Neutral Citation Number: [2008] IEHC 105

THE HIGH COURT

2002 No.4834 P

BETWEEN

DARREN CLARKE

PLAINTIFF

AND

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment delivered by Ms. Justice Irvine on the 18th day of April 2008

1. The plaintiff in this action is Darren Clarke who was born on the 1st July, 1979, and is a member of the Permanent Defence Forces.

2. The events, the subject matter of this claim, occurred on the 31st May, 1999, whilst the plaintiff was on his second tour of duty with the Irish Defence Forces in the Lebanon as part of the 85th Battalion which was stationed at post 6-42.

3. The plaintiff's tour of duty commenced in early May, 1999 and a diagram showing the layout of post 6-42, where he was stationed, is to be found at page 130 of the defendant's discovery. This plan shows the perimeter of compound 6-42 and also the living accommodation available to members of the Defence Forces. Of significance to this action are the billets, the bunker and the perimeter.

4. Of further relevance to the historical background to these proceedings is a map which, the parties agreed, showed the relevant UNIFIL boundaries, observation posts, checkpoints and compounds. This map accurately depicts the location of post 6-42 relative to other compounds, villages and landmarks.

5. It is common case that the plaintiff was billeted with a colleague, Private Rushe, in billet number 6 at post 6-42. Unfortunately, in the early hours of the morning on the 31st May, 1999, an Israeli 81mm mortar landed directly outside the perimeter of camp 6-42. Almost immediately thereafter, a further similar mortar landed within the compound. The location where both mortars landed is marked on the diagram at p.130 of the defendant's discovery.

6. The uncontested evidence was that as soon as the first mortar fell outside the perimeter wall that "Groundhog", a signal to all troops to take shelter in the bunker on the compound as a matter of urgency, was called by those who had been on guard room duty. Because it was the middle of the night, the plaintiff and Private Rushe were in their beds at the time when the first mortar landed. They gathered their flak jackets in response to the call of Groundhog from their colleague Private Kedian and were just about to leave their billet when the second mortar landed outside this billet. Tragically, as a result of this impact, Private Kedian was killed and Private Rushe sustained very serious bodily injuries. The plaintiff received significant shrapnel wounds to his legs and there is no dispute that the shrapnel which became embedded in the plaintiff's legs and abdomen had penetrated the walls of the billet.

7. The plaintiff brings this claim seeking damages for the physical injuries he sustained prior to leaving his billet and gaining shelter in the bunker on 31st May, 1999. He also claims damages in respect of post traumatic stress disorder ("PTSD") as a result of his exposure to the events of the 31st May, 1999.

8. The plaintiff's claim is that the defendants were negligent in respect of his care in:-

> (I) Delaying or failing to comply with Special Observation Regulation 3(11) which provided that in the event of an attack on Whiskey 144 (a compound under the control of forces supported by the Israeli Government) or firing from Whiskey 144 that the Groundhog alarm would be sounded.
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> (II) Failing to adequately assess on an ongoing basis, the risk to its troops whilst on UNIFIL duties in Lebanon.
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> (III) Providing billets which were not reinforced to better withstand the impact of mortars or shells. It was alleged that sand bags, rubber curtaining, the positioning of T-walls or the building of concrete billets would have reduced the risk of shrapnel injury to those in the billets and were thereby mandated.
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> (IV) Failing to have a system to monitor the effects of this type of incident upon its troops and in particular in failing to identify the plaintiff as being at an increased risk of developing P.T.S.D.
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> (V) Failing to provide adequate debriefing or subsequent follow-up psychological care for the plaintiff post the events in question either in Lebanon or in Ireland.

History

9. Since 1979, the Irish Defence Forces have participated in peacekeeping missions in Lebanon as part of the UNIFIL operation authorised under Chapter 6 of the UN Charter. The overall mandate of the UN force at the relevant time was to oversee the withdrawal of Israeli forces from Lebanon.

10. Brigadier General Moore advised the Court that peacekeeping activities conducted under Chapter 6 of the UN Charter were characterised by the high visibility of such operations. Those operations were carried out by UNIFIL with the consent of the parties involved in the conflict, namely the Governments of Lebanon and Israel. The mandate of the troops engaged in operations under Chapter 6 limited them to act only in self defence and thus they were only lightly armed. The principal role of the troops engaged on such a mission was to monitor the areas where hostilities were taking place, to report on such activities and to protect the local population.

11. Military Operations under Chapter 6 of the UN Charter were, according to the evidence, to be distinguished from operations authorised under Chapter 7 where troops become involved in peace enforcement for the purposes of seeking to resolve aggression between opposing factions. In Chapter 7 operations, the risk to troops is much greater than those posed to them on a Chapter 6 mission.

12. In relation to this Chapter 6 operation, the Court was advised that agreements were in place between the UN and the

Governments of Israel and Lebanon that the warring factions would not target UNIFIL posts and neither would they fire close to UN positions. Any breach by either party of such agreement led to the notification of such breach to the relevant Government. The continued involvement of UNIFIL as peacekeepers in Lebanon was dependant on these agreements being substantially complied with although the evidence was that they were regularly broken by the relevant fighting factions.

13. The area occupied by the Irish troops provided a buffer zone between the warring parties and the legitimacy of their deployment was accepted by both Governments. The presence of UNIFIL troops provided some degree of normality for those living in what was a war zone. Sometimes, however, the warring factions ignored the terms of the agreements upon which UNIFIL troops were deployed and the military operations carried out by them resulted in the death of troops. The defendants urged the Court that all such deaths occurred as a result of the deliberate targeting of those concerned and did not result from a failure on the part of the defendants to formulate and implement policies to try to ensure the safety of troops on a daily basis.

The Irish Defence Forces

14. At the time relevant to these proceedings, three companies of Irish Defence Forces were involved in UNIFIL peacekeeping operations in Lebanon. Each company comprised approximately 130 soldiers and had its own Commander. Further, each company had a number of platoons with each having its own Commander. In the present case, the Court is concerned with the activities of C. Company. Commandant Ian Hanna was the Commander of C Company and the platoon of which the plaintiff was a member was under the command of Captain Morgan.

15. In the context of the present proceedings, it is helpful to refer to the map which has been agreed between the parties to establish the whereabouts of the Irish posts in Lebanon and also the areas occupied by the warring factions.

16. The area of operation for the Irish troops was known as "IRISHBATT" and covered an area of approximately 10 kilometres by 12 kilometres. A broken black line is shown on this map running across its southern and eastern side. The forces supported by the Israeli Government, principally the de facto forces ("DFF"), occupied the area to the south and east of the broken black line which starts on the southwest side of the map with a compound designated as Whiskey 128 (W128) and ends near Echo 210 (E210) on the north-eastern side of the map. All of the compounds with a W or A prefix were under the control of the DFF or other groups backed by the Israeli Government. North of the broken black line were the Islamic resistance groups or armed elements ("AE"), operating with the backing of the Lebanese Government.

17. The evidence of Brigadier General Moore was that Irish troops positioned in posts along or near the broken black line were most at risk as it was there that hostilities were most prevalent. As an example, he referred to post 6-28 Alpha which is on the north east side of the map which post was within some 60m of a DFF compound. Post 6-42, where the plaintiff was billeted, was not, on the evidence, considered to be one such post.

18. The Irish posts were located throughout all of the IRISHBATT area and as can be seen from the map some of these were actually located in villages. These posts provided significant benefit to local communities due to the agreement between the Governments and the UN that such posts would not be targeted. One such village was that of Brashit where the Irish post 6-16 was located.

19. The post where the incident, the subject matter of this claim, took place was at post 6-42. This post was approximately 800m north of the DFF/Israeli Defence Force compound described as Whiskey 144. Post 6-42 was also approximately 800m south east of Brashit village. Post 6-42 was positioned between Whiskey 144 and where the AE centred a significant amount of their activities at Brashit village and its environs.

Duty of Care: foreseeability of an unannounced mortar attack on post 6-42

20. The duty of care owed by the defendants to the plaintiff in this case must be viewed against the backdrop of the evidence adduced by the parties as to the risks faced by Irish troops whilst participating in peacekeeping duties under Chapter 6 in Lebanon and the foreseeability of injury to troops in their billets from an unannounced mortar attack on post 6-42.

21. It was accepted by all witnesses that even peacekeeping missions brought with them risks for troops engaged in such operations. It was further the evidence of a number of the defence witnesses that those risks, to which I will return later, were constantly reviewed and updated by Defence Force personnel of all ranks.

22. The role of the Irish troops on UNIFIL duties was apparently wide ranging. Their role included operating checkpoints, providing protection to the local communities, carrying out vehicular and foot patrols, monitoring all military and hostile actions and the occupation and protection of their own posts. Troops were at risk whilst within or outside their posts. The type of risks to which the troops were exposed ranged from injury to death and it was such risks that the defendants were charged with combating.

23. Lieutenant Colonel Patrick Kelly, a Civil Engineer with extensive military training and with experience of five tours of duty in Lebanon, advised the Court that seventeen Defence Force personnel had been killed in action in UNIFIL duties between 1978 and 2001. Eleven of these were killed by small arms fire, four by landmines or like devices, one as a result of a building collapse and only one, Private Kedian, by indirect fire. There were twenty nine other fatalities in UNIFIL over this period. Of this number, eleven died in traffic accidents, six by accidental shooting, five from natural causes, one soldier is missing in action presumed dead and the remaining six were killed in other accidents. From these statistics, and from their ongoing assessment of activities in Lebanon, the defendants' evidence was that the greatest risk from weaponry was posed to troops whilst on duty outside the perimeter wall of Irish compounds from small arms fire.

24. In relation to injuries to soldiers from shrapnel whilst in their billets as a result of mortars landing within Irish posts in Lebanon between 1979 and 1999, the Court heard practically no evidence of any such injuries having being sustained save for those inflicted upon the plaintiff and his colleagues in the mortar attack, the subject matter of this claim, on the 31st May, 1999. Apart from this one incident and the injuries sustained by a Private Ryan, which are detailed in the decision of the Supreme Court in *Ryan v. Ireland* [1989] I.R. 177, a decision to which I will return later, the Court received no evidence on behalf of the plaintiff to establish whether there was any such history of injury to troops from mortar fire whilst in their billets over the aforementioned period. The Court did hear of injuries to a member of the Defence Forces whilst in his billet at the Irish headquarters in Camp Shamrock in 1989, but these injuries were sustained as a result of the lack of an effective perimeter wall at that post which was situated on an exposed hillside and which rendered the perimeter wall ineffective as a defence to direct fire weapons.

25. The hostilities in Lebanon involved the use by the warring factions of an extensive variety of weaponry which included the use of roadside bombs, grenades and other forms of direct or indirect fire. Direct fire weapons included, amongst others, heavy and light machine guns and rifles. These were used to fire at specific targets and had a capability of attacking targets significantly distant from the point of firing.

26. In general, troops within posts had to be protected from direct fire which might be exchanged between the warring factions. It was the accepted evidence in the case that all of the Irish posts were adequately protected as far as their perimeters were concerned as far back as 1989. There had been difficulties with Camp Shamrock which was situated on an elevated hill as a result of which its perimeter wall did not provide adequate protection from direct fire weapons. Hence, T-walls were erected in front of exposed billets to better protect them from direct fire and multipurpose concrete structures were also built within the post to provide better protection to troops whilst engaged upon a range of daily activities.

27. Post 6-42 was positioned only slightly east of the direct line of fire between Whiskey 144 and the AE's who were stationed close to and within Brashit village. Because of the risk of injury in the course of an exchange of direct fire weapons, a perimeter wall which was 3 metres high was erected and this was topped with gabions bringing the defensive perimeter to some 15 feet in height. It was agreed that this perimeter wall provided excellent protection to troops from direct fire and that it also provided adequate protection to those within the compound from mortars which might explode outside the perimeter. In these circumstances, on the evidence, the Court was in no doubt that the incident which occurred at Camp Shamrock could not have occurred at post 6-42 where the perimeter wall was sufficiently elevated and fortified such that direct fire could not impact upon the billets within the compound.

28. In relation to direct fire, the evidence received by the Court was that the agreement in place between UNIFIL and the Governments of Israel and Lebanon precluded what were referred to in evidence as "firings from close" and also "firings close". Warring factions were not permitted to launch an attack on the opposing faction from within 500 metres of a UN compound. This was to ensure that any retaliatory fire would not endanger those stationed at such compound. Similarly, the firings close prohibition was such as to preclude warring factions from firing missiles which would land within 500 metres of a UN post.

29. The evidence before the Court established that all firings of any nature whatsoever were noted by UNIFIL troops. Also, all firings close and firings from close were also logged, notified to headquarters and to the respective Governments. A material fact in relation to post 6-42 was that there were no firings close or firings from close reported from the time the plaintiff's platoons took over post 6-42 on 28th April, 1999, until the events which occurred on the 31st May, 1999.

30. In contrast to direct fire, indirect fire involved the launch into the air of explosives such as shells or mortars. The target for such indirect fire would be selected but it was accepted by both parties that mortars and shells did not always reach their desired destination and that the accuracy of such missiles was often influenced by variables including wind, the trajectory of the barrel of the mortar, and/or the stability of the equipment on the ground. The plaintiffs, in their evidence, relied heavily on the unreliability of such indirect fire in urging the Court that one of the risks that the defendants failed to consider was the risk to soldiers from a mortar or shell being unwittingly misdirected such that it could land within a post thereby exposing soldiers within the compound and those who might be in their billets to the risk of injury from shrapnel.

31. It was the accepted evidence that the agreement between UNIFIL and the Governments of Israel and Lebanon provided that the UN Forces would be advised in advance of the intended use by warring factions of indirect fire weapons and of their intended target by reference to the areas marked in grid squares on the map depicting the IRISHBATT area of occupation. Whilst there was evidence that occasionally such notification did not occur, there was no evidence given to the Court save in relation to the Private Ryan case to which I will return later, that any indirect fire, be it by way of shell or mortar, notified or un-notified, ever landed within an Irish post between 1979 and 1999.

Relevant Case Law

32. Finlay C.J. in *Ryan v. Ireland* [1989] I.R. 177 dealt with the duty owed by the State to soldiers whilst in the course of military service. He distinguished between the culpability of those in control at a time when decisions had to be made in the "agony of the moment" from situations where decisions could be made in a more measured fashion. The negligence asserted against the defendants in this case relates to the alleged ongoing failure on the part of the defendants to address the safety of soldiers in billets and clearly such negligence cannot be considered against the more sympathetic standard as advised by Finlay C.J. referable to negligence occurring as a result of decisions made in the "agony of the moment".

33. I am satisfied that the defendants' duty of care in this case was to take, as was advised in Ryan "such precautions as were reasonable and practicable" to reduce the risk of the plaintiff being wounded or killed in the circumstances and having regard to the activities in which they were engaged.

34. I do not accept the plaintiff's submission set out at p. 4 of the written submissions filed on his behalf that the decision in *Walsh v. Securicor (Ireland) Ltd* [1993] 2 I.R. 507 obliged the defendants in this case to take every precaution or use every device available to seek to eliminate a risk to its troops. If this was the appropriate standard, the case being made by the plaintiff should have been that every billet should have been replaced by a bunker like structure which both parties were agreed was the best protection possible from shrapnel in the event of a mortar landing within the compound. In this case, I believe I must balance the risk of the occurrence of the event, the subject matter of the claim, against the steps which the plaintiff states were mandated to seek to eliminate or reduce that risk.

35. The particular duty of care arising in the Walsh case was one which was directly related to the high risk of the likelihood of an attack being made on an armoured vehicle known to be transporting monies and for this reason must be distinguished from those very different facts which arise for the consideration of the Court in this case, which demonstrated the unlikelihood of an unannounced mortar attack on post 6-42.

36. In Walsh the plaintiff, who was an employee of the defendant, was attacked when the armoured vehicle which he was driving for the purposes of delivering money to customers of the defendant, was held up by armed robbers. The delivery which he was making at the time of the assault had, for the previous seven years, been carried out each Thursday morning at precisely the same time and using the same route.

37. There was no doubt in *Walsh* that the operation being carried out by the plaintiff was a high risk operation and highly visible. In these circumstances, the Supreme Court, in endorsing the decision of the High Court, held that where there was a high risk operation, the defendant was bound to avail of every safety precaution, including changing the times of and altering the route selected for the delivery.

38. The facts of that case are entirely different to those in the present case. In the present case, the defendants' evidence was that in twenty years, notwithstanding the deployment of thousands of Irish troops in the Lebanon over a substantial area of operations, there had never, prior to the events the subject matter of this claim, been an unannounced mortar attack on any Irish post. It could not be said in relation to Walsh that over the previous twenty years there had never been an attack or armed robbery on security personnel transporting cash in Ireland. Neither could it be stated that history would suggest that companies involved in the

transportation of cash might not expect their vehicles to be a potential target. Clearly, an attack in such circumstances was much more foreseeable than the attack under scrutiny in the present case and further the ability of the defendants to reduce such risk one which was easy to implement. The "high risk" which mandated the defendants in Walsh to avail of every safety precaution was an entirely different type of risk to that which pertains to the present case and I do not believe it provides good authority for the suggestion that the duty of care is as contended for by the plaintiff. There is no doubt that in the event of an unannounced mortar attack occurring, the risk of injury to the plaintiff was "high" but the likelihood of this event which would result in such injury occurring was, on the defendants', evidence almost negligible. My reading of the judgment in Walsh is that it was the risk of the attack, as opposed to the upshot of such an attack, that mandated the type of precautions advised by the Court.

39. It is against the backdrop of the aforementioned case law that I must consider whether or not the defendants failed in their duty of care to the plaintiff in terms of the type of housing provided for him whilst he was stationed at post 6-42 in May, 1999.

The billets

40. The billets housing the UNIFIL troops in Lebanon were provided by UNFIL and were of standard construction. The billets for the soldiers' accommodation consisted of prefabricated soft skin units and these offered no protection from mortar or artillery rounds if they were directly targeted. Further, the billets offered little protection from the spread of shrapnel in the event of a mortar or shell landing close to a billet. The billets were not reinforced with sand bags or protected by rubber curtaining. Further, the billets within Post 6-42 were not protected in any way by T-walls. The defendants' evidence in relation to T-walls was that these were erected very rarely and were predominantly used to protect troops within compounds, such as Camp Shamrock, where the perimeter walls of the post did not provide adequate protection from direct fire. T-walls were not used as a protection against mortar attacks i.e. indirect fire, although it was conceded that if present they would afford marginally better protection to a soldier in a billet in the event of a mortar landing within the compound.

41. The uncontroverted evidence in this case given by the defendants was that even a bunker could not withstand a direct hit from a mortar or a shell and that if this occurred all inside would be killed. Hence, the evidence of the defendants' witnesses in this case to the effect that if there was a real risk of such an occurrence other than as an extraordinarily rare event, that any post facing such risk would have to be closed or abandoned.

42. While the Court was advised that in 1999, UNIFIL commenced constructing some reinforced multifunctional buildings which provided better protection for soldiers whilst sleeping, eating or otherwise remaining indoors on its most vulnerable positions, the Court was told that post 6-42 had not been designated as such a post.

The mortar attack of the 31st May, 1999

43. In May, 1999 IRISH BATT was blighted by events perpetrated by the Islamic resistance. The Court heard evidence that a roadside bomb was detonated by way of an attack on DFF forces and that Whiskey 139 was overrun on 15th May by Islamic resistance. Subsequently, the DFF alleged that Irish troops had assisted the AE's in this attack by opening a strategic gate on the night in question, a fact denied by the Irish troops. In evidence, the Court was told that as a result, when the DFF were attacked by the AE's on the morning of the 31st May 1999, the DFF struck out deliberately against the Irish post in a pre-planned attack without warning. Such an attack was something never before experienced at any Irish post and the speed of retaliation by the DFF against Post 6-42 was such as to thwart the effectiveness of the Groundhog warning system. According to the defendants' evidence, the shelling of the IRISHBATT post 6-42 by the DFF was an unprovoked and deliberate attack without prior warning and delivered within moments of the first firing by the AE on Whiskey 144, a speed which could not have been anticipated.

The plaintiff's expert evidence

44. The plaintiff's adduced evidence to the Court from two experts who stated that in their opinion the defendants ought to have anticipated unannounced mortars landing within Irish compounds and that the foreseeability of such an occurrence mandated that a variety of steps be employed to reduce the risk of injury to soldiers who might be in their billets at the time of such an attack.

45. In dealing with the foreseeability of an unannounced mortar attack, Mr. Lydon, Consulting Engineer, relied upon certain statistics which he had seen in the defendants discovery in relation to fatalities to Irish troops in Lebanon. Armed with such statistics, Mr. Lydon unfortunately came to wholly unjustified and entirely incorrect conclusions to the effect that the majority of such deaths, as had occurred in Lebanon in the 20 years prior to the plaintiff's injuries, were as a result of the inadequate protection to troops whilst in their compounds. This assertion was contrary to all of the defendant's evidence and was without support from the documentation admitted by the parties in the proceedings and was also unsupported by any further oral testimony from the plaintiff's witnesses. Under cross examination, Mr. Lydon had to concede that none of the twenty nine fatalities (save for that of Private Kedian), that had occurred between 1978 and 2001, had any connection with attacks by mortar or shell fire on Irish compounds and neither did such deaths have anything to do with the nature of the accommodation provided to Irish troops in Lebanon. Mr. Lydon ultimately agreed that the fatalities occurred in the manner outlined by Lieutenant Colonel Kelly in his evidence.

46. Mr. Lydon further relied upon the facts in the case of *Michael Ryan v. Ireland* [1989] I.R. 177, to support his argument that better protection ought to have been afforded to troops within billets in circumstances where Private Ryan had been injured in his billet on UN duties in Naqoura as far back as the 18th April, 1979. Mr. Lydon, on behalf of the plaintiff, did not appear to recognise that the facts of that case were entirely distinguishable from those in issue in the present proceedings.

47. In *Ryan* the plaintiff had been stationed at an Irish post in Naquora in April, 1979. On the 18th April, 1979, a member of the Christian Militia was shot directly outside an Irish Army guard post. The Christian Militia decided that the Irish post would be the target for their revenge. To this end the Christian Militia gathered their troops and weapons which included mortars a couple of hundred yards from the Irish post. The manoeuvres of the Christian Militia were noted by those on duty at the Irish post. Later the same day the Christian Militia attacked the Irish post on a number of occasions. The first attack took place early in the day when they employed weapons directly focused on the Irish camp. The second attack which occurred somewhat later in the day involved the use of mortars but thankfully all of them cleared the encampment. At the time of the third attack, Private Ryan, who had been on guard duty at a guard post fortified with sandbags, was sent to a billet which was only some 10 metres away from this guard post, which all agreed was an obvious target for the Christian Militia. In the course of the third attack, which was clearly to be anticipated, Private Ryan was injured.

48. Private Ryan, in his case, contended that his employers were negligent in that they had failed to provide a bunker for his safety, such bunkers being available to soldiers in other armies in equivalent circumstances. He further alleged that there were shelters and better buildings available at the post where other members of his platoon had taken shelter and which he could have availed of had he not been directed by his superior officer to go to his billet. Finally, he alleged that sandbags would have better protected his billet thereby reducing his injuries.

49. The High Court judge in *Ryan* did not permit the case to go to the jury on the basis that the incorrect defendants were named in the proceedings he having concluded that any potential liability for negligence would likely rest with the UN. The Supreme Court, in dealing with the appeal and a cross appeal brought by the defendants, considered *(inter alia*) the issue as to whether or not the defence of *volenti non fit injuria* was available to the defendants and concluded that Private Ryan's superior officers owed him a duty to protect him from foreseeable risks and thus sent the case back to the High Court of rehearing.

50. The facts of the *Ryan* case are entirely different from those in the within case. Firstly, what occurred in the case of Private Ryan was not an attack using indirect missiles without warning. The attack on the post should have been anticipated from the events which had occurred earlier in the day and possibly Private Ryan should have been advised to go to the safest place possible having regard to the impending attack. In the present case no evidence was adduced to suggest that the unannounced mortar attack was likely to occur or ought to have been anticipated. If there had been any such warning or prior hostilities then the plaintiff would have benefited from a groundhog warning and would have made it to the bunker where he would have been protected from shrapnel from any mortar landing within the compound.

51. Mr. Lydon further relied upon the fact that there were regular breaches of the agreement which precluded firings from close and firings close. Mr. Lydon gave evidence that consequent upon such breaches that the Defence Forces regularly went to their bunker perhaps as often as once per week. Mr. Lydon however, was not in a position to give any evidence to establish that the operation of the Groundhog warning had not, for twenty years, adequately dealt with the ramifications of any such events. Further, notwithstanding such occurrences, Mr. Lydon had to accept that not one unannounced indirect fire attack had been made on any Irish post from 1979 up until 20th May, 1999, at which time there was an attack on an Irish post a number of kilometres from Post 6-42. I do not propose to deal with this event in circumstances where I believe it would have been wholly unreasonable to have expected the Defence Forces, even if they felt this one attack rendered it foreseeable that other attacks might occur at other posts and which they did not believe was likely, to have fortified their billets at all posts in a manner such as advised by Mr. Lydon and Mr. Furey between that date and the 31st May, 1999.

52. In addition, to the evidence of Mr. Lydon, the plaintiffs also adduced evidence to the Court through Mr. Furey, who was a member of the Defence Forces and held the position of Commandant at the time of his retirement in 1999. Mr. Furey gave evidence of his qualifications in civil and military engineering and advised the Court that in that capacity he had been posted to Lebanon as part of its 65th Battalion in 1989. The Court was told that three members of the Defence Forces had been killed by a landmine whilst on duty as part of the 64th Battalion and that another Defence Force member had been killed by a roadside bomb. Mr. Furey gave evidence that his brief when sent to Lebanon in 1989 was to assess the overall situation of the safety of Irish troops and come up with a formal plan for their better protection.

53. Mr. Furey, in the course of his evidence, advised the Court that as far as he was concerned, it was "inevitable" that at some point in time that a mortar would land in an Irish post and that all steps had to be taken to protect troops from such an event. Mr. Furey advised the Court that sandbags, T-walls, the erection of concrete structures and/or the erection of a perimeter fence, that would include mesh fencing above perimeter walls to catch or deflect mortars, were all mandated. Anything less than the implementation of these measures, he believed, was to expose the troops in the compound or in their billets to unnecessary injuries from a foreseeable risk.

54. In terms of the predictability or foreseeability of an unannounced mortar attack, either accidental or deliberate, Mr. Furey conceded that to his knowledge no such attach had ever occurred during the twenty years up to May, 1999.

55. Mr. Furey advised the Court that the perimeters of all Irish camps had been adequately protected and secured from direct fire since as early as 1989. For this reason he advised the Court that warring factions, if they wished to attack an Irish post, were more likely to adopt the use of indirect fire weapons such as mortars or shells. However, notwithstanding Mr. Furey's opinion in this respect, the Court heard evidence that no such attacks had occurred between 1989 and May, 1999.

56. In terms of the foreseeability of a mortar attack occurring without warning, Mr. Furey relied on two attacks that had taken place over the period 1979 to 1999. He firstly relied upon an attack in 1989 on Camp Shamrock which injured soldiers in their billets. Mr. Furey, however, had to accept that these injuries resulted from direct fire and that the soldiers were injured because of the lack of the normal perimeter protection that existed at other compounds. Consequently, his formal plan for the better protection of the Irish troops in Lebanon in 1989 included advice that T-walls be built in front of that compound. However, it is noteworthy that Mr. Furey did not advise the installation of either T-walls, sandbags or rubber curtaining at any other compound and in particular at Compound 6-42. Neither did Mr. Furey advise the erection of perimeter fencing to include mesh fencing above the perimeter walls to catch or deflect mortar or shellfire as he had advised the Court ought to have been installed in this case.

57. Mr. Furey also relied upon an attack at Haddat some four months prior to the events of the subject matter of this claim. However, on cross-examination Mr. Furey agreed that on that occasion the Irish post had not been hit by a mortar but by direct fire from a general purpose machine gun. He also had to agree that the Irish post in Haddat was in a village and had become caught up in an exchange between the DFF and the AE which was also positioned within the village. This was clearly not an unannounced deliberate mortar attack on an Irish post as occurred at Post 6-42 on 31st May, 1999.

58. Mr. Furey, in the course of his evidence, repeatedly stated that the Defence Forces should have anticipated an unannounced mortar attack even though they had no prior experience of such attacks. In relation to the obligation upon the defendants to protect its troops from injuries he advised that the approach to be adopted by anyone assessing such a risk was to look at the frequency of the occurrence of every risk and then multiply it by the consequences of such event occurring. However, in circumstances where Mr. Furey was not in a position to give any evidence to the Court of any prior unannounced mortar attack on an Irish post, it is difficult to see how this formula could have been applied usefully by the defendants in this case.

Nature of the precautions advised as being necessary by the plaintiff's experts

59. The plaintiff's experts both accepted that in the event of a mortar landing within a compound on a bunker that the bunker would be destroyed and everybody in it killed. The plaintiff's experts also accepted that if a mortar landed in a compound that anyone in close proximity to its landing position would be killed and others even some distance removed therefrom would be seriously injured. Further at risk of injury from a mortar exploding in the compound were those in their billets at the time of the attack.

60. The height of the plaintiff's expert evidence was that the use sandbags, T-walls, or rubber curtaining would improve, to a certain degree, the protection afforded to soldiers whilst in their billets in the event of a mortar impacting in the compound. It was accepted that none of these measures would protect the billets from penetration by shrapnel. Alternatively, the plaintiff's experts also suggested that the building of multipurpose concrete buildings within the posts, which included sleeping accommodation, would have afforded better protection to soldiers in the event of a mortar attack. However, even if all such precautions had been adopted, the

same would not have had the effect of reducing the risk, to those either in a bunker or in the compound in the event of a mortar landing therein. In this respect, there is a great deal of logic to be found in the statement made by Heuston and Buckley in *Salmond and Heuston on the Law of Torts*, 21st Ed., (London, 1996) at p. 230 where they advise as follows:-

> "The general principle is that the risk has to be weighed against the measures necessary to eliminate it.
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> …
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> If the risk is very remote, it is material to consider the degree of security which the suggested measures would afford: if in such a case the suggested measures are of an elaborate nature and would result only in a possibility that the accident would have been prevented or its consequences mitigated, then the defendants may be justified in doing nothing. It is also relevant to consider the degree of risk (if any) which taking the precautionary measures may involve. But the greater the risk the less should be the weight given to questions of the cost of precautionary measures in time, trouble or money. If the risk to life or property is really substantial, and no precautions would avail against it, it may be the duty of the defendants to cease to carry on the particular activity in question."

61. The plaintiff's expert witnesses advised upon a wide variety of precautions which they contended were mandated to reduce the risk of injury to soldiers in their billets, a risk that had never materialised in the previous twenty years. The steps advised by the plaintiffs were extraordinarily elaborate in nature, particularly Mr. Furey's suggestion that each post might have a perimeter wall which supported overhead netting to deflect mortars, a precaution not mentioned in his expert report or indeed mentioned by Mr. Lydon in his report. As an alternative, Mr. Furey's supported the installation of T-walls between the billets and/or the use of sandbags against the sides of billets to provide additional protection. When faced with an assertion that the layout of the billets and the size of camp 6-42 would not permit of the installation of T- walls or the use of sandbags without such installations constituting a significant impediment to soldiers trying to gain refuge in the bunker in a moment of emergency, Mr. Furey contended that the perimeter of the post could have been extended and the billets moved to permit of this intervention. The Court believes that to suggest that this work was mandatory and constituted a failure on the part of the defendants, appears to this Court to be unsustainable, having regard to the limited additional protection to be afforded by such proposal, the fact that it would add nothing to the safety of those not in their billets and would not afford any additional protection should a bomb hit a bunker.

62. The plaintiff's evidence to the effect that the use of sandbags or T-walls was mandated was further complicated by Mr. Lydon's evidence. He accepted that in the event of a mortar dropping within the compound and either sandbags or T-walls having been installed, that there would be a ricochet effect of shrapnel off such fortifications with the consequence that any person caught between the mortar and the fortification would be subjected to a risk of increased injury.

63. The evidence of both of the plaintiff's expert witnesses was somewhat undermined by the fact that neither witness could give any evidence to the Court that other Defence Forces engaged in UNIFIL duties in 1999 had adopted any such precautions to protect their troops who were accommodated in similar billets throughout Lebanon. Further, the plaintiff's two expert witnesses were not *ad idem* as to the level to which the sandbags would have to be built to afford protection to the troops who might be inside at the time of a mortar attack. Mr. Lydon, who is an engineer without any military experience, advised that the defendants were negligent in failing to cover the entire wall surface of the billets whilst Mr. Furey gave evidence that such sandbags would be sufficient up to shoulder height.

64. Mr. Lydon's evidence regarding the negligence on the part of the defendants in failing to employ the use of rubber curtaining outside billets was entirely unsatisfactory. The height of Mr. Lydon's evidence in this respect was that rubber curtaining was used successfully in an industrial setting in relation to explosions in the course of demolition and that he saw no reason why the same should not be effective as a method of countering the dispersal of shrapnel following upon a mortar attack. Mr. Furey gave no evidence in support of the assertion that the installation of such rubber curtaining was mandated as a method of curtailing the effects of shrapnel from mortar fire.

The defendants' evidence regarding the safety of its troops in general

65. The Court heard evidence that each Irish post in Lebanon was subjected to ongoing review in terms of its safety. The Defence Forces' policy was to monitor, on a daily basis, the activities of the respective warring factions and to ensure such information was available both at platoon and company level. The defendants asserted that they were constantly vigilant in their efforts to monitor tension in the area of operations so as to be prepared for any potential incidents which might impact upon the safety of their troops. Defence personnel conceded that no matter how comprehensive such reviews or assessments might have been that there was simply no way of guaranteeing the safety of troops from unprovoked and deliberate attacks.

66. The defendants' evidence was that it was standard practice that each post had to be assessed by its platoon Commander prior to their taking over the control of such post from their predecessor. The platoon Commander was charged with carrying out a physical assessment of the safety of the post and was expected to do this having taken a full history of activities in the area so as to ensure that he could implement any changes he felt necessary to protect his troops. Captain Morgan formally took a handover of post 6-42 on 28th April, 1999, following several days of preparations during which he was briefed by his predecessor regarding these matters and during which he himself conducted a physical assessment regarding the safety of post 6-42 for his incoming platoon.

67. Captain Morgan gave evidence that he assessed the effectiveness of the physical protection afforded to his troops at Post 6-42 against the risks to which he believed his troops might be exposed. Having done so, Captain Morgan concluded that his main concern was an area directly behind the kitchen which he believed needed protection by the installation of T-walls. He gave evidence that he believed that the kitchen area was exposed in the event of direct fire being exchanged between the warring factions and that he made this fact known to his superior, Commandant Hanna, who implemented these changes with the assistance of an IRISHBATT engineer.

68. Commandant Hanna, company Commander, gave evidence that it was part of his every day duty to visit the Irish posts within C. Company and to himself independently evaluate the safety of operations for troops at all of these posts. He did this independently and also with the assistance of the platoon Commander and indeed from his interface with troops with whom he stated he had regular and meaningful dialogue.

69. Finally, in relation to the ongoing safety of troops within the post, the Court heard evidence from Brigadier General Moore who himself stated that he carried out an ongoing assessment of all of the posts which he visited, as did Lieutenant Colonel Kelly, engineer.

70. Each of the aforementioned witnesses not alone had significant military experience in Lebanon, but they were also kept fully

appraised of all military activities carried out by the warring factions on a day to day basis. As already stated, the role of the Irish troops was to observe and monitor all hostilities in their area. The troops and their Commanders were familiar with the methods adopted by the respective forces when engaged in military operations. They were also acutely aware of the patterns of behaviour of those operating in close proximity to their post and therefore should have been particularly well placed to best anticipate the nature and likelihood of the wide variety of risks to which their troops might be subjected.

71. The defendants' evidence was that by far the greatest risk anticipated in relation to troops within the compound at Post 6-42, was the risk of injury from the direct firing of weapons by the DFF from Whiskery 144 at the AE's stationed close to and within Brashit village. Post 6-42 was only slightly east of the direct line of fire between these two locations. To combat the risk of injury or fatalities to those within the post, it was necessary to ensure that the perimeter protection of the post was fully secured both in terms of its height and resistance to such direct fire weapons.

72. In relation to the potential risk of an unannounced mortar attack, each of the defence witnesses advised that they had not considered reinforcing billets with sandbags, T-walls or rubber curtaining. T-walls were only used where perimeter walls were inadequate in height to protect against direct fire. The defendants' evidence was that sandbags and T-walls were never considered as providing any realistic protection against unannounced mortar fire. It was the consistent evidence of the defence witnesses that if unannounced mortar fire constituted anything other than a marginal risk to troops that the post concerned would have to be closed. This was so, according to the defendants' witnesses, because a mortar which landed on a bunker would kill all those inside. Similarly, a mortar landing within the compound would kill anybody within the compound in close proximity. The marginal improvement of protection to those soldiers who happened to be in their billets at the time a mortar shell might have landed within the compound, would have been of little consolation when faced with the likely fatalities and more serious injuries that would be occasioned to those who where not in their billets at the time the mortar landed.

Summary of the defendants' evidence regarding the risk of unannounced indirect mortar fire landings
73. In relation to the risk of unannounced indirect fire causing injury to troops in billets, the defendants relied principally, but not exclusively, upon the following facts:-

(a) There had simply been no history of such an event occurring in the twenty years prior May, 1999.

(b) That the agreement between UNIFIL and the Governments of Israel and Lebanon required that there would be no firings from close or firings close to UN positions.

(c) That in the event of potential shelling, the agreement between UNIFIL and the Governments of Israel and Lebanon was that there would be a forewarning of such intended shelling and the grid square into which the mortars were to be fired would be notified.

(d) That all firings of any nature were monitored by the Irish Defence Forces both locally at their post and also at headquarters. The Irish troops were kept constantly informed as to all military activity in any particular area such that they could avail of the Groundhog warning in the event of any untoward activity.

(e) Nothing had occurred from the end of April, 1999, up until the 31st May, 1999, in terms of firings close or firing from close, that might have forewarned of the unannounced, unprovoked and deliberate attack which occurred on the 31st May, 1999.

(f) Mortars were normally fired at 45 degrees in which case, according to the defendants' witnesses, mortars fired from either a DFF compound or an AE stronghold, would have been expected to land well beyond Camp 6-42. The defendants' witnesses asserted that the mortar, the subject matter of this case, which landed in Post 6-42, must have been fired at an angle of at least 80 degrees so as to permit it to land so close to Whiskey 144. The defendants thereby asserted that it was completely unforeseeable that any mortar could accidentally be fired with such a degree of error so as to cause it to land unintentionally within the post. The only risk, therefore, to Irish troops, was of a deliberate attack without warning and that this had never occurred between 1978 and May, 1999.

(g) Groundhog was availed of any time there were firings from close or firings close lest such firing of either direct or indirect missiles could endanger Irish troops within the compound.

(h) That if indirect mortar attacks constituted a significant risk, the post would have to be closed. The defendants asserted repeatedly that they would not have considered it acceptable in such circumstances to merely ameliorate the potential for injury to those who happened to be in their billets at the time such a mortar might land in the compound. Such an approach would have to adopt insufficient care for the welfare of those who might be in the compound at the time of such a mortar attack or might not even obtain sufficient protection if they had been in the bunker in advance of such an attack.

Summary of defendant's response to the safety measures advised by the plaintiff's experts
74. In relation to the measures the plaintiff alleged should have been employed to protect him against the potential of an unannounced mortar attack whilst in his billet, the defendants in their evidence relied upon the following fact:-

(a) Sandbag and or T-walls could not have been availed of at post 6-42 as there was simply no room for their use without significantly impeding the passage of troops trying to get to the bunker in the event of Groundhog being called.

(b) That T-walls were only used by the defendants to provide protection for billets against direct fire where perimeter walls were insufficient for such purpose.

(c) Sandbags and/or T-walls were not used by other defence forces on UNIFIL duties in Lebanon as a means of protecting billets from indirect fire.

(d) The use of rubber curtaining was not known as a method of protecting billets from shrapnel penetration.

(e) That concrete structures were not warranted to replace all billets in IRISHBATT having regarding to the fact that unannounced mortar fire landing in Irish posts was a concept unknown to the defence forces in Lebanon from 1979 to

May, 1999. Whilst some multipurpose buildings had by 1999 been built to further protect troops in high risk areas, post 6-42 did not fall into such a category.

(f) That concrete structures, even if installed in every compound would have achieved no more than an amelioration or reduction of potential injury to those who were in their billets at the time of a mortar attack. The defendants asserted that the best place for troops to be was in a bunker and the emphasis was upon developing a strategy to get troops as fast a possible from their billet to their bunker in advance of such a potential attack. Given that even a bunker could not protect against a direct hit from a mortar or a shell the defendants contend that posts would have been closed if such potential fire was seen as anything other than the remotest potential risk.

75. In all of the a foregoing circumstances, having regard to the duty of care owed by the defendants to the plaintiff as set out earlier in this judgment, I conclude that the defendants assessment of the risk of an unannounced mortar attack on post 6-42 was reasonable in all of the circumstances having regard to the evidence. I am further satisfied that the defendant's assessment of the risk of injury to its troops in the course of their duties in Lebanon was kept under constant review at every level of authority. I cannot, on the evidence, conclude that the defendants were negligent in failing to increase the protection to the soldiers billets at camp 6-42 in the manner contended for by the plaintiff in this action. I have no difficulty whatsoever in stating that the approach taken by the Defence Forces to the safety of their troops cannot be faulted and that those in command appeared to the court to have been relentless and vigilant in their efforts to support and defend the welfare of their troops whilst on UNIFIL duties.

Special Observation Regulation 3(11)

76. Special observation regulation 3(11) for post 6-42 provided as follows:-

> "In the event of an attack on W144 or from W144 the NCO I/C on duty will sound the Groundhog alarm. Number 2 Sentry will alert all personnel to proceed to the bunker immediately."

77. In the present proceedings, the plaintiff alleges that Special Order 3(11) was not complied with. It is alleged that the non-compliance on the part of those in charge constituted negligence for which the defendant is vicariously liable. Had it been complied with, all members of the plaintiff's platoon would have made it safely to the bunker before the fatal mortar hit the post.

78. The facts of relevance to this issue are not in dispute. Private Merrigan and Corporal Conway came on duty at midnight on the 30th/31st May, 1999. At approximately 4.40am, rounds of machine gun fire were discharged from Whiskey 144. Captain Morgan attended at the observation post as a result of this firing. Following upon an assessment of the nature of the firing, those in charge concluded that the discharge of ammunition from Whiskey 144 amounted to weapons testing. In these circumstances, Groundhog was not called. Captain Morgan proceeded back to his billet and guard duty continued. Unfortunately, minutes short of 5.00am, Whiskey 144 came under attack from the AE at which point Corporal Conway advised Captain Morgan that the company was going to Groundhog. A mortar immediately landed outside the perimeter of Post 6-42 at which time Private Kedian had already been directed by Captain Morgan to evacuate the platoon from the billets and get them to the bunker. Regrettably, whilst the troops were responding to the Groundhog alarm, the second mortar landed within the camp killing Private Kedian and propelling shrapnel through the walls of the immediately adjacent billets thereby injuring private Rushe and the plaintiff..

79. The defendants accept that there was firing from Whiskey 144 at approximately 4.40 am on the 31st May, 1999. Hence, it would seem that on a strict interpretation of Special Order 3(11) that Groundhog should have been called at that time. The question for the Court is whether the failure of those in command to strictly comply with this Special Order constituted negligence in all of the circumstances.

80. Having regard to the evidence tendered to the Court on this issue, I conclude that the defendants were not in breach of Special Order 3(11) and even if there was a non -compliance with the strict letter of the order, that this did not amount to negligence. I have come to this conclusion for the following reasons:-

(I) I accept the evidence of Captain Morgan and his Superior, Commandant Hannon, that it was only necessary to call Groundhog if the firing, the subject matter of the Order, in the opinion of those in command, constituted a threat to the Irish troops stationed at that camp.

(II) I accept Captain Morgan's evidence that he concluded that there was no such threat to the Irish troops at Camp 6-42. Captain Morgan made his judgment based on his significant prior military experience and his experience and knowledge of the nature of the hostilities between the warring factions in the area of Post 6-42. Captain Morgan further discussed the events as they occurred with Corporal Conroy who was on duty at the time and they were both agreed that the firing was not indicative of the commencement of hostilities between the factions but was weapons testing by the DFF. Corporal Conroy was himself a senior member of the Defence Forces and was on his seventh tour of duty in Lebanon. He gave evidence that he advised Captain Morgan that the firing from Whiskey 144 was consistent with the pattern of firing normally adopted at a time of weapons testing, and was not, in his opinion, an attack upon the AE such as was likely to provoke retaliatory fire that might put the troops at camp 6-42 at risk.

(III) Those in command had noted that the direction of the firing from Whiskey 144 was into an area known as the "graveyard" which was an area used by the DFF when testing weapons and which was some 800m away from the compound at 6-42. I accept that the firing from Whiskey 144 was not in the direction of the AE such as might have suggested the commencement of hostilities against the AE or was such as ought to have been deemed to be the type of firing that would have constituted a risk to those in Post 6-42.

(IV) The defendants called no expert evidence to suggest that Order 3(11) did not permit of discretion on the part of those in charge in terms of its operation.

(V) There was no criticism by the plaintiff or any of his witnesses of the decision made by Captain Morgan and Corporal Conroy not to call Groundhog at 4.40. Neither did any of the plaintiff's witnesses challenge the evidence of Captain Morgan or Commandant Hannon that each Commanding Officer was entitled to exercise his own discretion as to how and when Special Observation 3(11) was to be operated.

81. I accept the evidence of Captain Morgan and Commandant Hannon that the role of the Irish Defence Forces was to report and observe on a war in Lebanon and that this could not be achieved if Battalions were consigned to protection in a bunker each time there was firing from the adjacent warring factions. I further accept the defendants' evidence that the Special Orders for post 6-42 were not absolute in nature and permitted those in command discretion to make decisions based upon their expertise and knowledge.

Once such a discretion remained with those in charge, any departure from the strict letter of the Order would not amount to negligence unless it could be established that such a decision was made carelessly or without due consideration of the relevant facts. The decision made by Captain Morgan and Corporal Conroy was, it appears to me, made following a careful and knowledgeable evaluation of all of the relevant circumstances and accordingly cannot be considered to amount to negligence.

82. In concluding that there was no negligence on the part of the defendants in respect of their failure to call Groundhog at approximately 4.40 am on the 31st May, 1999, I believe that I am fortified in my decision by the fact that the plaintiff produced no evidence to suggest that any disciplinary action was ever taken against Captain Morgan or Corporal Conroy whose decision not to call Groundhog on the evening concerned proved fatal for Private Kedian. I am satisfied, that if there had been either no discretion to depart from the strict letter of the Special Orders for Post 6-42 or if the decision made was viewed as having been made without reasonable cause, that some sanction would have been imposed on Captain Morgan or Corporal Conway, having regard to the gravity of the outcome for all concerned.

Post Traumatic Stress Disorder

83. The plaintiff alleges that his employers were negligent in failing to adequately identify and treat the condition of Post Traumatic Stress Disorder which he went on to develop in the aftermath of the events of the 31st May, 1999.

84. Given that I have concluded that there was no negligence on the part of the plaintiff's employers in relation to the circumstances which led to the plaintiff's injuries and the death of Private Kedian, the plaintiff's claim for damages for personal injuries is one which is confined to any psychological injury sustained by him by reason of a want of due care on the part of his employers in caring for his mental health in the aftermath of the events of the 31st May, 1999.

85. The plaintiff has alleged negligence in respect of the care afforded to him by the defendants both whilst in Lebanon after the bombing which caused his injuries and also following his return to Ireland after his tour of duty was completed later in 1999.

86. In respect of this aspect of the plaintiff's claim, it is necessary to briefly record the more salient parts of the plaintiff's evidence regarding the events as they unfolded on the 31st May, 1999, and in the weeks thereafter.

87. The plaintiff's own evidence in relation to the morning of the 31st May, 1999, was that as he made his way to the billet door he was knocked to the ground by the force of the mortar shell that had landed outside. He saw that Private Rushe was injured and whilst he was initially confused he went to Private Rushe's aid. The plaintiff stated that he tried to keep his mind off his own injuries whilst attending to a wound to Private Rushe's abdomen. Thereafter, he went outside where he saw Private Kedian bleeding heavily on the ground. The plaintiff, whilst having had no direct involvement in dealing with Private Kedian or his injuries, was gravely shocked at the sight of his injuries and also heard his distressing moaning after he took shelter in the bunker.

88. The plaintiff told the Court that later the same day he was transferred to the medical aid post at the Irish Headquarters, otherwise referred to as Camp Shamrock, where he was noted to have multiple particles of shrapnel embedded in his right leg and abdomen. Thereafter, the plaintiff was removed to the hospital in Naqoura where his wounds were cleaned and the foreign bodies removed under general anaesthetic. The plaintiff was discharged from hospital on the 11th June, 1999.

89. Whilst in hospital, the plaintiff stated that he was scared, lonely, depressed and was not sleeping. He told the Court that he was constantly replaying events and often cried himself to sleep. On one occasion, the plaintiff stated that he had contemplated cutting his wrists. Regrettably, the plaintiff felt it would not be brave to demonstrate these feelings and emotions. Consequently they were not revealed either to medical or Defence Force personnel.

90. The plaintiff remembered being visited by a number of members of his platoon and other army personnel during his stay in hospital. He recalled that a female officer, Captain Moloney, who was part of the Defence Forces' Critical Incident Stress Debriefing ("CISD") Team, came to visit him in the hospital and spent a significant period with him.

91. The plaintiff gave evidence that he was anxious to get out of hospital and to return to duty as soon as possible. He stated that he wanted to keep busy and that he resumed normal duties three weeks after the 31st May, 1999. He reneged on taking a short trip to Thailand that had been planned prior to the bombing of Post 6-42 and further rejected the advice of Captain Morgan that he should avail of some short break even if he did not want to go ahead with the trip to Thailand.

92. The plaintiff described having difficulties for the duration of his stay in Lebanon. He stated that he was sad and lonely at times, that he spent more time on his own than previously and that he changed the subject if the issue of the events of the 31st May, 1999, were raised. In particular, Private Clarke recollected one evening when posted to Post 6-16 that he considered shooting himself but could not go through with it.

93. The plaintiff, in evidence, stated that his symptoms somewhat improved after his return to Ireland. Indeed, it is to be noted that the plaintiff enrolled for a second tour of duty in Lebanon in October, 2001, and successfully completed that tour of duty without significant complication. He attended Dr Tobin, Consultant Psychiatrist on behalf of the Defence Forces in February, 2000, at which time Dr Tobin did not diagnose PTSD. Notably, Dr Tobin was not advised by the plaintiff that he had ever contemplated suicide. Dr Tobin, on the basis of the history given to him and the plaintiff's presentation, prescribed medication which the plaintiff felt worked only in the short term to alleviate his anxiety and sleeplessness.

94. The plaintiff gave evidence that he felt that his condition and mood started to improve significantly when he commenced counselling in May, 2005, following upon which he made a rapid recovery from his PTSD. Dr McLoughlin, Consultant Psychiatrist, confirmed to the Court that the plaintiff's condition had fully resolved by the time he attended with her in February, 2006. Notwithstanding Dr McLoughlin's evidence to this effect, it was clear to me from the plaintiff's own evidence, that even to this day he continues to experience deep distress when confronted with the events of the 31st May, 1999. Hopefully, the plaintiff's ability to deal with the recollection of the events of the 31st May, 1999, will improve in future years.

95. It was accepted by the defendants in this case that the plaintiff did indeed develop PTSD in the aftermath of the events of the 31st May, 1999, and that he was not diagnosed with such a condition until he was first seen by Dr. McLoughlin in June, 2002. It was also accepted by the defendants that had the plaintiff's condition been diagnosed earlier, that in all probability he would have made an earlier recovery and have endured less in terms of pain and suffering.

96. The only witness called on behalf of the plaintiff to support the alleged failure on the part of the defendants to adequately monitor and care for the plaintiff's psychological welfare in the aftermath of the 31st May, 1999, was Dr. Bridget McLoughlin, Consultant Psychiatrist.

97. Dr. McLoughlin's evidence in chief was given on the third day of the trial and is to be found on pp. 1 to 21 inclusive in that transcript. A number of criticisms were made by Dr McLoughlin in her evidence:-

> (a) That the Critical Incident Stress Debriefing ('CISD') programme operated by the Defence Forces was not of any clinical value in arresting the development of PTSD and that in any event such CISD, insofar as it had any value, was only useful if given at least 24 hours after the distressing event.
>
> (b) That the plaintiff had a poorer prognosis because he had not been adequately treated proximate to the events causative of the trauma and that the defendants had no adequate system in place to identify those most likely to be at risk of developing PTSD.
>
> (c) That when seen by Dr. Tobin on the 15th February, 2000, that the symptoms recorded by Dr. Tobin in his notes were very suggestive of PTSD and that the plaintiff should consequently have been requested to return for medical review.

98. Dr. McLoughlin gave evidence to the Court that CISD such as that employed in 1999 by the defendants for the benefit of troops following a critical event, is no longer considered valuable in terms of preventing or mitigating the effects of PTSD. However, Dr. McLoughlin, at question 168 on Day 3 agreed that in mid-1999, CISD was widely used and believed to be effective in preventing the onset of PTSD and in lessening its effects. Further, whilst Dr. McLoughlin stated that there were some studies which would have cast doubt on the benefit of CISD as early as 1999, she gave no evidence to the Court of any other methods employed elsewhere in the world by those charged with the care of soldiers exposed to trauma in the course of combat so as to demonstrate any lack of care on the part of the defendants' in their management of the plaintiff's welfare.

99. Dr. McLoughlin advised the Court that CISD was recommended to be given, not in the first 24 hours but perhaps 24 to 72 hours after the critical event because people were in general too emotional to deal with CISD so close to a stressful experience. Whilst this criticism by Dr. McLoughlin may have had some validity in respect of soldiers other than the plaintiff, who received two sessions of CISD in the 24 hours following the mortar attack, the plaintiff's principal CISD session with Captain Moloney took place over several hours his during his hospitalisation either on the 8th or 11th June, 1999.

100. Having regard to the aforementioned evidence on the part of Dr. McLoughlin, the Court must conclude that the plaintiff has not established that there was any negligence on the part of the defendants in relation to their use of CISD referable to the plaintiff's condition in the aftermath of the 31st May, 1999.

101. Dr. McLoughlin criticised the defendants for failing, on her knowledge of events, to have any system in place to seek to identify individuals most likely to be at risk of developing PTSD. She advised the Court that the monitoring of troops by their superiors, whether the same was carried out individually on an informal basis or more formally in group sessions, did not provide the type of forum or structure where those most at risk would be identified. She endeavoured to canvass the possibility that the defendants might have set up a system whereby troops would have been compulsorily required to attend with trained personnel over the period following a critical event. However, Dr McLoughlin could not support this opinion by reference to any precedent of such a system being operated by other defence forces. Neither did she support her opinion as to the likely benefit of such a system in identifying the development of PTSD in soldiers by reference to any medical or military literature. Further, Dr McLoughlin agreed that compulsory interviews with trained personnel might be difficult to enforce and that in any event there was no assurance that the plaintiff, had he been directed to attend such sessions, would have either attended or co-operated in terms of divulging any symptoms of ongoing psychological distress.

102. In this respect, the plaintiff's own evidence was to the effect that at all stages he had withheld from those in authority, be they medical or military, any symptoms of distress believing that any demonstration of such weakness on his part might lead to vilification by his colleagues or more importantly, might adversely effect his career prospects within the Defence Forces.

103. In terms of the need to identify soldiers likely to be psychologically damaged as a result of exposure to traumatic events, the Court heard evidence on behalf of the defendants that as of 1999, CISD was believed to be of great assistance, not only in identifying those affected by traumatic events but also in lessening the psychological damage emanating therefrom. In accordance with the prevailing medical and military knowledge as of 1999, the defendants, in advance of the 85th Battalion, compiled a team specially trained to deal with the upshot of any critically stressing event that might unfold to the detriment of those troops whilst on UNIFIL duties. Further, in the aftermath of the events of the 31st May, 1999, the defendants, through this specially trained CISD team, put into operation the system that they believed was the best available for identifying troops at risk of PTSD and in alleviating its psychological consequences.

104. The Court heard evidence that the CISD team saw all personnel involved in the incident of the 31st May, 1999, on the day of the bombing, on the following day and also on the 9th June, 1999. The plaintiff, because of his hospitalisation, received CISD from Captain Moloney over several hours on either the 8th or 11th June, 1999. The CISD team further attended at the post on the 13th July, 1999, to provide further support for the troops. According to the evidence, on this occasion, none of the troops wanted to attend with Captain Moloney, to further discuss the events of the 31st May and she concluded that she should abide by the wishes of the troops in this respect. The fact that none of the soldiers felt they needed CISD at this time was noted in the relevant records. Captain Moloney also gave evidence that she attended at the plaintiff's post on approximately fifteen occasions in total, and upon each such occasion she would have had discussions with all of those who were involved in the events of the 31st May, 1999. Captain Moloney stated that, in her opinion the plaintiff appeared to be coping well and did not agree that he was one of the most likely candidates for PTSD. Relative to other troops in the same platoon also under her care the plaintiff seemed to her to be coping well notwithstanding his injuries and his involvement in the tragic circumstances of the 31st May, 1999.

105. In addition to the CISD team, the defendants' evidence was that Private Clarke was monitored in terms of his general health and his psychological welfare by a number of his superiors after this event. A system called the "buddy buddy" system was in operation. This was a system operated by the Defence Forces which instilled in soldiers the need and obligation to keep an eye out for the welfare of their colleagues and to report any adverse concerns to their superiors. Captain Morgan advised the Court that no reports were received from any of the plaintiff's colleagues suggesting that the plaintiff's behaviour was not in keeping with what they had come to except as normal for Private Clarke.

106. Apart from the formal CISD and the other follow up support aforementioned, Captain Morgan gave evidence that he assessed the performance and welfare of his troops on a daily basis. To this end, Captain Morgan kept a diary in relation to each of the members of his platoon and all of these entries were made available to the Court in the course of evidence. The entries in Captain Morgan's diary referable to the plaintiff in the period after the 31st May, 1999, all suggested that he was coping extraordinarily well and gave no indication that he was developing any psychological condition arising from his involvement in that event.

107. Commandant Hanna, the Commander of C. Company, also gave evidence that he himself made it his business to monitor all of the members of his Company both personally and through discussion with the commanding officers of the various platoons. He gave evidence to the Court that such interaction as he had with the plaintiff in the aftermath of the events of the 31st May, 1999, did not cause him to be concerned for the ability of the plaintiff to cope with what he had experienced in the course of that event.

108. The thrust of the defendants' evidence was that following the 31st May, 1999, the plaintiff's mental health had been monitored at every level of authority and that such monitoring included surveillance by those who were specially trained to recognise the potential psychological consequences of exposure to traumatic events in the course of combat. In this respect the Court was impressed with the extent to which the defendants, apart from providing formal support for the plaintiff's medical health after these events, also made every effort to comfort the troops in the humanitarian sense. In particular, the defendants supported the mental welfare of the plaintiff by ensuring that he went to Tel Aviv to pay his last respects to Private Kedian before his body was taken back to Ireland. He also was facilitated in meeting and speaking with the Rushe family when they arrived from Ireland to visit Private Rushe following his injuries. A month's mind mass was arranged at the post to commemorate the death of Private Kedian and another service arranged to coincide with his burial in Ireland. Further, a dinner in honour of Private Kedian was also arranged by Father Ward, the Chaplain, prior to the platoon's departure from Lebanon. All of the aforementioned events were designed by those in charge to assist the plaintiff and his colleagues to come to terms with the tragic events of the 31st May, 1999.

109. Having regard to all of the aforementioned evidence, the Court concludes that the use by the defendants of CISD as a method of seeking to identify the onset of PTSD and potentially lessening its consequences, was in accordance with the prevailing standards of the day and cannot be considered to be negligent. Further, the Court concludes that the defendants did have an adequate system in place to seek to identify those most at risk of developing PTSD. However, lest I be incorrect in that finding, I also conclude that irrespective of what system might have been put in place by the defendants seek to identify those at risk of developing PTSD, even the scheme suggested by Dr. McLoughlin, I find as a high probability that the plaintiff would not have disclosed his concerns or feelings to any third party such as would have permitted them to identify him as a potential candidate for PTSD.

110. In relation to the care afforded to the plaintiff on his return to Ireland, the height of Dr. McLoughlin's evidence was that from the notes made by Dr. Tobin in February, 2000, she felt that it would have been prudent for him to have arranged for the plaintiff to return to him later for further review. She did not give any evidence that, in her opinion, the plaintiff's outcome would have been any different had he been called back for review by Dr. Tobin. Further, Dr. McLoughlin's evidence did not go so far as to contend that Dr. Tobin's treatment fell short of what might have been expected having regard to the plaintiff's symptoms. Hence, the Court has no evidence upon which it could reach any finding of negligence post February, 2000.

111. For all of the aforementioned reasons, I conclude that the plaintiff's claim in relation to the alleged failure on the part of the Defence Forces to identify and treat PTSD in the aftermath of the events of the 31st May, 1999, has not been made out.

Conclusion

112. For the reasons already stated in this judgment I conclude that the injury sustained by the plaintiff on the 31st May, 1999 did not arise by reason of any negligence on the part of the defendants whose care and attention of the safety of their troops was, on the evidence, beyond reproach.