Neutral Citation Number: [2023] EWHC 1632 (KB)

Case No: QB-2020-004224

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2023

**Before** :

**MRS JUSTICE HILL**

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**Between :**

**Claimant**

**EDWIN AFRIYIE**

**- and –**

**THE COMMISSIONER OF POLICE FOR THE CITY OF LONDON** **Defendant**

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**David Hughes** (instructed by **Donoghue Solicitors**) for the **Claimant**
**Mark Ley-Morgan** (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 10, 11, 12, 16 and 17 May 2023

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# Approved Judgment

This judgment was handed down remotely at 2:00 pm on 30/06/23 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

**Mrs Justice Hill:**

## 1: Introduction

1. In the early hours of 7 April 2018, the Claimant was stopped by the Defendant's officers while driving. An incident developed which resulted in him being "tasered" by one of them, PC Mark Pringle. The Claimant fell to the ground, hitting his head. He was handcuffed thereafter. He now brings claims for assault, battery and misfeasance in public office against the Defendant.

2. The Defendant denies all the claims and contends that the Claimant has been fundamentally dishonest, such that his claim should be dismissed under the Criminal Justice and Courts Act 2015, s.57.

3. The claim proceeded to trial in late June/early July 2022 before a Deputy High Court Judge. Unfortunately, the judge became ill and was unable to complete the reserved judgment. Accordingly, it was necessary for the claim to be re-tried. That trial took place before me in May 2023. This judgment is structured as follows:

   **Section 2**: The evidence in overview: paragraphs [4]-[8];

   **Section 3**: The factual background: paragraphs [9]-[40];

   **Section 4**: The assault and battery claims: paragraphs [41]-[112];

   **Section 5**: The misfeasance in public office claim: paragraphs [113]-[116];

   **Section 6**: Quantum: paragraphs [117]-[159];

   **Section 7**: Fundamental dishonesty: paragraphs [160]-[197]; and

   **Section 8**: Conclusion: paragraph [198]-[199].

## 2: The evidence in overview

4. I heard evidence from the Claimant, his friend William Cole and PC Pringle. A record of their evidence at the first trial was available in the form of court transcripts (for two days of the evidence) and an agreed note from the parties (for the other two days, when it was understood there had been difficulties with the court recording equipment).

5. Another officer, PC Garry Worster, gave evidence at the first trial but was unable to do so at the trial before me due to ill-health. The Claimant did not contest a hearsay application by the Defendant to rely on (i) PC Worster's Body Worn Video ("BWV") footage and radio "airwaves" relevant to him from 7 April 2018; (ii) his "MG11" or police witness statement from the same date; (iii) his witness statement in these proceedings dated 20 October 2021; and (iv) the agreed note of his evidence from the first trial on 1 and 4 July 2022.

6. The BWV footage from PC Worster and another officer, PC Sam Rickman, had captured the key elements of the incident in very great detail. It was played repeatedly through the trial. The parties provided an agreed chronology and transcript of the footage. The Claimant also provided a part of PC Worster's BWV which had been slowed down to around 50% of its normal speed by a forensic media analyst.

7. Reference was made to the Authorised Police Practice ("APP") guidance on the use of conducted energy devices. One such brand of device is a "Taser" but they are so widely used that the word has become both a noun and a verb. I will refer to "taser" and "tasering" in this judgment as the parties did throughout the trial.

8. The most pertinent other items of evidence were (i) MG11's from another friend of the Claimant's who was present at the scene (Simon Grant) as well as the other police officers in attendance (PC Rickman, PC Nicole Lacy and PC Saqib Murudker); (ii) the Use of Force form completed by PC Pringle shortly after the incident; (iii) the Claimant's medical records; and (iv) various expert reports the Claimant relied on for the purposes of his claim for damages for personal injuries. The Defendant had not instructed any experts on quantum issues and did not seek to cross-examine any of the Claimant's experts.

## 3: The factual background

*The stop of the Claimant's car and the first two breathalyser tests*

9. The Claimant is a social worker who was 31 years old at the material time. Prior to the index event he had worked closely with the police in his role, especially with a community project in Peckham that worked with young people. At around 5.30 am on 7 April 2018, he was driving his Mercedes car on King William Street in the City of London. He was stopped by PC's Worster, Rickman and Lacy on suspicion of driving with excessive speed. He maintained that he had not been speeding. He was never charged with any criminal offence in this respect.

10. The Claimant handed over his car keys and driving licence. Checks on his licence confirmed that he owned the vehicle and that it was properly insured. PC Rickman indicated that he would conduct a breathalyser test on the Claimant. Such a test involves the individual exhaling into a mouthpiece sufficiently strongly and for a sufficient duration to provide a sample of breath from which their blood alcohol content can be measured. The Claimant confirmed that he had not previously taken a breathalyser test. The breathalyser device registered the first two attempts by the Claimant to provide a sample as "insufficient".

*The third breathalyser test*

11. The officers asked the Claimant to try the breathalyser test again. At 5.45 am, PC Rickman activated his BWV. At the outset of the third test, PC Rickman told the Claimant to take "a really deep breath, a really really deep breath." PC Worster told the Claimant that he was not breathing hard enough, saying "This is your last chance, you will get nicked on this occasion". The Claimant expressed some frustration, saying "Are you joking me? Why you gonna nick me?" PC Worster said "No, we

will...because we've given you three chances now and you're not blowing hard enough."

12. At 5.46 am, PC Rickman confirmed that the result on this test was again deemed insufficient. PC Worster noticed that the Claimant had chewing gum in his mouth, which can interfere with the result. He told the Claimant to remove the chewing gum and to wait for a further twenty minutes for them to administer another test. He instructed the Claimant not to eat or drink anything in the interim. The Claimant returned to the car, where his friend, Mr Cole, was in the front passenger seat. PC Lacy was standing at the front of the car on the driver's side.

*Instructions to the Claimant to remain out of the car*

13. At 5.48 am, PC Rickman indicated to the Claimant that he had seen him put something in his mouth and asked what it was. The Claimant denied having anything in his mouth. PC Rickman said he could hear that he had something in his mouth. The Claimant got out of the car, seeming exasperated.

14. PC Rickman told the Claimant to "calm himself down". The Claimant took a few steps away from the car, whereupon his back was to PC Rickman. He raised his right arm and lowered it. PC Rickman said that he believed that the Claimant had had chewing gum in his mouth and had removed it as his back was turned. The Claimant denied this.

15. PC Rickman instructed the Claimant to stay on the pavement, rather than returning to his car, for a further twenty minutes. The Claimant moved on to the pavement, where PC Worster was standing. PC Rickman followed and snippets of a conversation between the Claimant and PC Worster can be heard, including PC Worster telling the Claimant "We don't want to be here any longer than you do."

16. PC Pringle was on duty in a marked police van nearby with PC Murudker. PC Worster called PC Pringle by radio. The words he used were not captured on PC Rickman's BWV. However, PC Pringle's evidence was that PC Worster explained the situation with respect to the breathalyser checks; described the Claimant as a man of "large athletic build"; said he was fairly agitated and likely to become more so when another breathalyser test was conducted; and asked him to park nearby. PC Pringle did so, stopping around fifty metres from the scene.

*The Claimant's telephone call*

17. At 5.52 am, while waiting on the pavement, the Claimant rang his girlfriend on his mobile phone. PC Rickman asked him who he was ringing. The Claimant responded, "What does that matter?" to which PC Rickman replied, "I'm only asking a question." Once he ended the call, the Claimant returned to the issue, saying "What's being on the phone got to do with [inaudible – but sounds like "anything"]?" PC Rickman replied that he could "ask a question as easily as you can refuse it" and said that he hadn't "pushed" the Claimant on it.

18. The Claimant turned and made a gesture with his right arm as if to dismiss the matter as he walked back towards the car. PC Rickman told him not to get back into the car

or he would arrest him for failure to provide a sample. PC Worster echoed PC Rickman's instruction not to get into the car. The Claimant expressed annoyance at PC Rickman "asking stupid questions." He remained on the street. At this point, at 5.54 am, PC Worster activated his BWV.

19. The Claimant opened the boot of his car and sat on the ledge of the boot. After a short period of time, he again asked PC Rickman "What's who I'm on the phone to got to do with anything?" PC Rickman replied, "Just a question, buddy, didn't mean to cause you any offence by it." A short exchange followed, which PC Rickman ended by saying "You've made your point." The Claimant asked for his licence to be returned. PC Rickman said that it was still being checked. PC Worster asked the Claimant why he was getting so upset. The Claimant made clear that he was upset by PC Rickman's questions about who he was on the phone to, reiterating that he had not been driving while on the phone.

20. At 5.57 am PC Worster made another radio call to PC Pringle. PC Worster's voice on the radio call was captured on his BWV, but PC Pringle's voice cannot be heard. PC Worster explained that they had to wait another 10 minutes or so before they could perform another breathalyser test and said:

> "…the chances are he might blow over…he's really aggy…he knows what's going to happen. We've given him three chances and then realised he had some gum in his mouth…I think if he goes over, he will kick off…maybe not kick off violently but he's not gonna be happy if he gets arrested. He's saying he's provided three times but every time he provided the machine kept saying 'take sample' so he wasn't breathing properly, blowing properly."

21. At 5.59 am PC Worster asked PC Pringle to drive up and check on Mr Cole who had walked around the corner. PC Pringle did so.

22. The Claimant and PC Worster made amiable small talk for a few minutes, including about the Claimant's work with young people and his engagement with police in this role.

*The fourth and fifth breathalyser tests*

23. At 6.02am, PC Rickman prepared to administer the fourth breathalyser test. He said "Right, OK, one long continuous breath like you're blowing a balloon. Failure to provide a sample will make you liable [for] arrest". The Claimant asked PC Rickman "So are you going to tell me when to stop?" and PC Rickman replied "Yep".

24. PC Worster said "The machine will…" at which point the Claimant began to exhale. PC Rickman said: "Harder" fifteen times in quick succession, followed by "A lot harder, needs to be a lot harder, lot lot lot more harder." PC Rickman then told the Claimant to stop for a second and asked him if he was asthmatic or if there was any reason why he could not provide a sample. The Claimant replied that he had what he described as "breathing issues". PC Rickman demonstrated how he wanted the Claimant to take a breath, by rolling his shoulders back to stand upright and said,

"From the stomach, really really deep breath." PC Worster interjected to say "You will get nicked if it doesn't happen this time. We're gonna go back to the police station, do it on a proper machine." PC Rickman continued "Really deep breath," and demonstrated exhaling audibly for several seconds.

25. At 6.04 am, the fifth breathalyser test was administered. It was this part of the BWV footage that had been slowed down by the Claimant's expert. The Claimant exhaled into the breathalyser. PC Rickman said "Blow" fourteen times. The Claimant can be seen on the footage raising his eyebrows and blinking. Three short beeps then emitted from the device. PC Worster said, "That's it, sounds like that's happened", suggesting that he believed a successful sample had been taken. The Claimant removed his mouth from the mouthpiece. However, it immediately became clear that the test had again failed: PC Rickman said: "Insufficient sample." PC Worster asked, "Insufficient sample?" and the Claimant looked at the device.

*The arrest of the Claimant and arrival of PC Pringle*

26. PC Worster moved forward and said to the Claimant "…alright…gonna get the cuffs on you now, you're nicked mate." The Claimant said, "You're joking, I blew" and "You said that was it". PC Rickman told him to put his hands behind his back to be handcuffed. The Claimant said more loudly "Are you joking me? I blew. You just said 'That was it'." The Claimant seemed to think that it was PC Rickman, rather than PC Worster, who had said "That's it, sounds like that's happened."

27. PC Worster called PC Pringle by radio, asking him to make his way to the scene. The Claimant said to Mr Cole, who was standing by the car, "They just said 'that was it' and now they're saying they're going to cuff me." PC Worster said "You're under arrest now." He placed his hand on the Claimant's arm, who pulled it away and said "Mate, I ain't doing it. You told me that was it." He continued to remonstrate with officers that he had been told "that was it." The officers continued to respond by saying that the machine had indicated an insufficient sample. At this point, still at 6.04 am, PC's Pringle and Murudker pulled up in the police van.

*The discharge of the taser*

28. At 6.05 am, PC Pringle told the Claimant to "calm down". He asked if the Claimant was under arrest and PC Worster said "He is now." PC Rickman told the Claimant that he was under arrest on suspicion of failure to provide a sample. PC Pringle told him to listen to what PC Rickman was saying. As the Claimant was being cautioned, PC Murudker took hold of the Claimant's right arm. He pulled it away, saying "just get off of me man". PC Murudker took hold of the Claimant again, who continued to protest in the same vein as before. PC Rickman advised Mr Cole to move back for his own safety.

29. PC Pringle drew his taser and "red dotted" the Claimant, meaning the activation of the laser sight on the taser caused a red dot to appear on the Claimant's body. The Claimant glanced over his shoulder towards PC Pringle on two occasions. PC Worster pointed towards PC Pringle saying what sounds like "don't blow up" and then "there's a taser on you, fella. We don't want to do that." At the same time, PC Rickman was also pointing his PAVA incapacitant spray in the Claimant's direction.

30. PC's Murudker and Worster each took hold of one of the Claimant's arms. The Claimant addressed PC Worster along the lines of "Did he [PC Rickman] not tell me that was it?" PC Worster said, "The machine has told us you haven't done it, fella." The Claimant's wrists were still being held by PC's Murudker and Worster. PC Rickman again asked Mr Cole to step to the side. The Claimant asked if he could put his trainers on. PC Worster said that the officers would put them on him.

31. At 6.06 am, the Claimant turned to Mr Cole and shouted loudly several times "I'm not going to allow this." PC Worster asked that the Claimant's trainers be obtained and Mr Cole said "Don't get tasered" five times. PC Worster's hand was still on the Claimant's left wrist. He then pulled away from PC Worster's hold and stepped away. This meant he was standing directly in front of PC Pringle, who still had his taser aimed at him.

32. PC Pringle shouted "Do not struggle. Do not struggle. You struggle, you get tasered. Get your hands out". Mr Cole said "SP [a nickname for the Claimant], don't get tasered" twice. The Claimant pulled his other arm away from PC Murudker's grip. The Claimant then removed his watch from his left wrist and threw it to Mr Cole, repeatedly saying "take my watch". Mr Cole said "Don't get tasered" four further times.

33. Both PC Worster and PC Pringle shouted "Put your hands out" to the Claimant. PC Pringle added "Do not struggle again". Mr Cole said "Don't get tasered" four more times. The Claimant shouted "Get your phone out" three times. Mr Cole said "SP! Please!" six times. PC Pringle again shouted, "Put your hands out". At this point the Claimant had his left hand near his chin area and his right arm by his side, slightly behind his back. He continued to talk to Mr Cole, saying that one of the officers had said, "That was it". PC Worster said, "Shut up, shut up, listen".

34. PC Pringle again shouted "Put your hands out. Do as your told". At 6.07 am, the Claimant folded his arms. Shortly thereafter PC Pringle discharged his taser in the Claimant's direction, causing him to fall backwards and hit his head against a stone ledge bordering the bottom of a window that formed part of the front of a building.

*Events after the use of the taser*

35. The Claimant lay motionless for approximately five seconds. PC Pringle shouted, "You've been tasered. Taser, taser, taser. Do not struggle. There are fifty thousand volts going through you. Do not struggle. Do as you're told." PC Worster approached the Claimant, asked if he was alright and then placed handcuffs on him.

36. Mr Cole was visibly and audibly distressed at seeing the Claimant being tasered. Mr Grant got out of the car. They both frustratedly asked the officers why the Claimant had been tasered and stressed that they worked with the police. The Claimant was groaning and wailing as he lay on the ground, again saying that the officer had said "that was it".

37. Firearms officers arrived on the scene to provide the Claimant with first aid. He stood up and went back to the floor on several occasions. On the third he began to struggle

and was restrained by the officers. Both Mr Cole and Mr Grant shouted at him to calm down, including as he was restrained on the ground. He complained about the tightness of the handcuffs, which PC Worster checked.

38. At 6.41 am the ambulance arrived. At 6.43 am the paramedics started to assist the Claimant to the ambulance. He continued to struggle and shout such that he was physically restrained and taken to the ground by the officers.

39. The Claimant was eventually taken to hospital. At around 9.00am, he was woken up by the police officer in attendance with him who asked him to provide a blood sample. He said he had a phobia of needles. The hospital doctor signed a form indicating that there was no medical reason why the Claimant could not provide a blood or urine sample, stating that fear of needles did not amount to such a reason. The Claimant's evidence was that he offered to provide a urine sample in lieu of a blood sample. The parties agreed that any such offer was not recorded on the officer's BWV. The Claimant was discharged from hospital and taken to the police station, where he was charged with a failure to provide a specimen for analysis.

40. At the first hearing in the Magistrates' Court, the Prosecution was ordered to disclose the BWV footage within fourteen days. The footage was not disclosed; and the prosecution was discontinued.

## 4: The assault and battery claims

### 4.1: The legal framework

41. The word "assault" is frequently used to refer to both assaults and batteries, but properly legally defined, an assault involves causing someone to apprehend that they will suffer a battery; and a battery is an act by which contact is intentionally made with the claimant's body, where the contact is direct and hostile, and where the claimant did not consent to the contact: Winfield & Jolowicz on Torts (20th Edition) at 4-006-4-007.

42. In a claim for trespass to the person, such as a claim of assault or battery, once the trespass is admitted or proved, the burden of proof shifts to the Defendant to seek to justify the trespass.

43. The Defendant in this case relied on the following statutory defences: (i) the Criminal Law Act 1967, s.3, which provides that a person (including a police officer in the execution of their duty) may use "such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large"; and (ii) the Police and Criminal Evidence Act 1984, s.117, which gives police officers the power to use "reasonable force, if necessary", in the exercise of a power provided for by that Act, including the power of arrest.

44. The test applicable to ss.3 and 117 is identical, and is "whether the force is reasonable, in other words necessary and proportionate": *Cameron v Chief Constable of the Police Service of Northern Ireland* [2020] NIQB 75 at [27](c), per McFarland J.

45. There was some confusion between the parties about whether the Defendant also relied on self-defence, but at the outset of the second trial, Mr Ley-Morgan confirmed that this was the case. It was not said that the Claimant was in the act of assaulting an officer. However "anticipatory" self-defence was relied on, in light of PC Pringle's evidence that he used the taser as he feared that the Claimant would injure one of his fellow officers or himself.

46. A defendant is entitled to act reasonably in defence of himself or third parties and is not required to wait until he is struck before he is permitted to act in his own defence. The defence of self-defence has two elements: (i) it must be necessary to use defensive force; and (ii) the force used by the defendant must be proportionate to the threat he faced.

47. When considering the reasonableness of the belief of a defendant in a particular case, it is for the trial judge to "take into account those factors which, provided they are permissible in principle, appear...relevant, and to give each of them such weight as [the judge] thinks appropriate": *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] AC 962 at [92], per Lord Neuberger.

48. Whether or not the force used is reasonable is a question of fact: Winfield & Jolowicz on Torts (20th Edition) at 26-060. In determining what force is reasonable, the court may take into account all the circumstances, including the nature and degree of the force used, the gravity of the offence for which the arrest is to be made, the harm that would flow from the use of force against the suspect, and the possibility of affecting the arrest or preventing the harm by other means. However, the fact that the force used results in serious injury does not necessarily make it unreasonable: Blackstone's Criminal Practice at D1.7 and *Roberts v Chief Constable of Kent Police* [2008] EWCA Civ 1588. Determining whether the force is reasonable will also depend on the perception of the police officer at the time of the incident faced with the situation that he or she faced: *Cameron* at [27](d).

49. The courts have deprecated "using jeweller's scales to measure reasonable force": *Reed v Wastie* [1972] Crim LR 221. An officer "is unlikely to have the luxury of mature reflection" and the courts "must have regard not only to the rights of the person at the receiving end of the Taser but also to the challenges facing a police officer endeavouring to maintain law and order in a volatile situation": *Chief Constable of Merseyside v McCarthy* [2016] EWCA Civ 1257 at [19].

50. In a civil claim, the defendant will only be entitled to the defence of self-defence where he uses defensive force as a result of a mistake if the mistake was a reasonable one: *Ashley*. Although *Ashley* was a case concerning self-defence, the parties agreed that the same principle applies to ss.3 and 117.

51. In *Cameron* at [27](j), McFarland J held that "When a police officer acts reasonably, and a person has been suitably warned and he or she ignores the warnings, or acts in a way that is aggressive towards...the police officer, or acts in a way that is contrary to common sense...he or she will not succeed in a claim in tort against the police". Mr Ley-Morgan drew support from this passage, as a factual analogy with how he contended the Claimant had behaved. I did not understand his case to be that this

passage was intended to add any gloss to the key issue of reasonableness. In any event I do not consider that it was.

52. In light of these principles, Mr Ley-Morgan accepted that in respect of each use of force found to have been applied, it was for the Defendant to prove that (i) the officer honestly believed that it was necessary to use force; (ii) the officer's belief was objectively reasonable; and (iii) the force used was no more than was objectively reasonable in the circumstances.

## 4.2: The Claimant's assault and battery claims

53. The Claimant's claim as advanced at trial alleged assault/battery in relation to: (i) the decision to use handcuffs on him on arrest; (ii) the tasering; and (iii) the use of handcuffs on him thereafter. Claim (ii) was plainly the most serious.

## 4.3: The decision to handcuff the Claimant on arrest

54. Handcuffing is not an automatic consequence of arrest. Handcuffs should only be used where they are reasonably necessary to prevent an escape or to prevent a violent breach of the peace: *Lockley* (1864) 4 F & F 155, cited in Blackstone's Criminal Practice at D1.8. Where handcuffs are used unjustifiably, their use is a trespass even in an otherwise lawful arrest: *Bibby v Chief Constable of Essex Police* (2000) 164 JP 297.

55. The Claimant did not challenge the decision to arrest him. However, he contended that PC Worster's decision to handcuff him at the point of arrest was unjustified, such that if handcuffs had been applied then, the same would have constituted a battery. On that basis he claimed that PC Worster's indication to him that he was going to be handcuffed was an assault.

### 4.3.1: Whether PC Worster honestly believed it was necessary to handcuff the Claimant

56. PC Worster had felt the need to call PC Pringle to be on standby because he thought the incident was "potentially escalating" and he and his colleagues "might require assistance". He told PC Pringle in the first call that the Claimant was already fairly agitated and likely to become more so. In the second, he expressed the view that the Claimant was "really aggy" and that the "chances" were that the Claimant would "blow over" or "kick off" if he was arrested. While PC Worster ended the second radio call by saying "maybe not kick off violently", in my judgment the reason for his calls to PC Pringle and the contents of them makes clear that he thought violence was a realistic possibility. In light of this evidence, I am satisfied that PC Worster honestly believed that it was necessary to use handcuffs to prevent a violent breach of the peace, per *Lockley*.

### 4.3.2: Whether any such belief by PC Worster was objectively reasonable

57. PC Worster stated in his MG11 that he decided to use handcuffs to protect himself and his colleagues, because the Claimant's "non-compliant" and "aggressive" behaviour had "progressively increased". He adopted that account in his civil

statement. He was cross-examined about his account during the first trial and I have considered that evidence.

58. Mr Hughes contended that PC Worster had lied in his account. He submitted the Claimant had done all that was asked about him, albeit sometimes reluctantly. He had not been aggressive: he had merely been unhappy and irritated and had sought to reason with the officers. This was momentary rather than progressively increasing since the stop.

59. It is clear that the Claimant did much of what the officers asked him to do. There was no dispute that he stopped his car and provided his documents when asked. He also complied with the officers' requests to get out and stay out of the car and wait to conduct further breathalyser tests.

60. However, matters were more complex than that. As PC Worster made clear in his evidence at the first trial, he had formed the view that the Claimant was deliberately not complying with the officers' requests to blow hard enough into the breathalyser device. In my judgment, there was a reasonable basis for this view, given the number of times the tests had been conducted unsuccessfully and the appearance of the Claimant on the BWV during the fifth test. It is clear from the BWV that the Claimant did not take a deep breath of the sort demonstrated by PC Rickman. The Claimant said he took a deep breath through his nose, but this is not discernible on the BWV. Further, I agree with the Defendant's analysis that the Claimant's raising of his eyebrows and blinking strongly suggests that he had stopped exhaling. There had also been a point at which the Claimant appeared not to be complying with the request to stay out of his car. For these reasons I consider that PC Worster was justified in considering that the Claimant had been non-compliant.

61. As to whether PC Worster reasonably described the Claimant's behaviour as "aggressive", it was common ground that at no time had Claimant struck or grabbed any of the officers, despite having had ample opportunity to do so. Nor had he attempted to strike or grab them or threaten that he would. PC Worster also accepted at the first trial that the interactions between the Claimant and the officers prior to him making the phone call were in relatively good humour and conversational.

62. However, PC Worster's evidence was that he perceived a change in the situation after the question from PC Rickman about the phone call. He said this clearly angered the Claimant; while he was not shouting, his voice was raised; his words were accompanied by arm movements and forward movement of his body; he also wanted to "go back over" the issue, focusing on PC Rickman's conduct in this regard, even when the latter was silent. These elements of the Claimant's conduct as described by PC Worster are almost all borne out by the BWV. Whether to describe this behaviour as "mere" irritation or aggression is a rather subjective issue, as PC Pringle himself said in evidence. I do not consider it objectively unreasonable for PC Worster to interpret these aspects of the Claimant's behaviour, when seen in the overall context of the event, as aggressive. More pertinently for the purposes of the handcuffing issue, they contributed to an objectively reasonable view that aggression or violence might follow on arrest. The fact that PC Worster turned on his own BWV shortly after the

issue over the phone call provides further support for the suggestion that he regarded this issue as having "raised the temperature" of the incident.

63. PC Worster's perception that the Claimant's non-compliant and aggressive behaviour "progressively increased" was, in my judgment, justified by the increasing number of occasions on which the Claimant had not complied with the breathalyser instructions; and the fact that as the incident progressed, the Claimant was gradually getting more agitated, even if there were periods of time when he was not evidencing this.

64. PC Worster had to plan ahead for the likely outcome if the Claimant was told he was under arrest. In this regard, it is also relevant that the Claimant had already given some indication that he would not accept being placed under arrest, saying "Are you joking me? Why you gonna nick me?" before the third test was administered.

65. In my judgment all of these matters prove that PC Worster's belief in the need to use handcuffs, to prevent a violent breach of the peace, was objectively reasonable.

66. Mr Ley-Morgan also highlighted that (i) the Claimant was an unknown risk; (ii) he was a large, athletic and muscular man; (iii) PC Worster was a lot older than the Claimant; (iv) PC Rickman was an inexperienced probationer; (v) PC Lacy was small in stature; and (vi) the street was busy with traffic. These factors also help explain why PC Worster view that handcuffs were necessary was objectively reasonable.

4.3.3: Whether the threatened use of handcuffs would have been no more than was objectively reasonable in the circumstances

67. As the Defendant has proved that it was objectively reasonable for PC Worster to consider handcuffs necessary to prevent a violent breach of the peace, per *Lockley*, the Defendant has also proved that if handcuffs had been used at that point, the force used would have been no more than was objectively reasonable.

4.3.4: Conclusion on the claim relating to the decision to handcuff the Claimant

68. For all these reasons, the Defendant has proved that if handcuffs had been used at this point, the same would not have constituted a battery. On that basis, the indication to the Claimant that handcuffs were going to be applied did not amount to an assault.

69. The Particulars of Claim had also advanced a battery claim relating to the officers' seizing of the Claimant with a view to handcuffing him. However, Mr Hughes did not develop this claim at trial, such that I assume it was not pursued. To the extent that it was, it would be rendered difficult by Mr Hughes' sensible concession that the Claimant became non-compliant after he was told he was under arrest. This justified the use of some force to effect the arrest. Further, as Mr Ley-Morgan highlighted, the force used by the officers before the taser was discharged consisted of no more than PC's Worster, Murudker and Rickman trying to, or managing to, take hold of the Claimant's arms, with the Claimant resisting of all their attempts. To the extent that the same is necessary, I find that the force used by the officers with a view to handcuffing the Claimant, prior to the use of the taser, was reasonable.

## 4.4: The use of the taser

70. The APP guidance makes clear that tasers are designed to "temporarily incapacitate a subject through the use of an electrical current that temporarily interferes with the body's neuromuscular system and produces a sensation of intense pain". One of the particular risks they pose is that the subject may not be able to control their posture such that officers should consider the risk of injury from an uncontrolled fall, including the risk of "head injury, either from the subject's head hitting the ground or from collision with nearby rigid objects". The Court of Appeal has recognised that they are potentially lethal weapons: *McCarthy* at [18]. At the first trial, PC Pringle agreed that the Claimant could have been killed by the use of the taser.

71. The guidance states that:

> "Taser should only be used as a proportionate response to an identified threat. It should not be used to simply gain compliance with instructions or procedures where compliance is not linked to such a threat, or where a threat has been reduced to such an extent that Taser use would no longer be proportionate."

72. The duration of the initial discharge and any subsequent discharge must be **proportionate**, **lawful**, **accountable** and absolutely **necessary** (PLAN)" [bold in the original].

4.4.1: Whether PC Pringle honestly believed it was necessary to taser the Claimant

73. PC Pringle recorded the matters that contributed to his rationale for the use of the taser in the Use of Force form he completed shortly after the incident, as follows:

> "*Information/intelligence:* Male of heavy muscular build, in a heightened emotional state, being arrested. Making verbal threats. Male removed wristwatch, having pushed police hands away from him and assumed a fighting stance. Repeatedly ignored commands to put hands out to be cuffed and to calm down…"

74. In my judgment, almost all of what PC Pringle wrote in this part of the Use of Force form was objectively accurate.

75. The Claimant's "heavy muscular build" is apparent from the BWV.

76. He was plainly in a "heightened emotional state" on being arrested. He repeatedly shouted about the fact that an officer had said "that was it" in relation to the fifth breathalyser test. Mr Hughes submitted that the Claimant was simply trying to reason with the officers. In my judgment this is an understatement: the Claimant shouted the same thing around 25 times and was not listening to what the officers were trying to say to him. Had he done so, it would have been obvious to him that PC Worster was trying to explain that the machine had said the sample was insufficient, effectively "overriding" the fact that he initially thought the sample was acceptable, leading him to say "that was it".

77. As to the words used by the Claimant, PC Pringle wrote in this MG11 that the Claimant was repeatedly shouting "something like "You said it was OK, you said it was f**king OK". The BWV shows that the Claimant did not swear at this point (though he did on other occasions). Mr Hughes put to PC Pringle that he had added the obscenity to this part of his witness statement to make the Claimant seem more aggressive. PC Pringle said it was simply a mistake because he had not watched the BWV at the time of writing his MG11; and in any event his use of the phrase "something like" made clear he was not purporting to quote the Claimant exactly. I consider this explanation credible and accept it.

78. Returning to the contents of his Use of Force form, PC Pringle was justified in describing the Claimant as making "verbal threats": although the Claimant did not explicitly threaten any of the officers with violence, his repeated shouting of "I'm not going to allow this" was reasonably interpreted as an implicit verbal threat of resistance to arrest.

79. The Claimant had "removed [his] wristwatch" and thrown it to Mr Cole. His evidence was that the reason he did so was because the clasp had opened when PC Worster had taken hold of him, and he was concerned that it would fall off and get damaged or lost in the melee. PC Pringle accepted at the first trial that it was possible that the clasp had come loose in the way the Claimant said, but at the second trial said that he had taken hold of lots of people over the years and never known that to happen. In my judgment it is possible that the Claimant's watch had come undone in the way he described; and that he was fearful of what might happen to it. However, in the context and atmosphere of this event, it was reasonable for PC Pringle to interpret this as the Claimant gearing himself up to aggressively resist the officers' attempts to handcuff him.

80. The Claimant had "pushed police hands away", namely the attempts of PC's Worster, Murudker and Rickman take hold of him. Mr Hughes sought to portray these as "defensive not aggressive" actions. With respect, I disagree. The Claimant was by this point under arrest, the legality of which he does not challenge. The officers were entitled to use reasonable force to effect that arrest by virtue of ss.3 and 117 and the Claimant was resisting their efforts. The BWV makes clear that he was not merely pulling away from the officers: he was doing so while very angry and repeatedly shouting. Moreover, the force being used by the officers was minimal: each of them simply sought to place their hand on his arm. As Mr Ley-Morgan rightly highlighted, the officers did not seek to increase the use of force at this point by collectively seeking to physically restrain him.

81. He had "[r]epeatedly ignored commands to put [his] hands out to be cuffed and to calm down". The "commands" came from the police officers, but the Claimant had also ignored Mr Cole's attempts to calm him down: he said "don't get tasered" some 15 times.

82. The part of PC Pringle's Use of Force form which was not entirely accurate was his suggestion that the Claimant had adopted a "fighting stance". PC Pringle had been heard using this phrase at the scene and repeated it in his MG11. He was extensively

cross-examined about this phrase, with good reason. A fighting stance typically involves, as Mr Hughes put to him, the person having one foot in front of the other to enable movement whilst maintaining balance, knees bent, with heels slightly off ground, and arms bent so as to strike a blow, grab the opponent or respond. I note that in his MG11 he had gone further than simply referring to "fighting stance" and said that the Claimant had "his hands in front of his body, forearms perpendicular to the ground" which suggests a "fists up" stance. Yet it is clear that the BWV shows the Claimant doing no such thing at any point in the incident.

83. PC Pringle clarified in his statement in these proceedings that he "did not mean that Mr Afriyie, for example, had his fists up. What I meant was that Mr Afriyie had dropped his shoulders and put his feet shoulder width apart".

84. In evidence at both trials he accepted that the point just before he tasered the Claimant, when he was standing with his arms folded, was not the "fighting stance". Rather, this had occurred when, just after throwing aside his watch, he had his arms or hands in front of him. He said it had been "fleeting" and that "ready stance" was a better description. He accepted that the stance had concluded by 20:54 on PC Rickman's BWV (25 seconds before the discharge of the taser).

85. Mr Ley-Morgan contended that there had been an undue focus during the trial on the "fighting stance" phrase. I respectfully disagree. The use of this description of the Claimant's behaviour was, at best, entirely unhelpful. Further, this same distinctive phrase was also used by PCs Rickman and Murudker in their MG11s. PC Pringle robustly denied that they had conferred in writing their accounts. There were other worrying features of the officers' accounts: for example, PC Rickman said that the Claimant had "resisted PAVA" and PC Lacy said that immediately before the Claimant was tasered, she saw him "reach for his pockets", neither of which was correct. The totality of this evidence created a justified concern, emphasised by Mr Hughes, that the officers had colluded together to deliberately exaggerate the Claimant's conduct to make him appear more aggressive than he had in fact been. The Defendant chose not to call any of these officers at trial so these issues could not be explored further with them.

86. However, having heard PC Pringle's evidence, and seeing this phrase in its full context, I accept that it was an unfortunate shorthand, intended to convey his belief that the Claimant was readying himself to attack or aggressively resist the officers in the immediate aftermath of throwing off his watch. I make this finding in light of the series of other matters set out at [75]-[81] above which PC Pringle had recorded accurately, and which were consistent with his belief that these were the Claimant's intentions. I also note the point made by PC Pringle in his evidence, to the effect that it would have been foolish for him to lie, because he knew the entire incident was being captured on the BWV. This point was persuasive on this issue, because it related to something that would have been visible on the BWV, namely the Claimant's physical position.

87. In his Use of Force form, PC Pringle recorded his assessment of the Claimant as posing a "[s]ignificant physical threat" due to his "aggressive attitude, stance and general agitation". In his MG11, he wrote: "I…firmly believed was about to attack or

aggressively resist Police…Fearing that the male was steeling himself to attack officers I fired the Taser."

88. PC Pringle's evidence at trial was that while the Claimant was not within striking or grabbing distance of any police officer, he considered that they had reached the stage where an officer was going to have to go forward to place handcuffs on the Claimant and that the Claimant posed a significant threat to those officers: "That was going to happen any moment… and I was faced with the prospect of watching a colleague stepping forward and getting assaulted and everything coming off that".

89. During both trials, he was more specific about what he thought was going to happen. He said he thought that PC Worster was likely to step forward and try to handcuff the Claimant and was at risk of being injured by the Claimant's resistance: he said there was "[n]o doubt in my mind whatsoever" that PC Worster "any moment is going to take a step towards him and is going to get assaulted". Mr Hughes suggested to him that this was a lie and that had it been correct, he would have mentioned it in the contemporaneous documents or his witness statement. In my judgment PC Pringle had always been clear that he feared the Claimant would aggressively resist the officers; and the evidence he gave at trial merely reflected a more developed analysis of how that might actually have played out. I do not accept that this point illustrates PC Pringle has lied about his belief in the need to use the taser.

90. For these reasons I am satisfied that PC Pringle honestly believed it was necessary to taser the Claimant.

4.4.2: Whether any such belief by PC Pringle was objectively reasonable

91. As noted at [87] above, the key elements of PC Pringle's belief in the need to use the taser were his assessment of the Claimant as posing a significant physical threat due to his "aggressive attitude, stance and general agitation" and his belief that he was about to "attack or aggressively resist" the officers.

92. In my judgment these key elements were objectively reasonable for the reasons set out at [75]-[86] above. The Claimant was a large and muscular man. He was clearly very agitated. He repeatedly shouted words to the effect that he was not going to allow himself to be arrested. He had already pushed away PC's Worster, Murudker and Rickman when they had used a low level of force to take hold of him. The circumstances in which he threw his watch to his friend meant that this action was reasonably interpreted as him readying himself to aggressively resist the officers. It is clear from the BWV that he saw PC Pringle's taser but in any event PC Worster and Mr Cole specifically warned him about it in their attempts to get him to calm down. He ignored all these interventions and multiple commands from officers to put his hands out to be cuffed.

93. The Claimant's final physical movement before he was tasered was his folding of the arms. Mr Hughes submitted that the proper interpretation of this was that he posed no further threat. However, that was not the only possible interpretation. PC Pringle said at the second trial that he took the Claimant's folded arms as a gesture that said "come get me". In all the circumstances, and especially given that the Claimant folded his

arms in response to repeated requests that he put his hands out, PC Pringle's interpretation was not unreasonable. "Come get me" effectively meant that the Claimant was not going to go willingly and that an officer was going to have to step forward. PC Pringle discharged his taser 3 seconds after the Claimant folded his arms, illustrating the fast-moving nature of this incident and his logical response to the Claimant's actions.

94. As noted at [89] above, Mr Hughes took particular issue with PC Pringle's evidence that he thought PC Worster, specifically, was likely to step forward and try to handcuff the Claimant. In my judgment, this belief was objectively reasonable.

95. Of all the officers PC Worster was the most likely one to try and handcuff the Claimant. PC Worster had initially placed the Claimant under arrest such that the Claimant was, as PC Pringle explained, "…his prisoner, or PC Rickman's". As between PC's Worster and Rickman, the former was the most obvious candidate to try and handcuff the Claimant: again, as PC Pringle explained, PC Worster "had called me there" and "had cuffs in his hands…he was clearly going to apply them".

96. It is correct that PC Worster had not yet made any movement to arrest the Claimant and that he does not say in his evidence that he was going to. It is also correct that at the precise moment the taser is discharged, PC Worster appears to have turned his body towards Mr Cole. However, that is only apparent from close and repeated examination of the BWV and would not necessarily have been obvious to PC Pringle in the heat of the moment. Mr Ley-Morgan rightly reiterated that while the BWV footage is good evidence, it is not all of the evidence; and that the court must make allowance for the fact that officers have to make decisions in "real time" whilst under pressure, while recalling that PC Pringle said at the scene, "we don't have to wait to get hit" (see [46] and [49] above).

97. A further way of assessing whether the force used was reasonable is to consider whether the relevant guidance was complied with. The APP guidance makes clear that a taser "…should not be used to simply gain compliance with instructions or procedures where compliance is not linked to such a threat [ie. a threat of the sort mentioned earlier in the guidance: see [71] above], or where a threat has been reduced to such an extent that Taser use would no longer be proportionate."

98. In one sense, the taser in this case was used as a compliance tool. The officers at the scene appeared to think that: PC Pringle said the Claimant "got tasered for not doing what he was told" and PC Rickman said it was because he "refused to comply". However, I consider that is too simplistic an analysis for two reasons. *First*, the compliance in question was compliance with a lawful request that the Claimant be handcuffed, as he was already under arrest, such that the statutory powers to use reasonable force under ss.3 and 117 had been triggered. *Second*, the issue of compliance remained "linked to…[the] threat" posed by the Claimant, such that it was permissible within the wording of the guidance. This is because PC Pringle's concern that the Claimant was not complying with the request to be handcuffed was inextricably linked with what he thought the Claimant would do instead, namely aggressively resist or attack the officers (that being the nature of the threat). He explained at trial that his words as quoted at the outset of this paragraph were a

"clumsy way" of explaining his rationale; and the Claimant's "not letting officers handcuff him [led] me to believe there was a threat".

99. Mr Hughes highlighted what he described as PC Pringle's "contemptuous" attitude towards Mr Grant, who was visibly upset and loudly remonstrating with officers. The BWV records PC Pringle loudly saying "why don't you just shut your mouth?" to Mr Grant; suggesting that he and Mr Cole would get "lifted" [arrested] if they carried on "screaming and shouting"; and at one point appearing to threaten to taser Mr Grant too. In my judgment these actions illustrate what PC Pringle described as his feeling of being "exasperated" and reflect the continued heated nature of the situation, with the need for officers to restrain the Claimant more than once after he had been tasered and while he was in handcuffs. These actions by PC Pringle do not, as appeared to be implied by Mr Hughes, in themselves suggest his use of the taser was objectively unreasonable on the basis that he was somehow "trigger happy" with respect to the use of the taser. Nor does the fact that the Claimant was tasered just over 2 minutes after PC Pringle's arrival on the scene and that he had his hand on his taser or had it drawn for the vast majority of that time: this factor merely indicates how fast-moving the situation was, and how PC Pringle was alive to the threatening nature of it.

100. Mr Hughes submitted that I should find as a fact that nothing was about to happen that necessitated the use of force. He may be right that nothing would, in fact, have happened had the taser not been discharged. However what matters is whether PC Pringle's belief in what might happen, so as to justify the use of the taser, was objectively reasonable. I am satisfied that it was. Even if PC Pringle was mistaken in his view that the Claimant was going to attack the officers or aggressively resist any further attempt to restrain him, this was a reasonable one, on which he is entitled to rely: *Ashley*.

4.4.3: Whether the use of the taser was more than was objectively reasonable in the circumstances

101. During the trial consideration was given to two potential options which would have involved a lesser use of force than the taser: PAVA incapacitant spray and exercising patience.

102. Incapacitant sprays and tasers are both classified as firearms for the purposes of the Firearms Act 1968, s.5(1)(b). PC Pringle accepted at both trials that PAVA spray is a less dangerous device to use than a taser and that while it causes significant discomfort to the face, it does not carry the risk of an uncontrolled fall to the ground, and thus a head injury, that a taser does. The BWV reflects that PC Rickman had his PAVA spray drawn. PC Pringle had indicated on his Use of Force form that PC Rickman could not use his PAVA spray because he was unable to get into the correct position to discharge it, so as to make sure he made contact with the Claimant's eyes as required. He maintained this in his MG11: "I saw that PC Rickman, who was also shouting at the male had his Pava incapacitant spray in his hand but I could see that he would not be able to hit the male in the eyes from his position". He accepted in cross-examination that PC Rickman would, conceivably, have only needed to take a couple of steps to the side to be able to get in the correct position.

103. However, PC Rickman was an inexperienced probationer officer. In the very rapid pace of this highly charged incident, he did not appear to have given serious consideration to discharging his PAVA spray, nor had any of the more experienced officers told him to get into position to do so or warn the Claimant that he might use it. For that process to have taken place and for PC Rickman to have moved himself into position may itself have taken too long given how rapidly the incident developed.

104. Further, PAVA spray is not always effective on the subject and can impact on the officers. PC Pringle suggested that "cross-contamination" had happened nearly every time he had seen it used. A taser substantially reduces the risk of injury to officers because it is a more effective incapacitant. More specifically in respect of this incident, PC Pringle's evidence at the trial before me was that there was a risk of serious injury or worse if the Claimant had been sprayed in the face and then run into the road. Mr Ley-Morgan highlighted that there would have been a further risk to the Claimant and to the officers had PAVA spray been used, because, inevitably, the officers would then have had to try and take physical control of him. These reasons show that there was an objective basis for the use of a taser rather than PAVA spray in this particular situation.

105. As to the option of patience, PC Pringle had discounted using the option of "backing off" or "giving space" to the Claimant on his Use of Force form, on the basis that the Claimant was "being arrested for failing to provide". I understand what he meant by this was that the Claimant was under arrest, and therefore needed to be taken to the police station so that "doing nothing" was not a realistic option. The fact that the Claimant was under arrest does not, in itself show that "backing off" or "giving space" to the Claimant were not reasonable options. Mr Ley-Morgan submitted that there was pressure of time, given that there had already been a delay on almost an hour since the Claimant was stopped, meaning that he could have been under the limit by the time he gave a sample at the police station (assuming he agreed to do so). This factor cannot provide a justification for the use of the taser, not least as the Claimant was already under arrest for the comparably serious offence of failing to provide a sample.

106. Ultimately, however, once the Claimant had folded his arms, PC Pringle had to make a split-second decision as to whether to try and engage him further in negotiation or whether to discharge the taser. He accepted that generally for officers to try and diffuse a difficult situation is the right course. However, he explained that in his mind the officers had already tried to diffuse this particular situation without success: they had tried backing off, and the Claimant had taken his hands away violently; "every officer there virtually" had tried to calm the Claimant down, as had Mr Cole; this tactic had been "tried, and it hasn't worked"; indeed, the Claimant's temper was "going up not down". This was a loud and frantic situation with the officers, the Claimant and Mr Cole all shouting or speaking at once. In the final seconds before the taser was discharged, PC Worster insightfully said, "Listen, listen. There are too many voices." PC Pringle shouted "Put your hands out. Do as you are told" one further time, at which point the Claimant folded his arms. In my judgment he was objectively justified in concluding at that point, just before he discharged the taser. that further negotiation with the Claimant would be futile.

4.4.4: Conclusion on the claim relating to the use of the taser on the Claimant

107. For all these reasons the Defendant has proved that PC Pringle honestly believed that the use of the taser was necessary; that his belief was objectively reasonable; and that the use of the taser was no more than was objectively reasonable in the circumstances.

**4.5: The handcuffing of the Claimant after the use of the taser**

108. Mr Hughes contended that the Claimant was "groggy" after he was tasered; while he was still upset, he was not aggressive, save for one brief period; and that he posed no real threat to anyone. On that basis, he submitted that the use of handcuffs was unjustified.

109. PC Worster explained his rationale for the use of handcuffs at this stage as follows: (i) the Claimant was under arrest; (ii) he had been non-compliant and aggressive before he was tasered; (iii) the Claimant had ignored warnings that he would be tasered; (iv) the effects of the taser wear off quickly; (v) it was necessary to achieve control of the Claimant while he was still disorientated from the use of the taser; (vi) not restrained he could have resisted and been tasered again; (vii) handcuffing him was therefore in the best interests of the Claimant and the officers; and (viii) it would not cause him an injury and did not do so. I am satisfied that PC Worster honestly believed all these things.

110. Further, his belief was objectively reasonable. In addition to the matters that justified the initial decision to use handcuffs and to use the taser, the BWV makes clear that although the Claimant appeared groggy at times, he recovered from the use of the taser fairly rapidly. Within a matter of seconds, he had sufficient mental capacity to warn Mr Cole not to get arrested; and he returned to saying "You said that was it". He was not fully complying with the officers' instructions that he stay still. He was also aggressive on more than one occasion and began swearing, looking for PC Rickman ("where's that c**t?").

111. The BWV shows that PC Worster, a highly experienced officer, used his finger to check the tightness of the handcuffs, and found them to be correctly applied. I accept this and his witness evidence in this regard. On that basis, the force effected through the use of handcuffs was no more than was objectively reasonable in the circumstances.

**4.6: Conclusion on the assault and battery claims**

112. For all these reasons the Claimant's assault and battery claims are dismissed.

**5: The misfeasance in public office claim**

113. In *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1, Lord Steyn explained at 191E that the tort of misfeasance in public office had two forms:

> "First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case

> involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that [they have] no power to do the act complained of and that the act will probably injure the [claimant]. It involves bad faith inasmuch as the public officer does not have an honest belief that [their] act is lawful."

114. The Claimant's claim of misfeasance in public office was advanced on the basis that the officers must have known they had no power to threaten and use force on the Claimant without lawful justification in the manner that they did; and they either intended or foresaw that this would probably cause the Claimant harm.

115. I do not accept the Defendant's contention that this claim was insufficiently pleaded. However, in light of my findings in section 4 to the effect that the force the Claimant was threatened with (the initial use of handcuffs) and the force used on him (the use of the taser and handcuffs) was lawful, the misfeasance claim necessarily fails.

116. Mr Hughes accepted that even if this claim had succeeded it would have been unlikely to justify any additional damages being awarded to the Claimant.

## 6: Quantum

117. I make findings on all the quantum issues in case I am wrong with respect to any aspect of the merits of the claims, especially because this claim has already been heard twice.

### 6.1: Basic damages for assault and battery

118. Mr Hughes submitted that a conventional award for unlawful handcuffing in an otherwise lawful arrest is £500. I accept that this would have been an appropriate total award for (i) the alleged assault by PC Worster's indication to the Claimant that he was going to handcuffed; and (ii) the alleged battery by the use of the handcuffs after the tasering, had these claims succeeded.

119. Mr Ley-Morgan submitted that if the use of the taser had been found unlawful an award of £1,000 would have been appropriate, in addition to any further award to reflect physical or psychiatric damages caused by the tasering. I agree. This sum would properly have reflected the significant use of force inherent in the discharge of taser but also the fact that the immediate impact of the tasering, namely the period during which the Claimant was entirely incapacitated by it, lasted around 5 seconds.

### 6.2: General damages for personal injuries

#### (a): Head injuries

120. The Claimant sought damages for head injuries caused by the use of the taser. He relied on the evidence of Professor Warner, Consultant Neurologist. He had watched the BWV and described the impact of the Claimant being tasered as "like a tree being felled", landing on his back and hitting the occiput (back of his head) on the pavement. He later said that the footage shows that the Claimant "fell backward in a rigid position and hit his head"; further, that "[f]rom his height of 6 foot 2 inches this sort of injury would involve a forceful impact to the head". In my judgment this is a

much more accurate characterisation of the Claimant's fall and the likely impact on his head than the Defendant's description of a "glancing blow".

121. The parties agreed that the Claimant suffered a laceration to his head where it touched the ground. The Claimant described this as 1-2 inches long and said it was "glued together" at the Royal London Hospital shortly after the incident. There are several entries within the hospital notes from that morning. The 8.16 am entry describes it as a "superficial bruise". None describe the laceration as having been glued as part of the treatment plan. When the Claimant was examined by Mr Carroll, his Consultant Orthopaedic Surgeon, on 21 November 2019, he said that the laceration healed within 2 weeks. I am satisfied that he suffered a superficial laceration to the head that healed within 2 weeks.

122. The parties disagreed as to whether the Claimant had lost consciousness due to the tasering. The Claimant's case was that he drifted in and out of consciousness. He relied on Professor Warner's evidence that the first 5 seconds after the impact of the taser in which the Claimant was motionless, groaning and appearing incoherent was consistent with a brief period of a loss of consciousness caused by him failing directly backwards on to a concrete surface. However, Professor Warner may not have appreciated that under the APP guidance, 5 seconds is the duration of the discharge from the taser. Further, within 30 seconds, the Claimant was able to address Mr Cole; and PC Worster who had been the first to attend to the Claimant after he fell told the paramedics that there had been no loss of consciousness. Mr Hughes submitted, rightly, that it was important not to take an unduly simplistic approach: determining precise states of consciousness is a matter for expert medical opinion that cannot be resolved by the court simply looking at the BWV and just because, for example, the Claimant was able to get to his feet, this did not mean he was fully "with it". Overall, however, the evidence suggests that any loss of consciousness was at most "brief", according to Professor Warner; and if not, the Claimant was in a "concussional state".

123. The Claimant described extreme pain in the front and back of his head and headaches, accompanied by nausea, blurred vision and photophobia (a sensitivity to light) in the immediate aftermath of the incident. He reported these when he attended King's College Hospital on 12 April 2018. He saw his GP regularly throughout the remainder of 2018 and was still complaining of headaches on 21 November 2018. When he saw Professor Warner on 23 January 2020, he said was still experiencing headaches around once a fortnight. In his 30 November 2011 witness statement, he said he was still suffering from headaches around once a month, although he accepted that these might be related to general life stresses rather than the incident.

124. Professor Warner classified the Claimant's injury as a "minor traumatic head injury" on the basis of the blow to his head, a brief loss of consciousness and the ongoing consequences as described by the Claimant. He identified a "slow but steady trajectory of recovery". He opined that the Claimant had developed post-traumatic migraines and noted that these appeared to continue, albeit with decreasing frequency since the incident. He noted that the various CT scans carried out on the Claimant were normal. Although the Claimant had described a series of cognitive difficulties, Professor Warner's view was that these were more likely to relate to psychological factors than any significant brain injury.

125. It was agreed that the Claimant's head injury should be classified as a "minor" brain and head injury within the Judicial College Guidelines for the Assessment of General Damages in Personal Injury cases ("the Guidelines"), meriting an award in the £2,210-£12,770 range. The Guidelines indicate that the level of the award is affected by the severity of the initial injury, the period taken to recover from any symptoms, the extent of continuing symptoms and the presence or absence of headaches. Further, cases resolving within about two to three years "are likely to fall within the mid to lower range of the bracket".

126. Applying those Guidelines to the facts of this case, in my judgment a figure of £5,000 would have been appropriate to reflect (i) the laceration to the back of the Claimant's head; (ii) the brief period of unconsciousness/concussional state; (iii) his ongoing headaches; and (iv) Professor Warner's evidence that some symptoms were likely to persist for up to 2 years, that being a "normal period of time over which they would improve and resolve in a situation such as this".

**(b): Further physical injuries**

127. The evidence suggests that the Claimant sustained two puncture wounds to his posterior chest wall where the parts of the taser connected with his body. Mr Carroll noted that the chest wounds healed 4 weeks after the incident but pain and discomfort in the area continued for 6-8 weeks. Under the Guidelines for chest injuries, soft tissue injuries causing "serious pain and disability" over a period of weeks merit awards of up to £3,950. Given that the Claimant did not suggest he was in serious pain due to these wounds and recovered from them in full within a maximum of 8 weeks, in my judgment an award of £1,500 would have been appropriate.

128. The Claimant also sought damages for injuries to his back and knee.

129. Mr Carroll described a soft tissue injury to the Claimant's lumbar spine (lower back). On examination he identified no bony or soft tissue tenderness. Mr Carroll's view was that the symptoms of this injury had largely resolved 12 months after the incident. The Claimant described ongoing occasional back pain, but in Mr Carroll's view, this was more likely than not linked with the Claimant's history of back pain and thus unrelated to the incident. He referred to entries in the Claimant's GP records from 29 December 2011 and 25 November 2015, both of which mentioned him suffering back pain consequential on road traffic accidents.

130. Mr Carroll also described a soft tissue injury to the Claimant's right knee. On examination he found quadriceps wasting in the right knee compared to the left. He noted that the overwhelming majority of symptoms had resolved by the time of his report. He diagnosed some intermittent symptoms, which he said were consistent with patellofemoral pain secondary to poor extension mechanism function, for which he recommended a course of physiotherapy over a period of three to six months.

131. There are a series of evidential difficulties with these claims: (i) there is no record in the Claimant's medical records of him suffering a back injury after this incident; (ii) the records suggest that the Claimant had not undertaken physiotherapy for his back despite having been offered this twice; (iii) had he done so, his recovery time would

have been shorter; (iv) the Claimant suggested that he had had massages for his back and felt the need to put strapping on his knee, but made no mention of either of these to Mr Carroll; and (v) the only evidence of the Claimant having chiropractor treatment for his lower back related to sessions on 30 January 2020 and 25 February 2020, after the Claimant had seen Mr Carroll (and by which point, on Mr Carroll's evidence, the Claimant's back symptoms were not related to this incident).

132. More fundamentally, there are causation difficulties with respect to both of these claims. In the Part 35 process, Dr Carroll clearly stated that (i) he had watched the BWV footage; (ii) he could not see any evidence on the BWV of the officers kneeling directly on the Claimant's back and/or right knee; and (iii) if such kneeling had not occurred, it is more likely that the Claimant's alleged back and knee injuries were not caused as a result of the incident.

133. I agree with Mr Carroll's assessment of the BWV. There is no evidence that the officers kneeled directly on the Claimant's back and/or right knee. While Mr Hughes contended that the back and knee injuries could have been caused by another mechanism, given the significant force applied to the Claimant during the incident, there is no expert evidence to support such an assertion.

134. Accordingly, even if the Claimant's claims had succeeded on their merits, his claims for damages in respect of his back and knee would, in my judgment, have failed.

**(c): Psychiatric injuries**

135. The Claimant also sought damages for psychiatric injuries. He gave evidence that the incident has had a very adverse impact on his mental health. In the first few months after the incident, he felt depressed and suicidal and his sleep was disturbed. The incident has led to him being less sociable and hyper-vigilant. It has placed a strain on his friendships and relationships, particularly that with his mother and partner. He has become reliant on CBD oil to help him sleep and lost a lot of weight. He avoids going to Shoreditch, where the incident happened. He still has occasional low moods and flashbacks, especially when seeing police cars or officers.

136. Although the Defendant alleged that the Claimant had been fundamentally dishonest with respect to his psychiatric symptoms, he was not cross-examined about them. In my judgment his evidence on these issues was credible. It was corroborated by (i) his GP notes, which show him seeking help for his symptoms on 24 April 2018 and on several occasions thereafter; (ii) the fact that Dr Kerr, Research Clinical Psychologist, assessed him on 9 January 2019 as having met the criteria for Post-Traumatic Stress Disorder ("PTSD"), such that she accepted him on to a 12 week clinical trial of on-line therapy; and (iii) the evidence from Mr Cole, who has known the Claimant for many years, that since the incident, he had not been the same person as before; the incident having had an "extremely negative" impact on him.

137. The Claimant's expert, Dr Agarwal, Consultant Psychiatrist, examined him on 10 November 2019, concluding that he continued to fulfil the criteria for PTSD, as well as a moderate depressive episode. The PTSD was wholly attributable to the incident and the depression was secondary to it. Dr Agarwal noted that although the Claimant had benefitted to some extent from Dr Kerr's programme of treatment, this was a

stress management programme, not a specific treatment for PTSD, and there was "little evidence base for its efficacy". On that basis Dr Agarwal recommended that the Claimant have 16-20 sessions of a specific PTSD treatment, either Trauma Focused Cognitive Behavioural Therapy ("TFCBT") or Eye Movement Desensitisation and Reprocessing ("EMDR").

138. Dr Agarwal classified the Claimant's PTSD as towards the lower end of the "moderately severe" category of the Guidelines, giving a range of £23,150-£59,860. The Defendant contended that if proved, the Claimant's injuries fell properly within the "less severe" category, with a range of £3,950-£8,180.

139. In my judgment, the "less severe" category is not appropriate given that when Dr Agarwal saw the Claimant, at around 18 months after the incident, he was still in need of treatment and so could not be described as having made a "virtually full recovery within one to two years". However, the "moderately severe" category also seems too high a classification given that Dr Agarwal anticipates a "good" recovery for the Claimant within 6-12 months of him receiving appropriate treatment. Accordingly, he is not a patient where the prediction is only for "some recovery" with professional help; nor is there evidence that the effects of the Claimant's PTSD are likely to cause "significant disability for the foreseeable future".

140. I consider that the Claimant's PTSD would properly be classified as "moderate" within the Guidelines, as he is someone who has "largely recovered and any continuing effects will not be grossly disabling". That category gives a range of £8,180-£23,150. Doing the best I can, I would locate the Claimant's PTSD in the middle of this range. I would therefore have made an award of £15,000 for it.

**6.3: Special damages**

141. Had the Claimant succeeded on liability, he would have recovered an agreed figure of £131.58 for travel to and from his GP, King's College Hospital and to Kingston.

142. The Claimant sought £60 for his Zara top which was damaged by the holes caused by the taser. Given that there were puncture wounds on the Claimant's body it seems inevitable that his top was also damaged. Had the claim succeeded I would have awarded the Claimant this sum.

143. The Claimant also sought £400 for his D-Squared jeans which he said in his witness statement became scuffed during the incident. He was cross-examined on the basis that they it was part of the design feature of the jeans that they were already ripped and scuffed. That much is clear from the BWV. However, he responded by saying that they had become ripped further during the incident such that his skin was visible. He also said that he no longer wears the jeans as they bring back bad memories of the incident. I accept that evidence. Accordingly had the claim succeeded I would have awarded the Claimant £400 for the damage to and lost use of his jeans.

144. The Claimant sought £296 for chiropractic treatment costs and £760 for physiotherapy costs, with £20 travel costs for each form of treatment, in respect of, respectively, his back and knee. In light of my findings on those claims (see [128]-[134] above), no such awards would have been made.

145. The Claimant sought £2,500 in treatment costs for 20 sessions of CBT as recommended in Dr Agarwal's 10 November 2019 report. Although the Defendant's Counter-Schedule of Loss queried the benefit of such input at this stage, no Part 35 questions were asked of Dr Agarwal to this effect. There is nothing in Dr Agrawal's supplementary report dated 26 October 2021 to suggest that the earlier recommendation of CBT was no longer considered appropriate. I would therefore have awarded the Claimant the £2,500 sought.

## 6.4: Aggravated damages

146. In *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 at 516 the Court of Appeal held that aggravated damages can be awarded where there are:

> "aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted".

147. As to the level of any award for aggravated damages:

> "…where it is appropriate to award aggravated damages the figure is unlikely to be less than a £1,000 [uprated for inflation: around £2,375]. We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest…
>
> The total figure for basic and aggravated damages should not exceed what is considered fair compensation for the injury the Claimant has suffered": *Thompson* at 516.

148. The Particulars of Claim advanced the claim for aggravated damages on a series of grounds, that can be grouped together into three themes.

149. First, reference was made to (i) the decision to handcuff the Claimant, made and communicated to him immediately upon his arrest; (ii) the decision to escalate the incident by drawing the taser and aiming it at the Claimant; and (iii) the decision to taser the Claimant without justification. These matters largely reflect the underlying allegations of assault and battery. Taken alone, they do not, in my judgment, make out a persuasive claim for aggravated damages.

150. Second, reliance was placed on the manner in which the Claimant had been cross-examined at the first trial about an article in The Guardian in which he had featured. The article was published on 21 May 2022, around a month before the first trial began, with the headline "Black social worker Tasered by City of London police treated like 'wild animal'". The Claimant was interviewed and was quoted as saying: "I'd done nothing for them to treat me like this and make me feel like a wild animal that's escaped the jungle. If I was white I would not have experienced this in my life." His solicitor was reported to have said "My client's strength and threat level was pre-judged due to his ethnicity...Sadly it is a common experience of black men in London."

151. The Claimant had not advanced a claim under the Equality Act 2010 in these proceedings, nor sought to argue that the officers' treatment of him was motivated by his race and should be reflected in an aggravated damages award. Mr Ley-Morgan cross-examined the Claimant at the first trial on the basis that he did not actually believe that the way he had been treated by police was due to his race and that he had given the interview in an effort to put pressure on the Defendant to settle the claim rather than risk the bad publicity of an adverse trial.

152. Mr Hughes submitted that this line of questioning was grossly offensive, especially given the Claimant's background of working with the police. However, given the content and timing of the article it was appropriate that the Claimant was questioned about it. There were differences between the Claimant's pleaded case and the allegations in the article which were relevant to the Claimant's credibility. Accordingly, this was a legitimate topic for cross-examination. It had been approved by the judge. Further, as Mr Ley-Morgan highlighted, he made no suggestion to the Claimant that young black men in London never suffer discrimination at the hands of police or that the Claimant himself had never been the victim of discrimination. I would not, therefore, have considered it appropriate to include reference to this factor in any award of aggravated damages.

153. Third, the Claimant sought aggravated damages on the basis that the officers had not only behaved unlawfully but then colluded together to fabricate their accounts. As noted at [85] above), there was a basis for his concern. However, the conduct of the Claimant and his friends in this regard was also an issue. As Mr Ley-Morgan highlighted in cross-examining the Claimant, there were significant similarities in the statements given by the Claimant, Mr Cole and Mr Grant, including on aspects of the incident that were clearly incorrect. For this reason, I would not have considered it appropriate to include reference to the officers' conduct with regard to their accounts in any award of aggravated damages.

154. The claim for aggravated damages also asserted that (i) PC Worster had lied in describing the Claimant as "aggressive" and having displayed "aggressive resistance"; and (ii) PC Pringle had lied in saying that he feared that the Claimant was "steeling himself to attack officers". In my assessment these phrases reflected the officers' honestly held perceptions of the Claimant's behaviour and thus the beliefs that I have found they held (see sections 4.3.1 and 4.4.1 above). However, if I am wrong about that, this issue would potentially have sounded in aggravated damages.

155. However, in my judgment any such award (even if it included reference to the overarching matters at [149] above) would properly have been reduced to nil in accordance with the principle set out in *Thompson*, at 517D. This is to the effect that any improper conduct by the Claimant can reduce or even eliminate any award of aggravated damages if it is found that this conduct caused or contributed to the behaviour complained of. As Mr Ley-Morgan submitted, the Claimant's behaviour caused or, at least contributed, to the incident.

156. For these reasons I would have accepted the Defendant's submissions that basic damages sufficed; and would not have made an award of aggravated damages.

## 6.5: Exemplary damages

157. Exemplary damages are available where there has been "conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages". As to the level of such awards:

> "Where exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent": *Thompson* at 516. Uprated for inflation, these figures become, respectively, approximately £11,872, £61,790 and £131,258.

158. Mr Hughes submitted that a sum of not less than £50,000 would be appropriate to reflect the exceptionally grave nature of an incident of unlawful tasering followed by officers lying about the incident.

159. In my judgment an award of exemplary damages would only have been appropriate in this case if it was found that the officers did not honestly believe that force was necessary, that all the force used was unreasonable and that the officers had then colluded to fabricate their accounts with a view to exaggerating the Claimant's behaviour. Had such findings been made, the level of award would, in my judgment, have been at a lower level than that contended for by Mr Hughes. I consider that a figure of £12,000 would have been appropriate, again having applied some reduction to reflect the argument over the Claimant's conduct noted at [156] above.

## 7: Fundamental Dishonesty

## 7.1: The legal framework

160. The Criminal Justice and Courts Act 2015, s.57 provides as follows:

> **"57 Personal injury claims: cases of fundamental dishonesty**
>
> (1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim") –

(a) the court finds that the claimant is entitled to damages in respect of the claim, but

(b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.

(2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.

(4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.

(5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.

(6) If a claim is dismissed under this section, subsection (7) applies to –

(a) any subsequent criminal proceedings against the claimant in respect of the fundamental dishonesty mentioned in subsection (1)(b), and

(b) any subsequent proceedings for contempt of court against the claimant in respect of that dishonesty.

(7) If the court in those proceedings finds the claimant guilty of an offence or of contempt of court, it must have regard to the dismissal of the primary claim under this section when sentencing the claimant or otherwise disposing of the proceedings.

(8) In this section –

"claim" includes a counter-claim and accordingly, a "claimant" includes a counter-claimant and "defendant" includes a defendant to a counterclaim;

*"personal injury"* includes any disease and any other impairment of a person's physical or mental condition

*"related claim"* means a claim for damages in respect of personal injury which is made –

(a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and

(b) by a person other than the person who made the primary claim. […]."

161. The effect of the section is therefore that if the judge is satisfied that the claimant has been fundamentally dishonest in relation to the primary claim and/or a related claim, then the judge must dismiss the claim including, by virtue of s.57(3), any element of the primary claim in respect of which the claimant has not been dishonest unless, in accordance with s.57(2), the judge is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

162. In *Jenkinson v Robertson* [2022] EWHC 791 at [20]-[24], Choudhury J reviewed the authorities on s.57. At [25], he summarised their effect, as is material to this case, as follows:

> "i) The burden is on the defendant to establish on the balance of probabilities that the claimant has been fundamentally dishonest;
>
> ii) An act is fundamentally dishonest if it goes to the heart of or the root of the claim or a substantial part of the claim;
>
> iii) To be fundamentally dishonest, the dishonesty must be such as to have a substantial effect on the presentation of the claim in a way which potentially adversely affects the defendant in a significant way;
>
> iv) Honesty is to be assessed by reference to the two-stage test established by the Supreme Court in *Genting*".

163. The '*Genting*' test is that referred to by Lord Hughes in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* [2017] UKSC 67 at [74], thus:

> "74. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

164. *Cojanu v Essex Partnership NHS Trust* [2022] EWHC 197 (QB) was an example of an allegation of dishonesty that was found not to go to the "root of the claim". The Claimant was serving eleven years in prison for the attempted murder of his wife with an eight-inch knife. On his admission to the prison where he was held in remand, he had deep cuts to two fingers, which he attributed to an attack on him by his wife. He later brought a claim in negligence against the NHS trust that supplied services to the prison, which accused him of lying about sustaining the injuries when he attacked his wife or was resisting arrest. On appeal, Ritchie J overturned a finding of fundamental

dishonesty by the County Court and held that the manner by which he sustained the injuries were irrelevant to the question of the Trust's liability for negligence.

165. In *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 at [65], Julian Knowles held that:

> "…substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty. That must be so because of s.57(3). Parliament plainly intended that sub-section to be punitive and to operate as a deterrent. It was enacted so that claimants who are tempted to dishonestly exaggerate their claims know that if they do, and they are discovered, the default position is that they will lose their entire damages. It seems to me that it would effectively neuter the effect of s.57(3) if dishonest claimants were able to retain their 'honest' damages by pleading substantial injustice on the basis of the loss of those damages per se. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages."

**7.2: Submissions and analysis**

166. The Defendant alleged that the Claimant had been fundamentally dishonest about the twelve issues referred to below. The Claimant's response was, in summary, that he had not been dishonest; any discrepancies were the result of honest mistakes by a man who had suffered a forceful blow to the head and a traumatic experience; and/or any findings of fundamental dishonesty did not go to the heart of the claim in the sense described in the case-law as summarised in *Jenkinson* at [25].

**(i): Whether the Claimant put something in his mouth, having been told not to**

167. Mr Ley-Morgan submitted that PC Rickman's BWV footage clearly showed the Claimant removing something from his mouth as he walked away from PC Rickman. His suggestion was that it was chewing gum, with the implication being that, having been told that chewing gum distorted the results, the Claimant was trying to "game" the breathalyser device. The Claimant maintained that he had had nothing in his mouth and therefore nothing to throw away. His evidence on watching the footage at the second trial was that it seemed like he had touched his chest. No chewing gum was ever recovered.

168. I did not have the benefit of hearing evidence from PC Rickman at the trial, which may have assisted in resolving the conflict of evidence between him and the Claimant as to whether the Claimant had been seen putting something in his mouth while in the car. The BWV does not, in my judgment, clearly show the Claimant removing something from his mouth. The Defendant has not therefore proved that the Claimant has been dishonest on this issue.

169. In any event, in my judgment, this is not an issue that goes to the heart of the claim. It was part of the factual chronology of events leading to the crucial fifth breathalyser test, and to some limited degree may have contributed to PC Worster's assessment of the Claimant as "non-compliant", but it was not central to the officers' use of force.

Further, PC Rickman's evidence on this issue was not relied on as an example of officers allegedly lying for the purposes of the exemplary damages claim.

**(ii): Whether the Claimant was cooperating with the breath test procedure**
**(iii): Whether he stopped blowing on the fifth occasion because a police officer told him to stop**

170. The Claimant was asked at the scene whether there was any medical reason why he could not give a breathalyser sample. He said that he suffered from certain breathing issues. The Defendant's case is that he was lying about this matter: he played football and went to the gym regularly before the incident; he told Mr Carroll he went running; and his medical records did not support his claim to suffer from breathing difficulties on exertion. Further, the Claimant's attendance at A & E a few weeks after the incident in which he reported breathing problems led to no abnormality being detected and was a "sham", intended to create evidence of such difficulties in his medical records for the purposes of this claim.

171. In my judgment this issue was largely irrelevant: the Claimant did not suggest that any breathing difficulties had prevented him from giving the sample. Rather, his case was that he was cooperating with the breath test procedure and only stopped blowing into the device once PC Worster said "that was it". I cannot accept either of these propositions. As noted at [60] above, I accept the Defendant's analysis that the Claimant stopped exhaling at the point at which he can be seen raising his eyebrows and blinking, before PC Worster said, "That's it, sounds like that's happened". In my judgment the Defendant has proved that the Claimant has been dishonest about these issues.

172. However, again, I accept Mr Hughes' submission that they do not go to the heart of the claim. Any failure to cooperate with the breathalyser procedure was relevant to the arrest, the legality of which the Claimant did not challenge. It was not directly relevant to the central question of the use of force by the officers: that was largely determined by reference to the Claimant's behaviour after he was arrested.

**(iv): Whether the Claimant honestly thought the officers might kill him**

173. In his first witness statement, the Claimant said that while he was on the floor after the tasering (i) he recalled one or more officers putting their body weight on to the back of his knee, causing a lot of pain; (ii) he could feel an officer leaning on his back and pressing down on his chest; and (iii) he was struggling to breathe. He said he remembered thinking that the officers were going to kill him. He said he could not recall when in the sequence of events this took place.

174. Mr Ley-Morgan submitted that the fact that the Claimant was repeatedly warned to calm down or he would be tasered, that he was given appropriate aftercare after he was tasered, and that no force (other than handcuffing) was used on him until he started to become aggressive shows that he could not possibly have believed, as he said, that the officers were going to kill him.

175. I respectfully disagree. The Claimant had had potentially lethal force applied to him. At the time he described having this thought, he was restrained in the prone position on the floor and was struggling to breathe. It is therefore plausible that he genuinely thought that the officers might kill him. Alternatively, his perception may have been skewed given that he had sustained a blow to the head and was unlikely to be thinking straight. Accordingly, the Defendant has not proved that the Claimant was fundamentally dishonest about this issue. It does not go to the heart of the claim in any event.

**(v): Whether a police officer knelt on the Claimant's lower back**
**(vi): Whether the Claimant suffered a knee injury**
**(vii): Whether the Claimant suffered a back injury**

176. The Claimant said in his first witness statement that he recalled one or more officers putting their body weight on to the back of his knee causing him a lot of pain; and that he could feel an officer leaning on his back and pressing down on his chest. He was recorded by Mr Carroll as saying that when he "came around", he had been handcuffed and "two officers were kneeling on his back and right knee". During the first trial, Mr Ley-Morgan put to him that the BWV clearly showed that this had not occurred. In the Claimant's second witness statement, provided between the two trials he reiterated the account given in his first statement. He recognised that his recollection or perception of these specific details might have been mistaken given that he had sustained a blow to the head, was in shock and was dazed and confused.

177. Mr Ley-Morgan submitted that the Claimant's concession that he may have been mistaken was at odds with his previous unequivocal allegations and shows that he had lied. I disagree. The Claimant's evidence in these proceedings has been consistent, to the effect that the felt pain to his knee and back and believed that police officers were placing their body weight on him. To the extent that he was wrong with respect to the source or location of the pressure on him, it is plausible that this was a genuine mistake, made after he had sustained a heavy blow to the head and in the context of a situation where he was restrained on several occasions.

178. Further, Mr Ley-Morgan's position was that, since no officers knelt on the Claimant's knee or back, he must have been fabricating the injuries to these areas that he alleged. Again, I do not accept this. Mr Carroll's evidence suggests that the Claimant does have issues with his back and knee, albeit disputing that they were caused by this incident.

179. Accordingly, although these are issues that go to the heart of the claim, the Defendant has not proved that the Claimant has been fundamentally dishonest about them.

**(viii): The Claimant was drifting in and out of consciousness**

180. I have found at [122] above that the Claimant may have lost consciousness for a brief period and if not was in a concussional state. Mr Hughes was right to submit that determining precise states of consciousness is a matter for medical experts. I do not accept that the Claimant has been fundamentally dishonest in saying that he was

drifting in and out of consciousness, especially given the impact of his head injury and the stress of the incident.

**(ix): Whether the Claimant could not provide a sample of blood at the hospital because has a needle phobia**

181. The Claimant's evidence was that while he does not have a medically diagnosed needle phobia, and does not find having injections unduly difficult, he has struggled for many years with giving blood. He said that while he will provide a blood sample if absolutely necessary, it takes a lot of "psyching up" and reassurance from the person conducting the test for him to do so. His phobia in this respect has been heightened by his work with young people who have been stabbed. It was for these reasons that at hospital he asked to be given morphine in liquid form; and when the officer told him he was required to give a sample of urine or blood, he offered a urine sample. There is no record of this on the officer's BWV.

182. Mr Ley-Morgan relied on medical records showing that the Claimant had had vaccinations before going on holiday in 2010 and 2016 and had completed a course of acupuncture in 2015. None of these examples were inconsistent with the Claimant's account of his specific difficulties with giving blood. He also referred to specific occasions when the Claimant had blood samples taken: when he was aged 17, in around every 6 months in 2012 and in March 2013. Again, this was not inconsistent with the Claimant's case that he will give blood when necessary, but will avoid if it possible. It was not clear that the fact that the officers BWV did not capture the Claimant offering a urine sample meant that he did not do so.

183. I am not therefore satisfied that the Claimant has been fundamentally dishonest about this issue.

184. Even if he had been, this issue does not go to the heart of the claim as the question of the blood sample post-dated the use of force by the officers. To the extent that it might have been relevant to the reasons for the Claimant's arrest or prosecution, he did not challenge the lawfulness of either of those decisions in this claim.

**(x): Whether the Claimant sustained any of the injuries described in paragraphs 81-91 of his first witness statement**

185. The Defendant's case was that the Claimant had knowingly exaggerated the physical and mental injuries he described in his witness statement.

186. Two of the paragraphs in the Claimant's witness statement cited by the Defendant in this part of the fundamental dishonesty claim are simply narrations of the facts: at paragraph 85 he described his attendance at King's College Hospital on 12 April 2018 and at paragraph 91 he referred to attending his GP surgery on a number of occasions regarding his head injury. These matters are clear from the Claimant's medical records and there is no basis for the assertion that he has been fundamentally dishonest about them.

187. In the remaining paragraphs cited above, he described the injuries he sustained to his head and the consequences thereof. Professor Warner's evidence provides support for the Claimant's account of these symptoms, albeit concluding that the cognitive issues described by the Claimant were not attributed to the head injury but to psychological issues. I would have awarded the Claimant damages for the other aspects of his claim relating to his head injury: see [123]-[126] above.

188. Accordingly, although these are issues that go to the heart of the claim, the Defendant has not proved that the Claimant has been fundamentally dishonest about them.

**(xi): Whether the Claimant experienced the symptoms and sequelae described in paragraphs 95-107 of his first witness statement**

189. At paragraphs 95-98 of his statement the Claimant referred to the laceration to the back of his head and the puncture wounds, for which I would have awarded him damages: see [121], [126] and [127] above. He also referred to some neck sprain, which was contemporaneously recorded in his medical notes.

190. At paragraphs 99-100 and 101-104, the Claimant described the pain in his lower back and right knee. I have addressed this at [176]- [179] above.

191. At paragraphs 105-107, the Claimant said that the impact of his injuries had adversely impacted his ability to drive, complete household chores and go to the gym. He was not cross-examined about these matters.

192. I therefore do not accept that the Claimant has been fundamentally dishonest about any of these matters.

**(xii): Whether the Claimant experienced the symptoms and sequelae and suffered the financial losses described in paragraphs 108, 109, 113-115, 117-119 and 122-137 of his witness statement**

193. At paragraphs 108, 109, 113-115, 117-119 and 122-132 of his statement, the Claimant described the adverse impact the incident had on his mental health. I would have accepted his account of these issues and awarded him damages for his injuries: see [135]-[140] above.

194. At paragraphs 133-135 of his statement, he described the treatment recommended by Dr Agarwal and confirmed that he would be willing to try it. He also explained that he had taken 4 months off work (paid). There is no basis for a finding of fundamental dishonesty in relation to these parts of the Claimant's evidence.

195. At paragraphs 136-137 of his statement he set out the basis of his claim for damage to his top and jeans, on which I would have found in his favour: see [142]-[143] above.

196. I therefore do not accept that the Claimant has been fundamentally dishonest about any of these matters.

**7.3: Conclusion on fundamental dishonesty**

197. I therefore do not find that the Claimant has been fundamentally dishonest on any issues that go to the heart of the claim in the sense described in *Jenkinson* at [25]. The issue of "substantial injustice" does not therefore arise.

## 8: Conclusion

198. Accordingly, for all these reasons, I dismiss the Claimant's assault, battery and misfeasance in public office claims on their merits. I have given indications of the level of damages I would have awarded had the claims succeeded. Had the claims succeeded, I would not have dismissed them under s.57.

199. I reiterate my thanks to both counsel for their considerable assistance with this complex case.