Neutral Citation Number: [2023] EWHC 2565 (KB)

E41YX881

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Date: 16th OCTOBER 2023

Before:
MR JUSTICE RITCHIE
- -

BETWEEN

VICTORIA CLARK

Claimant

- and –

THE CHIEF CONSTABLE OF MERSEYSIDE POLICE

Defendant

Emma Favata (instructed by **Broudie Jackson Canter**) for the **Claimant**
Michael Armstrong (instructed by **Weightmans**) for the **Defendant**

Hearing date: 5th October 2023
- -

Judgment approved by the Court for handing down. This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be at 10:00 am on Monday 16th October.

Mr Justice Ritchie:

The Parties

1. The Claimant is a member of the public who was arrested and detained by the Defendant.

2. The Defendant is the Chief Constable of Merseyside police whose officers arrested and detained the Claimant.

Bundles

3. For the hearing I was provided with an appeal bundle, a video clip, a supplementary bundle, a bundle of authorities and skeleton arguments.

Summary

4. This is an appeal from a Judge and jury decision after a 12 day trial. At trial the Claimant lost on all issues and the claim was dismissed. The appeal was made on many grounds, most were not given permission to proceed, but on 27.10.2022 Heather Williams J granted permission to the Claimant to appeal on grounds 1-3, 9 and 11.

The Issues

5. The issues for me to decide are as follows:
   (1) (Grounds 1-3) was Recorder Grundy (the Recorder) wrong to withdraw from the jury the issue of whether the Claimant was assaulted after "the bite" (I shall explain that term a little later). Within that issue are two sub issues: (a) was the Recorder wrong to find himself as a fact that the Claimant grabbed the ankle of Detention Officer Newbury (DON)? (b) Was reasonable force used by DON to remove the Claimant's grip on her ankle (if she did grab it)?
   (2) (Grounds 9 and 11) was the Recorder wrong in law to rule that: Inspector Foulkes lawfully detained the Claimant at 02.23 on 13.3.2016, and Inspector Forsyth lawfully detained the Claimant at 09.59 on 13.3.2016?

The Pleadings and the chronology of the action

6. On 8/9th March 2016 the Claimant was certified as in need of detention under the Mental Health Act 2003 by two psychiatrists at Fazakerley Hospital. There were no inpatient beds so she was released. On 12th March 2016 the Claimant was mentally very unwell and attacked her mother (M) and then was in the process of injuring herself at home in her own kitchen by lying on the kitchen worksurface and putting a wire from a boiler around her neck. The police had been called by M and arrived to see this. They entered her home (M had given them the key) and the Claimant allegedly attacked them violently and was arrested at 20.15 hours then taken to the police station. She was detained in a cell overnight and released into the detention of the mental healthcare authorities at around 17.24 in the afternoon on the 13th.

7. During the process of getting the Claimant into the overnight cell at the police station 4-5 officers lifted the Claimant by her arms, legs and torso and carried her in. She was put on a mat on the ground face down and her handcuffs were removed. Her clothing was cut off and she was given a gown. During this process the Claimant struggled and at one stage bit her teeth into the inner thigh of DON. This led to DON hitting her in the face to make her release the bite. DON asserted that after that part of the struggle the Claimant used her right hand to grab DON's left ankle and held on, so DON punched the Claimant repeatedly in the right arm to release the grip. It is this part of the incident which is at issue in the appeal. In addition the decisions to continue detention under the *Police And Criminal Evidence* (PACE) Act 1984 taken at 02.23 and 09.59 are in issue.

Pleadings - the alleged ankle grab and alleged assault

8. By Particulars of Claim dated 7.5.2018 the Claimant made a wide range of claims against the Defendant. I shall not mention any of them save those that are relevant to the appeal. The relevant details which she pleaded were that:

> "9. ….Her clothing was forcibly removed, her pyjamas were ripped off her. Her bra was ripped off and she felt someone's hands go underneath her pulling her knickers off. When she was thrown onto the mat she missed it was the thrown onto the concrete floor. The Claimant was left in the cell completely naked.
> "10. At this time the Claimant did not know what was going on, where she was or who she was with despite the individuals dealing with her being dressed as police officer. She thought she had been kidnapped and was going to be killed. … She was on the floor hearing voices telling her to break her neck and kill herself and that she needed to die."
> "26. **Assault** All uses or threats of hostile force set out herein constituted assaults … i) the officers used force against the Claimant during her detention for which there was no lawful justification; and ii) Further or alternatively, the degree of force deployed by the Defendant's officer was unreasonable and/or unnecessary and/or excessive in all the circumstances of the case."
> "27. **Particulars of Assault** The Defendants officers used force … d. At the police station the Claimant was restrained with force, punched … g. Force was used against the Claimant throughout her detention."

9. In the Defence the Defendant denied all the claims and descended into particulars. At para. 6(XVI) the Defendant pleaded as follows:

> "At that point, the Claimant grabbed out at DON's ankle at which point DON and DO Crowther tried to pull the Claimant off DON. The Claimant was punched repeatedly to her right arm in an attempt to get the Claimant to release her grip. When the Claimant released her grip, the strikes ceased."

10. In the Reply the Claimant dealt with other matters and made no factual pleading about the alleged ankle grab. Under r.16.7 of the Civil Procedure Rules the Defendant's assertions were impliedly not admitted and needed to be proved by the Defendant,.

The allegedly unlawful detentions

11. In the Particulars of Claim (POC) the Claimant asserted that she was wrongfully arrested because she had not committed any offence. The jury rejected that claim so the Recorder ruled that she was lawfully arrested and lawfully detained at the police station after arrival and lawfully put into her cell. However, her continued detention is the subject of Grounds 9 and 11 of her appeal. In paras. 21(f – m) of the POC the Claimant set out her claims of unlawful detention on the basis that she was unfit to be detained through mental ill health and her need for medical care. The Claimant asserted that there was no prospect that she could be properly interviewed about the charges of assault levelled against her because she could not understand or answer. The Claimant asserted that the Defendant failed to take her to a place of safety under the Mental Health Act 1983 (MHA) in breach of the PACE Code C para. 9.5. I have set the PACE Code C out below. (I work on the basis that it was the 2014 version the Claimant relied upon but no date was pleaded and the authorities bundle did not contain it.)

12. In the defence the Defendant denied that the police knew or ought to have known that the Claimant was suffering from a mental illness and required immediate medical treatment or to be taken to hospital. The Defendant relied on her recent release from hospital a few days before. It was asserted that the Defendant was concerned that the Claimant was intoxicated on drink or drugs and a drugs test had been authorised. She was placed in to cell to "rest" until the following morning. The Defendant admitted that at 00.53 on 13.3.2016 the Defendant had received "unverified" information that the Claimant had been "sectioned" a few days before (probably from M). The Defendant relied on *Williamson v Att. Gen. of Trinidad* [2014] UKPC 29, to plead that the Claimant's pleading failed to specify the period of unlawful detention so the whole period stood or fell on the original decision to detain. The Defendant asserted the grounds for detention were reasonable.

The Judgment and the decisions appealed

13. The Recorder did not permit the decision over whether the Claimant grabbed DON's ankle to be left to the jury. Instead he decided the facts himself. He decided on balance that the Claimant did grab DON's left ankle (Judgment paras. 5-12) and determined that the force used by DON was reasonable to release the hold. He stated that he had applied the test in *McDonnell v The Comm. Of the Met Police* [2015] EWCA Civ. 573, per Bean LJ at para. 28, namely whether the force used by the officer was necessary, reasonable

and proportionate in the circumstances. He also took into account that when making the decision the officer may not have had a lot of time to make a measured calculation using "jeweller's scales", taking into account the judgment of Geoffrey Lane J in *Reed v Wastie* [1972] Crim. LR 221.

14. Not all of the Recorder's reasoning given on 6.5.2022 for refusing to leave the issue of whether the Claimant grabbed DON's ankle to the jury was in the transcripts provided to this Court. What the transcript recorded was at paras. 3-4. The Recorder clearly held that there was no evidence that the Claimant was punched in the face after she released her bite on DON's leg. However, the written transcript also stated that the Recorder referred back to what he had said originally when refusing to leave this issue to the jury. There is no transcript of that reasoning. Counsel provided the best notes which they had of what was said and I am very grateful for that. The notes are below:

> "**Claimant's note**
> I will give a ruling the issues now questions put to the jury and whether in fact there was punches to Victoria Clark either to the face or arm after the bite was released. In my judgment that is not an issue in this case, one it is not pleaded in the particulars of claim or reply to defence. It is not given to Victoria Clark in her witness statement, evidence in chief. It is submitted to me by Ms Favata that it is open to the jury, looking at the evidence to reach that conclusion. It is not raised as an issue in the case in my judgment that is improper, the case can't change. Maria Michaels thought punches had been struck once bite released. No questions for the jury on this."
>
> **"Defendant's note**
> The issue is whether questions should be put on the actions of DO Newbury and punches to the face or the arm after VC had released her bite. In my judgment, that not an issue in the case for these reasons.
> 1. It is not pleaded, in the Particulars of Claim or in the Reply to the Defence, nor was in VC's evidence. Her WS is silent upon that, the issue was not addressed by that in her evidence in chief. It was submitted to me by Ms F that it was open to the jury looking at the CCTV evidence to reach that conclusion, but it was not raised as a previous issue. The Claimant's case can't chose, to try and construct a case before the judge and jury,
> 2. Ms Michael thought that the punches had been administered, after VC after had released her bite on DO Newbury. This is wrong. In my judgment there is no proper evidence on the issue basis that she was punched to the face after she released her bite upon DO Newbury. It is not a proper question, will not assist me in the resolution or whether her civil rights have been breached."

15. In relation to the detention, the Recorder found that the original arrest and the original detention on admission to the police station were lawful under S.24(5) of the PACE Act on the basis of the suspected assaults committed by the Claimant on police officer Galloway and/or M and suspicion of the Claimant being at risk of causing harm to herself or others. In addition, the suspicion of drugs or alcohol intoxication and the need for the Claimant to dry out, calm down or recover. Those decisions are not under appeal.

16. It was common ground between the parties that the Recorder's powers, when reviewing the detention decisions of the Defendant's officers at the police station, were to be exercised only if any decision was unreasonable in the *Wednesbury* sense. That requires the decision to be considered lawful unless it is proven that no reasonable officer would have made such a decision in the circumstances.

17. At para. 33 the Recorder set out the facts of what happened on arrival at the police station thus:

> "33. Police Sergeant Brine can be seen on the CCTV when the claimant was brought into the custody suite. He attempted to perform a risk assessment by asking the claimant a set of questions, including questions about her mental health. The claimant refused to reply, telling him to "fuck off'. The claimant can be seen trying to bite Police Constable Paul and then she lunges forwards and takes hold of the custody pen in her mouth which had to be removed from her. I accept Police Sergeant Brine's evidence that he checked the NICE computer system and the Police National Computer system and found that there were no markers recorded there for mental health in respect of the claimant.
> 34. Although Police Sergeant Brine does not recall being told that the claimant suffered with mental health issues, I find it likely that it was mentioned in his presence. His evidence, which I accept, was that, in the seven years as a custody sergeant at that time, what he saw of the claimant's behaviour was not completely out of the ordinary, but was at the upper level of behaviour he had witnessed. He said, and I accept, that he saw that type of behaviour at least a couple of times per month. In his opinion the claimant was likely to be under the influence of drugs and/or alcohol, based on her violent and/or aggressive behaviour and her apparent strength.
> 35. This accords with the evidence of Nurse Michaels, which I accept, that she also thought that the claimant was under the influence of drugs because of what she described as the pure level of aggression and strength of the claimant and the fact that the claimant could keep up that level of resistance and aggression for a protracted period. In her

> experience, this fitted with the picture of someone under the influence of drugs, in particular cocaine.
> 36. I find that Police Sergeant Brine reasonably concluded that the claimant was intoxicated and needed to be placed on a rest period."

18. None of those findings is appealed. The findings between paras. 38 and 41 as to the Claimant's mental state are appealed and between paras. 44-49 as to the reasonableness of the decisions to detain the Claimant in the police cell rather than seek to have her transferred to a mental health treatment centre with accommodation. The Recorder found that the Claimant was not in a medical emergency overnight (paras. 38 and 41) and that Ms McDonnell, who came on duty at 07.00, examined the Claimant at 08.30, after making enquiries and decided that the Claimant needed detention under the MHA 1983. She then set about getting approval for that to take place and called the approved mental health practitioner (AMP) to do just that. Mr Sandhu arrived at around 3pm and was satisfied that the Claimant needed to be detained under the MHA 1983 but likewise did not consider the Claimant was a medical emergency. No evidence was put before the Recorder that the detention in the cell aggravated the Claimant's psychiatric condition or as to the length of time it would have taken to transfer her to mental health care if she had been an emergency.

19. The Recorder ruled that the detention at 02.23 am was lawful. He relied on the custody logs and the witness statement of Inspector Foulkes who made that decision. At that time the Claimant was in her "rest period". The Inspector considered that she was potentially intoxicated and/or had taken drugs; that she would need a mental health assessment (later, after the rest) and decided that when she was more relaxed she could be read her rights and have someone informed and interviewed. Inspector Foulkes detained her under the PACE Act 1984 S.s 37 and 40.

20. The Recorder ruled the further detention at 09.59 was lawful (para. 49 of the Judgment) for the reasons set out by Inspector Forsyth in the log and repeated in para. 48 of the Judgment. Those reasons amounted to little more than an acknowledgement of the Claimant's mental health challenges and a desire to interview her later. Inspector Forsyth did not give evidence.

The relevant evidence

21. The following matters are relevant to the decisions below.

The ankle issue

22. Firstly, in evidence, the Claimant could not recall what happened at the police station so could not give evidence as to whether she did or did not grab DON's ankle. In her witness statement dated 29.4.2019 there was no mention of the relevant events in the cell whatsoever. There was no pleading in the Particulars of Claim or Reply setting out any positive case about the events in the cell after the bite.

23. Secondly, the CCTV evidence which the jury and the Recorder saw, was shown to me. The video shows DON after the bite is released, moving, crouched down with her knees bent, on her haunches near the Claimant's head and shows the Claimant's right arm coming above the Claimant's shoulder line (she is lying flat on the ground on a mat) towards DON's left lower leg. Then the arm goes out of view of the CCTV because DON's body blocks the line of sight. So, the CCTV is permissive of a grab but not determinative of a grab and certainly does not prevent a finding of a grab. Then DON started punching the right arm.

24. Thirdly, DON gave written evidence in her witness statement that the Claimant grabbed her ankle and that is why she punched the Claimant's right arm.

25. Finally, all other witnesses did not see what was going on. DOs Crowder and Stanley were busy restraining the Claimant and did not see the grab. Maria Michaels wrote:

> "I did not see Ms Clark grab hold of any other part of the officers bodies, the officers were holding Ms Clark's arms and legs throughout so she did not have much option to move." … "DON punched Ms Clark pretty much after she had been bitten …, After I shouted to stop, DON stopped punching."

The evidence on the detention issues

26. The reasoning for continued detention given in the custody log by Inspector Foulkes at 02.23 was set out in the Judgment at para. 46. He considered the Claimant was unfit to be interviewed at that time. He considered that she needed a full mental health assessment. He did not consider that in the middle of the rest period an assessment was required. He considered that detention was needed to preserve evidence and to secure future evidence (presumably from her in interview). He expressly stated that when the Claimant "is" more relaxed and communicative she would be told of her rights (to legal advice etc.) and he appears to have had in mind an interview at that stage. In his witness statement, dated 30.1.2017, he explained that he had seen the Claimant when she entered the police station and witnessed her bizarre behaviour. He thought she might be intoxicated with drink or drugs combined with mental health issues. He was aware that DON had been bitten by the Claimant because she had informed him after putting the Claimant into the CCTV cell. He had ordered a class A drugs test: the form was completed at 22.19 hours on 12.3.2016. He had been given information by patrol officers that the Claimant had been "sectioned" but this was, at that time, unconfirmed by medical sources. He also viewed her through the spy hole in the cell door. He did not speak to the Claimant because of her behaviour.

27. The reasoning for the continued detention by Inspector Forsyth at 09.59 on 13.3.2016 was set out in the custody log and para. 48 of the Judgment. He recorded that the Claimant was likely to become violent and that the Claimant's state of mind would prevent understanding of the purpose of a face to face discussion. He gave the reasoning

for the continued detention as "to preserve evidence … and obtain further evidence by questioning". No witness statement was served from him and he did not give live evidence.

28. The additional evidence which was available to Inspector Forsyth at 09.59 was as follows: (1) the CCTV footage of the Claimant's behaviour in the cell since 02.23 which was clearly disturbed. (2) The reports of Kelly McDonnell, the mental health criminal justice liaison practitioner, who came on duty at 07.00 and assessed the Claimant with a student at 08.30 am and determined that the Claimant needed to be admitted to a mental health treatment establishment. (3) In her witness statement dated 30.1.2017 Ms McDonnell stated that she was made aware of the officers' concerns about the Claimant's mental health when she came on shift that morning. She started making enquiries straight away and obtained from Fazakerley Hospital A&E the information that two consultant psychiatrists had recently recommended inpatient treatment under S.2 of the MHA 1983. When she went to meet the Claimant she decided not to go into the cell because the Claimant would not move away from the door, despite requests to do so. Ms McDonnell had started the process of getting the AMP to come to the station to have the Claimant admitted and to source a mental health bed before 09.59.

29. At a later time that day, so irrelevant to the decision Inspector Forsyth had to make at 09.59, Ms McDonnell herself went to Fazakerely Hospital to pick up the written decisions of the consultant psychiatrists at 1pm.

30. Sonny Sandhu was the AMP who attended at the police station on 13.3.2016. He only completes the admission paperwork if two consultant psychiatrists have concluded the detainee needs to be admitted for treatment. He was called between 2 and 3 pm. He read the notes after he arrived and saw that the recommendation was for a PICU bed (which was intensive mental healthcare). The custody sergeant was reluctant to let him into the cell due to the risk of violence. The door was opened and Mr Sandhu stood in the gap. The Claimant walked towards him and casually walked past him, ignoring him. A struggle ensued, pepper spray was used. Several officers were needed to get her back into the cell. The Claimant was taken to the Priory Hospital after being discharged from the police station some time after 17.00 hours.

Grounds of appeal

31. **Ground 1.** The Claimant asserts that the Recorder's reasoning for refusing to put the issue of the ankle grab before the jury was faulty, internally inconsistent between the two transcripts and wrong. He focussed on punches to the face and the absence of evidence of those rather than focussing on the evidence relating to whether there was any ankle grab at all. Through her counsel at the appeal the Claimant accepted that the Claimant herself did not recall the events surrounding the alleged ankle grab. The Claimant/Appellant asserted that the Recorder failed to understand the Claimant's case. This was so despite the Claimant providing written questions to the Recorder for him to put to the jury relating to the ankle grab issue. The Claimant's case was that the issue

of whether the force used by DON was reasonable depended on the facts which should have been put to and found by the jury in relation to whether the Claimant grabbed DON's ankle. The Claimant submits that her pleadings were sufficient to comply with her obligations to state her case in relation to the assault by DON on her after the bite and properly to inform the Defendant of the case it had to meet. The Claimant relied on the evidence of Ms Michaels but accepted that her evidence in relation to the punches by DON after the bite was released had altered after seeing the CCTV (see the Appellant's skeleton paras. 33-35).

32. **Ground 2.** This ground succeeds or fails with Ground 1. The Claimant appeals on the basis that the Recorder was wrong to make factual findings himself rather than leave the facts in relation to the ankle grab to the jury.

33. **Ground 3.** This Ground succeeds or fails with Ground 1 and additionally relates to the Recorders decision on reasonable force.

34. **Grounds 9 and 11.** In these the Claimant/Appellant asserts that the decisions to detain her at 02.23 and 09.59 were not lawful under the PACE Act 1984 and the PACE Code.

The Law

What should be left to the jury?

35. In a civil trial by a Judge and jury the issues of fact are for the jury and the issues of law are for the Judge. However, there are qualifications and finesses to those general rules.

36. In *Safeway v Tate* [2001] QB 1120, the trial Judge granted summary judgment against the Defendant in a libel action depriving the Defendant of trial by jury and the Defendant appealed on the basis that trial by jury was his right under S.69 of the *Supreme Court Act 1981*. The Court of Appeal allowed the appeal, Otton LJ at p 1132 set out the background thus:

> "Finally, I return to consider the functions of the judge and jury in a defamation action. As Lord Denning MR said in *Ward v James* [1966] 1 QB 273, 295: "It [trial by jury] has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake ... then trial by jury has no equal." This recognition of the importance which English law has ascribed to trial by jury over the centuries has been frequently endorsed at the highest level before Blackstone and after Lord Devlin: see Devlin, *Trial by jury, The Hamlyn Lectures*, 8th Series (1956), pp 164-165, "jury as lamp of freedom". This is still as true today as it has ever been."

37. In *Alexander v Arts Council* [2001] EWCA Civ. 514, another libel claim, the Court of Appeal gave guidance on which issues should be left to the jury and which should not.

The Judge had refused to leave the issue of malice to the jury and was upheld on appeal. At para.37 May LJ ruled as follows:

> "37 There are of course a variety of possible circumstances in libel cases in which issues of law may arise for decision by the judge. In so far as questions of this kind properly depend on an evaluation of evidence so as to determine material questions of disputed fact, these are matters for the jury. **But, as Mr Milmo accepted in the present appeal, it is open to the judge in a libel case to come to the conclusion that the evidence, taken at its highest, is such that a jury properly directed could not properly reach a necessary factual conclusion. In those circumstance, it is the judge's duty, upon a submission being made to him, to withdraw that issue from the jury**. This is the test applied in criminal jury trials: see *R v Galbraith* [1981] 1 WLR 1039, 1042C. In my view, it applies equally in libel actions. It is in substance the test which the judge set himself to apply in the present case.
> 38 Mr Milmo also drew our attention to the judgment of Bingham LJ in *Kingshott v Associated Kent Newspapers Ltd* [1991] 1 QB 88, 99D. In that case, a question arose under section 7 of the Defamation Act 1952 whether a newspaper article was a fair and accurate report of proceedings at a local public inquiry. The judge ruled that no reasonable jury properly directed could conclude that the words complained of were other than a fair and accurate report of the proceedings. Bingham LJ accepted that this was the correct test, but was not persuaded that the jury could not attach decisive weight to any of the plaintiff's points or to those points cumulatively. Relevantly for present purposes, he asked himself whether, **if the issue were left to the jury and the jury found for the plaintiffs, that verdict would be set aside as perverse.** His answer in that appeal was that he did not think it would. His judgment, however, shows that, if in a libel action a party's case depends on a finding of fact by the jury which, if it were so found, is bound to be set aside on appeal as perverse, the judge should withdraw that issue from the jury in the first place. In my view, this is not, as was suggested in *Safeway Stores plc v Tate* [2001] 2 WLR 1377, speculating that the jury might reach a perverse decision: rather that the only jury decision capable of supporting the case in question would be bound to be set aside on appeal." (My emboldening).

38. What are the limits of the decision the Judge has to make about which issues to leave to the jury? In *Balchin v Chief Constable of Hampshire* [2001] EWCA Civ. 538, Henry LJ considered this issue and ruled as follows:

> "2. Because he was claiming false imprisonment, Mr Balchin was entitled to be tried "... with a jury..." under Section 66(3)(c) of the

County Courts Act, 1984, this clearly not being a case within any of the exceptions to that entitlement under (c) above. The way that the expression "...with a jury..." is understood in cases of false imprisonment (and malicious prosecution, though that is not this case) is exemplified by the case of *Dallison -v- Caffery* [1964] 2 AER 610. There Diplock LJ (as he then was) explained at 619D:

> "Since arrest involves trespass to the person and any trespass to the person is prima facie tortious, the onus lies on the arrestor to justify the trespass by establishing reasonable and probable cause for the arrest. ... One word about the requirement that the arrestor... should act honestly as well as reasonably. In this context it means no more than that he himself at the time believed that there was reasonable and probable cause, in the sense that I have defined it above, for the arrest... The test whether there was reasonable or probable cause for the arrest... is an objective one, namely whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause. Where that test is satisfied, the onus lies on the person who has been arrested ... to establish that his arrestor ... did not in fact believe what ex hypothesi he would have believed had he been reasonable. ... In the nature of things this issue can seldom seriously arise. Next, as to procedure. In arresting [or] detaining... a suspected felon, a person is acting in furtherance of the administration of justice. It is a well-settled rule of procedure that the question whether he is acting reasonable is one to be decided by the judge. It may be that this rule reflects the judicial distrust of Jacobinism among juries at the formative period of this branch of English law; but it can at least be rationalised on the ground that the judge, by reason of his office and his experience, is better qualified that a juryman to determine what conduct is reasonable or unreasonable in furtherance of the administration of justice. In those days, however, the jury was the only tribunal which at common law was competent to determine disputed issues of fact. **If there was conflicting evidence as to what had happened, that is what the conduct of the defendant in fact was, the jury alone was competent to resolve the conflict.** But when what had happened was established whether by uncontradicted evidence or, in the case of conflict, by the jury's finding of fact, it was for the judge to rule whether the defendant's conduct was reasonable or

> unreasonable. This is still the position today where an action for false imprisonment... arising out of the arrest [or] detention... of a suspected felon is tried by judge and jury. **It is for the judge to decide what facts given in evidence are relevant to the question of whether the defendant acted reasonably. It is thus for him to decide, in the event of a conflict of evidence, what finding of fact is relevant and requisite to enable him to decide that question.** A jury, however, is entitled to base findings of fact only on the evidence called before it, and, as in any other jury trial, it is for the judge in an action for false imprisonment, to decide whether the evidence on a relevant matter does raise any issue of fact to fit be left to the jury. **If there is no real conflict of evidence, there is no issue of fact calling for determination by the jury**. This applies not only to the issues of fact as to what happened on which the judge has to base his determination whether the defendant acted reasonably, but also to the issue of fact whether the defendant acted honestly, which, if there is sufficient evidence to raise this issue, is one for the jury (see *Herniman -v- Smith*). For the reasons already indicated, however, where there is reasonable and probable cause for an arrest ... the judge should not leave this to the jury except in the highly unlikely event that there is cogent positive evidence that despite the actual existence of reasonable and probable cause, the defendant himself did not believe that it existed (see *Glinski -v- McIver*)." (My emboldening).

39. With that introduction Henry LJ summarised the principles thus:

> "3. We get from that authority the following:
> a) the burden of proof is on the police to justify the arrest;
> b) to do so, they must satisfy the judge that a reasonable man, assumed to know the law and possessed of the information that the arresting officer had, would believe that there was a reasonable or probable cause for the arrest;
> c) while the above question is a question of law for the judge, it is a question he can only answer on agreed facts or uncontradicted evidence or, where the evidence is conflicting, by the jury's explicit finding of fact;
> d) it is for the judge to decide what finding of fact is "relevant or requisite", and whether the evidence on a relevant matter does raise an issue of fact to go to the jury."

40. When considering what to leave to the jury in a civil action against the police, in my judgment the authorities require a Judge to consider the following 3 steps:

A pleaded issue of fact

(1) Is there a relevant issue of fact between the parties identified in or arising from the pleadings?

Not agreed or uncontradicted

(2) By the end of the evidence, is the identified relevant issue of fact no longer in issue because it is agreed or there is uncontradicted evidence determining it? If so, it is no longer an evidential issue and no longer for the jury.

A real issue on the evidence

(3) By the end of the evidence, is there a real conflict of evidence relating to the identified relevant issue of fact? If so, then it must be left to the jury. However, if no reasonable jury could decide the issue in any other way than the obvious way, so it would be perverse and overturned on appeal if the jury decided the issue any other way, then there is no real issue to be left to the jury.

Reasonable force

41. The *Criminal Law Act* 1967 S.3(1) empowers any person to use such force as is reasonable in the circumstances "in the prevention of a crime…".

42. S.117 of the *PACE Act* 1984 states:

> **"Power of constable to use reasonable force.**
> Where any provision of this Act—
> (a) confers a power on a constable; and
> (b) does not provide that the power may only be exercised with the consent of some person, other than a police officer, the officer may use reasonable force, if necessary, in the exercise of the power".

43. In *Connor v Chief Constable of Merseyside* [2006] EWCA Civ. 1549, the Court of Appeal considered the power to detain whilst a firearms search was being carried out at the Claimant's house. The Court ruled that a power could be implied which was necessary to ensure the safe and effective exercise of an express power to search, relying upon *Murray v Ministry of Defence* [1988] 1 W.L.R. 692, and the detainee was not entitled to a decision from a jury as to the reasonableness and the lawfulness of his detention, that was a matter of law for the Judge. See also *Dallison v Caffery* [1965] 1 Q.B. 348, [1964] 4 WLUK 22.

44. The Recorder referred to *Reed v Wastie* in his Judgment, but I have been unable to find a report of *Reed v Wastie* in Westlaw or Lexis and neither party provided a copy to me, however it is summarised in the judgment of Beldam LJ in *Cross v Kirkby* [2000] EWCA Civ. 426. The Claimant had threatened to kill the Defendant and attacked him

with a wooden bat. After 3 blows the Defendant took the bat and hit the Claimant fracturing his skull. Beldam was considering reasonable force and ruled as follows:

> "34. In this passage, while emphasising that it was a hard blow to the side of the claimant's head with a hard wooden implement and one likely to cause, as it did, serious injury, the judge seems to have overlooked the fact that it was the same implement with which the claimant was attacking the defendant and had struck him three times. It was thus implicit that the defendant was defending himself from an attack with a hard wooden implement which was likely to cause him serious injury. Moreover the actions of the defendant had to be judged by the facts as he believed them to be (*R v Gladstone Williams* [1987] 78 Cr App R 276). There was ample evidence from the witnesses, whose evidence the judge preferred, supporting the defendant's evidence that he thought he was facing serious injury and that he had no time to and did not aim a blow but hit the claimant instinctively. Further, although the judge had said that it was the nature of the blow rather than the disastrous consequences i.e. the injury that had to be looked at, the whole basis of his finding that the blow was hard was based on the serious nature of the injury and the estimate on the imaginary scale of the force necessary to produce it. The judge accepted Doctor Baden-Powell's reservations about inferring the degree of force from the nature of an injury but seems to have decided the blow was hard on the basis that Doctor Timperley thought it was 10% harder than a blow delivered with average force. I think that the judge here fell into the error which Lord Lane graphically described in *Reed v Wastie* [1972] Crim LR 221 of:
>
> > "... using jeweller's scales to measure reasonable force."
>
> 35. Further the judge placed too much emphasis on the degree of force used in this single blow as he divined it to be. It was wrong simply to concentrate on the blow neglecting the other factors bearing on reasonable force. The defendant had taken every reasonable step to avoid becoming involved with the claimant who the judge rightly described as "trying to goad him into retaliating". It was only when he was under actual attack with a weapon, described by the judge as "likely to cause serious injury", that he became involved in the struggle to prevent the claimant hitting him with the bat. Had the defendant in a moment of unexpected anguish only done what he honestly and instinctively thought was necessary? In my view, by starting from his holding that the blow was a hard blow based on medical opinion, the judge overlooked the wider question whether in hitting out with the bat

> at the claimant the defendant had done what he honestly thought was necessary in the anguish of the moment…"

45. In *McDonnell v Comm. for the Metropolis* [2015] EWCA Civ. 573, the Court of Appeal was dealing with a police officer who "took down" the Claimant (who was carrying 1 kg of cannabis) onto a concrete pavement bouncing off a brick wall, breaking his arm, by approaching fast from behind and using a technique of shoulder grabbing from "the Metropolitan Police's Rear Take-Down Officer's Safety Manual". The trial judge found the officer's use of force to have been unreasonable. On appeal Bean LJ considered the reasonableness of the use of force as follows:

> "28. The judge placed too much emphasis on the result of the force, namely the injury and its severity, rather than the act (the taking to the ground). The severity of the injury resulted partly because of the force used, but also because Mr McDonnell's shoulder struck the wall. PC Marwick, like the rugby player who tackles his opponent, intended to bring the clamant down, but not to inflict injury. Mr Waters was justified in describing it as an accident, not a deliberate infliction of a wound. If the tackle had been slightly less vigorous, Mr McDonnell's shoulder might not have struck the wall. But in the circumstances of this case that does not make the force used unreasonable, excessive or disproportionate (which seem to me to be three different ways of saying the same thing)."

The reasonableness test for custody detention decisions

46. Under S.34 of the PACE 1984:

> "(1) A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part of this Act.
>
> (2) Subject to subsection (3) below, if at any time a custody officer—
>
> (a) becomes aware, in relation to any person in police detention, that the grounds for the detention of that person have ceased to apply; and
>
> (b) is not aware of any other grounds on which the continued detention of that person could be justified under the provisions of this Part of this Act,
>
> it shall be the duty of the custody officer, subject to subsection (4) below, to order his immediate release from custody.
>
> (3) No person in police detention shall be released except on the authority of a custody officer at the police station where his detention was authorised or, if it was authorised at more than one station, a custody officer at the station where it was last authorised."

47. Under S.37 of the PACE 1984:

> "**37 Duties of custody officer before charge.**
> (1) Where—
> (a) a person is arrested for an offence—
> (i) without a warrant; or
> (ii) under a warrant not endorsed for bail,
> (b) . . . the custody officer at each police station where he is detained after his arrest shall determine whether he has before him sufficient evidence to charge that person with the offence for which he was arrested and may detain him at the police station for such period as is necessary to enable him to do so.
> (2) If—
> (a) the custody officer ("C") determines that C does not have such evidence before C, and
> (b) the pre-conditions for bail are satisfied,
> the person arrested must be released on bail (subject to subsection (3)).
> (2A) If—
> (a) the custody officer ("C") determines that C does not have such evidence before C, and
> (b) the pre-conditions for bail are not satisfied, the person arrested must be released without bail (subject to subsection (3)).
> **(3) If the custody officer has reasonable grounds for believing that the person's detention without being charged is necessary to secure or preserve evidence relating to an offence for which the person is under arrest or to obtain such evidence by questioning the person, he may authorise the person arrested to be kept in police detention.**
> (4) Where a custody officer authorises a person who has not been charged to be kept in police detention, he shall, as soon as is practicable, make a written record of the grounds for the detention.
> (5) Subject to subsection (6) below, the written record shall be made in the presence of the person arrested who shall at that time be informed by the custody officer of the grounds for his detention.
> (6) Subsection (5) above shall not apply where the person arrested is, at the time when the written record is made—
> (a) incapable of understanding what is said to him;
> (b) violent or likely to become violent; or
> (c) in urgent need of medical attention."

48. S.40 of the PACE Act 1984 stated as follows:

> "**40 Review of police detention.**

(1) Reviews of the detention of each person in police detention in connection with the investigation of an offence shall be carried out periodically in accordance with the following provisions of this section—

(a) in the case of a person who has been arrested and charged, by the custody officer; and

(b) in the case of a person who has been arrested but not charged, by an officer of at least the rank of inspector who has not been directly involved in the investigation.

(2) The officer to whom it falls to carry out a review is referred to in this section as a "review officer".

(3) Subject to subsection (4) below—

(a) the first review shall be not later than six hours after the detention was first authorised;

(b) the second review shall be not later than nine hours after the first;

(c) subsequent reviews shall be at intervals of not more than nine hours.

(4) A review may be postponed—

(a) if, having regard to all the circumstances prevailing at the latest time for it specified in subsection (3) above, it is not practicable to carry out the review at that time;

(b) without prejudice to the generality of paragraph (a) above—

(i) if at that time the person in detention is being questioned by a police officer and the review officer is satisfied that an interruption of the questioning for the purpose of carrying out the review would prejudice the investigation in connection with which he is being questioned; or

(ii) if at that time no review officer is readily available.

(5) If a review is postponed under subsection (4) above it shall be carried out as soon as practicable after the latest time specified for it in subsection (3) above.

(6) If a review is carried out after postponement under subsection (4) above, the fact that it was so carried out shall not affect any requirement of this section as to the time at which any subsequent review is to be carried out.

(7) The review officer shall record the reasons for any postponement of a review in the custody record.

(8) Subject to subsection (9) below, where the person whose detention is under review has not been charged before the time of the review, section 37(1) to (6) above shall have effect in relation to him, but with the modifications specified in subsection (8A)

(8A) The modifications are—

(a) the substitution of references to the person whose detention is under review for references to the person arrested;
(b) the substitution of references to the review officer for references to the custody officer; and
(c) in subsection (6), the insertion of the following paragraph after paragraph (a)—

"(aa)asleep;"

(9) Where a person has been kept in police detention by virtue of section 37(9) or 37D(5) above, section 37(1) to (6) shall not have effect in relation to him but it shall be the duty of the review officer to determine whether he is yet in a fit state.

(10) Where the person whose detention is under review has been charged before the time of the review, section 38(1) to [(6B)] above shall have effect in relation to him, but with the modifications specified in subsection (10A).

(10A) The modifications are—

(a) the substitution of a reference to the person whose detention is under review for any reference to the person arrested or to the person charged; and
(b) in subsection (5), the insertion of the following paragraph after paragraph (a)—

"(aa) asleep;"

(11) Where—

(a) an officer of higher rank than the review officer gives directions relating to a person in police detention; and
(b) the directions are at variance—
(i) with any decision made or action taken by the review officer in the performance of a duty imposed on him under this Part of this Act; or
(ii) with any decision or action which would but for the directions have been made or taken by him in the performance of such a duty, the review officer shall refer the matter at once to an officer of the rank of superintendent or above who is responsible for the police station for which the review officer is acting as review officer in connection with the detention.

(12) Before determining whether to authorise a person's continued detention the review officer shall give—

(a) that person (unless he is asleep); or
(b) any solicitor representing him who is available at the time of the review, an opportunity to make representations to him about the detention.

(13) Subject to subsection (14) below, the person whose detention is under review or his solicitor may make representations under subsection (12) above either orally or in writing.

> (14) The review officer may refuse to hear oral representations from the person whose detention is under review if he considers that he is unfit to make such representations by reason of his condition or behaviour."

49. The PACE Code C of 2014 stated as follows:

> "9.5 The custody officer must make sure a detainee receives appropriate clinical attention **as soon as reasonably practicable** if the person: (a) appears to be suffering from physical illness; or (b) is injured; or (c) appears to be suffering from a mental disorder; or (d) appears to need clinical attention.
> 9.5A This applies even if the detainee makes no request for clinical attention and whether or not they have already received clinical attention elsewhere. If the need for attention appears urgent, e.g. when indicated as in Annex H, the nearest available healthcare professional or an ambulance must be called immediately.
> 9.5B The custody officer must also consider the need for clinical attention as set out in Note 9C in relation to those suffering the effects of alcohol or drugs.
> 9.6 Paragraph 9.5 is not meant to prevent or delay the transfer to a hospital if necessary of a person detained under the Mental Health Act 1983, section 136. See Note 9D. When an assessment under that Act is to take place at a police station, see paragraph 3.16, the custody officer must consider whether an appropriate healthcare professional should be called to conduct an initial clinical check on the detainee. This applies particularly when there is likely to be any significant delay in the arrival of a suitably qualified medical practitioner.
> 9C A detainee who appears drunk or behaves abnormally may be suffering from illness, the effects of drugs or may have sustained injury, particularly a head injury which is not apparent. A detainee needing or dependent on certain drugs, including alcohol, may experience harmful effects within a short time of being deprived of their supply. In these circumstances, when there is any doubt, police should always act urgently to call an appropriate healthcare professional or an ambulance. Paragraph 9.5 does not apply to minor ailments or injuries which do not need attention. However, all such ailments or injuries must be recorded in the custody record and any doubt must be resolved in favour of calling the appropriate healthcare professional." (My emboldening).

50. The classic statement of the correct test for the Recorder to apply when considering the lawfulness of detention decisions was provided in *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223, by Lord Green who ruled thus at p228:

"What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. **As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law**. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. **The exercise of such a discretion must be a real exercise of the discretion**. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, **then in exercising the discretion it must have regard to those matters.** Conversely, if the nature of the subject matter and the general interpretation of **the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. …**

I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. **Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question.** If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable." It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that

> must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." (My emboldening).

Applying the law to the facts

Ground 1 – withdrawing the asserted ankle grab issue from the jury

51. CPR r.16.2 states that the Claim Form must contain a concise statement of the nature of the claim. If the particulars of claim are not set out in it then the Claim Form has to state that they will follow. CPR r.16.4 requires the POC "must" include a concise statement of the facts on which the Claimant relies. PD 16 at para 4 sets out what is required in a personal injury claim (civil actions against the police are such claims).

52. The Claimant's pleadings did not identify any issue of fact in relation to the ankle grab which the Defendant pleaded in the defence that the Claimant had done in the cell to DON. In my judgment the Recorder was correct to rule that the pleadings did not identify the Claimant's case on the ankle grab. Thus, all the Defendant had to do was to carry and fulfil the burden of proof on the grab assertion which the Defendant had pleaded, it was not denied.

53. In her evidence before the Judge and jury DON asserted that her left ankle was grabbed. No other witness said otherwise. Ms Michaels was standing outside the door of the cell and could not possibly have seen through the two officers restraining the Claimant on the floor to be able to determine whether the Claimant's right had grabbed DON's ankle, so her evidence did not assist the Claimant. The other officers were busy and said so in their evidence so could not assist the Claimant. The CCTV evidence summarised above was neutral as to the grab. It certainly did not contradict DON's assertion, on the contrary it facilitated the assertion by showing the Claimant's arm outstretched towards DON's ankle. But the camera could not see through DON's body so could not show if the Claimant's right hand had actually grabbed her ankle. Therefore, there was no evidential conflict with DON's assertion of the grab. It was uncontradicted.

54. Running though the steps I have identified the Recorder should have taken to determine whether to leave the issue to the jury:

A pleaded issue of fact

(1) Is there a relevant issue of fact between the parties identified in or arising from the pleadings? In my judgment the pleadings did impliedly permit for the identification of a potential issue over the ankle grab because the Reply, being silent in response, put the Defendant to proof. The potential issue was relevant to DON's assertion of reasonable force in self defence.

Not agreed or uncontradicted

(2) By the end of the evidence, is the identified relevant issue of fact no longer in issue because it is agreed or there is uncontradicted evidence determining it? If so, it is no longer an issue and no longer for the jury. The grab was not agreed by the Claimant in her evidence. She could not recall what she is had done. However, DON's evidence about the grab was uncontradicted. Thus, in my judgment there was no real issue over it for the jury to decide. There was no need to move to step 3. The Recorder was right to withdraw the matter form the jury.

A real issue on the evidence

(3) *By the end of the evidence, is there a real conflict of evidence relating to the identified relevant issue of fact? If so, then it should be left to the jury. However, if no reasonable jury could decide the issue in any other way than the obvious way, so it would be perverse and overturned on appeal if the jury decided the issue any other way, then there is no real issue to be left to the jury.* This step was not necessary for the Recorder. In my judgment the jury would have been perverse to have found that the Claimant did not grab DON's ankle in the face of the uncontradicted evidence from DON that the Claimant did do so which was not undermined by cross examination and was facilitated by the CCTV.

55. For the reasons set out above Ground 1 of the appeal is not made out. The Recorder was not wrong to withdraw the asserted issue from the jury. True it is that the notes and transcripts of the Recorder's reasoning make it appear that he was distracted by the punches in the face assertion made by Ms Michaels, but her evidence in her later witness statement, having seen the CCTV, was clear: she accepted the punches were to the arm. In addition, there can be no doubt that the Recorder did specifically state "arm" in the notes of his initial reasoning, so he had punches to the arm in mind. Extempore judgments are not always perfect but the reasoning behind the words is discernible.

Findings of fact – Ground 2

56. I take into account the decisions in *Henderson v Foxworth* [2014] UKSC 41, per lord Reed at [67]; *Grizzly Business v Stena Drilling* [2017] EWCA civ 94, per Longmore LJ at [39-40] that any challenges to findings of fact in the court below have to pass a high threshold test. The trial Judge has the benefit of hearing and seeing the witnesses which the appellate Court does not. The Appellant needs to show the Judge was plainly wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable Judge could have reached that decision.

57. The threshold was summarised in *Deutsche Bank AG v Sebastian Holdings [2023] EWCA Civ 191*, per Lord Justice Males at [48] - [55]:

"48. The appeal here is against the Judge's findings of fact. Many cases of the highest authority have emphasised the limited circumstances in which such an appeal can succeed. It is enough to refer to only a few of them. For example, in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 Lord Reed said that:

"67. ... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, an appellate court will interfere with the findings of fact made by a trial Judge only if it is satisfied that his decision cannot reasonably be explained or justified."

We were also referred to two more recent summaries in this court explaining the hurdles faced by an appellant seeking to challenge a Judge's findings of fact. Thus in Walter Lily & Co Ltd v Clin [2021] EWCA Civ. 136, [2021] 1 WLR 2753 Lady Justice Carr said (citations omitted):

"83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial Judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:

The expertise of a trial Judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed; The trial is not a dress rehearsal. It is the first and last night of the show; Duplication of the trial Judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case; In making his decisions the trial Judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping; The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence); Thus, even if it were possible to duplicate the role of the trial Judge, it cannot in practice be done... In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows: Where the trial Judge fundamentally misunderstood the issue or the evidence, plainly

> failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support; Where the finding is infected by some identifiable error, such as a material error of law; Where the finding lies outside the bounds within which reasonable disagreement is possible. An evaluation of the facts is often a matter of degree upon which different Judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the Judge was wrong by reason of some identifiable flaw in the trial Judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial Judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise."

58. The threshold was also more recently considered by Lord Justice Lewison in *Volpi v Volpi* [2022] EWCA Civ. 464, [2022] 4 WLR 48, at paras. 2 and 52-54:

> "2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled: An appeal court should not interfere with the trial Judge's conclusions on primary facts unless it is satisfied that he was plainly wrong. The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial Judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable Judge could have reached. An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial Judge has taken the whole of the evidence into his consideration. The mere fact that a Judge does not mention a specific piece of evidence does not mean that he overlooked it. The validity of the findings of fact made by a trial Judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial Judge must of course consider all the material evidence (although it need not all be

> discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him. An appeal court can therefore set aside a judgment on the basis that the Judge failed to give the evidence a balanced consideration only if the Judge's conclusion was rationally insupportable. Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.
> …
> "52 … It need hardly be emphasised that "plainly wrong", "a decision ... that no reasonable Judge could have reached" and "rationally insupportable", different ways of expressing the same idea, set a very high hurdle for an appellant.
> [...]
> 54. These considerations apply with particular force when an appeal involves a challenge to the Judge's assessment of the credibility of a witness. Assessment of credibility is quintessentially a matter for the trial Judge, with whose assessment this court will not interfere unless it is clear that something has gone very seriously wrong. It is not for this court to attempt to assess the credibility of a witness, even if that were possible, but only to decide, applying the stringent tests to which I have referred, whether the Judge has made so serious an error that her assessment must be set aside."

59. On the evidence before him, which I have set out above, the Recorder's decisions in relation to the facts of what occurred just before and whilst DON was punching the Claimant's right arm to release her grip, are factual decisions based on the evidence he heard and in my judgment were well within the boundaries of what any reasonable recorder would have found. There was ample evidence to support them. They were not plainly wrong.

Reasonableness of force

60. The Recorder found that the use of punches on the Claimant's arm was reasonable in the context of her violent behaviour before the grabbing of the ankle, which included assault of officers, verbal aggression, complete lack of co-operation, strong physical opposition to detention, kicking and biting. As set out above, in my judgment the Recorder was wholly correct to find on the uncontradicted evidence of DON that the Claimant grabbed her ankle. This is what caused DON to punch the Claimant's right arm to get her to release her grip.

61. In submissions on Ground 3 it was not seriously suggested that punching the arm was unreasonable if a grab had occurred. Nor would the reasonable ambit of the Recorder's scope for decisions on the reasonableness of the use of force have been exceed by his actual decision. As set out above, and stated by the Recorder, the level of force used in

the punches (DON having just been bitten on the inner thigh) is not to be judged by the use of *jeweller's scales*. I do not consider that the punches shown on the CCTV which were to the Claimant's grabbing arm, were unreasonable or disproportionate. They achieved DON's objective of freeing her ankle with a use of force which did not endanger the Claimant's life or general bodily integrity.

Decisions on detention

62. When Inspector Foulkes made his decision at 02.23 on 13.3.2016, he was focussed on his worries about the Claimant's mental health issues and her having mixed that vulnerability with class A drugs and possibly alcohol. The original decision to let the Claimant calm down and rest until 07.00 is not appealed and he was continuing that decision during the *wee small hours of the morning* – the best sleep hours available to human beings. There was no sufficient evidence of a medical emergency before the Inspector or the Recorder, as he found. At that time the Inspector knew was that someone (probably M) had told the officers that the Claimant had been sectioned "a few days ago" but had also been released. In my judgment he was entitled to see if she would calm down in the morning sufficiently to be interviewed. Her condition could have been variable and aggravated by drugs. At 02.23, he did not take into account matters he should not have done, nor did he exclude matters he should have taken into account. His decision to detain for later questioning was not *Wednesbury* unreasonable.

63. Different factors applied by the time Inspector Forsyth made his decision at 09.59. His note is shorter. He did not give evidence to explain his decision. He relied on the need to interview despite the following new facts: (1) the Claimant had not recovered during the rest period and was still obviously disconnected from reality. (2) Two consultant psychiatrists had sectioned her 2-3 days before to be detained in PICU (intensive mental health care) and the Inspector had medical confirmation of that. (3) Miss McDonnell had tried to speak to the Claimant and failed due to her disconnection from reality and so had determined that she should be admitted to a mental health establishment. I do not understand how Inspector Forsyth could have been realistic in any hope he might have had to hold a sensible interview with the Claimant before she left for the mental health intensive treatment with that new information. The paragraph he put into the log looks word processed and in my judgment the decision to detain for interview was one which no reasonable Inspector could have made taking into account the relevant, clear mental health evidence, the lack of improvement after rest and all of the circumstances at the time. In my judgment the detention for the stated reason was irrational and unlawful.

Common Law detention

64. There was a raft of submissions from the Defendant about the right of the police to detain the Claimant under the common law for her protection and for the protection of the public if I were to find that the actual reason for detention, under the PACE 1984 and the Code, was unlawful, as I have. It was submitted that even if the wrong reason had been given by Inspector Forsyth, because the common law power existed the arrest

would have been lawful in any event. I asked both counsel for written submissions to be delivered the day after the end of the appeal hearing on this because I was unclear about the authority for that submission. In the event the Defendant withdrew the submission and accepts that if the actual reason for detention was unlawful then this part of the appeal succeeds.

Review of the decision and what to do

65. I take into account that under CPR rule 52.21 every appeal is a review of the decision of the lower court and under CPR r. 52.20 this Court has all the powers of the lower court. I have considered remitting the case to the trial Recorder for determination of the damages for the detention decision which was unlawful. However, both parties agreed expressly that if the 09.59 decision was unlawful, taking into account the following matters numbered below, only nominal damages would be awardable. (1) The Claimant needed to be kept in a place of safety and the police were entitled to detain her under their common law powers. (2) There was no evidence that the police could have obtained any faster authorisation for her to be transferred to the Priory. (3) The Claimant was unaware of the reason for her detention, she was detached from reality. (4) No medical or psychiatric evidence was proffered or called to support any additional suffering by the Claimant from the wrong power being used to detain her until she was transferred to a mental treatment establishment. (5) It was right and correct to detain the Claimant until she was transferred for treatment and would have been dangerous to her and others if the police had released her.

Remedy - Damages

66. I consider that the most proportionate and cost effective way of dealing with the remedy is for me to award nominal damages of £5 for the procedural error made by Inspector Forsyth. I refer to *Parker v Chief Constable of Essex* [2018] EWCA Civ. 2788, per Sir Brian Levison at para. 132 in relation to this approach.

Conclusions

67. The appeal is dismissed on all grounds save for Ground 11. Having granted the appeal on that Ground, by agreement the Claimant is entitled to nominal damages for the unlawful basis for the detention decision at 09.59 on 13 March 2016. The Claimant would not have been released had the correct common law power to detain been used in any event thus her situation would have been the same until her transfer for intensive mental health treatment to the Priory in the late afternoon the same day.

END