Neutral Citation Number: [2020] EWHC 3457 (QB)

Case No: HQ17X00521
QB-2017-007123

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2020

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

SARAH JANE YOUNG	**Claimant**
- and –	
JOHN ANTHONY DOWNEY	**Defendant**

- -
- -

Miss Anne Studd QC (instructed by **McCue & Partners LLP**) for the **Claimant**
The Defendant was unrepresented and did not attend

Hearing dates: 2 and 3 December 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MARTIN SPENCER

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 16 December 2020.

Mr Justice Martin Spencer:

Introduction and Background Facts

1. This matter has come before me for the quantification of damages following the judgment on liability of Mrs Justice Yip dated 18 December 2019.

2. I am grateful to Mrs Justice Yip for her exposition of the background facts and her findings. The claim arises from the bomb attack in Hyde Park on 20 July 1982 for which the Irish Republican Army (the IRA) claimed responsibility. The bomb, concealed in a car boot, was detonated as members of the Household Cavalry rode past on their regular route from Knightsbridge Barracks to Horse Guards for the Changing of the Guard. Four soldiers, including the Claimant's father, Lance Corporal Jeffrey Young, were killed by the bomb, 31 other people were injured and seven horses were destroyed.

3. The Claimant's father, born on 27 July 1962, was aged just 19: he would have been 20 one week later. The others who died were Lt Anthony Daly, aged 23, Trooper Simon Tipper, aged 19 and Squadron Quartermaster Cpl Roy Bright, aged 36.

4. In the words of Mrs Justice Yip, "there can be no doubt that this was a wicked, pre-meditated attack. Four young men lost their lives and the lives of many others were indelibly altered." She found that the Defendant, John Anthony Downey, was deeply implicated in the planning and execution of the attack. Her findings are at paragraph 87-90 of her judgment, as follows:

> "87. i) The Claimant's father, Lance Corporal Jeffrey Young was unlawfully killed (as were the three other soldiers) by persons acting together in the name of the IRA.
>
> ii) The deaths resulted from a deliberate, carefully planned attack on members of the military as they were on their way to carry out their ceremonial duties in the Changing of the Guard at Horse Guards.
>
> iii) The explosion was caused by a radio-controlled improvised device in the boot of the Morris Marina, registered number LMD 657P, which had been designed and carefully assembled to kill and maim with the addition of nails as shrapnel.
>
> iv) The car was bought at auction on 13 July 1982 by an Irishman, whom it can reasonably be inferred was one of the bomb conspirators.
>
> v) The car is likely to have remained in the possession of the conspirators in the week leading up to the bombing, during which time the bomb was assembled in its boot.
>
> vi) The car was parked in Portman Square between 17 and 18 July. It was then parked at the Royal Garden Hotel car park from 18 July until the morning of the bombing.
>
> vii) The defendant's fingerprints were on the tickets for both car parks.

viii) There can be no sensible explanation for the defendant's fingerprints to be on the car parking tickets other than that he was responsible for moving the car between the car parks. It is probable that he was driving it on the morning of 20 July 2019.

ix) The defendant was a member of the IRA, as evidenced by his conviction in 1974.

x) In the circumstances, it is reasonable to infer that the defendant was knowingly involved in the concerted plan to detonate the bomb in Hyde Park specifically targeted at the passing Guard.

88. I find that the defendant was an active participant in the Hyde Park bombing which caused the death of the Claimant's father and the other soldiers.

89. I find that the defendant's participation was part of a concerted plan aimed at killing or at least doing really serious harm to members of the Household Cavalry.

90. As such, the Claimant has established that the defendant is responsible as a joint tortfeasor for the unlawful killing of her father and she is therefore entitled to recover damages from him. The extent of those damages will be determined later. Since damages remain to be assessed, I intend to say no more at this stage about the impact of this dreadful event on the Claimant."

These Proceedings

5. The pursuit of this claim followed the collapse of criminal proceedings in 2014 against the Defendant. The circumstances are set out in the judgment of Mrs Justice Yip:

"5. The defendant, John Anthony Downey, was arrested in connection with the explosion in May 2013. His involvement had been suspected from shortly after the bombing. During the 1980s, consideration was given to seeking his extradition. However, proceedings were not commenced. His arrest in 2013 resulted from him voluntarily travelling to Gatwick Airport. He was subsequently charged with four counts of murder and one of doing an act with intent to cause an explosion and was due to stand trial at the Central Criminal Court. On 21 February 2014, Sweeney J acceded to an application to stay the indictment as an abuse of process.

6. Sweeney J set out his reasons in a detailed judgment. The ruling triggered an independent review of the administrative scheme for 'on the runs' (OTRs) in Northern Ireland conducted by Dame Heather Hallett DBE. The report of the Hallett Review is also detailed and I shall not repeat that which has already been publicly stated. It suffices to say that the scheme was implemented as part of the Northern Ireland peace process. It was not intended to provide an amnesty for those who had committed terrorist offences or to impact on ongoing investigations. Had the scheme been properly administered, the defendant should not have received a letter of assurance under the scheme. However, a catastrophic failure led to the defendant being provided with assurance that he was not under investigation, which he relied upon in travelling to the United Kingdom mainland. This underpinned Sweeney J's ruling, although a short

> summary such as this cannot do justice to the full analysis of all the circumstances which is contained in his judgment, which remains readily available on the website of the Judiciary of England and Wales"

Part of the motivation for the bringing of this claim is therefore to achieve vindication where the State is perceived to have failed the Claimant in relation to the more usual channels, namely prosecution in the criminal courts and imprisonment of those responsible upon conviction.

6. Apart from the filing of an initial defence to the claim, the Defendant has declined to participate in these proceedings. In a "Note to the Court" dated 29 October 2018, the Defendant wrote:

> "I therefore notify the Court and the parties that such proceedings as may continue, will have to take place without my active participation. What I have to say has already been set out. I have always made it clear that none of the comments I have made should in any way be taken as disrespect to the Claimant herself and her integrity."

Since then, the Defendant has not communicated with the court or with the Claimant's solicitors at all. On 28 April 2020, Master Davison gave directions for the service of documents on the Defendant at his two last known addresses, the Defendant's email address no longer being active, and in an email of 28 April 2020, the Master wrote to the Claimant's solicitors indicating that it would be sufficient for them to serve the Notice of Hearing, incorporating the Remote Hearings Guidance at those addresses. I am therefore satisfied that the non-participation of the Defendant in these proceedings, and in particular at the hearing before me, has been deliberate thereby entitling me to proceed in the Defendant's absence.

7. There are two principal claims by the Claimant in this action: first, the Claimant's own claim for personal injury comprising mainly psychiatric damage arising out of the death of her father; secondly, a claim under the Fatal Accidents Act for loss of dependency on the part of the Claimant and her mother together with a small claim on behalf of the deceased's estate for the deceased's pain and suffering in the short period between the detonation of the bomb and his death pursuant to the Law Reform (Miscellaneous Provisions) Act 1934.

8. The evidence before me has comprised:

   (i) a witness statement by the Claimant dated 21 February 2019;

   (ii) a further witness statement by the Claimant dated 14 November 2019;

   (iii) an expert report on employment by Gary Craggs dated 25 August 2020 together with an addendum dated 2 November 2020;

   (iv) an expert forensic accountancy report addressing loss of dependency by Mr Maurice Faull dated 4 September 2020 together with a supplementary report dated 2 November 2020;

   (v) an expert psychiatric medical report by Dr Nicholas Cooling dated 23 June 2017;

(vi) an updated medical report from Dr Cooling dated 11 September 2020;

(vii) In addition, I heard some oral evidence from Dr Cooling.

9. The claim for damages is brought under the following heads of loss:

(i) The Claimant's claim for personal injury, including Aggravated Damages;

(ii) The claim for Exemplary Damages;

(iii) The claim for the deceased's pain and suffering prior to death; and

(iv) The dependency claim.

I shall deal with these in turn.

The Claimant's claim for personal injury, including Aggravated Damages

10. The claim by the Claimant for personal injury is brought by her as a secondary victim. The Claimant was born on 12 January 1978 and was aged 4½ when her father was killed. The circumstances are set out in her witness statement (which I accept) as follows:

> "8. On the morning of 20 July 1982, I was in the nursery in the barracks. The nursery windows looked out over the courtyard of the barracks. Before my father and the other soldiers left for ceremonial duties on their procession down South Carriage Drive, I went to the windows of the nursery, to wave my father off. I pressed my nose up against the glass as they trooped out. I remember they looked so smart in their uniforms and when they got to the gates, Dad turned to look up and smile at me before he left.
>
> 9. When the bomb exploded, I was still in the nursery in the barracks. I knew that my father had left on horseback. There was this huge noise. I heard the explosion and I felt the building shake. From the window, I saw soldiers rushing out of the barracks to see what was happening.
>
> 10. I then saw soldiers returning to the barracks covered with blood and embedded with nails. One man had nails sticking out of his hand.
>
> 11. I felt frightened, and then Lulu, my nursery teacher took me away from the window and put me in a different room. I remember telling my Mum afterwards "Daddy should be coming now" but he never did.
>
> 12. I remember that day as clear as if it was today. The memories of it hit me at unexpected moments, and especially when I hear fireworks or I hear loud bangs.
>
> 13. I have suffered severe psychiatric illness since my father's death. As a result of hearing the bomb explode and then seeing soldiers returning to the barracks covered in blood and embedded with nails, any one of which could have been my father, I suffered nervous shock which has resulted in my suffering from a number of recognised psychiatric illnesses since 1982, which have continued

> into my adult life and are likely to continue. This has had a devastating impact on all aspects of my life."

11. It is to be noted that although the Claimant gives evidence of having heard the bomb explode and having witnessed the aftermath of the event in terms of seeing the return to barracks of the injured soldiers, she does not say that she remembers associating what she saw and heard with her father or appreciating that her father was or might be involved. I do not find that surprising in a 4-year-old who would not, as it seems to me, necessarily have had the understanding or development of mind to associate what she had witnessed with danger to her father. As far as she was concerned, she had waved him off, he had smiled at her and he would be coming home later.

12. In this regard, at my suggestion, Dr Cooling, who examined the Claimant twice in 2017 and 2020, was called to see if he could elucidate on what might have been in the mind of a 4-year-old. Although he is not a specialist child psychiatrist, he ran the child psychiatry service intermittently between 1989 and 1992 when his colleague who was a specialist child psychiatrist, was away. He said that he would have expected a child of 4½ to make an association between what she was watching and her father. He referred to the fact that she had seen him off in uniform and then, a short time later, saw men wearing the same uniform covered in blood, one of whom had a nail sticking out of his hand. It didn't surprise him that she did not express concern at the time as, in his opinion, she wouldn't have appreciated that it was a terrorist act which had occurred. He said:

> "What she would have appreciated was an interruption, a problem with how things had gone and she was frightened by what she saw. She would have appreciated she was seeing something unusual, frightening and challenging."

As for the Claimant saying to her mother: "Daddy should be coming now", Dr Cooling did not interpret this as indicating that she had no fear or inkling that her father had been involved in the events which she had experienced earlier that day. He thought that this was the child seeking reassurance about her father, reassurance which was not forthcoming. However, I have difficulty with this. Had she said, "Daddy is coming soon now, isn't he?" (or words to that effect), then that might well have betrayed some anxiety on her part and that she was seeking reassurance, but simply saying "Daddy should be coming now" indicates to me that the Claimant was expecting her father home soon. He was apparently her main carer and she would have been looking forward to seeing him.

13. Miss Studd submitted that I should find that, on the basis of Dr Cooling's evidence, the Claimant did at the time associate what she heard (the bomb exploding) and what she saw (the soldiers wearing the same uniform as her father returning covered in blood and, in some cases, severely injured) with danger to, or fear for, her father. However, having thought about the matter carefully, I cannot accept that. As I explain in paragraph 29 below, a 4-year-old's mind works very differently to an adult's, and I do not think that a 4-year-old would have appreciated that her father was in danger without witnessing herself a trauma being inflicted on him. I am not prepared to assume that she made the connection in the absence of some evidence to that effect from what she said at the time. Contrary to Dr Cooling, I interpret what she did say later as indicating that she had not made the association. If the fact that her father was, or may have been, implicated in the events which she witnessed was not in the Claimant's mind, then she was arguably in no different position to, for example, any other child in the nursery that

day who heard the explosion and saw the aftermath: her father had in fact been killed, but she did not know or fear that, and therefore the effect of what she saw and heard was not enhanced by her close relationship with one of the victims. Whether this is necessary is a matter to which I return in paragraph 26. below.

The Psychiatric Evidence

14. Dr Cooling interviewed the Claimant for the first time on 15 June 2017, when the Claimant was aged 39. For the history, he drew heavily on a letter dated 12 July 2016 from Dr Jenna Ivey of the Community Mental Health Service in Pentre. This revealed a troubled childhood. Soon after the bombing, the Claimant, her sister (who was born on 13 March 1981 and was aged just 1½) and her mother moved back to Wales where the Claimant was largely brought up by her grandmother and aunt. The Claimant and her sister were sent to a Catholic boarding school run by nuns when the Claimant was just 9, where she was deeply unhappy and the nuns were unable to cope with her, and when she returned home, at age 12, her relationship with her mother broke down completely and she moved to live with her grandmother. The Claimant told Dr Cooling that this was when she was 14. The letter noted that unfortunately her grandmother passed away in approximately 2013 and her auntie had become terminally ill. The Claimant felt that these were the only people in her life who had been able to support her and calm her when distressed.

15. Dr Cooling also had access to the Claimant's medical records. A handwritten note dated 27 July 1983 referred to the Claimant, then aged 5½, understanding what had happened to her father and having occasional nightmares and being terrified of needles, associating them with her father's death. There is reference to an overdose of Septrin in November 1992 when the Claimant was aged 14, attributed to the Claimant's "difficult social circumstances". She left school at the age of 16 with two GCSEs and joined the Army Cadets. In about June 1994, when on a training course, she suffered a fall on an assault course and suffered a stable wedge fracture to her L1 vertebra. She was in fact at this time about three months pregnant and she gave birth at age 17 to a boy, Brett, in the spring of 1995. An entry in the Claimant's medical records for 21 January 1997 referred to the previous vertebral fracture and incontinence as well as social problems.

16. The Claimant was referred to the psychiatric service in 1997 when a diagnosis of depression of moderate severity with post-traumatic stress disorder was made. Her mood disorder responded reasonably well to treatment with Moclobemide and she was seen by Psychology where it was recorded she responded well to Eye Movement Desensitisation and Reprocessing ("EMDR"). She was re-referred in March 2002 when her principal complaint was of headache. She gave a history of depressed mood, impaired concentration, impaired short-term memory and sleep disturbance. Her drug regimen was changed. A letter dated 17 December 2002 referred to the Claimant suffering from postnatal depression and bipolar disorder, both references being puzzling: it was over seven years since Brett had been born and the Claimant has never suffered from bipolar disorder and one wonders whether the author was confusing the Claimant with another patient.

17. After 2002, there appears to have been little in the way of significant psychiatric history.

18. It was Dr Cooling's opinion that the Claimant developed post-traumatic stress disorder as a result of witnessing the circumstances and direct aftermath of the Hyde Park

bombing on 20 July 1982, stating:

> "In my opinion she was exposed to a stressful event of exceptionally threatening or catastrophic nature, which would be likely to cause pervasive distress in almost anyone. Subsequently she has been affected by flashbacks, vivid memories and nightmares. Subsequently she has avoided circumstances resembling aspects of the trauma and in particular she has developed a needle phobia, which relates to her seeing a large nail sticking out of the hand of one of the returning soldiers."

He has also diagnosed a recurrent depressive disorder as a result of the shock of the index event, which was mild at the time of interview. Thirdly, he has diagnosed an enduring personality change and finally a reactive attachment disorder of childhood.

19. Addressing causation, Dr Cooling says:

> "In my opinion the post-traumatic stress disorder, enduring personality change, recurrent depressive disorder and childhood attachment issues would not have manifested but for what Sarah Jane witnessed in the immediate aftermath of the Hyde Park bombing, when she saw the physical condition of the returning soldiers."

20. In his report, Dr Cooling recommended treatment by way of outpatient psychiatric sessions over the following two years "in order to bring her residual depressive symptomatology under better control and also to further reduce her chronic symptoms of post-traumatic stress disorder". He also recommended further sessions of trauma-focused psychotherapy including CBT and EMDR. The prognosis, however, was guarded, Dr Cooling stating: "it is very unlikely at this stage that much in the way of treatment benefit will be obtained, apart from symptomatic amelioration. In my view she will remain highly vulnerable to further bouts of depression in response to stressful life events in the future."

21. Dr Cooling re-interviewed the Claimant on 10 August 2020 for the purposes of his updated report. She presented as being moderately anxious and depressed and her mental state had deteriorated during lockdown (this being in the middle of the 2020 Covid-19 pandemic) and she was continuing to suffer from quite marked social isolation although she was having regular contact with her mother. His opinions in relation to diagnosis, causation and treatment were the same. He expressed concerns about the Claimant's morbid obesity which was causing painful disability and limited physical mobility. By now the Claimant had become heavily dependent on her mother in terms of activities of daily living including eating, self-care, looking after Amelia, shopping and attending hospital appointments.

Secondary Victims: the legal position

22. The ability of certain secondary victims to recover for psychiatric injury is an exception to the general rule that the law does not allow recovery by others affected by injury to a primary victim, for example those who have sustained economic loss. It has always been recognised that to allow some secondary victims to recover requires 'control mechanisms' to limit the class of those for whom the law allows recovery. The exception was originally very narrow, recovery being limited to those who suffered "nervous shock" having witnessed the death or injury of a primary victim, who had to be spouse or child of the Claimant (though there was an exception for "rescuers"); and the Claimant had to see or hear the injury directly (though there was an extension

allowing recovery where the Claimant came upon the "immediate aftermath" of the incident).

23. In her skeleton argument, Ms Studd QC relies first upon *McLoughlin v O'Brian* [1983] 1 AC 410, which was the first authoritative statement of the control mechanisms or limits to recovery, and in particular the speech of Lord Wilberforce. At 422B Lord Wilberforce set out the three criteria that need to be satisfied before damage for such a claim can be recovered:

> "It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused."

He then went on to define each of the criteria required in further detail:

> "As regards the class of persons, the possible range is between the closest of family ties — of parent and child, or husband and wife — and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.
>
> As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the "nervous shock." Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. In my opinion, the result in Benson v. Lee [1972] V.R. 879 was correct and indeed inescapable. It was based, soundly, upon "direct perception of some of the events which go to make up the accident as an entire event, and this includes ... the immediate aftermath ..." (p. 880.)
>
> The High Court's majority decision in *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1, where a child's body was found floating in a trench after a prolonged search, may perhaps be placed on the other side of a recognisable line (Evatt J. in a powerful dissent placed it on the same side), but, in addition, I find the conclusion of Lush J. to reflect developments in the law.
>
> Finally, and by way of reinforcement of " aftermath " cases, I would accept, by analogy with " rescue " situations, that a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene — normally a parent or a spouse — could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account

> must be taken of the possibility of alterations in the circumstances, for which the defendant should not be responsible. Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts."

24. The other leading authority relied upon by Miss Studd QC is *Alcock v Chief Constable* [1992] AC 310 in which, she submitted, the House of Lords reiterated the four limb formula which would permit a Claimant to recover damages for nervous shock as a secondary victim:

    (a) The Claimant must have a close tie of love and affection with the person killed, injured or imperilled;

    (b) The Claimant must have been close to the incident in time and space;

    (c) The Claimant must have directly perceived the incident rather than, for example, hearing about it from a third person; and

    (d) The Claimant's illness must have been induced by a sudden shocking event.

25. Miss Studd QC submits that the Claimant satisfies all four of those criteria:

    (a) She was the young daughter of the victim and clearly had the close tie of love and affection to her father;

    (b) She was close to the incident both in time and space having been situated close to the window in the nursery of the barracks when the soldiers left for the changing of the guard, hearing the blast and witnessing the return of soldiers other than her father with injuries sustained in the blast including one with nails embedded in his hand.

    (c) This was a direct witnessing of the aftermath of the incident although the aftermath came to her as a small child looking out of the window rather than the Claimant going to the aftermath of the incident as was envisaged in McLoughlin. However, that makes no difference in terms of recovery.

    (d) On the basis of Dr Cooling's evidence, the Claimant's illness was induced by the sudden shocking event which she underwent.

26. I refer to the issue raised in paragraphs 11 to 13 above, namely whether it is necessary, in order for a secondary victim to recover, that her "shock" is materially connected to an appreciation that the primary victim is a loved one and whether it is necessary for the secondary victim to appreciate that a loved one has been or might have been involved in the accident witnessed (including its aftermath). I am not aware that this is an issue which has previously been considered directly by the courts.

27. Miss Studd refers to Lord Ackner's definition of shock in *Alcock*, namely "sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind". She submits:

> "It would follow that without the "agitation of the mind" there could be no claim. Thus in very many cases that would in fact require the actual sight of a person injured in a damage state and to that extent certainly the aftermath cases which concern a visit to a hospital after the incident may well require actual sight of the victim. However it is submitted that "sight" of the accident once the victim has been removed from the scene may also be sufficient."

However, in my judgment this does not address the issue. It is surely the fact that the accident has involved (or, possibly, may have involved) a loved one which distinguishes sight of the accident aftermath once the victim has been removed from the scene in the case of a secondary victim who can recover from any innocent bystander who comes across the scene of an accident. Thus, if sight of the accident once the victim has been removed is covered by the doctrine of secondary victims, as Miss Studd submits, that proves, in my mind, that appreciation that a loved one has been, or may have been involved, is a necessary ingredient.

28. Miss Studd invites the court to compare the position in this case with the position had it been the Claimant's mother in the location of the Claimant in the window of the nursery on that very same morning. She submits:

> "The Claimant will aver that in those circumstances the Claimant's mother would undoubtedly be able to recover as a secondary victim and therefore the real question for the court is why a child should be treated any differently subject to proof of injury."

She reiterates that, on the evidence of the Claimant and a proper analysis thereof, the three elements outlined by Lord Ackner are undoubtedly fulfilled. She submits that a secondary victim such as this Claimant should be treated no differently simply because she is a child. The Claimant's experience of the "aftermath" - watching the soldiers run to the scene and others return injured - assists the court in determining whether she sustained "sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind."

29. In my judgment, a comparison between this Claimant, aged four at the time, and her mother is indeed instructive, although not perhaps as Miss Studd intended. A woman, having seen off her husband on horseback and then hearing an explosion and seen the aftermath, would naturally be terrified that her husband was involved. She would instinctively run to the scene to check that her husband was all right. The potential for her husband to be involved would be at the forefront of her mind. However, the same is not true, necessarily, of a four-year-old. As I have said, my interpretation of the evidence suggests that it never occurred to this four-year-old's mind at all that her father might have been injured, or killed, or involved at all in what she had heard and seen. She does not say so and her remark to her mother later "daddy should be coming now" indicates clearly, as it seems to me, that she had no appreciation that her father had been involved.

30. In my judgment, support for the proposition that the need for the Claimant to have a close tie of love and affection with the person killed, injured or imperilled incorporates an appreciation that the loved one is or may have been the one, or one of those, killed injured or imperilled can be found in the decision of the Court of Appeal in *Taylor v A Novo (UK) Ltd* [2014] QB 150.

The facts were that the primary victim, Mrs Taylor, was injured in an accident at work as a result of which she sustained injuries to her head and left foot. She was injured when a fellow employee caused a stack of racking boards to tip over on top of her. The accident was caused by the admitted negligence of the defendant her employer. She was apparently making a good recovery when on 19 March 2008 she suddenly and unexpectedly collapsed and died at home. Her sudden collapse and death were due to deep vein thrombosis and consequent pulmonary emboli, which themselves were due to the injuries that she had sustained in the accident. Her daughter, Crystal Taylor, did not witness the accident, but she did witness her mother's death. It was not in dispute that, as a result of witnessing her mother's death, she suffered significant post-traumatic stress disorder. The only issue at the trial before Judge Halbert was whether Ms Taylor was entitled as a matter of law to claim damages from Novo as a "secondary victim" of the accident to her mother. Judge Halbert held that she was, and that decision was overturned by the Court of Appeal

31. At first instance in that case, Judge Halbert purported to set out seven requirements to be fulfilled for a secondary victim to recover:

> "In order to succeed as a secondary victim, Ms Taylor had to satisfy the following seven requirements:
>
> (i) her injury was reasonably foreseeable;
>
> (ii) she was a close relative of and had a close emotional relationship with the primary victim;
>
> (iii) she had suffered a recognised psychiatric injury;
>
> (iv) the injury was caused by the actions of the defendant;
>
> (v) the injury was caused by "shock" as a result of a sudden perception of the death of, or risk to or injury to the primary victim;
>
> (vi) she was either present at the scene of the accident which caused the death or must have been involved in its immediate aftermath (both physical and temporal proximity being required); and
>
> (vii) she must have perceived the death, risk of injury with her own senses."

32. In allowing Novo's appeal, Lord Dyson considered that the relevant "event" was the accident at work, not the death of the Claimant's mother. However, the Court of Appeal did not disapprove of Judge Halbert's fifth requirement, namely that the injury had to be caused by "shock" as a result of a sudden perception of the death of, or risk to or injury to the primary victim. Thus the identification of the loved one as the primary victim is an important, indeed in my judgment, an essential element. By contrast, in the present case there was never, at the relevant time, any recognition by the Claimant of her father as the primary victim.

33. For the above reasons, in my judgment the Claimant cannot recover damages for her psychiatric injury and that aspect of the claim must be dismissed.

34. It is nevertheless appropriate that I should assess damages under this head in case I am

wrong about that. However, I shall do so briefly. On the basis of Dr Cooling's opinion, the Claimant has suffered the consequences of her post-traumatic stress disorder as a result of what she witnessed for nearly 40 years. It has blighted her life. I take the view that she falls within the category in the Judicial College guidelines of severe psychiatric damage with a bracket of £51,460-£108,620. I accept Miss Studd's suggestion that the appropriate award in this case is £75,000. In addition, I consider that this is an appropriate case for an award of aggravated damages for the reasons set out in the judgment of the Court of Appeal of Northern Ireland in the case of *Breslin v McKenna* [2011] NICA 33. In that case the court upheld an award of £30,000 by way of aggravated damages to each Claimant which I increased to £37,000 to take account of inflation. Future treatment costs amount to £9,500 and the total damages awarded under this head would therefore have been £121,500.

The claim for Exemplary Damages

35. As Miss Studd recognised in her skeleton argument, the courts in England and Wales have not considered the issue of exemplary damages in the context of a claim resulting from a terrorist attack. The law in this regard is derived from the seminal judgment of Lord Devlin in *Rookes v Barnard* [1964] AC 1129. Two categories of claim are recognised as meriting an award of exemplary (or punitive, as it is also called) damages. The second category, which it is accepted can have no application here, relates to those who make profit at the expense of their tort. In relation to the first category, which concerns oppressive, arbitrary or unconstitutional conduct by government servants, Lord Devlin said at page 1226:

> "The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category – I say this with particular reference to the facts of this case – to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the others, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and, very likely, the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages."

36. Miss Studd concedes that on present authority the position remains as stated by Lord Devlin in *Rookes*. She submits that the court can and should allow a limited extension to the category, where the Defendant has not paid for his illegality in the ordinary way. With a crime of the kind committed by this Defendant, those injured and the families of those killed would find some measure of justice, and thereby closure, by seeing the perpetrators prosecuted, convicted and punished. Here, however, the state and the criminal law has let the Claimant down and Miss Studd submits that where the criminal law is unable to provide punishment, it is open to the civil courts to mark that failure, in such exceptional circumstances, by an award of exemplary damages.

37. In considering this submission, I have had regard to the decision of the NICA in *Breslin* (supra) at paragraphs 128 – 140. Having given due consideration to the views of the

Law Commission as expressed in Law Commission Report on Aggravated, Exemplary and Restitutionary Damages (1997 No. 247) and the decision of the House of Lords in *Breslin v McKenna* [2011] NICA 33, the court said:

> "[139] It is not difficult to have considerable sympathy for the plaintiffs' submission that the court should have the power to award exemplary damages in a case such as the present. The function of exemplary damages is punitive rather than compensatory and the terrorist atrocity such as the Omagh explosion might seem to be the archetypical case for damages to serve such a purpose. However, upon reflection, given the anomalous nature of the remedy and its longstanding restriction to very limited types of case by the highest judicial authority, we do not consider that it would be appropriate for this court to embark upon the radical extension sought by the plaintiffs."

38. With respect, I agree with those words and, in my judgment, even assuming that Miss Studd is right that this is an appropriate case to extend the categories of recovery for exemplary damages, such an extension would be for either Parliament or the higher courts, and probably the Supreme Court.

The claim for the deceased's pain and suffering prior to death

39. The Claimant seeks an award for the deceased's pain and suffering prior to death, such an award being recoverable on behalf of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934. Miss Studd refers me to the Judicial College Guidelines which provide a bracket of between £1290 and £2620 for immediate unconsciousness/death within one week. She suggests a figure of £1750. I accept that suggestion and award damages of £1750 under this head.

The dependency claim

40. The dependency claim under the Fatal Accidents Act 1976 is made by the Claimant on behalf of herself and her mother: although there is a further dependent, the Claimant's younger sister, she has indicated that she does not wish to make a claim.

41. At the time of the deceased's death, he was a soldier aged almost 20 who had joined the army at age 16¾ and had been promoted from Private to Lance Corporal. An assessment of the dependency claim involves consideration of the deceased's likely career but for his untimely death, both within the army and after leaving the army. My consideration of these matters has been made considerably easier by the impressive report from Mr Craggs. Miss Studd, on behalf of the Claimant, accepts that the claim should be based on loss of a chance, with the assessment of lost earnings being made in accordance with the approach of the Court of Appeal in *Langford v Hebran* [2001] PIQR Q13.

42. Mr Craggs explains that the full non-commissioned rank structure in the army is:

- Private
- Lance Corporal
- Corporal (known in the Household Cavalry as "Lance Corporal of Horse")
- Sergeant (known in the Household Cavalry as Corporal of Horse)
- Staff Sergeant (known in the Household Cavalry as Staff Corporal)
- Warrant Officer Class II

- Warrant Officer Class I

43. The deceased enlisted as a Junior Entrant into the army in April 1979 aged about 16¾ and at age 18 he would have committed to serving a minimum of either three, six or nine years. Although the deceased's service records showing his minimum commitment are not available, Mr Craggs says that from his experience of training Junior Entrants in the 1980s, most would commit to 9 years and I shall assume that to have been the case which would have given him a potential End of Engagement Date (EED) of 26 July 2002 (that is, 22 years' service from age 18 to age 40) with a commitment to serve at least until 26 July 1989. Thus, it seems to me appropriate to assess the dependency on the basis of a 100% certainty that the deceased would have remained in the army until 26 July 1989, having served nine years.

44. The next question concerns the chance that the deceased would have remained in the army for a further three years to the 12-year point. At Appendix 2 to his report, Mr Craggs reproduces statistics produced by Defence Statistics on the chances of a soldier completing various lengths of service and from that data he has extrapolated a table giving the chance of further service to various leaving points for a soldier who has completed nine years' service. On the basis of the statistics, a soldier in the Household Cavalry who has completed nine years' service has a 75% chance of completing 12 years' service, a 50% chance of completing 18 years' service and a 44% chance of completing 22 years' service. However, as Mr Craggs comments, the statistics are taken from data spanning all employment, levels of ability and ranks within the Household Cavalry and therefore care must be taken in the direct application of them to individual cases. At paragraph 2.8 of his report, Mr Craggs points to important factors governing the decision whether or not to stay on in the army:

> "Mr Young was enrolled into the Armed Forces Pension Scheme 1975 under which soldiers who leave aged 40 or over and after serving 22 years or more receive an immediate pension and tax-free lump sum. Soldiers who leave before that point receive a deferred pension from the age of 60 while those who leave before their pension point but with a minimum of 12 years' service are eligible for a tax-free Resettlement Grant on discharge (currently £14,123). In my experience this tax-free payment often acts as an incentive for soldiers to stay in the army to at least the 12-year point while the prospect of an immediate pension acts as a significant financial incentive to serve to the end of the 22-year engagement."

It seems to me that the tax-free Resettlement Grant on discharge would have been a powerful incentive to the deceased to remain in the army for the extra three years and I assess the chance of the deceased completing 12 years' service as being 95%.

45. The next question concerns the chance of the deceased completing the full 22 years' service to age 40. Three factors appear to me to be powerful indicators in this regard. First, having enlisted at age 16¾, life in the army was all that the deceased wanted or knew - he was an army man through and through. Secondly, he was successful in the army: promotion to Lance Corporal occurs on average after five years' service, but the deceased had achieved promotion within 2½ years indicating that his career was on an upward trajectory. Thirdly, I consider that the tax advantages would have been a powerful incentive for the deceased to stay on for the full 22 years: he would have received his pension and tax-free lump sum at age 40 rather than at age 60 had he retired from the army earlier. For these reasons, I consider that the chance of the deceased

completing his full 22 years' service would have been 75%.

46. Next, it is necessary to consider what the deceased would have achieved by way of promotion in his lost career in the army. This is considered in detail by Mr Craggs, all the time acknowledging that he had not seen the deceased's appraisals and was therefore unable to provide an opinion on how he might have been ranked on the basis of his annual reports. He states:

> "2.21 However, Mr Young had already been promoted to Lance Corporal and I understand this occurred in October 1981, after around 2 ½ years' service. This is significantly ahead of average rates and on this basis in my opinion it is reasonable to assume that Mr Young was likely to have been judged "Above Average" as a junior rank and in my opinion he is likely to have been promoted to Corporal after around seven years' total service, i.e. around April 1986. … Accordingly if Mr Young had left the army after nine or 12 years reckonable service aged 27 or 30 he would have done so in the rank of Corporal.
>
> 2.22 if Mr Young had served beyond age 30 years than in my opinion on the balance of probability he would have been promoted to sergeant after around 13 years' total service, i.e. around April 1992. If he had continued in service and assuming he was judged "average" in his SNCO peer group then in my opinion on the balance of probability he would have been promoted to Staff Sergeant after around 17 years total service, i.e. around April 1996."

I accept these predictions and therefore I accept the calculations made by Mr Faull based upon them.

47. Finally, there is an issue as to whether, upon retirement from the army, the deceased would have achieved median earnings or upper quartile earnings. Mr Craggs states that, during their service, individuals undertake a significant amount of training which is often significantly more than an individual may receive in civilian employment. In particular, they will undertake leadership and management training much of which is linked to qualifications awarded by bodies such as the Institute of Leadership and Management or the Chartered Management Institute. Most soldiers are required to drive as part of their role and a significant majority will undertake Large Goods Vehicle (LGV) driver training: Mr Craggs considers this to be virtually certain. Popular choices for work after leaving the service are jobs in security, LGV driving jobs, work in supervisory and management and in health and safety. Mr Craggs says:

> "In my experience and opinion Mr Young would have had a wide range of civilian employment options on leaving the army, particularly leaving as a staff sergeant. Depending on when he left the army he would have had 27 to 40 years working life to state pension age (67 for Mr Young). In my experience and opinion it is reasonable to assume he would have worked for the vast majority, if not all, of that period."

48. On the basis of the above evidence, I consider it likely to the point of certainty that the deceased would have achieved earnings in the median bracket, with a 50% chance of achieving upper quartile earnings.

49. The second part of the equation in the calculation of the dependency comprises the calculations carried out by Mr Faull using the data derived from the report of Mr

Craggs. For the purposes of those calculations, Mr Faull was instructed to assume that but for her father's death the Claimant would have attended University and graduated in June 1999. He was further instructed to assume that the Claimant would have remained dependent on her father up to and including 31 August 1999 when the Claimant would have been 21.63 years old. Whilst I would question the assumption that the Claimant would have attended University given the evidence contained in the report of Dr Cooling about her academic record, nevertheless, given that there was a younger sister, I am content with the date of 31 August 1999 as the date for the end of the dependency. This has implications for the *Harris v Empress Motors* calculation whereby, conventionally, 75% of income is used for the dependency where there is a spouse and dependent child whilst 66.67% is used for a spouse only.

50. Mr Faull has made his calculations upon the basis that the deceased would, but for his death, have received income from the following sources:

- earnings from employment within the army;
- earnings from civilian employment following discharge from the army;
- pension benefits from membership of the Armed Forces Pension Scheme;
- Resettlement Grant from the army (dependent on length of service); and
- state pension.

51. Inevitably, given that Mr Faull did not know the basis upon which the court would decide that the dependency should be calculated, nor the percentage probabilities representing the chance of the deceased remaining in the army, he has had to set out alternative scenarios relating to the deceased expected army career but for his death. Scenario 1 considers discharge from the army after 9 years' service; scenario 2 considers discharge from the army after 12 years' service; and scenario 3 considers discharge from the army after 22 years' service. Mr Faull has assumed that within scenarios 1 and 2 the deceased would have been promoted to the rank of Corporal on 1 April 1986 and would have retained that rank to the date of discharge. Within scenario 3, he has assumed further promotion to the rank of Sergeant on 1 April 1992 and then promotion to the rank of Staff Sergeant on 1 April 1996. Those assumptions are fully in line with the opinion expressed by Mr Craggs and I accept that they are reasonable for the purposes of the calculations.

52. So far as employment following discharge from the army is concerned, Mr Faull considered it reasonable to assume under scenarios 1 and 2 that, following a short period after the expected discharge, the deceased would have commenced civilian employment earning at the median level of male full-time earnings, as indicated by Mr Craggs. Again, I consider this to be a reasonable assumption. However, in relation to scenario 3 (discharge after 22 years' service) Mr Faull has considered two alternatives ("A" and "B") representing median earnings and upper quartile earnings.

53. For the purposes of this judgment, it is unnecessary for me to recite in detail Mr Faull's methodology and the way in which he has made his calculations. Suffice to say that his methodology is familiar to me and I consider it to be wholly in line with conventional practice and existing authority. One matter does need to be considered, however: in making his calculations, Mr Faull has had to make assumptions on the multipliers to be adopted. He has done so whilst acknowledging that it is not his prerogative to advise on multipliers and that the appropriate multipliers are a matter for the court. Again, though, I consider that the multipliers which Mr Faull has used are wholly reasonable and represent the multipliers which I would have reached by way of

independent assessment. I therefore endorse the suggested multipliers set out at paragraph 3.41 of Mr Faull's report and the calculation thereof in the appendices to the report and in particular appendices 42 and 44.

54. At appendix 1 to his supplementary report, Mr Faull has set out the summary of the claim for loss of dependency on income within the four scenarios (1, 2, 3A and 3B). This is:

(i) Scenario 1 (9 years' service, median civilian earnings)

Loss of dependency to date of trial:	£269,635
Future loss of dependency:	£200,600
	£470,235

(ii) Scenario 2 (12 years' service, median civilian earnings)

Loss of dependency to date of trial:	£274,497
Future loss of dependency:	£220,633
	£495,130

(iii) Scenario 3A: (22 years' service, median civilian earnings)

Loss of dependency to date of trial:	£392,633
Future loss of dependency:	£333,993
	£726,626

(iv) Scenario 3B (22 years' service, Upper Quartile civilian earnings)

Loss of dependency to date of trial:	£479,373
Future loss of dependency:	£369,786
	£849,159

55. To these calculations, the percentage chances set out at paragraphs 45, 46 and 49 of this judgment need to be applied. In accordance with *Langford v Hebran*, I use what Mr Faull refers to as the "additional claim" method, applying the appropriate percentage to the additional amount represented by each enhanced scenario.

(i) The base sum under scenario 1 is £470,235.

(ii) The additional sum under scenario 2 is £24,895 (£495,130-£470,235). Applying the percentage chance of achieving this additional sum (95%) the additional sum recoverable under scenario 2 is £23,650.

(iii) The additional sum under scenario 3A is £231,496 (£726,626-£495,130). Applying the percentage chance of achieving this additional sum (75%) the additional sum recoverable under scenario three is £173,622.

(iv) The additional sum under scenario 3B is £122,533 (£849,159-£726,626). Applying the percentage chance of achieving this additional sum (50% x 75% = 37.5%) the additional sum recoverable under scenario 3B is £45,950.

The total recovery for loss of dependency is accordingly £470,235 + £23,650 + £173,622 + £45,950 = £713,457.

56. As submitted by Miss Studd, apportionment of this sum involves a consideration not only of an amount for the Claimant when she was still a child but also compensation

for the money that would have been spent on her in the course of her adult life. It is impossible to carry out an apportionment other than through a somewhat rough and ready percentage approach. I consider that the appropriate percentages are 25% to the Claimant and 75% to her mother. Those percentages should apply to any and all money recovered from the Defendant in this case. Accordingly, the sum payable to the Claimant is £178,364 and the sum payable to the mother is £535,093.

Conclusion

57. In conclusion, the total sum of damages which I award is £715,207 comprising £1750 in respect of the Law Reform Act claim and £713,457 in respect of the dependency claim. The dependency claim will be apportioned as to £178,364 to the Claimant and £535,093 to the Claimant's mother.