remembered standing up with two soldiers holding him. He was placed on a chair. He was questioned again about the killing of the soldier but was unable to estimate the duration of the questioning.

[106] The plaintiff then states that he was subjected to "water torture" again. He recalled the same sensations, but the water seemed less cold. In particular, he experienced the same drowning sensation. The plaintiff stated as follows:

> "It kills me to think I could let them do it without a struggle. But [what] could I have done? I don't know."

[107] At this point, the plaintiff became distressed and tearful during the interview with Dr Grounds. The plaintiff was unable to state whether he was subjected to water boarding for a third or fourth time. The plaintiff persisted in his denial that he murdered the soldier.

[108] The plaintiff then told Dr Grounds that he remembers hearing a soldier tap a handgun against the door frame, saying, "This is for you", before leaving the room. The plaintiff was left alone for a few minutes.

[109] Soldiers returned and a pillowcase was placed over the plaintiff's head. He could only see light through the pillowcase. He was then taken outside and placed in a car with a soldier sitting on either side of him. The plaintiff recalled the soldiers telling him that he was being taken to Glencairn Estate which was about five to ten minutes' drive from the plaintiff's home. Dr Grounds recorded the following verbatim account:

> "Everybody knew what it meant. It was where the UDA and UVF dropped Catholics they had killed. Everyone knew that. I knew that. There are open fields and waste ground all over it."

[110] The plaintiff then recalls a soldier tapping him on the knee with what he believes was a gun. The soldier stated, "This is for you." The car then stopped, and the plaintiff was taken to what he believed was a field. He then recalled a gun being placed and tapped against the side of his forehead in the temple area. The plaintiff was told that if he did not admit to killing the soldier, they would kill him and leave him there. The plaintiff provided the following recollection to Dr Grounds:

> "I don't know what was going on in my head, but I turned round and said, 'yes, I killed him.' No hesitation.

> It was like I was watching me. I know I hadn't killed anybody and yet they were so adamant. … As far as I was concerned, they were going to shoot me - end of story. To this day, I have no doubt in my mind they would have killed me."

[111] In his evidence, Dr Grounds focused upon the words "It was like I was watching me." He stated this was a very striking statement which as a clinician, Dr Grounds identified as a "description or state of disassociation." The fact that the plaintiff did not struggle was a form of capitulation which, according to Dr Grounds, techniques like water boarding can induce. The admission made by the plaintiff was because he believed he was about to be killed.

[112] The plaintiff was then placed back in the vehicle. The hood was still over his head. At the Blackmountain Command Post the hood was removed and the plaintiff was placed in another cubicle. He was then interviewed by Captain Milton. During his military detention, the plaintiff stated that he had nothing to drink and had no food. When interviewed, the plaintiff found it difficult to concentrate and speak coherently. Captain Milton asked the plaintiff whether he had anything to tell him. The plaintiff recited to Dr Grounds that, in response to Captain Milton:

> "…[he] told him a cock-and-bull story about shooting a soldier, running away with the weapon, burying it beside a timber yard [and then] ran home."

[113] The plaintiff was further questioned about the weapon that was used. The plaintiff told Dr Grounds that he responded as follows:

> "[I] told him I shot him with a 303. Because I used to buy action comics, cowboy comics - bought them every day. Second World War action packed comics. They [referred to] … 303s [used by] the British Army. … I could only tell him what I thought I could get away with. … I didn't know what was operational. … I know now they would never send someone out on his own to shoot a soldier, and the person running 20 yards [away] with a weapon. … The Captain wanted a body. He got the statement and was happy enough with that."

[114] The plaintiff then stated that he was taken to Castlereagh Holding Centre. The plaintiff told Dr Grounds that, when he was interviewed by the police, they told him that if he did not cooperate, he would be "taken back up there." The plaintiff further reported to Dr Grounds:

> "I am still convinced they would have shot me. To this day no one will change my mind."

[115] The plaintiff described to Dr Grounds vivid, recurrent thoughts and nightmares at night of water torture and of being shot. The plaintiff reported that on occasions he would wake suddenly, tense, sweating, thinking of the water torture and experiencing intense fear.

[116] With regard to the frightening nature of the dreams described to Dr Grounds, the plaintiff gave the following account:

> "Anything that's happened to me in life hasn't been as frightening as the dreams, the nightmares. When the nightmares are on, it's never done until I wake up … Even in my dreams I'm fighting them, but I don't win. They always get me. The water goes in. I still feel to this day the water going up my nose."

[117] A significant aspect of Dr Grounds' evidence centred on the plaintiff's striking description of avoidance of water in particular situations. The plaintiff told Dr Grounds that, when in jail, he showered twice a day. After his release he worked in a leisure centre and enjoyed swimming. Then this enjoyment of water stopped. The plaintiff alleged that two years after release, he would ensure that no water would go near his head. The plaintiff claimed that he has not had a proper bath or shower for at least five to six years. He uses baby wipes to wash instead. While shaving, he allows some water in his hand but uses a towel to wipe shaving gel or foam off his face rather than rinsing his face with water.

[118] Mr Dunlop KC questioned Dr Grounds at length about this alleged aversion to water, particularly since the plaintiff admitted to showering whilst in prison and then subsequently enjoying swimming on his release. Dr Grounds conceded that the delay in developing these symptoms was unusual and he was unable to provide an explanation. However, Dr Grounds was not prepared to accept that these allegations were fabricated; nor did he think the plaintiff was delusional.

[119] Dr Grounds referred to the REY-15 test which was administered to the plaintiff. Essentially, this is a short memory test designed to assess the effort a person is making when tested. Low scores may indicate malingering and cast doubt on the validity of reported symptoms. Dr Grounds noted that the plaintiff's score was high (15/15). According to Dr Grounds he did not get any impression of exaggeration or malingering on the part of the plaintiff.

[120] In relation to the allegation of water boarding and threats to kill made by the soldiers, Dr Grounds stated that the descriptions provided by the plaintiff were a major contribution to his psychological symptoms and diagnosis of PTSD. The court notes that Dr Grounds and also Dr Daly, Consultant Psychiatrist retained on behalf of the Defendants, both agreed that the prognosis is pessimistic.

[121] One significant aspect of Dr Grounds' evidence related to the plaintiff's "very strong desire to discover why he had been arrested" and why the real truth has been withheld from him. The plaintiff gave the following account to Dr Grounds:

> "There is an abundance of proof, but the real truth is in those documents - the reason why they picked me, why I was the Patsy … then the hate, I mean real hate, comes on me that they have the documents. I don't care about the soldiers that tortured me. I don't care about the conviction. I don't care about the years in jail - because I can never get them back. I haven't got closure. The closure I want is the document that says, 'We know he is innocent.' … They have the documents to prove, without a shadow of a doubt, that I am innocent, and that's where the hate comes from - that they won't give me the evidence; that they won't give me the documents. I have to fight every step of the way to get one scrap of paper. … The case will never be done for me until that comes out. And the trouble is with me, I am very pessimistic. I can't see them releasing the papers. … The proof of the water boarding would be one of the soldiers saying, 'We did this.' I'll never get it."

[122] Mr O'Hare BL, Junior Counsel for the plaintiff, referred Dr Grounds to the fact that the defendants still maintained a denial of wrongdoing in this case. Dr Grounds was asked about the impact that the said denial of misconduct would have on the plaintiff. Dr Grounds confirmed that the denial would help maintain and exacerbate the plaintiff's symptoms. Although there is limited research evidence on whether "perpetrator impunity" exacerbates post-traumatic stress reactions, Dr Grounds stated that an apology from the defendants would certainly provide significant relief.

[123] In cross-examination, Dr Grounds was questioned as to whether he sought corroboration for the plaintiff's allegations. Dr Grounds stated that he attempted to obtain corroboration from one of the plaintiff's sisters, but to no avail. Mr Dunlop KC emphasised that the plaintiff was one of a family of twelve and questioned why Dr Grounds did not seek corroboration from any other siblings.

[124] Mr Dunlop KC suggested to Dr Grounds that memories fade after a period of time and essentially deteriorate. Dr Grounds did not totally accept this suggestion as accurate. He emphasised that memories of traumatic experiences take on a different quality. Traumatic events, or "hot spots" can remain consistent and accurate.

[125] With regard to the plaintiff's allegation that he made up a "cock-and-bull story", Mr Dunlop KC claimed that it was significant that the alleged cock-and-bull

story matched the events that occurred on the night in question. Mr Dunlop KC did not further elaborate upon this line of questioning with the witness.

[126] Probably the most significant aspect of Mr Dunlop's cross examination was the concession made by Dr Grounds that his diagnosis of PTSD and the other psychological sequelae incorporated the totality of the events, to include water boarding, hooding and threats to kill. In other words, Dr Grounds did not segregate the psychological impact of the alleged impropriety by the soldiers with the psychological damage caused by the other traumatic events, to include imprisonment for seventeen years.

Evidence of the plaintiff

[127] The plaintiff commenced his evidence in chief on 11 January 2022 when he was noticeably distressed and reported that he was unwell. He recommenced his evidence on 14 January 2022.

[128] The plaintiff repeated the same history he had provided to Dr Grounds in relation to the allegations of ill treatment. In particular, with regard to his description of the alleged waterboarding, he gave the same account which clearly still causes distress to the plaintiff despite the passage of time. However, whereas the plaintiff told Dr Grounds that he was unable to say whether the waterboarding had occurred on a third or fourth occasion, in his evidence the plaintiff stated that waterboarding had occurred three to four times.

[129] The plaintiff reiterated that he had been hooded, placed into a car and taken to area where he thought he would be shot. A gun was put to his head. He states that he falsely admitted to killing a soldier. The plaintiff stated that he had no doubt that he would have been shot dead if he did not make this admission.

[130] The plaintiff stated that, when questioned by Captain Milton, he gave a "cock-and-bull story" about shooting the soldier, the type of the weapon used and where he left the weapon after the shooting. The plaintiff repeated that he made the confession statement to the Police after he was told that if he did not assist, he would be handed back to the soldiers.

[131] On resumption of his examination in chief on 14 January 2022, the plaintiff provided comprehensive details as to adverse consequences and significant psychological trauma suffered by him arising from the arrest, detention and long-term imprisonment. The plaintiff also described the detrimental impact that the imprisonment has had on his life, health and relationships with other people since his release. The traumatic impact of all these elements have been comprehensively described by Dr Grounds in his psychiatric report and further analysed in my determination of compensation for miscarriage of justice. I will return to these considerations later in the judgment.

[132] The plaintiff remained adamant that the admissions made to the military and

the confession statement were false. When asked by Mr Brian Fee KC why did he make them, the plaintiff replied he "was tortured, plain and simple." He stated that he had played no part in the murder of Private Bell.

[133] The plaintiff was asked about his attitude to the fact of the defendants continual denial of impropriety. The plaintiff replied, "I feel that they still think I am guilty. I feel frustrated. I would like it finished. I wish these things were not in my head." The plaintiff emphasised that all he wants is an acknowledgement that he is telling the truth.

[134] The plaintiff was subjected to rigorous cross-examination by Mr Dunlop KC. The tactic employed by Mr Dunlop KC was to seek to undermine the plaintiff's credibility by firstly, highlighting alleged discrepancies between the plaintiff's evidence to this court and the notes of his evidence at the criminal court; secondly, emphasising the apparent failure of the plaintiff to make contemporaneous complaints of alleged impropriety; and thirdly, and probably more significantly, suggesting to the plaintiff that his confession was, in fact, true and, therefore, his allegations of waterboarding and threats to kill were fabricated.

[135] During the course of Mr Dunlop KC's cross-examination of the plaintiff, the court made the assumption that witnesses would be called on behalf of the Defendants to counter the plaintiff's allegations. It now transpires that this assumption was wrong. It was only after the plaintiff's case was closed that Mr Dunlop KC indicated to the court that he did not intend to call any rebuttal evidence.

[136] Mr Dunlop KC in cross-examination put to the plaintiff that he failed to make any contemporaneous complaints of ill treatment by the soldiers. Mr Dunlop stated that the only allegation made by the plaintiff was contained in the statement of Detective Sergeant Caskey, namely, that the plaintiff claimed he had been "roughed up a bit by the army." Emphasis was placed on the fact that the plaintiff not only failed to make complaints to police officers and the Royal Military Police, but he also made no complaint to Dr Irvine, a civilian doctor, nor did Dr Irvine identify and make a note of injury.

[137] The plaintiff accepted in his evidence that he did not make any complaints. He stated that at the time, namely, 1972, he did not make a distinction between soldiers and the police. He made it clear in his evidence that he did not consider the police to be any more approachable than the army and regarded them "all as one." The plaintiff also emphasised that at time he had never heard of the term "waterboarding." In his evidence he asked the rhetorical question, "How could he put a term to something he knew nothing about?" Mr Dunlop's response was that even without knowing the precise term, there was nothing to prevent the plaintiff from giving a description as to what had happened.

[138] Mr Dunlop KC highlighted the allegation made by the plaintiff during this hearing, namely that one of the detectives threatened the plaintiff that if he did not

repeat the admissions he made to the army, he would be handed back into the custody of the Military at Black Mountain Command post. Mr Dunlop challenged the plaintiff by stating that this was the first time he had made such an allegation and, secondly, the notes of the evidence at the criminal trial do not record such an allegation. At this stage, Mr Fee KC objected to the line of questioning and asked whether the defendants intended to call evidence to deny this allegation. No confirmation was given by Mr Dunlop KC.

[139] In the report from Dr Grounds at pages 9 and 10, the plaintiff gave the following account of his recollection when he was interviewed by the police:

> "They said if you don't help, you will be taken back up there. I am still convinced they would have shot me. To this day no one will change my mind."

[140] The court interprets reference to the words "you will be taken back up there" to mean the custody of the army at Black Mountain.

[141] Referring to the trial notes prepared by prosecution counsel, Mr Dunlop directed the plaintiff to his evidence that it was Sergeant Rowntree who told him that if he did not "tell the police" (ie confirm his confession) that he (Sergeant Rowntree) would come and collect the plaintiff. It should be noted that the actual note contains further detail. The note states as follows, "If you don't tell police same, I will come up and collect you - arrangement with the police."

[142] The court concludes that the words "arrangement with the police" are significant. They clearly imply cooperation between the army and police whereby if the plaintiff did not confirm his confession to the police, the arrangement would be that the army would come and collect him and that the police would hand him over to the army.

[143] The plaintiff repeated to Mr Dunlop in cross-examination that he had nothing to do with the death of Private Bell. He repeated that he had made up a "cock-and-bull story" and indicated that he had told Captain Milton a "load of crap." In cross-examination, Mr Dunlop forcefully asserted to the plaintiff that there was a remarkable degree of consistency between the plaintiff's alleged false confession and the facts surrounding the shooting, leading to the clear and obvious conclusion that the plaintiff's confession was not fabricated.

[144] The suggestion made by Mr Dunlop to the plaintiff that his confession was a truthful account are considered in more detail below at paras 162 to 171 below.

Evidence of Dr Bennett

[145] Dr Bennett has been a Reader in International Relations at Cardiff University since February 2016. He has been engaged in research regarding British counter-insurgency for some years and has published in this area. He has served as an expert historical witness. He has expertise in contemporary British military

history and in major archival collections. He is currently writing a book titled "The British Army's War in Northern Ireland 1966 – 1979."

[146] For the purpose of this litigation, Dr Bennett produced two reports dated 28 June 2018 and 15 October 2021. In his evidence, Dr Bennett referred the court to the salient matters arising out of relevant documentation contained in his reports.

[147] Dr Bennett's evidence in respect of his first report dated 28 June 2018 focused on the policy of detention and interrogation by the security forces, particularly the military, in the period 1971 to 1972. Considerable public controversary had been generated by the imposition of internment without trial in August 1971 (Operation Demetrius) and the associated "interrogation in depth" of fourteen men (Operation Calaba, namely "The Hooded Men"). After the publication of the Parker Report in March 1972 the British Government avowed never to use "interrogation in depth" in Northern Ireland again. The said interrogation methods included hooding, enforced wall standing, manufactured noise, restriction of diet and deprivation of sleep. Dr Bennett noted that water boarding, as alleged by Mr Holden, was not one of the explicitly banned interrogation methods, although it could be described as "intensive."

[148] Dr Bennett conducted a detailed survey of the archival evidence of the Government's policy in respect of detention and interrogation of suspects after the publication of the Parker Report and the consequent tensions and frustration existing between the army and various Departments. It is not necessary to go into specific detail in relation to the ongoing disputes and differences of opinion, suffice to state that, according to the extant policy at the time of the plaintiff's detention, questioning for prosecution or interrogation for intelligence-gathering should not have been conducted by soldiers. Ill treatment was explicitly banned.

[149] At para 71 of his report dated 28 June 2018, Dr Bennett states as follows:

> "The evidence scrutinised above does conclusively prove that the Chief of the General Staff, the Director of Military Operations and the General Officer Commanding, Northern Ireland all expressed support for the more intensive interrogation policy than Ministers seemed willing to permit. As PIRA offensive operations increased after the cease-fire broke in July 1972, the pressures grew for indulging in illegal interrogation, not least from soldiers themselves who resented having to fight a vicious enemy whilst unreasonably constrained. Ministers and Senior Officers understood these views. However, after the scandal surrounding "interrogation in depth" in 1971, reviving aggressive interrogation methods in full public view was politically impossible."

[150] In his evidence and in his report dated 28 June 2018, Dr Bennett candidly

accepted that his survey of the archival evidence cannot conclusively prove that the plaintiff was subjected to interrogation and ill treatment under three potential scenarios. The first alleged scenario was that the plaintiff's interrogation and ill treatment was derived from criminal behaviour carried out by the soldiers without any higher-level authorisation. The second alleged scenario was that the 1st Parachute Regiment, as a whole, may have conducted arrests and interrogations against a number of victims without higher military approval or with the authorities turning a blind eye to known irregularities. The third alleged scenario was that that the plaintiff's arrest and interrogation may have resulted from a covert special operation authorised by HQ Northern Ireland with ministerial sanction.

[151] Although Dr Bennett states that there is no conclusive evidence to prove that either of the alleged said scenarios pertained to Mr Holden, he goes on to state that:

> "But the evidence does suggest that one or other is highly likely to have occurred, not least because we do know the army were prepared to ignore ministerial decisions. And finally, we know that the Prime Minister personally endorsed a return to "intensive interrogation."

[152] With regard to the circumstances of this case, there is no evidence before this court which would lead it to reach a conclusion that the arrest and interrogation of the plaintiff was authorised by HQ Northern Ireland with ministerial sanction.

[153] In his evidence with regard to his second report dated 15 October 2021, Dr Bennett referred to a report prepared for the Chief of the General Staff dated 30 August 1972 encapsulating the ongoing dissatisfaction within the armed forces over arrest and detention. It stated that, of the forty-eight Provisional IRA officers arrested between 31 July and 25 August, only eighteen were charged with a criminal offence and none had been convicted.

[154] The report also refers to a letter from General Tuzo to General Carver dated 31 July 1972. In cross examination, Mr Dunlop KC took issue with Dr Bennett's written interpretation of this letter and challenged Dr Bennett's independence and impartiality. I reject this challenge. The letter in question was correctly referenced in a footnote and the full text of the letter was included in an index to the Report. However, for the avoidance of any doubt, this court has placed no weight on the said letter.

[155] At para 12 of Dr Bennett's second report, he referred to supplementary materials which included a considerable amount of evidence collected by the Association for Legal Justice on the nature of military interrogation in 1972. The materials include anonymous statements from persons who were subjected to interrogations by the army at the Black Mountain Army base, including water boarding. Some of the statements also refer to interrogations at the Black Mountain Army base when paratroopers threatened to shoot the arrested person, kicked him and placed him in a stress position. Another person, who was identified, referred to

her son being arrested seven times between 8 August and 5 September 1972 and on each occasion, he was taken to the Black Mountain Army base and beaten. On one occasion, a soldier threatened to shoot him in the head.

[156] This court cannot place any weight on the contents of the said anonymous statements. However, there is a statement from a Ms. Teresa Cahill who recorded that her son, Joe, aged nineteen, had been arrested and questioned on three occasions at the Black Mountain post between the end of July and November 1972. It is stated that the interrogations involved abusive language, death threats and physical violence. The statement also provides that another son, namely, Frank, seventeen years old, was also interrogated at the same location in September during which he was brutally beaten and had a wet towel tied tightly round his head and face which was then filled with water at intervals causing him great distress and suffocation. The statement from Ms. Cahill is dated November 1972.

[157] The report from Dr Bennett refers to a statement dated 1 September 2020 from Frank Cahill. I was not provided with a copy of the statement.

[158] Regrettably, Teresa Cahill is now deceased. Accordingly, the court can place no weight on the content of these statements, presumably raised to corroborate the evidence of the plaintiff.

Decision on the Allegations of Ill Treatment

[159] In coming to my decision, I have taken into consideration all the documents referred to me in evidence, the statements and depositions of the witnesses prepared for the criminal trial and prosecuting counsel's notes of the evidence given in the voir dire and at the trial. I have also considered the decision of the Court of Appeal in *R v Holden* [2012] (op cit) and the documentation provided by the CCRC. I have given particular attention to the evidence of the plaintiff, Dr Grounds, Dr Bennett, Mr Murphy and Mr Cobain. Finally, I have benefited greatly from the comprehensive closing written statements from counsel on behalf of the plaintiff and the defendants.

[160] After much deliberation, I am persuaded, on the balance of probabilities, that the plaintiff was subjected to the acts of impropriety as alleged against the defendants. It is my decision that the plaintiff was subjected to waterboarding; he was hooded; he was driven in a car flanked by soldiers to a location where he thought he would be assassinated; a gun was put to his head, and he was threatened that he would be shot dead. It is the view of this court that the said ill-treatment caused the plaintiff to make admissions and a confession statement.

[161] In reaching this decision, I have been influenced by and have placed weight on the following factors:

(a) The plaintiff was eighteen at the time of his arrest. He left school at the age of fifteen with no qualifications. He is described as a man of low intelligence.

Despite the passage of time, in my judgment there has been a constant thread of consistency in the plaintiff's evidence to this court when compared to his previous accounts of the events. Some inconsistencies were noted, but not sufficiently material to persuade me that the plaintiff was fabricating his evidence. On occasions during his evidence, the plaintiff became agitated, particularly during cross examination. This was plainly understandable. The plaintiff was obviously frustrated by his limited vocabulary and an inability to adequately express his feelings. However, this frustration and occasional agitation did not detract from my overall impression that the plaintiff was an honest and truthful witness, genuinely determined to give an honest account of his traumatic past experiences which undoubtedly, he was forced to relive during the course of his evidence.

(b) On or 1 October 1972 the first defendant received intelligence from a source that the plaintiff was the gunman who fatally wounded Private Bell. Unsurprisingly, the identity of the source has not been revealed. No evidence has been produced as to the reliability of the source. The actual source document has been heavily redacted following a claim for public interest immunity (PII). Accordingly, this court can place little weight on the document with regard to its accuracy and reliability. Although no confirmatory evidence has been called by the defendants, it seems likely that the intelligence contained in the source document led to the plaintiff's arrest. It is also likely that there were persons in the employ of the defendants who believed the intelligence was true. The said persons would have been aware that, in the absence of forensic, ballistic, pathology and/or eyewitness evidence, it was unlikely that the plaintiff would face charges in relation Private Bell's murder. The motivation for the arrest and interrogation of the plaintiff was clear and obvious. Even if I accept that the initial arrest of the plaintiff was lawful, the subsequent detention, questioning and the deployment of interrogation techniques by the first defendant were blatantly unlawful and unjustified.

(c) It is clear from the above analysis that the plaintiff, following his arrest, should not have been taken to Black Mountain Army base. No details have been provided as to who directed the plaintiff's arrest and who directed that the plaintiff be brought to the Black Mountain base. In my judgment, this was a blatant and deliberate disregard of the instructions contained in the Blue Card and revised arrest procedures. It is my view that the purpose was clearly to interrogate the plaintiff. It is significant that the initial statement from Private Lockhart (which was not disclosed at the criminal trial) specified that the reason the plaintiff was arrested and brought to Black Mountain was because "the Army wanted to see [him]."

(d) The defendants failed to disclose to the DPP, prosecuting counsel and defence counsel, the Blue Card and Private Lockhart's original statement. No details or information have been provided as to who directed that a second statement

from Private Lockhart should be taken, why it was considered necessary to obtain a second statement, why extracts from the original statement were excluded, who took Private Lockhart's second statement and the actual date of the statement? No evidence has been called to deal with these critical issues. The plaintiff's counsel submits, and I agree, that the obvious and probable explanations are that the servants and agents of the first defendant wanted to avoid any suggestion that the purpose of bringing the plaintiff to the Black Mountain Army base was to interrogate him and, if possible, to obtain a confession. Plaintiff's counsel argues that if a police officer or officers took a second statement from Private Lockhart and failed to provide disclosure of the original statement, then the servants of the second defendant are surely complicit. No evidence has been produced to confirm the allegation.

(e) The blatant and deliberate failure of the first defendant to disclose the said documents led the Court of Appeal in *R v Holden* to reach a conclusion that "there is a real possibility that the admissions would not have been admitted in evidence and, if they had been admitted, they may not have been considered reliable by the jury" (see paras 22 to 24).

(f) The Court of Appeal in *R v Holden* was also clear that if the documents had been disclosed, there was a real possibility that the plaintiff's defence team would have been in a position to significantly undermine the credibility and reliability of Captain Milton and Sergeant Rowntree. Since the plaintiff initiated civil proceedings in 2014, the Defendants have had ample opportunity to take statements and affidavits from both Captain Milton and Sergeant Rowntree in anticipation of them giving evidence in this case. No documents have been provided. The said witnesses were not called to give evidence. Accordingly, the plaintiff has been denied the opportunity to cross-examine the witnesses with a view to undermining their credibility and reliability.

(g) The defence urges the court to accept the truthfulness and accuracy of the statements and depositions given by Sergeant Rowntree and Captain Milton and their evidence at the criminal trial. In light of the observations of the Court of Appeal detailed above, and the failure to call them to give evidence, I consider this argument to be unsustainable. The weight to be given to the statements, the depositions and the oral evidence of both Captain Milton and Sergeant Rowntree at the trial has to be assessed in light of the first defendant's failure to disclose relevant materials and the criticisms of the Court of Appeal. The fact that Sergeant Rowntree and Captain Milton in 1973 denied that the plaintiff was subjected to assaults, hooding, waterboarding and threats to kill must necessarily be viewed with considerable caution.

[162] On several occasions during the course of the hearing, Mr Dunlop KC submitted that it was not for this court to decide whether the confession statement made by the plaintiff was true or untrue and whether the plaintiff did or did not fire

the fatal shot. The assertion is entirely correct. However, somewhat paradoxically, in his attempt to attack the credibility of the plaintiff, Mr Dunlop seeks to persuade me that on the basis of information provided by the plaintiff from his own personal knowledge in 1972, this must lead the court to "conclude that the plaintiff did not make up his account of his involvement in the murder and accordingly (the court) cannot accept his evidence that his confession was induced by waterboarding and/or threats to kill by the soldiers"

[163] In essence, replicating the submissions made by prosecuting senior counsel at the criminal trial, the defence in this case argues that there is such a degree of consistency between the plaintiff's alleged false confession and the relevant circumstances of the shooting that the inevitable conclusion must be that the plaintiff's confession was not fabricated. The defence submit that it is significant that the plaintiff accepted he told Captain Milton the following:

(a) the soldier was going away from him;

(b) the soldier was the last man;

(c) the soldier was struck in the head or neck by a bullet;

(d) that he was wearing gloves;

(e) that he was using a ·303 rifle;

(f) that he fired a single shot;

(g) that the rifle was delivered to him with eight bullets; and

(h) that he fired the shot from shops on Springhill Avenue.

[164] I have carefully considered this submission in the context of other relevant documentation. Documents disclosed reveal that Captain Milton made a statement (undated) and a deposition dated 21 December 1972. Notes were also taken by prosecution counsel of Captain Milton's evidence. (Notes allegedly taken by Captain Milton when he interviewed the plaintiff at Black Mountain on 16 October 1972 have not been produced). A comparison of the said documents reveal, in my judgment, several discrepancies which appear to cast doubt on the accuracy on the defendants' submissions.

(i) Firstly, in his deposition and notes of evidence at the criminal trial, Captain Milton states that the plaintiff told him he shot at the last soldier in the patrol. However, in Captain Milton's statement, there is no reference to any assertion made by the plaintiff that he fired at the last man in the patrol. It is assumed that Captain Milton would have made this statement prior to his deposition and prior to his evidence at the criminal trial.

(ii) Secondly, in his deposition, Captain Milton states that the plaintiff told him that he hit the soldier in the top part of his body, possibly the neck or head. However, in his statement, Captain Milton records that the plaintiff told him that he fired at the soldier hitting him on the upper part of the body, possibly the neck. There is no reference in Captain Milton's statement that the plaintiff told him he struck the soldier in the head.

(iii) Thirdly, in his deposition, Captain Milton stated that he could not recall details provided by the plaintiff as to how the rifle turned up in McManus' house. Captain Milton also alleges in his deposition that the plaintiff said "McManus was not responsible for taking the weapons in." However, in Captain Milton's statement, there is no reference to McManus, nor to the rifle being found in McManus' house, nor to the suggestion that the plaintiff allegedly said that McManus was not responsible.

(iv) Fourthly, in his deposition, Captain Milton stated that the plaintiff told him he had carried out "six snipes." In his evidence at the criminal trial, Captain Milton said that the plaintiff told him he had carried out "two snipes" previously. In his statement, Captain Milton made no reference to the number of occasions in which the plaintiff claimed to be involved in "snipes." In his deposition, Captain Milton said that "I asked him what sort of aim he took, because I was interested in whether he was using a sniper scope. He said that he just aimed the rifle and fired and made no mention of a sniper scope." In his statement, Captain Milton does not refer to any conversation with the plaintiff about a sniper scope, nor is there any reference to the plaintiff stating that he did not use a sniper scope.

[165] Further careful comparison of the above documents may reveal other discrepancies. The purpose of recording these discrepancies is to highlight inaccuracies which undoubtedly would been exploited by Mr Fee KC, senior counsel for the plaintiff in cross-examination of the witnesses, if they had been called to give evidence. Without testing the accuracy and reliability of the witnesses, it cannot be assumed that the plaintiff's confession was truthful.

[166] In seeking to convince the court that the plaintiff's confession is truthful, the Defence argued that, according to the deposition of Detective Sergeant Fitzpatrick, the plaintiff stated the rifle he used was found by soldiers in the home of Mr McManus. It is also claimed that the plaintiff stated the rifle was delivered to him with eight bullets.

[167] The weapon recovered from the home of Patrick McManus was a ·303 Enfield rifle with a magazine containing seven bullets.

[168] The court is drawn to reach the following conclusions:

(i) there is no forensic or ballistic evidence that the ·303 rifle found at the home of Patrick McManus was the murder weapon;

(ii) there is no evidence that the bullet which fatally wounded Private Bell was a ·303 calibre;

(iii) no bullet or fragment of any bullet was found at the scene or recovered from Private Bell's body;

(iv) no cartridge was found at the location where the weapon was allegedly discharged;

(v) there is no forensic or ballistic evidence to connect the fatal bullet with a ·303 rifle or a weapon capable of discharging ·303 bullets.

[169] It cannot be categorically stated that the shot which fatally wounded Private Bell came from the south, namely, the lower end of Springhill Avenue. As examined further below, it is significant that soldiers in the relevant patrol believed that the shot was fired from the west, ie from the direction of Ballymurphy. Also, a recently discovered RMP map and army logs appear to confirm that the fatal shot was fired from the Ballymurphy area.

[170] The court had the benefit of three comprehensive reports (including appendices) from Mr Brian Murphy, Consulting Engineer, dated 19 January 2016; 20 February 2017 and 11 September 2020. During Mr Murphy's testimony to this court, the said reports were admitted into evidence. For the purpose of my decision, it is not necessary for me to consider every aspect of the many issues raised by Mr Murphy in his reports and in his evidence. However, in my judgement, the following highlighted matters are very relevant.

(a) Firstly, a review of the depositions made by members of the army patrol, namely, Corporal Hill, Private Simpson and Private Smart provide that they believed the single high velocity shot came from the Ballymurphy area, which was to the west of the junction between Springhill Crescent and Springhill Avenue. Conversely, the confession statement of the plaintiff places him at "an alleyway at the side of the shops opposite Corpus Christie Church." This is almost directly south of where the deceased, Private Bell, was shot. After the shooting, Private Bell was moved to the side of No. 59 Springhill Avenue "for better cover." According to Mr Murphy, this location would have provided cover from further shooting from the western side of Springhill Avenue (ie from Ballymurphy/Divismore direction) and not from the south of Springfield Avenue, namely the alleged location of the plaintiff.

(b) Secondly, army logs from 17 September 1972 at 14:10 refer to a contemporaneous entry whereby a foot patrol near 80 Springhill Avenue was fired on from the Ballymurphy area (exact location not known) and that one round (possibly an armalite or ·22) hit Private Bell in the head. A second army log at 14:09 mentions a casualty at Springhill Avenue with one shot fired from Ballymurphy and no fire was returned.

(c) Due to the persistence of the plaintiff's solicitor in her determination to obtain full discovery, an RMP report was eventually provided to the solicitor following a FOI request. The RMP report contained at least ten relevant documents, including a scale plan of the relevant locus. According to Mr Murphy, the scale plan had been professionally produced in that it accurately identified the position of Private Bell, the positions of the other soldiers and was derived from an OSNI plan. Significantly, commentary boxes had been typed and placed on the plan. At the top left-hand corner of the plan, within a commentary box, the words "Murder of Private Bell which occurred at 14.09 hours on Sunday, 17 September 72" have been included. Below, within another commentary box, the legend states, "Shot believed to have been fired from this area." Three lines drawn from the commentary box clearly refer to locations in Ballymurphy and more specifically in Divismore Park. This area is to the west of Springhill Avenue and, as stated, from the area known as Ballymurphy. It is relevant that Mr Murphy states that these locations would not have had a direct line of sight to the junction of Springhill Avenue and Springhill Crescent where Private Bell was shot. According to Mr Murphy, in his initial report, the area to the rear of the houses at 40 to 50 Divismore Park would give a clear line of sight to the junction and a ready escape route. Inexplicably, the RMP report which included the said map and other relevant documents was not provided to the CCRC prior to its reference to the Court of Appeal in 2021.

[171] This court has not been asked to make a decision on whether the confession statement and other admissions alleged to have been made by the plaintiff are true and accurate. Without the benefit of hearing from all the witnesses, assessing their credibility and reliability, such as task for this court would be extremely difficult, if not impossible. Rather, this court is required to make a decision as to whether, on the balance of probabilities, the plaintiff was subjected to assaults, threats to kill, hooding and waterboarding by servants or agents of the first defendant at Black Mountain.

[172] On the basis of the analysis above, I have come to the conclusion that the plaintiff was subjected to the said unlawful acts of violence. Also, based on the evidence presented and my decision that the plaintiff was subjected to waterboarding, threats to kill, assaults and hooding, I do not rule out the possibility that the confession and the alleged admissions were untruthful.

[173] The plaintiff's claim for compensation under section 133 of the Criminal Justice Act 1988 (as amended) did *not* make an award for the physical ill treatment suffered by the plaintiff whilst in military custody at Black Mountain Barracks, to include the use of stress and search position, assault and battery, water torture, hooding and threats to kill. The rationale was that, in the absence of such evidence, it was not possible for me as the independent assessor to come to a conclusion that the said acts of impropriety and ill treatment had occurred.

[174] It is axiomatic that the major motivating factor behind these civil proceedings

was to give the court an opportunity to review all the available evidence in respect of alleged ill treatment and, in particular, to test the facts relied upon by the plaintiff in support of his claim against any contrary case advanced by the defendants.

[175] After a careful consideration of all the evidence, to include the evidence of the plaintiff, it is my view that the plaintiff is entitled to an award of damages for the deliberate and unlawful infliction of physical injury to the plaintiff. Inevitably, the award must include a figure for the assaults per se but also a figure for the injury to the plaintiff's feelings, namely the indignity, mental suffering, disgrace and humiliation suffered by the plaintiff.

[176] Although no medical evidence has been produced showing identifiable physical injury, I accept that the plaintiff was punched and made to stand in a stress position.

[177] In *Ireland v UK* (1979-80) 2 EHRR 25, the European Court of Human Rights ("ECtHR") examined, among other issues, whether five interrogation techniques used by the UK against detainees were contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment established by Article 3 of the European Convention of Human Rights. The five techniques were the following: wall-standing; hooding; subjection to noise; deprivation of sleep; and deprivation of food and drink. Examining each technique, the court concluded that they constituted a practice of inhuman and degrading treatment (but not torture), which said practice was in breach of Article 3 of the Convention. On 4 December 2014, the Government of Ireland made an application to the ECtHR requesting a revision of the Court's 1978 judgment in *Ireland v United Kingdom.* In a judgment issued on 20 March 2018 the ECtHR, by a majority of six to one, dismissed the request to revise the 1978 judgment to substitute a finding of torture for one of inhuman and degrading treatment. Waterboarding was not considered as one of the prohibited techniques (see also the decision of Supreme Court, *In the matter of an application by Francis McGuigan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3)* [2021] UKSC 55 at paras 83 to 98*).*

[178] Returning to the facts in this case, I accept the plaintiff's evidence that he was hooded, placed in a vehicle and driven to a location where he feared for his life. I accept that a gun was put to the side of his head, in the temple region, and that the plaintiff genuinely believed that he was going to be killed. I also accept that specific threats were made to his life. Hooding of the plaintiff, in the circumstances as alleged, constitutes inhuman and degrading treatment in breach of Article 3 of the Convention.

[179] Furthermore, the plaintiff describes, and I accept, that at Black Mountain Army base, during unlawful questioning of the plaintiff, he was lifted off a chair, placed on the ground and that his hands and legs were held down. A towel was placed on his face and then water was poured slowly over his face. He could not breathe. He tried to breathe through his mouth, but gagged as he sucked water in. He tried to breathe through his nose but felt the water going up into his nose. He

described a drowning sensation and felt himself 'sinking away.' The 'water torture', as he described it, occurred three or four times. Leaving aside the significant psychological effects of this 'water torture', the plaintiff now has an aversion to contact with water.

[180] On the basis of the above, I make a basic award of £50,000 damages for significant nature of the assaults and threats per se, the physical injuries and the injury to his feelings, including the mental suffering at the time of the assaults, the indignity, insult and humiliation suffered by the plaintiff.

[181] I have also decided that the plaintiff is entitled to aggravated damages caused by the first defendant's flagrant, unlawful and unacceptable nature of the ill treatment. My reasons justifying an award of aggravated damages are detailed in paras 217 to 222 below.

[182] It is clear from the report of Dr Grounds, Consultant Psychiatrist, dated 16-February 2016, that the plaintiff has suffered from a number of psychiatric/psychological conditions, to include post-traumatic stress disorder and enduring personality change after catastrophic experience and dysthymia. In my assessment for compensation pursuant to section 133 of the Criminal Justice Act 1988, I made an award £75,000 for the psychological/psychiatric injuries. Careful consideration of Dr Grounds' report reveals that, in making his assessment as to the causes of the plaintiff's psychiatric injury, Dr Grounds took into account all relevant factors relating to the plaintiff's unlawful detention, false imprisonment and ill treatment. The plaintiff's allegations relating to water boarding, hooding and threats to kill were included in the allegations of ill treatment which necessarily resulted in the diagnosis of post-traumatic stress disorder. Accordingly, to avoid double counting, no additional award will be made in these proceedings for the psychiatric injuries suffered by the plaintiff as a result of the ill treatment of the plaintiff at Black Mountain Army Base on 16 October 1972.

Malicious Prosecution

[183] A successful action for malicious prosecution requires the plaintiff to prove the following five elements: -

(i) The plaintiff was prosecuted by the defendant.

(ii) The prosecution was determined in the plaintiff's favour.

(iii) The prosecution was without reasonable and probable cause.

(iv) The prosecution was malicious.

(v) The plaintiff suffered actionable damage.

[184] With regard to the above elements, the defendants do not dispute that the plaintiff was subjected to a prosecution for murder and that the said prosecution was

determined in his favour when the plaintiff was acquitted by the Court of Appeal. The defendants also accept that the plaintiff has suffered actionable damage. However, it is denied that the first and/or second defendant instituted or carried on the proceedings maliciously and that the prosecution was without reasonable and probable cause.

[185] Before I consider the issues as to whether the prosecution was without reasonable and probable cause and whether it was malicious, it is necessary to analyse the roles played by both the first defendant and the second defendant in the prosecution of the plaintiff.

[186] Mr Dunlop KC, on behalf of both defendants, accepts the proposition that the Ministry of Defence and the Chief Constable would be vicariously responsible for any tortious liability of their respective servants and agents.

[187] In principle, there may be more than one prosecutor in an individual case. The case law establishes that an individual or a group of individuals may be treated as a prosecutor depending upon the circumstances. In *Mahon v Rahn* [2000] 1WLR 2150, at para 269, Brooke LJ stated that it may be possible to determine this issue by asking three questions:

> "(1) Did A desire and intend that B should be prosecuted?
>
> (2) If so, were the facts so peculiarly within A's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgement?
>
> (3) Has A procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?"

[188] It is settled law that, where an individual provides information to the police which leads to a prosecution, this does not make the individual the prosecutor. However, as stated by Lord Keith in *Martin v Wilson* [1996] AC 74 at pp 86G-87A, this rule is subject to a significant qualification-

> "Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the

> complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgement, and if a prosecution is instituted by the police officer, the proper view of the matter is that the prosecution has been procured by the complainant."

[189] For the reasons given above, it is my decision that the servants of the Ministry of Defence wrongfully and unlawfully induced the plaintiff to make admissions and thereafter a confession statement. Apart from the confession statement there was no admissible evidence to have grounded a prosecution. Soldiers, acting on behalf of the Ministry of Defence, deliberately manipulated the DPP into bringing the prosecution. I am satisfied that the prosecution was procured by servants of the Ministry of Defence in circumstances where it was virtually impossible for the DPP to exercise any independent discretion or judgement. For these reasons, that the Ministry of Defence is to be treated as the prosecutor.

[190] For the avoidance of any doubt, on the basis of the evidence received, the DPP are not open to criticism. Any independent exercise of judgement by the DPP was virtually impossible, because the decision to prosecute was based on the assumption that the confession statement made by the plaintiff was lawfully obtained.

Was the prosecution without reasonable and probable cause?

[191] In *Glinski v McIver* [1962] AC 726 at 768, in addressing this question, Lord Devlin stated as follows:

> "First the question is a double one: did the prosecutor actually believe, and did he reasonably believe that he had cause for prosecution? Clearly the test has objective and subjective elements."

[192] In *Rees v Commission of Police for the Metropolis* [2018] EWC Civ. 1587, McCombe LJ asked the following question at paras 69-70:

> "Does a prosecutor have *subjective* reasonable and probable cause for prosecution if he presents a case heavily reliant upon evidence which, because of his own misconduct, he knows is "certain or at least highly likely" to be ruled admissible by any trial judge? I am not aware of any case in which this question has arisen."

[193] The question posed by McCombe LJ arises in this case. There was no admissible evidence that linked the plaintiff to the murder and no realistic prospect of a conviction. Even if the first defendant's servants or agents strongly believed that the plaintiff was guilty of murder, the use of oppressive force, to include waterboarding, hooding and threats to kill, unlawfully induced the confession and

in effect deliberately manipulated the prosecution. The impropriety of the first defendant's servants or agents amounted to, at the very least, a deliberate attempt to pervert the course and interests of justice so as to procure a conviction. The inevitable conclusion is that a reasonable and probable cause is unsustainable.

Was the prosecution malicious?

[194] In *Dallison v Caffery* [1965] 1 QB 34 at 371, Diplock, LJ (as he then was) emphasised the essential ingredients of the tort of malicious prosecution:

> "To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted. A person, whether or not he is a police officer, acts reasonably in prosecuting a suspected felon if the credible evidence of which he knows raises a case fit to go to a jury that the suspect is guilty of the felony charged. This is what law constitutes reasonable and probable cause for the prosecution.
>
> One word about the requirement that the arrestor or prosecutor should act honestly as well as reasonably. In the context it means no more than that he himself at the time believed that there was reasonable and probable cause, in the sense that I have defined above for the arrest or for the prosecution as the case may be. The test whether there was reasonable or probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause. Whether that test is satisfied the onus lies on the person who has been arrested or prosecuted to establish that his arrestor or prosecutor did not in fact believe what ex hypothesi he would have believed had he been reasonable. … In the nature of things this issue can seldom seriously arise."

[195] The above dicta of Diplock LJ were quoted by McCombe LJ in *Rees v Commissioner of Police for the Metropolis* [2018] EWCA Civ. 1587 at para 79. The facts in Rees are interesting and relevant to this case. In April 2008 the appellants were charged with the murder of Daniel Morgan following the investigation of an alleged contract killing in a pub car park in south London in March 1987. There were no eyewitnesses. An important plank of the Crown case presented against the appellants was the evidence of a Gary Eaton who claimed to have been present at

the scene shortly after the attack on Daniel Morgan.

[196] The learned trial judge in the criminal case found that a police officer, DCS Cook, had committed the crime of perverting the course of justice by suborning Gary Eaton, a man with a known criminal past who suffered from a known personality disorder. DCS Cook knew that the suborned evidence of Eaton was tainted by his own wrongdoing. DCS Cook was found to have compromised the debriefing of Eaton by initiating and receiving an extensive number of unauthorised direct contacts with Eaton in the period leading up to Eaton making his statements, in contravention of express procedures for keeping a "sterile corridor" between the debriefing officers and the investigation team. In the course of the debriefing process, Eaton moved from being unwilling to identify any of the participants in the murder to directly naming the three appellants and giving his graphic (as it turned out obviously inaccurate) description of the murder scene.

[197] At the trial in February 2010, after Eaton's evidence was excluded, proceedings were discontinued against the appellants and verdicts of "not guilty" were entered.

[198] In actions brought by the appellants against the defendant, it was claimed that the appellants had been prosecuted maliciously and as a direct result of misfeasance by DCS Cook in public office. The trial judge, Mitting J, found that DCS Cook was, for the purpose of the claims, guilty of an offence of intending to pervert the course of justice. However, he rejected the claims on the basis that although it had been established that DCS Cook's actions regarding Eaton had led to the claimants being prosecuted, the defendant was not vicariously liable to compensate the appellants for the tort of malicious prosecution because DCS Cook was not a prosecutor, had not been malicious, and there was reasonable and probable cause to prosecute. Secondly, in respect of the claims for misfeasance in public office, although DCS Cook was a public officer exercising a public power and he had deliberately perverted the course of justice in the knowledge that it would probably cause injury to the claimants, the defendant was not liable to compensate them because they would have been prosecuted by the Crown Prosecution Service on other evidence.

[199] The appeal to the Court of Appeal succeeded. In his judgment in *Rees v Commissioner of Police for the Metropolis*, McCombe LJ came to the following conclusion at para 91:

> "For these reasons, I consider that DCS Cook's belief (as found by the judge) that the appellants were guilty of the murder, cannot prevent the prosecution having been malicious. He knowingly put before the decision maker a case which he knew was significantly tainted by his own wrongdoing and which he knew could not be properly presented in that form to a court. To find that the element of malice was not satisfied in this case, to my mind,

would be, quite simply, a negation of the rule of law."

[200] In my judgement, the same reasoning applies to the circumstances of this case. It is entirely feasible that Sergeant Rowntree and Captain Milton believed that the plaintiff was guilty of the murder of Private Bell. Absent admissions by the plaintiff, it appears that there was no admissible evidence linking the plaintiff to the murder. The admissions made by the plaintiff were obtained using oppressive and unlawful techniques.

[201] Malice means ill will against a person, but in its legal sense, it is a wrongful act, done intentionally, without just cause or excuse. The first defendant's servants or agents knowingly put forward evidence which they knew was significantly tainted by their wrongdoing and which they knew could not be properly presented in that form to a court. It is incontrovertible, in my judgement, that Sergeant Rowntree and Captain Milton were malicious in procuring the prosecution of the plaintiff.

[202] For the reasons given above, it is my decision that the first defendant is vicariously liable for the malicious prosecution of the plaintiff.

Is the Second Defendant guilty of malicious prosecution?

[203] The plaintiff also has the burden of proving that the second defendant, his servants or agents, procured, instituted and carried on the prosecution maliciously in the absence of reasonable and probable cause.

[204] For the reasons given below, I am not satisfied that the said elements of this tort have been satisfied.

[205] Firstly, the plaintiff has failed to convince me to the requisite standard that the second defendant, his servants or agents, were complicit or had any knowledge that the plaintiff had been subjected to unlawful and oppressive treatment, to include waterboarding, hooding and threats to kill. When the plaintiff was brought to the police station, he did not make any complaints of ill treatment to the custody sergeants, namely, Sergeant Armstrong at 6:35am and Sergeant McKnight at 7:00am. Furthermore, no complaints were made by the plaintiff during examinations by Dr Henderson at 5:00am, Captain Lord at 6:45am and 11:55am. The plaintiff was further examined by Dr Irwin, a civilian doctor who did not record any complaint made by the plaintiff or note any physical injury on examination. Apart from an allegation contained in the statement of Detective Sergeant Caskey that the plaintiff had been "roughed up a bit by the army", there is no evidence that the plaintiff was subjected to ill treatment.

[206] Secondly, there is no evidence that the "Blue Card" and its contents were at the relevant time within the knowledge of the second defendant and/or the DPP. Indeed, the investigations of the CCRC indicate that neither prosecuting counsel nor the DPP were aware of the provisions of the Blue Card.

[207] Thirdly, an issue of concern for this court is whether Detective Sergeant Fitzpatrick was complicit in or had knowledge that the original statement of Private Lockhart had been altered. By way of summary, the original statement prepared by Private Lockhart and witnessed by Detective Sergeant Fitzpatrick disclosed that the plaintiff had been arrested under regulation 11 of the Special Powers Act and was to be taken to the Black Mountain Base because "the army at Black Mountain wished to see them." However, in Private Lockhart's deposition, which was presented at the criminal trial, reference to the plaintiff and his brother being taken to Black Mountain because "the army wished to see them" had been removed. There is no evidence that Detective Sergeant Fitzpatrick was involved in the preparation of Private Lockhart's deposition and that he was responsible for concealing or removing Private Lockhart's first statement. Unfortunately, Detective Sergeant Fitzpatrick is now deceased, and the court has been deprived of an opportunity to consider in detail the background circumstances leading to the inconsistencies in Private Lockhart's original statement and deposition.

[208] Fourthly, although the plaintiff now alleges that he was threatened by Detective Sergeant Fitzpatrick and/or Detective Sergeant Caskey that he would be handed back to the custody of the first defendant unless he maintained his confession, these allegations were not advanced in the course of the criminal trial. The said allegations were not put to Detective Sergeant Fitzpatrick during the *voir dire* or subsequently before the jury.

Damages for Malicious Prosecution

[209] Based upon the above analysis, I have come to the conclusion that the first defendant is vicariously liable for the malicious prosecution of the plaintiff. However, I am conscious of the duty of the court to avoid double counting, particularly in cases of awards for both aggravated and exemplary damages (see *Thompson* at p 513A). In the course of my assessment of compensation under section 133 of the Criminal Justice Act 1988 (as amended), I took into consideration, *inter alia*, the conduct of the investigation and the prosecution of the offences. I refer, in particular, to paras 6:9 and 6:10 of my assessment in which I stated as follows:

> "In reaching my conclusion on the assessment of the basic award for loss of liberty, I have taken into consideration by analogy the awards for the torts of false imprisonment and malicious prosecution. … False imprisonment embraces an award in damages for loss of liberty itself, the conditions and effects of the imprisonment, hardship, injury to feelings and afront to dignity and damage to reputation. The essential elements of malicious prosecution embrace the distress of facing criminal proceedings and trial, any consequent appeal, damaged reputation, inconvenience, the suffering of part or all of the sentence and thereby the loss of liberty and the conditions and effect of imprisonment. Where the two

> torts are applicable to the facts of a case, it is clear that there is an overlap and duplication."

[210] The assessment did not make a specific finding of malicious prosecution. Accordingly, for the reasons given, and having considered the guidelines in *Thompson*, I will make an award of £10,000 for malicious prosecution against the first defendant only. The reduced award takes into consideration the compensation already paid to the plaintiff so as to avoid the possibility of double counting.

Misfeasance in Public Office

[211] The essential ingredients of the tort of misfeasance in public office are as detailed by Lord Steyn in *Three Rivers DC v Bank of England* [2003] 2 AC 1 at 191B - 194C.

[212] The first two ingredients of the tort are not in dispute in this case, namely, that the soldiers (and indeed the police officers) are plainly public officers who were at all times purporting to exercise their public functions, particularly in respect of their powers pursuant to the Civil Authorities (Special Powers) Acts (NI) 1922 - 1943. As stated by Lord Steyn:

> "It is not disputed that the principles of vicarious liability apply as much to misfeasance in public office as to other torts involving malice, knowledge or intention (see *Racz v Home Office* [1994] 1 All.E.R. 97."

[213] The third element of the tort relates to the state of mind of the defendant. In this regard, Lord Steyn stated as follows:

> "The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a police officer, ie conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained off and that the act will probably injure the plaintiff. It involves bad faith in as much as the public officer does not have an honest belief that his act is lawful."

[214] On the facts as detailed above, the third requirement is satisfied in this case. The soldiers acting on behalf of the first defendant deliberately engaged in unlawful conduct, including physical violence and threats to kill, designed to induce the plaintiff to make a false confession. It is the decision of this court that the plaintiff was arrested for an improper purpose, was unlawfully detained, and thereafter subjected to physical and mental abuse, all of which were deliberately and

consciously covered up. There is no question that the soldiers had an honest belief that they were acting lawfully. This is a clear case of targeted malice, namely, conduct specifically intended to injure the plaintiff. The soldiers knew and intended that their actions would injure the plaintiff and unquestionably acted in bad faith.

[215] The remaining ingredients for the tort of misfeasance in public office are also satisfied, namely, that the plaintiff has suffered loss and damage, which has been caused by the soldiers acting on behalf of the Ministry of Defence.

Damages for Misfeasance in Public Office

[216] It is my view that the damage to the plaintiff caused by misfeasance in public office by the servants and agents of the first defendant is inextricably linked in this case to the plaintiff's claim for damages for malicious prosecution. Similar to an award in damages for false imprisonment and malicious prosecution, a finding of misfeasance in public office also embraces the distress of criminal proceedings and a trial, loss of liberty and the effects of imprisonment, hardship, injury to feelings and damage to reputation. Therefore, to some extent, damages have already been paid as part of the compensation under section 133 of the Criminal Justice Act 1988 (as amended).

[217] The plaintiff has proved to the requisite standard misfeasance in public office against the first defendant. The soldiers knew and intended to cause injury and harm to the plaintiff. I will make an award of £10,000 to reflect the targeted malice by public officers in the exercise of their duties. I have also taken in consideration the risk of double counting.

Aggravated and Exemplary Damages

[218] I turn now to the question of whether, having regard to my findings above, I should consider making an award for aggravated and exemplary damages.

[219] In *Clinton v Chief Constable* [1999] NICA 5, Carswell LCJ referred to the Law Commission's 1993 consultation paper "Aggravated, Exemplary and Restitutionary Damages" which referred to two basic preconditions for an award of aggravated damages:

> "(1) exceptional or contumelious conduct or motive on the part of the defendant in committing the wrong, or, in certain circumstances, subsequent to the wrong: and
>
> (2) mental distress sustained by the plaintiff as a result."

[220] Referring to the said two basic preconditions, Carswell LCJ further stated as follows:

> "We consider that this formulation is an accurate statement of the law. It finds support in the judgment of Lord Woolf MR in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 at 514, where he stated that aggravated damages can only be awarded where "there are aggravating features about the defendant's conduct which justify the award of aggravated damages." By way of example of such aggravating features in a case of wrongful arrest he specified:
>
> > 'Humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows which shows that they had behaved in a high-handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution.'"

[221] Further to my finding of fact that the plaintiff was subjected to water boarding, hooding and threats to kill, I have no hesitation in concluding that the said wrongful acts amounted to exceptional and contumelious conduct on the part of the Parachute Regiment and that the plaintiff suffered considerable mental distress and emotions of extreme fear as a result. I conclude that the plaintiff was exposed to humiliation and degradation and that the soldiers behaved in a high-handed, insulting, malicious and oppressive manner during the detention and interrogation of the plaintiff.

[222] I also take into consideration the attitude of the first defendant in contesting these claims, particularly in light of the decision of the Court of Appeal and the failure to call any evidence to justify their persistent denial of any wrongdoing. The first defendant remains vicariously liable for the conduct of the soldiers and the aggravating features of the said conduct justify an award of aggravated damages which I assess at £30,000.

[223] In making this award for aggravated damages, I have referred to the authorities previously considered at paras 5:1 to 5:21 of my assessment of compensation under section 133 of the Criminal Justice Act 1988 (as amended). I also take into consideration the recent decisions of McAlinden J in *Quinn v Ministry of Defence* [2018] NIQB 82 and *Doherty v Ministry of Defence* [2019] NIQB 35 and the decision of Cheema-Grubb J in *Rees v Commissioner of the Police of the Metropolis* [2019] EWHC 2339 as approved by the Court of Appeal [2021] EWCA Civ. 49.

Exemplary Damages

[224] The nature of exemplary damages and the extent to which they may be awarded was considered by Lord Devlin in *Rookes v Barnard* [1964] AC 1129 and analysed further by Carswell LCJ in *Clinton v Chief Constable of the Royal Ulster*

Constabulary [1999] NICA 5.

[225] The relevant principles and limits regarding exemplary damages were succinctly outlined by Lord Dyson in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 at para 150:

> "The relevant principles are not in doubt. Exemplary damages may be awarded in three categories of case: see per Lord Devlin in *Rookes v Barnard* [1964] AC 1129. The category which is relevant for present purposes is that there has been "an arbitrary and outrageous use of executive power" (p1223) and "oppressive, arbitrary or unconstitutional action by servants of the government" (p1226). In this category of case, the purpose of exemplary damages is to restrain the gross misuse of power: see *AB v South West Water Services Ltd* [1993] QB 507, 529F per Sir Thomas Bingham MR. It must be shown that the "conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more [than compensatory damages] is needed to show that the law will not tolerate such behaviour" as a "remedy of last resort": see per Lord Nicholls in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at para 63."

[226] In *Quinn v Ministry of Defence* [2018] NIQB 82, McAlinden J carried out a comprehensive analysis of recent authorities relating to awards for exemplary damages. I have also gained guidance from the recent decision of the Court of Appeal in *Rees v Commissioner of Police of the Metropolis* [2021] EWCA Civ. 49 which upheld an award of £150,000 for exemplary damages (allocated equally between three claimants) made by Cheema-Grubb J *(see* [2019] EWHC 2339).

[227] In *Rees v Commissioner of Police of the Metropolis* [2021 EWCA Civ. 49 Davis LJ made the following observations:

> "[53] In my opinion, however, the statements made in *Thompson* as to the "absolute maximum" available by way of award of exemplary damages are not to be read in so limited a way. Indeed, the Court of Appeal in *Thompson* had itself stated at p. 516 A-B:
>
> > 'We appreciate, however, that circumstances can vary dramatically from case to case and that these and the subsequent figures which we provide are not intended to be applied in a mechanistic manner.'"

[228] In *Flynn v Chief Constable* [2017] NICA 13, further to an argument that Thompson placed a monetary limit on awards of exemplary damages, the Court of Appeal stated at para [27]:

> "… we do not see that the English cases referred to us regarding exemplary damages form a binding code in terms of the level of achievable damages. We consider that there is a valid argument that the subject matter of these proceedings extends beyond those bounds."

[229] The award of compensation made to the plaintiff for miscarriage of justice did not include a figure for exemplary damages. In a document entitled "Guidance for Assessors of Compensation for Miscarriages of Justice" dated 1 April 2014, it is expressly stated at para 24 that the amount awarded "will not include any element analogous to exemplary or punitive damages and will only include an element analogous to aggravated damages to the extent that such damages (if appropriate) are compensatory rather than punitive." Accordingly, based on the relevant principles detailed, it was my intention to give serious consideration as to whether the First Defendant's gross misuse of power and conscious wrongdoing justified an award of exemplary damages in all the circumstances.

[230] Sadly, the plaintiff died a short time after he gave his evidence in this case. In the circumstances, I requested counsel for the plaintiff and the defendants for their submissions as to whether an award of exemplary damages can be made to a deceased plaintiff having regard to section14(2)(a) Law Reform (Miscellaneous Provisions) Act (NI) 1937, which states as follows:

> **"14 Effect of death on certain causes of action**
>
> (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:
>
> Provided that this sub-section shall not apply to causes of action for defamation.
>
> (1A) The right of a person to claim under Article 3A of the Fatal Accidents (Northern Ireland) Order 1977 (bereavement) shall not survive for the benefit of his estate on his death.
>
> (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

(a) shall not include—

(i) any exemplary damages; …"

[231] As agreed by Counsel, it is clear that a deceased plaintiff is not entitled to exemplary damages since section 14(2)(a)(i) of the 1937 Act specifically precludes an award of exemplary damages in an action brought on behalf of the estate of a deceased person.

[232] Accordingly, it is not necessary for me to give further consideration as to whether an award of exemplary damages is appropriate.

[233] On 1 March 2023, a Master of the Court of Judicature made an order amending the writ of summons to appoint Bronagh and Samuel Bowden, executors of the plaintiff's estate, as plaintiffs in the action.

Special Loss

[234] Sensibly, in my view, the Defendants have agreed that the plaintiff is entitled to recover the balance of the compensation assessed for miscarriage of justice above the statutory cap. The Criminal Justice Act 1988 was amended by the Criminal Justice and Immigration Act 2008 to insert, inter alia, a statutory cap on the total amount of compensation payable under section 133 of the 1988 Act. (See section 61, Schedule 27 (Part 4, para 22) of the 2008 Act). In effect under section 133A of the Criminal Justice Act 1988 (as amended), the total amount of compensation payment for persons detained for at least 10 years is £1,000,000. The amendment was introduced with effect from 1 December 2008. The application for compensation made on behalf of the plaintiff in this case was made on 12 February 2014. Accordingly, section 133A(5) of the Criminal Justice Act 1988 (as amended) as applies.

[235] The special loss, namely the shortfall between the assessed compensation and the statutory cap, applying the appropriate discount rate has been agreed at £250,000 to include interest.

Summary of Damages

[236] In respect of the plaintiff's claim for damages for personal injuries, loss and damage sustained by him arising out of the ill treatment of the plaintiff during the plaintiff's unlawful detention at Black Mountain Army Base, to include water boarding, hooding and threats to kill, malicious prosecution and misfeasance in public office, I make the following awards:

(a)	Waterboarding, hooding and threat to kill	£50,000·00
(b)	Psychological injury	(compensation already received)
(c)	Unlawful Detention	(compensation already received)

(d)	Malicious Prosecution	£10,000·00
(e)	Misfeasance in Public Office	£10,000.00
(f)	Aggravated damages	£30,000.00
(g)	Special Loss	£250,000.00