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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**02/04/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

DESMOND JAMES DOHERTY
AS EXECUTOR OF THE ESTATE OF
BRIDGET McGUIGAN GALLAGHER (DECEASED)

Plaintiff;

-and-

MINISTRY OF DEFENCE

Defendant.

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McALINDEN J

[1] Mr Bernard McGuigan was born on 16th June, 1930. He was shot dead on 30th January, 1972. He was the last person to be shot dead on Bloody Sunday. At the time of his death he was 41 years old, he was a successful painter and decorator by trade, he was a respected member of the community and was married with six children aged between 16 and 6 years old. His widow Bridget McGuigan Gallagher initiated these proceedings by Writ of Summons issued on 28th May, 2014, claiming damages under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 on behalf of the estate of her late husband and under the Fatal Accidents (Northern Ireland) Order 1977. Mrs McGuigan Gallagher died before this Action came on for hearing and the Action was continued in the name of the Executor of her Estate, Mr Desmond Doherty, Solicitor.

[2] As I stated in my earlier judgment in the case of Michael Quinn, I do not consider it necessary to set out in detail the events of that afternoon leading up to the shooting of the Deceased because of the manner in which the Defendant has chosen to meet and deal with this litigation and indeed all the cases brought by the surviving victims and the relatives of the deceased victims of Bloody Sunday. The Defendant accepts that this Deceased and indeed all the victims were innocent victims and has admitted assault, battery and trespass to the person and has not sought to raise any matter or issue by way of attempted justification for the actions

of the soldiers in question nor has it sought to avail of any limitation defence which might otherwise have been available to it.

[3] On the day in question, Mr McGuigan (Deceased), had attended mass and then attended a funeral. He had returned home and had his Sunday lunch before going to take part in the civil rights march, the first such march he had attended. During the course of the afternoon, Mr McGuigan (Deceased) was in the vicinity of Chamberlain Street and Waterloo Street (see plan depicting the location at page 255 of the Trial Bundle) when due to shooting in his vicinity, he entered Block 3 of the Rossville Flats complex. He then made his way through Block 3 and Block 2 and emerged into an area between Block 1 and Block 2, at the southern gable end of Block 1 where a telephone box was located. He took shelter from the shooting at this location, along with a group of men as shown in a photograph taken at the time, a print of which appears at page 167 of the Trial Bundle. Mr McGuigan (Deceased) is identified with his back to the camera in the photograph by an arrow and dialogue box.

[4] Mr Gilmore, another of the individuals shot dead during that afternoon, was shot dead close to this group, and his body was dragged out of the line of fire to a point in front of the telephone box. The photograph contained in page 167 of the Trial Bundle shows a number of men kneeling or crouching in front of the telephone box and they are surrounding the body of Mr Gilmore.

[5] It would appear that Mr McGuigan (Deceased) decided to move out from his place of shelter, either to tend to another man who had been shot or to signal to the soldiers to stop firing as no one in that group presented any form of threat to the soldiers. It would appear that he had been given an orange towel soaked in vinegar by his wife to combat the effects of CS gas and a close up of the page 167 photograph which is shown in page 187 of the Trial Bundle shows Mr McGuigan holding something in his left hand which could well be that towel, still folded up. The second photograph on page 187 of the Trial Bundle seems to show the same object still folded lying to the left-hand side of his body shortly after Mr McGuigan had been shot.

[6] As he ventured out from this sheltered position, he was shot in the head and died instantly. The bullet that struck him was a 7.62 mm Nato round discharged from an SLR rifle. The bullet fragmented on impact. This was a direct strike with no intermediate strike or ricochet. The soldier who fired the fatal round was approximately 35 yards away from Mr McGuigan (Deceased) at the time at an entrance to Glenfada Park North. The Saville Inquiry determined that Mr McGuigan (Deceased) was the intended target of the soldier who fired the fatal shot and the Inquiry also raised the possibility that the round that struck the Deceased was either substandard or had been deliberately tampered with so that it was more likely to fragment on impact and cause more severe injuries to the target. The bullet entered the head of the Deceased behind the left ear and exited in the region of the right eye.

[7] The state of mind of the Deceased prior to being shot cannot be known with any certainty. No direct evidence as to his state of mind has been adduced. However, in the context of a wholly innocent individual who was attending his first civil rights march, who was caught up in the events of Bloody Sunday as they unfolded, who had witnessed soldiers shooting civilians, who had seen Mr Gilmore being shot, who had taken shelter in an area beside the telephone box with others and who had ventured out holding his orange towel either in an attempt to tend to another man who had been shot or in an effort to indicate to the soldiers that they should stop firing, the Court can safely assume that such a person of ordinary fortitude and lack of familiarity with such conditions as those prevailing in the immediate vicinity at that time, would have been filled with fear and dread, coupled with a strong sense of indignation and hurt at being the innocent victim of a blatant, unprovoked and unjust attack by members of the army.

[8] Mr Brian Fee QC for the Plaintiff and Mr David Ringland QC for the Defendant have been involved in intensive negotiations in this case and have considerably narrowed the issues which remain in dispute. The financial loss (dependency) aspect of the claim is, it would seem, capable of resolution. The issues which could not be resolved and which require the adjudication of the Court are:
(a) whether in the case of a victim who died instantly as a result of being shot, it was possible in law to make an award of aggravated damages; (b) if so, whether an award should be made in this instance; and (c) if so, the appropriate amount, bearing in mind the guidance which was set out in the case of Michael Quinn.

[9] The Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 changed the legal landscape in cases where the wrong inflicted upon the victim resulted in the death of the victim. Section 14 of the 1937 Act provided that all causes of action, whether against or vested in a person at his death should survive either against or for the benefit of his estate. The Act did not create a cause of action, it simply permitted existing causes of action to survive the death of the victim, whereas before the Act, those causes of action were extinguished with the death of the victim. See *Gammell v Wilson* [1982] AC 27 per Lord Scarman at page 76.

[10] From the outset, there were certain statutory exceptions to this new dispensation. Section 14 (2) (a) (i) specifically set out the following exception:

> "(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;"

[11] Mr Fee QC argues that in this case the manner of the commission of the tort is such as to warrant an award of aggravated damages even though the Deceased died instantaneously as a result of being shot in the head by a high velocity round fired from a distance of 35 yards. He argues that the actions of the soldiers in the period prior to the shooting constituted part of the tort of assault/trespass to the person and those actions were such as to cause significant injury to the feelings of the Deceased.

[12] Mr Ringland QC argues that aggravated damages are not recoverable in the case of a victim who dies as a result of the wrongdoing of the tortfeasor. The statute may expressly prevent an award of exemplary damages but the absence of any specific reference to the exclusion of an award of aggravated damages does not mean that such an award is permissible in law. He argues that it is not. He argues that no text book on fatal accident claims contains any reference to an award of aggravated damages being made in a fatal case and he asserts that no reported case has been adduced by either party which deals with this matter as it is taken for granted that no such claim could ever be mounted.

[13] Lord Russell of Killowen in the case of *Rose v Ford* [1937] AC 826 at page 838 stated that the purpose of the English equivalent of Section 14 of the 1937 Act was to:

> "put a person, who has by his negligence caused damage to someone who has subsequently died, in the same position as regards liability (subject to certain qualifications…) as he would have been in, if the injured person had sued and recovered judgment while still alive."

[14] The 14th edition of Charlesworth and Percy on Negligence at paragraph 17-81 states that "…there can be recovered for the benefit of the estate of the Deceased….damages for the pain and suffering experienced by the Deceased. Where unconsciousness and death occur within a short time after the injury no damages are recoverable by the estate for the Deceased's pain and suffering." The case referred to is the case of *Hicks v Chief Constable of Sussex* [1992] 2 All ER 65. This was the case brought on behalf of the estate of a young woman who died as a result of asphyxia caused by her being trapped in the crush in the Hillsborough Stadium disaster. Lord Bridge stated at page 69 e that:

> "It follows that fear of impending death felt by a victim of a fatal injury before that injury is inflicted cannot by itself give rise to a cause of action which survives for the benefit of the victim's estate."

[15] In contrast, where there is a significant period of unconsciousness before death there can be a substantial claim for damages for loss of the amenities of life. The fact that the victim is unaware of his loss of amenity is not a ground for

reducing the award. See *Andrews v Freeborough* [1967] 1 QB 1 CA. Awards in relation to pain and suffering are, however, based on the victim's awareness of his injury. See *Lim Po Choo v Camden and Islington Health Authority* [1980] AC 174.

[16] In the case of Michael Quinn v MOD, [2018] NIQB 82 at paragraph [35] I referred to the first paragraph of Chapter 42 of McGregor on Damages:

> "In so far as an assault and battery results in physical injury to the claimant, the damages will be calculated as in any other action for personal injury. However, beyond this, the tort of assault affords protection from the insult which may arise from interference with the person. Thus, a further important head of damage is the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation that may be caused. Damages may thus be recovered by a claimant for an assault, with or without a technical battery, which has done him no physical injury at all. There may be a basic award of damages for the injury to feelings and if the injury is aggravated by the defendant's conduct an additional award of aggravated damages or, as with many court awards, the two can be run together."

[17] In relation to claims for assault, battery and trespass to the person, the English Court of Appeal in the case of *Richardson v Howie* [2005] PIQR Q3 CA at 48 has stated that a Court:

> "… should not characterise the award of damages for injury to feelings, including any indignity, mental suffering, distress, humiliation or anger and indignation that might be caused by such an attack, as aggravated damages; a court should bring that element of compensatory damages for injured feelings into account as part of the general damages awarded. It is, we consider, no longer appropriate to characterise the award of the damages for injury to feelings as aggravated damages, except possibly in a wholly exceptional case."

[18] Carswell LCJ giving the judgment in the Court of Appeal in Northern Ireland in the case of *Clinton v Chief Constable* [1999] NICA 5 gave the following guidance in relation to the award of aggravated damages in such cases:

> "The concept of aggravated damages first appeared as a defined element in an award of damages in Lord Devlin's speech in *Rookes v Barnard* [1964] AC 1129, where he adopted the phrase to define an element of increase in previous cases which should not be regarded as exemplary damages in the proper sense. After espousing the idea in its Consultation Paper *Aggravated, Exemplary and Restitutionary Damages* (1993) that aggravated damages contain some punitive element, the Law Commission has now accepted in its Report on this topic (Law Com No 247, 1997) that they should not do so. This corresponds with the view which we expressed in this court in a fair employment case *McConnell v Police Authority* [1997] NI 244 at 255 that aggravated damages are purely compensatory and do not contain any punitive element.
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> The Law Commission at paragraph 2.4 laid down two basic preconditions for an award of aggravated damages:
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> (1) exceptional or contumelious conduct or motive on the part of a defendant in committing the wrong, or, in certain circumstances, subsequent to the wrong; and
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> (2) mental distress sustained by the plaintiff as a result.
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> 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 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."

[19] Although somewhat limited, there is some judicial authority on whether an award of aggravated damages is appropriate in a fatal case. The case of *Shah v Gale* [2005] EWHC 1087 (QB), involved a claim for aggravated damages by the mother of the murder victim on behalf of the estate of the Deceased. In that case, the victim, a 45-year-old Accountant, was at home when his front door was forced open and he was attacked and stabbed to death. A police investigation led to the prosecution of a number of individuals. Although there were a number of convictions, Ms Kelly Anne Gale, the Defendant in the subsequent civil action was acquitted at the trial. This was despite the fact that she had admitted that, albeit in error, she had pointed out Mr Shah's home as the home of another man, against whom another Defendant who was convicted of murder at the trial, had a grievance of which she was well aware. The family of Mr Shah felt that Ms Kelly Anne Gale bore a substantial responsibility for Mr Shah's death. As a result, Mr Shah's mother as the administratrix of his estate, commenced proceedings against Ms Gale seeking damages (including aggravated damages) on the basis that Miss Gale was a joint tortfeasor of the battery inflicted on Mr Shah and/or conspired to assault him. It is important to emphasise that damages were not sought for personal injury or under the Fatal Accidents Act for loss of a dependency.

[20] In his judgment at paragraphs [57] to [59], Leveson J addressed the entitlement to claim aggravated damages in a fatal case where death occurred shortly after the infliction of the injury.

> "[57] Mr Jones also claims aggravated damages. This head of award is intended to provide a Claimant with additional compensation where there are aggravating features of the case such that the basic award would not be sufficient compensation. Aggravating features, which relate to the initial incident, can include malicious or oppressive behaviour or behaviour of a high-handed, insulting, malicious or autocratic manner. It can include the way in which the litigation has been conducted. In *Appleton v. Garrett* [1996] 5 PIQR P1, Dyson J adopted a summary provided by the Law Commission in these terms (paragraph 3.3):
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> > 'In *Rookes v. Barnard*, Lord Devlin said that aggravated awards were appropriate where the manner in which the wrong was committed was such as

> to injure the plaintiff's proper feelings of pride and dignity and gave rise to humiliation, distress, insult and pain. Examples of the sort of conduct which would lead to these forms of intangible loss were conduct which was offensive or which was accompanied by malevolence, spite, malice, insolence or arrogance. In other words the type of conduct which had previously been regarded as capable of sustaining a punitive award. It would therefore seem that there are two elements relevant to the availability of an aggravated award, first, exceptional or contumelious conduct or motive on the part of the defendant in committing the wrong and second, intangible loss suffered as a result by the plaintiff, that is injury to personality.'

[58] Because he was immediately murdered, there is no scope for injury to personality but it is difficult to think of behaviour which is more serious than the attack upon Mr Shah's home. I have no doubt that an award is justified although I must bear in mind the observation of Woolf J in *W v. Meah* [1986] 1 All ER 935 at 942d in rape cases that the award of aggravated damages "must be moderate" and his later comment in relation to police cases (when Lord Woolf MR) in *Thompson v. Commissioner of Police of the Metropolis* [1998] QB 498 (at 516F):

> 'In the ordinary way … we would not expect the aggravated damages to be as much as twice the basic damages except where, on the particular facts, the basic damages are modest. … [T]he total figure for basic and aggravated damages should not exceed … fair compensation for the injury which the plaintiff has suffered. … [I]f aggravated damages are awarded such damages, though compensatory are not intended as a punishment, will in fact contain a

> penal element as far as the defendant is concerned.'
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> [59] It is important to underline that these aggravated damages are not being awarded in respect of the murder of Mr Shah but only for the circumstances in which he was assaulted and no more. Nevertheless, when Lord Woolf MR expressed the view that the aggravated element should not be as much as twice the basic damages except where the latter are modest, he was considering actions against the police in which comparatively substantial basic awards would also be made. Notwithstanding that this incident was over very quickly, having regard to all the circumstances, I award £2,000."

[21] This authority from such an eminent judge is strong persuasive authority for the award of aggravated damages for the tort of trespass to the person in a fatal case even in the absence of a claim for personal injury. Further judicial support for such a claim is contained in the speeches of some of their Lordships in the case of *Ashley and Another v Chief Constable of Sussex* [2008] UKHL 25. In that case, one of the issues for the House of Lords was whether the estate of a man who had been shot as a result of a genuine but mistaken belief on the part of an armed policeman could pursue before their Lordships a claim based on assault and battery in circumstances where the Defendant Chief Constable had previously conceded that, should he be found liable for negligence, he would be prepared to pay full compensatory damages including a sum by way of aggravated damages. He, therefore, argued that the assault and battery action served no legitimate purpose, as there was nothing more that the Plaintiffs could hope to obtain if the claim were allowed to proceed and it therefore amounted to an abuse of process of the Court. This argument had been accepted at first instance and by the Court of Appeal but the House of Lords by a majority of 3 to 2 rejected it. Part of the reason why the majority of their Lordships were prepared to allow the battery claim to proceed was a general perception of the propriety of seeking aggravated damages on the basis of that tort rather than on the basis of negligence. None of their Lordships seriously questioned whether aggravated damages could be claimed by the victim's estate. At paragraphs [101] and [102], Lord Neuberger had this to say about the claim for aggravated damages:

> "[101] Secondly, the Ashleys say they should be able to proceed with their claim in battery to recover aggravated damages. This argument did not really feature in their printed case, and it was not apparently pursued below. That was presumably because the Chief Constable's concession extends to liability for aggravated damages (see para 11 of the

> Master of the Rolls' judgment). However, it appears to be common ground that aggravated damages can be awarded for battery but not for negligence, and I am slightly troubled by the assumption that a defendant can confer jurisdiction on the court to award aggravated damages for a tort in respect of which aggravated damages are not recoverable as a matter of law.
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> [102] Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant. If that is so, I cannot see why such damages should not logically be recoverable in some categories of negligence claims. In the present case, for instance, it must have been reasonably foreseeable (the normal tort test) that a negligently mishandled armed police raid could result in just the sort of mental distress or shock that aggravated damages are intended to reflect. It appears to me that it would be reminiscent of the bad old days of forms of action if the court held that the Ashley's' claim could result in aggravated damages if framed in battery, but not if framed in negligence. In my view, there is a strong enough case for saying that aggravated damages would be recoverable for the instant negligence for the point to have been validly conceded by the Chief Constable."

[22] Lord Carswell in the same case at paragraph [80] made the following observations:

> "…In the present case the appellant has admitted liability for negligence and has undertaken to pay the respondents damages, including any award for aggravated damages (though it is more than a little difficult to see how such damages can be in question, when it is very questionable whether the deceased was conscious and sentient for any significant period between the shooting and his death)."

[23] Having regard to the weight of judicial opinion expressed in the cases of *Shah* and *Ashley*, I have no hesitation in concluding that in principle, an award of aggravated damages can be made even in circumstances where there is no claim for

general damages for pain and suffering. Having regard to the principles set out in the case of *Clinton v Chief Constable* [1999] NICA 5, I will now proceed to consider and assess the claim by the Estate for injury to the Deceased's feelings and to determine whether a compensatory award should be made for injury to feelings and if so whether the compensation awarded to the Estate of the Deceased should include any element of aggravated damages for mental distress suffered by the Deceased as a result of the exceptional or contumelious conduct or motive of the Defendant in committing the wrongs inflicted on the Deceased.

[24] Referring back to paragraph [7] above, having examined the events of the day in question, I conclude on the balance of probabilities that the wrongful actions of the servants or agents of the Defendant on the day in question would have filled the Deceased with fear and dread, coupled with a strong sense of indignation and hurt at being the innocent victim of a blatant, unprovoked and unjust attack by members of the army.

[25] Further, I have no hesitation in finding as a fact that the behaviour of the servants or agents of the Defendant responsible for these wrongful acts was exceptional and contumelious and was imbued with a degree of malevolence and flagrancy which was truly exceptional. The Deceased was forced to take shelter from shooting directed by soldiers towards the area where he was present. He witnessed Mr Gilmore being shot dead in the close vicinity. He subsequently ventured out from the place of shelter either to help another man who had been shot or to indicate to the soldiers that they should stop shooting as no one in that area posed a threat to them. When he did so, he was shot in the head from a range of 35 yards. Having regard to the uncontroverted evidence in this case, the Court determines that the claim by the Estate for injury to the feelings of the Deceased resulting from the tortious actions of the soldiers culminating in him being shot dead is clearly established in law and that the compensation to which the Estate of the Deceased is entitled should include aggravated damages. However, bearing in mind that the Deceased was killed instantly, the appropriate level of award in this instance is the sum of £15,000.