Neutral Citation No: [2023] NIKB 106	*Ref:* **SIM12292**
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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **13/10/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

CLAIRE McCLEAVE

Plaintiff

-and-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant

_____

Paul Bacon (instructed by Reavey & Co. Solicitors) for the Plaintiff
Fiona Fee (instructed by the Crown Solicitor's Office) for the Defendant

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SIMPSON J

Introduction

[1] The plaintiff, who was born on 14 April 1982, was injured on 12 July 2013 while standing on the Woodvale Road in Belfast. She states that she was struck by a plastic baton round discharged by a servant or agent of the defendant Chief Constable. The writ alleges negligence, assault, battery, trespass to the person and breach of statutory duty on the part of the defendant. No breach of statutory duty is pleaded or particularised in the statement of claim. At the conclusion of the oral evidence, I allowed the parties a total of three weeks to provide closing written submissions, which were duly received.

[2] On 12 July 2013, as a result of a determination by the Parades Commission, a parade by the Orange Order, with accompanying band, was prohibited from passing the Ardoyne shopfronts. This parade was returning from the city centre direction and would, but for the decision of the Parades Commission, have traversed the length of the Woodvale Road to its junction with Crumlin Road/Twaddell Avenue ie the vicinity of the Ardoyne shopfronts. In order to enforce this prohibition, a line of police

armoured land rovers was parked across the Woodvale Road, blocking the parade's further passage towards the Ardoyne shopfronts. Police officers were in riot gear as public disorder was feared.

[3] The evidence to the court was that approximately 6, or it may have been 7, armoured police land rovers were parked side by side across, and blocking, Woodvale Road. Police officers were stationed to the rear of the land rovers, their backs towards the Ardoyne area, and some officers were positioned in the gaps between the land rovers. The vehicles were deliberately placed on the Ardoyne side of Woodvale Parade so as to allow an unobstructed route for the public to disperse from the Woodvale Road and along Woodvale Parade if the public order situation worsened, as it did.

[4] The extreme right hand vehicle (as the police looked southwards along the Woodvale Road) was placed on the pavement outside number 138 Woodvale Road and close to that house's front garden wall and fence. There was probably room for only one officer, with riot shield, in the space between the wall and the land rover. The extreme left hand vehicle was parked up against a high wall which ran for some distance along Woodvale Road.

[5] The court was shown approximately 20 minutes of video footage recorded by police from 1940 hours to 2000 hours on the evening of 12 July. This shows that a very large crowd — estimates, at different times, put the crowd at anywhere from 1,000 to 5,000 — had gathered in the vicinity of the police land rovers. The video shows the crowd stretching from the immediate front of the vehicles as far back nearly as the eye can see. The crowd was hostile, many seem to be under the influence of alcohol. Some are seen drinking from cans. Many of the crowd can be seen shouting abuse at police. Stones, cans, bottles and larger items, which may have been pieces of masonry, are shown being thrown by some members of the crowd. Some others are hiding their faces either with masks or items of clothing. Some members of the crowd are shown damaging the police vehicles, trying to rip off a wing mirror. Some are shown standing on the bonnet or roof of the vehicles. One man is seen to be brandishing a sword and thrusting it at a police officer carrying a riot shield, who can just be seen standing between two land rovers. One or two members of the crowd appear to be holding batons. There is a clear and determined attempt to breach the police lines. The obvious animosity of the crowd is, at times, fueled by the music played by the band members who can be seen in the video close to the police lines, and on at least one occasion a loyalist banner is marched right up to the police land rovers, further inciting the crowd.

[6] I record here that it would be hard to understand the seriousness of the public disorder without viewing the video.

[7] At about 1948 hours the video shows police water cannon start to fire water at the crowd in an effort to disperse them. Initially one water cannon was deployed, firing intermittently. At about 1952 hours several water cannon were deployed, firing

continuously. While this caused some of the crowd to move back, the crowd did not disperse and notwithstanding this use of water cannon, some of the crowd remained very hostile to the police in the immediate vicinity of the police vehicles.

[8] At 1956 hours the video shows a person, who the plaintiff admits is her, standing just to the right of the midline of the road. She is carrying a small flag, which looks more furled than unfurled, almost the shape of a furled umbrella. She is surrounded by a large number of people, and this at a time when the hostile crowd was engaged in threatening the police lines and after water cannon had first been used. At my request for some evidence showing relevant distances, counsel, on the second day of the hearing, produced Google map information which led to counsel agreeing that the distance of the plaintiff (when shown on the video) from the police lines was 26 or 27 metres.

[9] Between 1930 hours on 12 July 2013 and 0300 hours on 13 July a total of 35 baton rounds were discharged at this location by police officers, with 29 hits claimed. Arising from the video footage and the discoverable documentation the parties were in agreement that the court is concerned only with 5 of those discharges, and those 5 discharges all occurred in the half hour period from 1945 to 2015 hours.

The plaintiff's evidence

[10] The plaintiff's case is that she and her (now deceased) uncle, Albert Haslett, were on the Woodvale Road that evening. She was wearing a blue and white dress, and wearing her son's bowler hat-shaped 'Union Jack' hat, and carrying a flag. They were at this particular location, which she described as being near flats, because they had arranged to meet other members of her family at that location. While she noticed some trouble, which she said was about 100 yards away from her, she did not know it was that bad. She saw people throwing things and, later, saw water cannon being deployed.

[11] The next thing which happened was that she was struck a blow in the chest by something. She said it was like "someone threw something at me." She looked down and saw something grey and plastic, about 4 inches in length. She picked it up and asked her uncle what it was. He told her that it was a plastic baton round. She did not see where it came from.

[12] It happened that the politician Mike Nesbitt was on the scene. She says she spoke to him, and he told her that he was only off the phone to the police and that they had fired the baton round at 7.51 (ie 1951 hours). Shortly after the incident she gave an interview to a television crew, then she walked away from the scene.

[13] She says that at the scene she was in shock, shaking, that she experienced chest tightness which radiated up into her neck and shoulders, and pins and needles in her left arm. She says that she was unable to sleep that night. The following day she went

to Antrim Area Hospital where she was triaged but was not examined by a doctor. Having waited 8 hours, she left the hospital without a medical examination.

[14] She had pain on and off for "a good few weeks", after which she suffered from tightness for well over a year. Her GP prescribed painkilling medication. For a period of about 6 months after the incident she did not want to leave the house. She was a community worker but found that she did not want to go to meetings because she just did not feel confident during that period. She had some nightmares and night sweats, perhaps 3/4 times per week for about 18 months, thereafter, occurring less frequently. She says that the dosage of her pre-incident anti-depressant medication was increased from 100mgs to 150mgs. In cross-examination she accepted that her GP notes and records actually showed that she was, prior to the incident, taking a dosage of 150mgs.

[15] I note from a medical report, commissioned by the defendant from Dr Daly, Consultant Psychiatrist, that the plaintiff told him that she was "off antidepressants for 2 to 3 years before this incident" and that "one week or so later [i.e., after the incident] I started on the antidepressant." Both these statements were incorrect.

[16] The plaintiff made a complaint to the Police Ombudsman's office following the incident. A statement was recorded from her. It is dated 8 August 2013. In that statement she said:

> "I was standing in the road when I felt something hit me in the chest. I stumbled back and when I looked down, I saw a plastic baton round at my feet. I was hit on the left hand side of my chest and I believe that this would have been at about 1951 hours. When I was hit, I can recall that the water cannon was in use and there definitely was rioting going on however this was happening about ¼ of a mile away from me and was not that bad."

[17] In cross-examination the plaintiff accepted that the distance given by her in that statement was not right and, subsequently, in light of the agreed distance of 26 or 27 metres, she accepted that the estimate of 100 yards, which she gave in evidence, was not correct either. Although in the statement she said that the rioting was "not that bad", in cross-examination she confessed to being shocked at the extent of the rioting when she saw it on the video played in court and that it was "worse than I had thought." She admitted that she had seen people throwing stones and bottles and that she saw men either masked or hiding their faces. She admitted that she saw people jumping on the land rovers. She admitted seeing water cannon being used. She said she had never been in a situation like this before and that it was frightening, "Especially now I see the video."

[18] Interestingly, I note from the first report from Dr Daly that the plaintiff told him that: "To us [i.e., to her and her uncle] there wasn't enough trouble for [baton]

rounds to be fired. There was nothing serious happening." In my view that was clearly not a truthful representation of the position.

[19] She admitted that, in hindsight, she should have gone away from the scene. When asked why she did not leave the area to get away from the trouble, her explanation was that she was to give a lift home to other members of the family and did not want to leave the agreed meeting place, because if she had done so the family members would have had no way to get home.

[20] As this explanation was probed in some depth, the following appears to have been the position. The plaintiff and her uncle came to the area in one car, which they parked in Enfield Street. Enfield Street is some distance on the Shankill Road side of the incident scene, and adjacent to the Ballygomartin Road. Her mother and two aunts, with the plaintiff's 7-year-old son, were to come to the same location in another car. The plaintiff thought they were to arrive about 5 to 10 minutes later. The arrangement was to meet them, and some other family members, adjacent to the wall at the flats, which would be on the right hand side of the road as one walked from Enfield Street towards the incident scene.

[21] On one of the Google map photographs, photograph number 2, those flats can be seen. There are three blocks of flats, roughly parallel to the Woodvale Road, each with a reddish-brown roof. Adjacent to the flats is superimposed (by the Google maps automatic distance-measurer) a white rectangle with "2 min 170m" within it. The plaintiff indicated that the area of the wall at which she had arranged to meet the other family members was just at the top of the white rectangle. This is clearly some distance along the Woodvale Road from where the video shows her standing. When asked why she left the arranged meeting place to move to a position much closer to the rioting, she said it was "just nosiness." In the circumstances I reject the plaintiff's evidence that she did not want to leave the scene (where serious rioting was taking place) because she had to meet family at an arranged place.

[22] While there was discussion about how the plaintiff came to tell the police that the incident occurred at 1951 hours — whether the time came from Mr Nesbitt, or from the plaintiff's uncle who, she said, looked at his watch and gave her the time — she accepted in cross-examination that the time of 1951 could not be right, in light of the evidence on the video.

[23] In the end, the plaintiff conceded to Ms Fee that "to be honest" she could not be confident that the incident happened before 8:00pm (2000 hours). While she accepted that things were being thrown and that she did not see exactly what hit her, she is adamant that there was nothing at her feet other than the spent baton round. She says that whatever hit her on the chest would, naturally, simply have fallen to the ground and that since there was nothing else in her vicinity, the baton round must have been what hit her.

[24] It was put to her that the police evidence would be that the baton rounds were fired from a position on the right hand side of the road (as the police were looking towards the crowd). She said she was never on that side of the road.

[25] Ms Fee took her to the entry in the Antrim Area Hospital notes which recorded her attendance there. The relevant note records against "Presentation Type:" — "Chest pain", and in handwriting — "Pleuritic yellow. Hit on chest yesterday with plastic baton round." The clear implication behind this cross-examination was that if a bruise was caused to her chest approximately 24 hours before her presentation, it is unlikely to have been yellow at the time of the presentation.

The defendant's case

[26] Shortly put, the case for the defendant is that there was significant rioting at the material time, that water cannon had not succeeded in dispersing the crowd or halting the rioting, that police lines were under sustained attack, that officers feared serious physical injury and that the use of **Attenuating Energy Projectile (**AEPs) was justified in all the circumstances. The defendant relies on the provisions of section 3 of the Criminal Law Act (Northern Ireland) 1967. The defendant also relies on the defences of ex turpi causa non oritur actio and volenti non fit injuria and alleges contributory negligence on the part of the plaintiff.

[27] At the scene outside 138 Woodvale Road there were about 40 police officers. What is known as a Bronze Commander was the senior officer present. The Bronze Commander was Chief Inspector Emma Bond. She was in radio contact with Silver Command. The relevant logs show regular contact between Bronze and Silver Command, so that Silver Command was kept abreast of the worsening situation in 'real time.' In its turn, in the chain of command, Silver Command would have been in contact with Gold Command.

[28] An agreed statement from Assistant Chief Constable George Clarke was provided to the court. In 2013 he was District Commander for North and West Belfast and was performing the role of Silver Commander in relation to the police operation at Woodvale Road. His records show that:

- At 1825 hours he directed the movement of water cannon closer to the scene.

- At 1936 hours he requested additional resources to be moved to the area due to the size of the crowd gathering.

- At 1944 hours he gave authorisation to deploy AEPs, noting that police were under attack by people using swords and there was serious disorder.

- At 1946 hours he gave authorisation for the use of water cannon, noting that police could not withdraw, were under sustained attack and serious disorder was underway.

- At 1951 hours "use of AEP was authorised at Woodvale as water cannon is ineffective and officers are suffering injury." He explains in his statement that his rationale for this was — "This authorisation is absolutely necessary and involves the minimum use of force in the circumstances."

[29] Both parties referred to the 'PSNI Manual of Policy, Procedure and Guidance on Conflict Management.' In Chapter 11 the following is stated, where material:

> "11.8 Users should be made aware that AEPs can ricochet in some circumstances and that the presence of obstacles and of personnel other that the identified subject should form part of their risk assessment in the decision to fire the weapon.
>
> 11.9 Consideration should also be given to the possibility of the unintended striking of individuals behind the identified subject who is being fired at. This risk assessment should include the possibility of direct strikes and as a result of ricochet."

[30] In Chapter 14, under the rubric "Circumstances for use of AEPs" the following is stated, where material:

> "14.20 AEPs must only be used in public order situations:
>
> - Where other methods of policing to restore or sustain public order have been tried and failed, or must from the nature of the circumstances be unlikely to succeed if tried; and
>
> - Where their use is judged to be absolutely necessary to reduce a serious risk of:
>
> - Loss of life or serious injury; or
>
> - Substantial and serious damage to property, which is likely to cause or is judged to be likely to cause a serious risk of loss of life or serious injury.
>
> 14.21 Except where urgent action is necessary — ie here there is an immediate risk to life, AEPs will only be used following authorisation from the Silver Commander.
>
> 14.22 In assessing the risk of loss of life or serious injury occurring, account should be taken of the risk to police

> officers and members of the emergency services, as well as to members of the public and others.
>
> 14.23 AEPs should be fired at selected individuals and not indiscriminately at the crowd. AEPs should be aimed to strike directly (ie without bouncing) the lower part of the subject's body ie below the rib cage. Officers are trained to use the belt buckle area as the point of aim at all ranges, thus militating against the upper body hits.
>
> …"

[31] It is the defendant's case that if the plaintiff was in fact struck by an AEP, the circumstances in which AEPs were discharged were such that the decision to discharge them was entirely justifiable. Further, that there was no negligence on the part of the officers in the discharge of the projectiles.

Legal issues

[32] If the plaintiff satisfies the court that she was struck by an AEP then the onus is on the defendant to prove, on the balance of probabilities, that the force used by police was reasonable in the circumstances. In the end there was no dispute between the parties as to the proper approach for the court.

[33] In *McKenna v Ministry of Defence* [2023] NIKB 17 McAlinden J was dealing with a plastic baton round fired by a soldier. The relevant law applies equally to police officers. He said as follows:

> "[121] … The relevant legal framework is non-contentious and was set out with admirable clarity by Lowry LCJ in the case of *Farrell v Ministry of Defenc*e [1980] NI 55 at page 61 C where he stated:
>
> > 'When a soldier deliberately applies force, by restraining or striking or shooting a person, that is prima facie an assault and battery for which the soldier and (if he is acting under orders or within the scope of his authority) his superiors are liable in tort at the suit of that person, unless the act of the soldier can be justified at common law or by statute ... When the cause of action is framed in trespass and the assault in fact is proved, the defendants must then prove the defence of justification …'

The rule at common law is that force used in self-defence or in the defence of others must be reasonable in the circumstances. As was pointed out by Hutton J in the case of *Tumelty v Ministry of Defence* [1988] 3 NIJB 51, prior to 1967 under section 4 of the Riot Act (Ireland) 1787, peace officers were indemnified if rioters were "killed, maimed or hurt" in the "dispersing, seizing or apprehending" of them after the passage of an hour from the reading of the proclamation set out in that Act. But section 4 of the 1787 Act was repealed by the Criminal Law Act (Northern Ireland) 1967 and, under the present law, as the plaintiff has proved that he was struck by a baton round deliberately fired at him by a soldier, the onus rests on the defendants to establish that the firing was justified in self-defence or in defence of other soldiers or in the prevention of crime.

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

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

Therefore, the plaintiff is entitled to succeed and to recover damages in this case unless the defendant establishes on the balance of probabilities that the force used by [the soldier] in firing the baton round in the manner in which he did constituted the use of such force as was reasonable in the circumstances.

[123] How the court is to approach the issue of justification set out in section 3 was helpfully explained by the Court of Appeal in the case of *Kelly and Others v Ministry of Defence* [1989] NI 341 where the judgment of the court was given by O'Donnell LJ. Quoting from the headnote will suffice.

> 'Section 3 of the Criminal Law Act (Northern Ireland) 1967 allowed a person to use

> reasonable force to prevent a crime or to arrest a suspected offender, and it provided a defence for the user of force in an action for trespass. The trial judge was correct in considering the question in two stages. The first stage was related to the facts and circumstances honestly and reasonably believed to exist at the time of the incident. The determination of this issue required the use of both a subjective test as to whether each soldier honestly believed that the occupants of the car were terrorists and an objective test as to whether there were reasonable grounds for the belief. The trial judge correctly held that the soldiers honestly believed the occupants of the car to be terrorists and that there were reasonable grounds for so believing. The second stage involved the issue of whether, given that honest and reasonable belief, it was reasonable to fire in the prevention of crime or to effect an arrest. This was to be determined by the court using an objective test, applying the judgment of the reasonable man and, in the light of the circumstances, it had been reasonable to fire.'"

[34] I also note the Court of Appeal decision of Hutton J (sitting with O'Donnell LJ) in *Livingstone v Ministry of Defence and another* [1984] NI 356, a case in which the plaintiff was injured by a baton round fired by a soldier, during rioting in which the soldiers were attacked. The action was brought in negligence and for assault, battery and trespass to the person. Curiously, the defendant did not rely on section 3 of the Criminal Law Act. In his judgment the trial judge omitted to deal with any matter other than the claim in negligence, hence the appeal.

[35] On appeal the defendant submitted that the tort of battery was not committed by a soldier who intentionally fired the round at person A but struck person B instead — essentially what the plaintiff says must have happened in the present case. Rejecting that submission Hutton J held that the 'intentional' application of force meant the application of force towards some person, even though the person struck was not the person whom the defendant intended to strike. At 316A Hutton J said:

> "In my judgment when a soldier deliberately fires at one rioter intending to strike him and he misses him and hits another rioter nearby, the soldier has "intentionally" applied force to the rioter who has been struck."

[36] Hutton J therefore held that the:

> "… soldier who fired the baton round which struck the plaintiff was guilty of battery to the plaintiff and the plaintiff is entitled to damages unless the … defendant could establish the defence that the firing was justified." (361H to 362A)

[37] The same reasoning applies to the plaintiff in this case, in respect of whom there was no allegation that she was a rioter i.e., the police officers fired at a person other than the plaintiff.

[38] In coming to my decision I have borne in mind the guidance provided by these authorities.

The police evidence as to discharge of AEPs

[39] Two police witnesses were called on behalf of the defendant, Constable Andrew Hamilton and Temporary Sergeant Mark McMaster. They were the officers who between them discharged the 5 AEP rounds with which I am concerned; 4 by Constable Hamilton; 1 by T/Sgt McMaster.

[40] It was helpfully agreed by counsel that both officers' statements — made in response to the plaintiff's complaint to the Police Ombudsman and dated 22 July 2013 (Hamilton) and 14 July 2013 (McMaster) — could stand as their evidence in chief, thus saving a significant amount of court time.

[41] None of the evidence given by the two police officers about the factual circumstances leading to the discharge of any of the 5 rounds was challenged in Mr Bacon's cross-examination of either — and in view of the video evidence this was not at all surprising; nor was there any challenge to the rationale behind either officer's decisions or the decision-making or risk assessment process which both went through leading to each discharge. The way in which the evidence emerged in the case led the plaintiff's counsel, in his final written submissions, to state that the "plaintiff does not now make the case that the defendant was unreasonable in the use of force, nor was that use of force excessive in response to the public order situation as it developed." It was also accepted that "the police were aiming and discharging the AEP gun in a discriminatory manner against specific targets." In my view these were entirely proper and responsible concessions by experienced counsel.

[42] Thus, on the evidence as it emerged, the plaintiff's final case is that there was a failure to follow guidelines as a result of which the officers "failed to give sufficient consideration to the risk that members of the crowd not involved in the rioting would be struck either directly, albeit unintentionally, or by ricochet." Further, says the plaintiff, warnings which one can hear [on the footage of the events] over the public address system "were unclear. The plaintiff says clear and unequivocal warnings should have been given over the same system that AEPs were about to be deployed."

[43] Accordingly, it is necessary to examine in some detail the police evidence as to the discharge of the 5 relevant AEPs.

Constable Hamilton

[44] On the evening in question Constable Hamilton was performing the role of "Attenuated Energy Projectile launcher system operator." He was on duty accompanied by Sgt Crone and Constables Burrows, Paisley and Ogden. At the date of the events in July 2013 he had had some five years' experience as AEP launcher system operator.

[45] In his evidence he described the three stages of authorisation leading to the use of AEPs, namely authorisations [1] to issue; [2] to deploy; [3] to use.

[46] First, authorisation was given by ACC Kerr to issue the AEP launcher system. This authority was effective for the whole period from 1430 hours on 29 June 2013 until 15 July 2013. Accordingly, the launcher system was locked in the secure carry box in the land rover which transported Constable Hamilton to the scene. The second stage came at 1947 hours when he received the order to deploy the AEP launcher system. When this order was given Constable Hamilton left his position behind the extreme right land rover and went back to his own vehicle, a distance of some 40 feet or so, to obtain the launcher. He had to put on the AEP holder vest and carry out a pre-use function test on the launcher. The third stage came at 1952 hours when his sergeant, Sgt Crone, following the authorisation by Silver Commander, gave the order "Engage. Engage." When that order was given Constable Hamilton loaded the launcher. Thereafter, identifying an appropriate target and discharging the launcher was at his discretion, subject to the PSNI use of force guidelines.

[47] Once Constable Hamilton was armed with the launcher, Constable Burrows acted in the role of his 'spotter', ie assisting him in identifying potential targets.

[48] Constable Hamilton's unchallenged evidence was that if a projectile was fired and nothing was in the way to impede its progress, it would travel some 52 yards, its velocity reducing as it travelled. The normal range at which officers practice discharging rounds is 25 yards. If, at a distance of 25 yards, the officer aims at the belt buckle, the round will strike at about shin level. If a person was struck on the body by an undeflected round at a distance of 26 yards (roughly where the plaintiff was standing from the police lines) it would not knock the person over, and the round would likely fall at that person's feet.

Discharge 1

[49] The authorisation to use AEPs came as Constable Hamilton had stepped into the garden of number 138 Woodvale Road, through the gate. Having loaded the launcher he looked towards the crowd. He says this:

> "I could see that Constable Paisley who was standing to my left and holding his medium length shield was being attacked with heavy pieces of masonry by numerous rioters. The attack was so ferocious that it was forcing Constable Paisley backward and I had genuine concern that serious injury or death could be caused to Constable Paisley should he be hit in the head with these weapons, or his shield be taken from him."

[50] He describes seeing Rioter A drawing back his arm to throw a large rock at Constable Paisley. He raised his launcher, aiming it at Rioter A's belt buckle — Rioter A was some 15 feet from him — and fired. He believes that the target was hit in the groin area, although he did not see the round strike him. In oral evidence he said he saw the target "fold and fall", exhibiting all the signs which in the constable's experience would indicate that he had been struck by the AEP. Rioter A was assisted away by other members of the crowd.

[51] Constable Hamilton reported the shot to Sgt Crone who relayed the message to Silver Command by radio. This appears to have been done after each discharge.

Discharge 2

[52] Following discharge 1 Constable Hamilton reloaded his launcher. To do this he stepped into cover of the land rover, activated the safety catch, broke the launcher (rather as one would do with a shotgun), removed the shell casing from the weapon, loaded another shell casing containing the new projectile, closed the launcher and de-activated the safety mechanism. He then looked again towards the crowd. As he did so a large glass bottle full of sticky liquid smashed on the side of the land rover and liquid went on to his visor, obstructing his view. He had to lift his visor.

[53] He then saw a man whom he knew. Rather than use his name in this judgment I will call him XY, clearly not his actual initials. This man broke the concrete coping stone from atop a wall and bent down to pick up the masonry. Constable Hamilton believed his intention was to throw it at police, with potentially severe consequences. He aimed at this man's belt buckle, again from a distance of some 15 feet, and fired. He saw the round deflect off a stone pillar, travel at 90 degrees directly vertically, before falling safely on the ground. It struck no-one. Having seen Constable Hamilton fire the projectile, XY moved away.

Discharge 3

[54] Following discharge 2 Constable Hamilton saw Constable Burrows being struck on the helmet by "a very large piece of heavy masonry." Constable Burrows was knocked off his feet and fell backwards, hitting his head on a concrete pillar as he fell. He stood up, but fell immediately to the ground, apparently unconscious. At

that stage Constable Hamilton saw a man wearing a white shirt and Orange collarette, "his face contorted with rage", brandishing in an aggressive fashion a ceremonial sword. Constable Hamilton's assessment was that this man represented a lethal threat and, since the AEP launcher was unloaded and he did not have the time to reload it, he attempted to reach his Glock pistol located on his right hip. However, due to the amount of personal protection equipment which he was wearing he was unable to do so. When he saw Constable Hamilton reaching for his pistol the sword carrier disappeared into the crowd.

[55] Constable Hamilton reloaded the AEP launcher and once again looked towards the crowd. There was a momentary lull in the attack, so he put the launcher into safe mode, and turned to provide assistance to Constable Burrows. Elements of the crowd, having seen this, surged forwards again, but backed away when Constable Hamilton raised his launcher. Over the radio he heard that no other public order units were available for support, and this led him to have grave concerns that the police then on the ground would be unable to hold back the rioters.

[56] He then saw a man who was wearing a Manchester United football top. In court, this man was referred to as "Manchester United man." Manchester United man lifted a large rock in his right hand, causing Constable Hamilton to believe that he was going to throw the rock at police, with the potential of serious injury. As he drew back his arm, and ran towards police, Constable Hamilton aimed at his belt buckle and fired, at a distance of about 10 feet. The round hit Manchester United man just above the right hip area. The video shows the aftermath of this, with Manchester United man staggering back towards the crowd and being assisted by members of it.

Discharge 4

[57] A number of members of the crowd ran forward towards the police lines shouting and taking photographs with phones. Constable Hamilton then saw XY again. He appeared to bend down and pick up a white coloured section of coping stone and Constable Hamilton believed he intended to throw it at police and that serious injury could result. He aimed at XY's belt buckle and fired. The round struck XY on the left bicep and he disappeared from view. Again, the video appears to show XY and his reaction after being struck.

[58] Shortly thereafter Constable Hamilton was relieved by another AEP trained officer, and that ended his involvement in the matter for the purposes of this action.

Cross-examination

[59] When asked about his public order experiences Constable Hamilton said that he had been involved in a lot of public disorder, but that this one was "up there." He had earlier said that this "was one of the most intense riots that I have been in." The principal thrust of the cross-examination was to the effect that if Constable Hamilton was unable to see precisely where a round went when fired, there existed the

possibility that it could go elsewhere and hit someone other than the target, eg the plaintiff. He said, variously, that this was "incredibly improbable" or "highly unlikely." If a projectile hit someone at an angle, causing a possible ricochet or deflection, his experience was that it might travel just a few metres further. He described how the base of the projectile (ie the back end of the projectile after it leaves the launcher) is white, enabling it to be seen in flight by the operator, and since its velocity is nothing like that of a bullet, it can be seen in flight.

[60] In relation to discharge 1 (Rioter A) he said that the target at whom he fired reacted the way he (Constable Hamilton) would have expected him to react if hit by the projectile. This led him to conclude that the round hit its target. Discharge 2 (the first aimed at XY) he saw deflecting straight up in the air and landing harmlessly on the ground. Discharge 3 struck Manchester United man, who staggered the way he (Constable Hamilton) would expect him to do if struck, leading him to conclude that the round hit the target. Discharge 4 (the second aimed at XY) struck the target on the left bicep.

[61] It was common case that the plaintiff was in a position some 26 or 27 metres from the police lines at the material time. She is seen standing in the middle of the road whereas, at all times Constable Hamilton was firing from the right hand side of the land rover positioned on the extreme right hand side of the Woodvale Road and at a discerned target in front of him. He said that it was highly improbable that any of his 4 discharged projectiles hit the plaintiff.

Temporary Sergeant McMaster

[62] At the date of this incident, this witness had 18 months/2 years' experience as an AEP launcher system operator. As noted above it was agreed that his statement to the Police Ombudsman's office stand as his evidence in chief.

[63] At the material time he was positioned between the extreme right hand land rover and the one immediately to its left, with Constables Horan and Kelly, the latter of whom was his 'spotter.'

[64] He described "a crowd in excess of 1,500 persons, so large that I could not see the end of it from my position, in what seemed to be a sea of persons who took up the whole width of the road and went back as far as I could see." In his statement he says he "was continually targeted with bottles and items such as wheel braces" and he saw a male strike at police vehicles with a large wooden pole.

[65] In the period leading up to T/Sgt McMaster's only discharge relevant to these proceedings he says, inter alia, the following:

> "The crowd were very violent and within minutes they were right up close to our lines and many were throwing bottles and large chunks of masonry at my shields from a

> distance of as little as 6-10 feet. Several of the rioters ventured right up between the vehicles and started attacked (*sic*) our shields and heads with sticks, bricks and bottles. Two males … repeatedly attacked our shields with sticks and iron bars."

[66] T/Sgt McMaster aimed a hand-held baton strike at one of these men, believing that he hit him, and tried to hit the other man. Notwithstanding this, the sustained attack continued involving these and other rioters, the detail of which is set out in his statement over several pages, and he made further attempts to repel the attack using his hand-held baton. He saw Constable Burrows being hit on the head and falling to the ground, and he saw Inspector Menary being struck by an item and falling to the ground.

Discharge 5

[67] T/Sgt McMaster saw a male, about 25 years of age, running towards him and Constable Kelly and carrying a large chunk of masonry above his head. He believed that officers were in danger of being caused serious injury from this man. At a distance of about 10 metres he aimed for the attacker's upper left thigh ie aiming the weapon from shoulder height in a downwards direction, and fired. Because the attacker was running towards police, the actual discharge would have occurred at a distance closer than 10 metres.

[68] T/Sgt McMaster saw the round strike the ground close to the attacker's feet. In his oral evidence, although not in his statement, he described seeing the projectile bounce twice on the ground. It bounced to around knee height before hitting the ground again.

[69] Eventually he was relieved by other officers, and that ended his involvement in the events relevant to these proceedings.

Cross-examination

[70] Again, the thrust of the cross-examination was to the effect that the projectile might have bounced up sufficiently high to strike the plaintiff on the chest. He was challenged as to why he did not say in his statement that he saw the projectile bounce twice.

[71] In reply, he said that he fired in a downwards direction, holding the launcher at shoulder height and that if the projectile had bounced up (high enough to hit someone at chest height) he would have seen that. As to why he did not mention two bounces in his statement, he said he did not think it was relevant at the time he made his statement.

Was the plaintiff struck by an AEP?

[72] I am satisfied, on a number of bases, that the plaintiff was not struck by a projectile on the evening in question. Having reviewed all the evidence in the matter, I am satisfied on the balance of probabilities that none of Constable Hamilton's discharges resulted in any of his projectiles striking the plaintiff. In addition, having reviewed the evidence relating to the fifth discharge I am satisfied on the balance of probabilities that the projectile discharged by T/Sgt McMaster did not strike the plaintiff. While I cannot, of course, rule out the possibility of a strike from one of the projectiles, a possibility is not enough for the plaintiff to succeed in proving to the requisite standard that she was so struck.

[73] Next, I have seen the video of the plaintiff's interview with a BBC reporter. I am not satisfied, having seen her demeanour, that she was shaking or appeared particularly shocked in what was the immediate aftermath of the alleged incident.

[74] Further, when she appeared at Antrim Area Hospital on the following evening, I would have expected the mark left by the projectile to be red, or bluish-black. Although no medical evidence was called to deal with the bruising, I consider that I am entitled to bring to this judgment ordinary common experience. That experience would tell me that bruising does not tend to turn yellow until several days have passed since the bodily insult; it is not likely to be yellow in colour within about 24/30 hours of the incident (approximately the time at which the plaintiff was at hospital).

[75] Accordingly, not only has the plaintiff failed to persuade me, on the balance of probabilities, that she was struck but, on the contrary, the evidence in the case satisfies me on the balance of probabilities that no projectile discharged by either of the officers did strike the plaintiff.

[76] The plaintiff was adamant that immediately after the strike on her chest the only thing at her feet was the baton round. However, the evidence shows that 5 rounds were discharged. None was apparently recovered by police, and Constable Hamilton's evidence was that often they were picked up as mementos. In the circumstances I consider that it is more likely than not that the plaintiff picked up a spent round, but that it did not strike her first.

Was there any breach of duty on the part of the defendant's servants and agents?

[77] If I am wrong about this, I turn to consider the plaintiff's case on the basis that she was struck, and the case specifically made in the plaintiff's final submissions. I have referred above to the legal issues in this case within which framework I have considered all the evidence, and I have borne in mind what Hutton J said in *Livingstone* about the intentional application of force.

[78] It is now accepted that neither of the two officers discharged any projectile into the crowd indiscriminately or discharged any projectile other than in the circumstances and in the way as described by each. As noted above neither officer was challenged about his risk assessment, either the process of risk assessment or his final decision to discharge. Having heard all the evidence, I am satisfied that each officer discharged each projectile at an identified target and not indiscriminately at the crowd or in any inappropriate manner. I am satisfied that each officer's risk assessment was entirely appropriate, in light of the events with which they were faced.

[79] In the circumstances I reject any suggestion in the pleadings that any one of the 5 projectiles was discharged negligently or in breach of any guideline.

[80] In light of the video evidence in this case I am satisfied that there was a very serious public order disturbance on Woodvale Road on that evening. It was an intense riot. It lasted for a significant period. I am satisfied that police officers were in regular and imminent danger of serious injury, or worse, from objects thrown by or brandished by rioters in the course of a sustained and lengthy attack. At least two officers (in the time period with which I am concerned) were injured, one being rendered unconscious. Constable Hamilton and T/Sgt McMaster were, I am satisfied, on a number of occasions during this period, entitled to believe that officers, including each of them, were at risk of serious injury, or worse.

[81] Having read his statement, having heard the oral evidence from Constable Hamilton and having seen the video evidence, I am satisfied that, in the prevailing circumstances, it was entirely appropriate, reasonable and proportionate for him to discharge each of the 4 AEP rounds which he did. I am satisfied from all the evidence, in relation to each of discharges 1, 2, 3 and 4, that Constable Hamilton feared that there was a likelihood of serious injury, or worse, occurring to a police officer, or police officers, including himself, if he did not fire the projectile in the way he did, and at the identified target in each case.

[82] Again, having read his statement, having heard his oral evidence and having seen the video evidence, I am satisfied that it was entirely appropriate, reasonable and proportionate for T/Sgt McMaster to discharge the 1 AEP round which he did. Equally, I am satisfied from all the evidence that T/Sgt McMaster feared that there was a likelihood of serious injury, or worse, occurring to a police officer, or police officers, including himself, if he did not fire the projectile in the way he did, and at the identified target.

[83] In light of all the evidence I am satisfied that the force used (in the words of section 3 of the Criminal Law Act) was such "force as is reasonable in the circumstances in the prevention of crime…"

[84] As to the plaintiff's case that no clear warning was given about the imminent use of AEPs, there was no cross-examination of either officer as to whether warnings were given before any AEP was discharged or as to the clarity of any warning; the

matter was simply not raised at all in the evidence. Further, no evidence was given by the plaintiff about unclear warnings. Nor did she give any evidence to the effect that if she had heard a warning she would have moved away from the area. The plaintiff accepted in cross-examination that she saw people throwing stones and bottles and saw water cannon being used against rioters. She accepted that having seen all of that, including masked men, and police being attacked, none of those events made her move away; on the contrary, she remained in close proximity to the disorder, some 26 or 27 metres from the police lines against which the rioting was directed. While, in light of the state of the evidence, I can make no finding about whether or not clear warnings were given, I consider that the plaintiff's behaviour on the day was such that it is more likely than not that she would not have moved away from the vicinity if a warning about the imminent use of AEPs had been given and had been heard by her.

[85] I dismiss the plaintiff's claims in negligence, and in assault, battery and trespass to the person.

[86] That is sufficient to dispose of the case, but lest the matter goes further, it behoves me to deal with other pleaded matters and the issue of damages, to reduce the likelihood for the case to be sent back to the High Court to deal with some issue should the Court of Appeal determine that I am wrong in relation to liability.

Volenti non fit injuria

[87] This defence is regularly pleaded, but seldom successful.

[88] Paragraph 4-79 of *Charlesworth & Percy on Negligence* 15th edition states:

> "A person who makes an agreement, whether expressly or by implication, to run the risk of harm negligently inflicted by another, cannot recover in respect of damage suffered in consequence…The defence … raises issues whether (a) the claimant agreed to the breach of a duty of care, owed to him by the defendant; and (b) the claimant consented to waive his right of action against the defendant in respect of that breach. If the answer to each is in the affirmative then the wrongfulness of the defendant's conduct is excised and the claimant is precluded from recovering damages."

[89] The defendant relies on the plaintiff's proximity to the riot in support of the defence. That may, in the particular circumstances of this case, have provided evidence of an implied agreement to the breach of the duty of care (the first limb), although in light of my finding in relation to the second limb, I make no finding on this.

[90] In my view there is no evidence to support the proposition that the plaintiff consented to waive her right of action if the defendant had been, through the actions of the officers, in breach of any duty to the plaintiff.

[91] I would have rejected the plea of volenti.

Ex turpi causa non oritur actio

[92] Translated from the Latin, this legal maxim means that no action arises from a base cause. Introducing the nature of this defence, albeit in a wholly different type of case, Lord Sumption, in *Les Laboratoires Servier and another v Apotex Inc and others* [2014] UKSC 55, said (paragraph [13]):

> "English law has a long-standing repugnance for claims which are founded on the claimant's own illegal or immoral acts. The law on this point was already well established when Lord Mansfield CJ articulated it in his celebrated statement of principle in *Holman v Johnson* (1775) 1 Cowp 34l, 343:
>
> > 'No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.'"

[93] At paragraph [22] he said:

> "The application of the ex turpi causa principle commonly raises three questions: (i) what acts constitute turpitude for the purpose of the defence? (ii) what relationship must the turpitude have to the claim? (iii) on what principles should the turpitude of an agent be attributed to his principal, especially when the principal is a corporation? Each of these questions requires a principled distinction to be made between different kinds of immoral or illegal act and different ways in which they may give rise to claims. For present purposes, we are concerned only with the question what constitutes turpitude for the purposes of the defence."

— adding, at paragraph [23] that the "paradigm case of an illegal act engaging the defence is a criminal offence."

[94] In the earlier case of *Gray v Thames Trains Ltd.* [2009] UKHL 33, Lord Hoffman said that the rule could be stated in a wider or narrow form:

> "The wider and simpler version is that which was applied by Flaux J [at first instance in *Gray*]: you cannot recover for damage which is the consequence of your own criminal act." (Paragraph [32])

[95] As the evidence emerged in court, it became clear that it was no part of the defendant's case that the plaintiff was taking part in the riot; it was never suggested to her that she was so involved. Neither of the police officers ever saw her, so none of the police evidence suggests that she was rioting or that she was aiding and abetting others who were committing illegal acts. Accordingly, there is no evidence of turpitude on her part to engage the defence as pleaded.

[96] In my view, further, her mere presence at the scene in the circumstances in which that presence is described above did not amount to any form of illegal act so as to allow for a successful reliance on this defence. Had I found any breach of duty on the part of the defendant, I would not have permitted the defendant to succeed on this defence.

Contributory negligence

[97] Section 1(2) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948, abolishing the former common law rule whereby contributory negligence was a complete defence, provides:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

[98] Arising from the wording of the section, first, there needs to be fault on the part of another party, so that the plaintiff suffers damage as a result of fault on the part of both. Secondly, the contribution is to the "damage" suffered, and not to the occurrence inflicting the damage. The classic illustration often given is a failure to wear a seatbelt — this in no way contributes to the accident occurring, but it can contribute to the extent of the damage.

[99] Lord Atkin said in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 165:

> "If the [plaintiff] were negligent but his negligence was not a cause operating to produce the damage there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation."

[100] A key point is that it is necessary when applying section 1(1) of the 1948 Act to take account "both of the blameworthiness of the parties and the causative potency of their acts" (see *Jackson v Murray* [2015] UKSC 5 [40]).

[101] In order for me to have assessed the degree of the "blameworthiness of the parties and the causative potency of their acts" I would have to have found some breach of duty on the part of the defendant and compared the degree of blameworthiness of that breach with that of the plaintiff. Since I have not found any breach of duty on the part of the defendant, I see no way in which I could make any ruling on the plaintiff's degree of blameworthiness for her injuries, other than to say that in light of her close proximity to the rioting during the sustained period during which it was taking place, had I found the defendant liable her degree of blameworthiness was likely to have been assessed as extremely high.

Damages

[102] I have set out above broadly what the plaintiff said about her injuries, and some relevant cross-examination.

[103] In addition, I was provided with four medical reports: for the plaintiff, a report from Mr McLaughlin, Consultant in Emergency Medicine, (dealing with physical injuries) dated 12 March 2014, and a report from Dr Mangan, Consultant Psychiatrist, dealing with psychiatric sequelae. For the defendant, two reports from Dr Daly, Consultant Psychiatrist, dated, respectively, 1 March 2018 and 7 July 2018, were relied upon. No doctors were called to give evidence.

[104] From the report of Mr McLaughlin I note his diagnosis as "chest wall contusion." The plaintiff had a pre-existing history of fibromyalgia. She told him (at 8 months post-incident) that she was taking painkilling medication, but this was for a combination of lower back pain (not related to the incident) and "the symptoms affecting her chest." He felt that matters would improve with the passage of time, which is broadly what the plaintiff told me.

[105] Dr Mangan recorded her pre-existing problems with depression and anxiety. On examination he found that her mood was not significantly depressed. He diagnosed an adjustment disorder with a prolonged depressive reaction but felt that these would resolve within the following 6 months.

[106] Dr Daly's second report was written after he had had access to the plaintiff's medical notes and records. Having seen those he was of the opinion that the plaintiff experienced an adjustment disorder, but that her GP neither changed her medication nor referred her for more specialist treatment.

[107] Having taken into account the plaintiff's oral evidence and the medical evidence before me, I would have assessed the level of damages at £20,000.

Disposition

[108] For the reasons set out above in this judgment, I dismiss the plaintiff's claim for damages and enter judgment for the defendant.