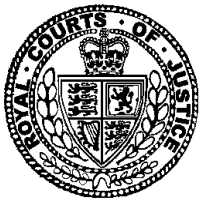

Neutral Citation Number: [2024] EWHC 126 (KB)

Case No: QA-2022-000164

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2024

Before :

THE HONOURABLE MR JUSTICE MARTIN SPENCER

- -

Between :

The Chief Constable of Essex	**Defendant/ Appellant**
- and –	
Matthew Carter	**Claimant/ Respondent**

- -
- -

Mr Daniel Wand (instructed by **Kesar & Co Solicitors**) for the **Claimant/Respondent**
Mr Paul Stagg (instructed by **Weightmans LLP**) for the **Defendant/Appellant**

Hearing date: 22nd January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 2nd February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE MARTIN SPENCER

Mr Justice Martin Spencer:

Introduction

1. The Defendant, the Chief Constable of Essex, appeals against the Order of Mr Recorder Dagnall, dated 15 July 2022 whereby he gave Judgment for the Claimant in the sum of £23,035.

2. The Claimant's action arose from the events which took place at Southend Police Station on 14 December 2017. The Claimant claimed damages for personal injury, including aggravated and exemplary damages, arising from 3 phases of his detention: first the events which took place at the custody desk when the Claimant was pulled to the floor, forcibly restrained, placed in handcuffs and leg restraints and taken to cell 28 ("Phase 1"); secondly the events in cell 28 when the Claimant's clothes were forcibly removed with a view to his being placed in an anti-self-harm suit ("Phase 2"); third, the events which took place in cell 26 (to where he was transferred from cell 28) when a further physical altercation took place when officers attempted to retrieve a blue latex glove which had been inadvertently left in the cell ("Phase 3").

3. The trial commenced on 16 February 2022 when the court heard the evidence. Written submissions were made to the court in March 2022 and on 25 April 2022 Recorder Dagnall delivered Part 1 of his Judgment when he found in favour of the Defendant in relation to Phase 1 (the events at the custody desk), he found in favour of the Claimant in relation to Phase 2 (the events in cell 28) and he indicated that, in Part 2 of his Judgment, he would be finding in favour of the Defendant in relation to Phase 3 (the events in cell 26).

4. Given the Judgment and indication in relation to liability, questions were put to the expert clinical psychologist, Dr Jenny McGillion, instructed on behalf of the Claimant, seeking her updated opinion on the basis that the Claimant succeeded in relation to Phase 2 but not in relation to Phases 1 and 3. Recorder Dagnall then delivered Part 2 of his Judgment on 15 July 2022 and the Order of the Court was made sealed on 28 July 2022.

5. The total damages of £23,035 comprised the following:

   i) £10,000 for injury to feelings;

   ii) £7,125 for psychiatric injury;

   iii) £5,000 for aggravated damages;

   iv) £910 for special damages arising out of damage to the Claimant's clothing.

6. In addition to his appeal against the finding on liability in relation to Phase 2, the Appellant also appeals against the awards of damages for injury to feelings and for psychiatric injury contending that an award of £5,000 is sufficient for all the first three heads of damage together, namely injury to feelings, psychiatric injury and aggravated damages.

The Facts

7. The Claimant (Respondent) was born on 1 July 1965 and was aged 52 at the date of the events with which this case is concerned. Sadly, the Claimant's partner, Sophie, had died a short time before and her funeral was fixed for 15 December 2017. On the afternoon of 14 December 2017, the Claimant was drinking in The Dickens Pub in Southend-on-Sea: there was a dispute as to how much he had had to drink but the Recorder, perhaps generously given the Claimant's later conduct, found that he was only mildly drunk. He had previously suffered from various stresses and sources of potential anxiety including agoraphobia and carpal tunnel syndrome which had resulted in his being unable to work for some months, so that in July 2017 he had suicidal ideation and although there had been some recovery it was the unchallenged evidence of the psychologist that his psychological symptoms would not all have resolved.

8. An altercation took place in The Dickens between the Claimant and two customers, a mother and daughter (both adults) who alleged they were assaulted by the Claimant. It was the Claimant's case that he had been racially abused by them (he is black). The police were called and the Claimant was arrested at 16:35 hours by PC Bickford for common assault. He was taken to Southend Police Station, arriving at 16:45 hours. The custody officer was dealing with other detainees so that the Claimant was put in a holding cell. The Claimant asked to use the lavatory on a number of occasions but the police officers at the holding cells were unable to obtain permission for this from the custody sergeant and, in the absence of such permission, refused the request. This led to the Claimant urinating in his clothes with urine spreading over the floor. Although no claim was made arising from this event, it was nevertheless the subject of critical findings by the Recorder.

Phase 1: The Custody Desk

9. The Claimant was brought before the custody officer, Police Sgt Bailey, at about 17:20 hours, ie some 35 minutes after his arrival at the police station. His hands were handcuffed at the front. As the Recorder found and as shown on CCTV footage, the Claimant started shouting and was in an agitated state. He was refusing to answer the questions which Sgt Bailey was posing but rather he was seeking to put his own points: he was protesting his innocence and complaining that the police had arrested the wrong person and he needed to go to his partner's funeral the next day. The questions being put by Sgt Bailey were not concerned with the rights or wrongs of the arrest (which would be for any interview) but were by way of a risk assessment. The questions and answers are shown in a pro forma which is to be found at page 214 of the Appeal Bundle and includes questions and answers for both officer assessment and for self-assessment. They include questions such as

    - whether the detainee appears injured or unwell,
    - whether the detainee needs first aid or medical treatment,
    - whether the detainee appears to be under the influence of alcohol, drugs or any other substance,
    - whether the detainee has any indications of self-harm,

- whether this is the first time the detainee has been in custody and so forth.

The answers to these questions enable the custody officer to make a risk assessment which will inform her as to the conditions of the detainee's detention.

10. The Recorder found that Sgt Bailey repeatedly sought answers to her questions but the Claimant responded only with his demands. What then happened resulted from the perception of the police officers in reaction to the Claimant seeking to stand up in a fast way. The events were related in detail by the Recorder at paragraph 23 of his first Judgment where he describes an altercation which was both verbal and physical:

> "Initially the Claimant stood apart from the officers while he was talking. A number of times the officers gathered around the Claimant who was directed or pushed face down onto the custody desk from which he would try and rise and turn towards the officers, in particular Police Constable Busby and Police Constable Soontorn behind him. On some occasions he was then pushed onto the side wall with his face out facing the police officers and then back towards the custody desk being bent over it with his head on or near it. On the third or so occasion the Claimant was bent over the custody desk with various police constables' hands on his back or on the back of his head with his elbows on the custody desk. He then stands, turns back towards the officers spinning to his right so his back is to the side wall on his right. At that point there were about 4 officers around him and the desk to the front. As part of this process his handcuffed arms move across his body and upwards. At this point the Claimant is seized by officers and forced to the floor. He is surrounded by 6-7 officers including Police Constable Young, Police Constable Robert Chapman, Police Constable Stannard. Police Constable Webber, Police Constable Busby and Police Constable Soontorn. He is struck a number of times; his legs are put into leg restraints and his hands are now handcuffed behind his back so that he is thoroughly immobilised."

11. The officers had construed what the Claimant did as being a preparatory step to striking out at them, potentially using his handcuffs which were heavy and could constitute a serious weapon. This was in the context of the officers having observed the Claimant to be agitated, and, in their view, drunk. The Recorder accepted that they honestly believed there was a threat and it was reasonable for them to believe that, in the light of the Claimant's movement, they needed to deal with this by restraint and in particular by taking the Claimant to the ground. In the course of the process of being restrained and immobilised, the Claimant bit the middle finger of one of the officers, Police Constable Young, which had the effect of tearing the blue latex glove he was wearing. In the course of the struggle, Sgt Bailey shouted words to the effect "Take to cell", and this was interpreted as a command to remove the Claimant to a cell and there to remove his clothing.

Phase 2: Cell 28

12. In response to Sgt Bailey's command "Take to cell" the Claimant was taken to cell 28. The time was now 17:25 hours. There he was laid face down on a mat on the floor of the cell. The officers surrounded him and removed his shoes, socks, jeans and underwear. They cut off his coat which was filled with down and this resulted in feathers being distributed all around including on the Claimant's skin so that they got into his mouth and nose and caused him to splutter. The remainder of this clothing was also cut off so that he was completely naked. The Claimant remained highly agitated during this process. I shall return to this phase when I consider the Recorder's findings: see paragraphs 21-25 below.

Phase 3: Cell 26

13. By reason of the feathers, the officers decided that the Claimant could not remain in cell 28 and so he was carried, naked, to cell 26. It was now 17:34 hours. There they laid him down on a mat on the floor of the cell, removed his handcuffs and left. On the bench bed, the officers left a paper suit (an anti-self-harm suit) which is designed for detainees to put on with limited potential for it to be used to cause harm to themselves or others. Next to the mat they left, inadvertently, a blue latex glove which had been worn by one of the officers in cell 28. When the officers left cell 26 at 17:37 hours, the Claimant was pacing around the cell, agitated, naked and swearing. Police Constable Chapman asked the Claimant to pass him the glove. Initially the Claimant threw the glove at the door. He then picked it up, waved it and challenged the police to come and get it. He then hid the glove in his hand and made a gesture towards his mouth which appeared to the officer to suggest that he had put it or some other item in his mouth. At that point, police officers, including Police Constable Chapman and Police Constable Soontorn, entered the cell. The Claimant retreated to the rear of the cell and adopted a boxer's stance and he then moved to stand on the bench bed. The Claimant was pulled down off the bench bed with the result that he was thrown across the cell and hit himself, including his head, on the far wall. He was pulled onto the floor with the officers surrounding him and they delivered a number of blows to the arm designed to, and resulting in, the Claimant opening his hand whereby the glove was located and thrown out of the cell. Further blows were delivered intended to cause the Claimant to open his mouth. The police then left the cell.

Further Events

14. Later that evening, the Claimant was taken to Southend General Hospital where he arrived at 19:38 hours. He was assessed at 20:30 hours and the clinical note included:

> "Head – injuries and swellings around the eyes and both temporal regions of head. Soft tissue swellings around the jaw, face and forehead. Some dried blood crusts noted on the nose. No active nasal bleeding. No otorrhoea or rhinorrhoea. Black eyes – right."

15. He was returned to custody and handed over to Police Sgt Heffron who had taken over from Police Sgt Bailey as the custody officer. She was able to carry out an assessment and to complete a risk assessment form. Sgt Heffron noted as follows:

> "The DP [detained person] has returned from SGH [Southend General Hospital] following an incident that occurred whilst he

> initially entered custody. The DP has visible injuries namely to his head and other parts of his body for which are recorded and have been treated at hospital where they have [declared] him medically fit. Other than that the DP doesn't have any medical issues or severe MH [mental health] issues. The DP does smell of intoxicating liquor, but hasn't consumed alcohol whilst he has been under police supervision [stale smell]. The DP is alert, coherent and communicating well. The DP is in good spirits and hasn't declared anything of a concerning nature whilst going through the question set …."

16. On 15 December 2017, the Claimant was charged with biting Police Constable Young and the assault on the women at the Dickens Public House. He was taken to the Magistrates Court and bailed but he missed his partner's funeral. He was subsequently tried and acquitted of the offences.

The Recorder's Findings

17. In considering the above events and the claims made in respect of them, the learned Recorder heard evidence from the Claimant, Police Constable Soontorn, Police Constable Busby, Police Sgt Bailey, Police Constable Young, Police Constable Lever, Police Sgt (then Police Constable) Chapman, and Police Inspector (then Police Sgt) Heffron. He also had the custody record of the Claimant and approximately 2 hours of CCTV from Southend Police Station. Having given detailed consideration to this evidence, the learned Recorder set out the relevant sections of the Police and Criminal Evidence Act 1984 ("PACE") including sections 36, 39, 54 and 117. He also referred to the Code of Practice under PACE and in particular Annex A, Section B which is headed "Strip Search". Finally he had regard to notes of guidance issued by the College of Policing and in particular a section entitled "Detention and Custody Control, Restraint and Searches".

18. The learned Recorder referred to relevant case law including *PD -v- Chief Constable of Merseyside Police* [2015] EWCA Civ 114, *Pile -v- Chief Constable of Merseyside Police* [2021] PIQR at p13, *Goodenough -v- Chief Constable of Thames Valley Police* [2020] EWHC 695 and some authorities relating to the rights protected by Articles 2 and 3 of the European Convention on Human Rights ["ECHR"].

19. In the light of those legal provisions and authorities, the learned Recorder directed himself as to the law as follows:

> "118. While I have borne in mind all these legal provisions and authorities it seems to me that the key points in terms of approach of law are as follows. Firstly that the custody officer is required to seek to carry out a risk assessment. Secondly, the custody officer or indeed any police officer, if they believe it to be necessary to carry out their arrest and remand duties in order to defend themselves or in order to defend others, may use reasonable and proportionate force for that purpose. Thirdly, that a custody officer, if they believe it necessary to protect the safety of a detainee or others, can require their clothing to be removed and for that purpose can use reasonable and

> proportionate force. Fourthly that in terms of those beliefs, what is necessary is that it has to be both a reasonable and an honest belief. Fifthly in terms of what is reasonable, both in terms of reasonableness of belief and reasonableness of force in the light of that belief, that needs to be seen in the context of the circumstances as the relevant person honestly and reasonably believed them to be. As far as reasonableness is concerned, that is to be assessed in all the circumstances of the case especially if those circumstances were fast moving and a quick decision was required as to what to do. All of that is simply a question of 'was it reasonable' so that if there was a range of reasonable beliefs and/or responses then the fact that the relevant belief and conduct falls within such a range is sufficient.
>
> 119. However, sixthly, it is also required for the force to be proportionate, both to do the act itself and to do it with the relevant degree of violence and intrusion. Proportionality is to be assessed in all the circumstances. Seventh, and in terms of removal of clothing, paragraph 11 of Annex A to Section C of the Code applies, including in particular sub paragraph D and also sub paragraph E which I have already read into this Judgment. Also one should bear in mind that the College of Policing points avert to such matters as: The risk of self-harm by the use of clothing to form a ligature and the ability to use any clothing to do so; the risks of personal asphyxia if somebody is secured in one simple restraint position; the vulnerability of those who have caused alcohol or have mental health problems etc to do detrimental impact of being restrained; the need to balance the justification for removal of clothing and the need to protect the dignity of the relevant person; and the need to bear in mind that removing somebody's clothing, at least forcibly, may be a worse option to the carrying out of close observation to ensure that they do not harm themselves." (Emphasis added).

The words underlined are critical to the principal issue on this appeal.

Findings in relation to Phase 1

20. In relation to Phase 1 – the incident at the custody desk – the learned Recorder reminded himself that he had to approach the events there in the light of what he found to be the police officers' beliefs in a fast-moving situation where they had little time. He said:

> "160… It seems to me, firstly, that the police officers did honestly and reasonably believe there had been a bite and that the punches were a reasonable response in the sense that they obviously and reasonably believed that it was necessary to subdue the Claimant. It seems to me that they were so justified in coming to that conclusion in the circumstances of their honest and reasonable beliefs and that the punches they administered were proportionate in those particular circumstances."

21. He also found that it was a reasonable course of action for the police to conclude that leg restraints were appropriate both to secure the Claimant and to carry him. Again, he referred to this being a fast moving situation where a choice had to be made quickly. He considered it to have been impracticable for the officers simply to have left the Claimant lying on the floor of the custody suite and he accepted it was essential that the Claimant be transported away and that to carry him in leg restraints was a reasonable and proportionate way to do it. For those reasons, he dismissed the claims in relation to Phase 1.

Findings in relation to Phase 2

22. In relation to Phase 2, it is appropriate first to relate the relevant entries in the custody record. First, there is the following entry:

> "A strip search was authorised by Sgt 42161 Bailey at 17:25 on 14/12/2017 for the reason to remove an article which the detainee is not allowed to keep on the grounds of the officer has reasonable grounds for believing that a strip search is the only means of removing the item(s). THE DP IS VIOLENT AND HAD TO BE TAKEN TO THE CELL. A STRIP SEARCH IS ONLY BEING AUTHORISED FOR THE PURPOSE OF CHANGING HIM INTO ANTI-SELF-HARM CLOTHING AS HE CANNOT BE RISK ASSESSED. THIS WILL INVOLVE THE EXPOSURE OF INTIMATE PARTS OF HIS BODY."

I consider this entry further at paragraph 49 below. Then there is Sgt Bailey's entry in the custody record which was as follows (but actually written in capitals):

> "I could see that when he had been lifted up and moved there was some blood on the floor from where his face had been. I'm unsure if that was from the blood he originally had on his face when entering custody or from any new injury. When officers got to cell 28 he was placed face down on the mattress facing the back of the cell. He continued to try and kick out at officers even though he still had the limb restraints around his legs. His shoes were removed by PC Young and thrown out the cell. PC Young and PC Stannard removed the limb restraints and then his jeans. At some point the male kicked out towards officers when the limb restraints were removed. PC Stannard then folded his legs up behind him to gain control of his legs. The male was still verbally expressive towards officers and trying to get up. Due to him being handcuffed, rear-stacked, his coat could not be removed without removing the handcuffs. Therefore PC Young used the custody safety clothing cutter to cut the male's coat, jumper and t-shirt off him. His coat was filled with feathers which went everywhere in the cell when this [was] done. At some point after his clothing had been cut off the male complained that he couldn't breathe, he was spitting feathers away from himself. He was immediately moved onto his left side to help with his breathing. All officers picked the male up while

> he was still handcuffed and he was carried face down to another cell, cell 26, where it was free from feathers."

23. So far as the facts are concerned, the Recorder found that, in the course of these events, the Claimant was in fear, bewildered and worried both that he was being physically assaulted and for the potential for him to be sexually assaulted as evidenced by the fact that he asked whether he was going to be raped. He said in his evidence that the officers responded with words to the effect,

> "That is what we do to women beaters"

but the Recorder found that those words were not said. Police Constable Chapman is heard on the audio record to say,

> "You might need a sex education. It's not a rape".

The Recorder found this to be a highly inappropriate comment to make to a person in the Claimant's position in those circumstances. Police Constable Chapman also said, when the Claimant asked what was going on,

> "We are cutting your clothes off you because you have been violent."

The Recorder accepted the Claimant's evidence that he was incredibly frightened and that what happened to him was deeply degrading and humiliating.

24. From paragraph 168 of the Judgment, the Recorder addressed the question whether the police officers were justified 'in law and fact' in their course of conduct. It was accepted that when Sgt Bailey shouted "Take to cell" this was interpreted by the officers as meaning they should take the Claimant to cell 28 and forcibly remove his clothing. The Recorder found that Sgt Bailey's decision was one which she effectively continued to make and remake as she observed the events in cell 28 on CCTV but also said:

> "On the other hand it does seem to me that it is some evidence of the fact that Police Sgt Bailey simply had come to something of an automatic conclusion, albeit one which she effectively continued to make and remake."

He found that the basis for commanding the removal of the Claimant's clothing was not to carry out a search or to locate items. However, he disagreed with the submission of Mr Wand for the Claimant that, if the purpose was not to search, then the actions of the police could not fall within Section 54 of PACE. The Recorder compared the situation here with the similar situation in *PD -v- Merseyside Police* where it was held that clothing could be seized and forcibly removed if a custody officer reasonably believed that a person may use them within Section 54 (4) (a) purposes, that is to say to cause physical injury either to themselves or to another person, referring to paragraph 35 of that Judgment. The Recorder also referred to paragraph 39 of the Judgment, interpreting that paragraph as meaning that,

> "the custody officer must act properly and reasonably in concluding that there is such an urgent necessity."

He said that the same approach was effectively adopted in the case of *Pile -v- Chief Constable of Merseyside Police*. Then, in an important passage for the purposes of this Appeal, the Recorder addressed the question as to the reasons for the decision to remove the Claimant's clothing. He said:

> "173. The question then arises as to what were the reasons for the decision. In the custody record it says, firstly, that the claimant is violent and cannot be risk assessed and, secondly, refers to blood on face, biting, struggling and resisting. In evidence Police Sgt Bailey said, first, that it was standard Essex Police procedure if a detainee is a violent person for the custody officer to authorise the forcible change of them into a self-harm suit as a result of risk to others or self. She then repeated that if the individual does not answer risk assessment questions and is violent, then the custody officer should consider that the detainee could be violent and could self-harm and, if so, then the custody officer must order a forcible swap of their clothing for an anti-self-harm suit. That is to say, that the swap of clothing must be ordered and that the circumstances will therefore require forcible removal of the existing clothing.
>
> 174. She did, however, then go on to say that this was not automatic, and detainees were to be treated individually. She did not explain as to what the individual treatment might be in circumstances which would involve a deviation from such a general policy. She went on to say that she could not leave a situation where the leg restraints were left on the claimant; and that he could not be simply observed, even with his handcuffs secured behind his back, as he might hit himself in some way or other such as banging his head on the floor and that she could not leave an observing officer at risk of being assaulted.
>
> 175. She pointed to the fact that any item could be used to create a ligature, and that the claimant had blood on his face although there was no suggestion that that was as a result of him being harmed by himself as opposed to by the others involved in the previous altercations. I do also bear in mind that Police Constable Chapman said in cell 28 that the reason for the forcible removal was that the claimant had been violent.
>
> 176. I conclude on all the evidence the actual reasons for the custody officer both to order and continue to order that the claimant's clothes be forcibly removed while the claimant was lying face down and was restrained by numerous officers (as it seems to me was obvious was going to happen and as Police Sgt Bailey ultimately observed through her own CCTV) was a mixture of a number of matters. Firstly, that Police Sgt Bailey knew that the claimant had refused to answer the risk assessment questions. Secondly, that Police Sgt Bailey had concluded at the custody stage that the claimant had done something which appeared to involve a risk that the claimant would be violent

resulting in an instant decision to throw him to the ground. Thirdly, that Police Sgt Bailey knew that the claimant when thrown to the ground had struggled and sought to resist and including by a bite. Fourthly, that Police Sgt Bailey thought there was a general direction from superiors that clothing should be forcibly removed where a detainee had refused to answer risk assessment questions simply because, as a result, the police sergeant would be unable to assess the risk of self-harm in the context of answers to questions which had not been answered; and that Police Sgt Bailey had thought that this policy applied all the more so where a detainee had done something which might suggest that that detainee could be violent. Fifthly, that Police Sgt Bailey, having taken that decision in effectively a quick spur of the moment circumstances, decided that she had no reason to revisit it and did not do so.

177. Sixthly, I feel that Police Sgt Bailey much more thought that she was ordering this in order to avoid the potential for the claimant harming himself, and was only to a much more limited degree concerned that the claimant could or would harm officers in circumstances. I say this because, firstly, where there was no suggestion that the claimant might have any weapon on him. Secondly, the claimant had already been searched to a considerable degree. Thirdly, the claimant's clothing was not obviously such as would obviously be capable of being used as a weapon. Fourthly, any propensity of the claimant to exert violence to others would only relate to his potential to be violent if he was released in order to remove clothing.

178. Next I note and bear in mind the following where the claimant ended up in what was a profoundly humiliating and degrading experience without being given any warning that that would or might occur. Firstly, he refused to answer the risk assessment questions; but which I note any detainee is entirely entitled to refuse to answer - there is no legal compulsion for the claimant to say anything, let alone answer those particular questions. Secondly, this arose from circumstances where the claimant had made a movement which might in very fast moving circumstances suggest an attempt to attack or a preparatory step to attempt to attack police officers; but which were actually circumstances where, in fact as I have held, it was a mere innocent attempt to stand up and clear space, and where any reasonable observer given a real opportunity to consider the matter with time would, in my view, come to a conclusion that that was all that the claimant was seeking to do. Thirdly, these are circumstances where the claimant has the benefit of a presumption of innocence, although, obviously, the police officers were faced with what they had been told by the various informants."

25. Then, having considered some submissions on behalf of the parties, the Recorder stated his conclusions as follows.

> "181. I conclude as follows. Firstly, as I have said before, the custody officer, or for that matter police officers, could forcibly remove clothing if the situation came within section 54(6) as interpreted in *PD* and *Pile*. However, the police would need a reasonable belief that such a step was necessary to prevent the clothing being used to cause physical injury to the claimant or to the police and must act proportionately and reasonably. Secondly, that "reasonably and proportionately" must be seen in the context, and in the light of paragraph 11D of Annex A, that any event of this nature must be carried out with proper regard to the sensitivity and vulnerability of the claimant, and that every reasonable effort must be made to secure the claimant's cooperation and prevent embarrassment, and that it is not normally required to remove all of a person's clothes at the same time. Also this is to be seen in the light of the College of Policing guidelines that: a detainee must be treated with respect; the process should involve an attempt where possible to de-escalate matters; the negative impacts of restraints and such a process on somebody who has consumed alcohol and may have mental health difficulties must be borne in mind; all clothing can be used to cause ligatures; and there must be a balance of the risks and the need to treat the detainee with dignity, and that the mere removal of clothing itself can increase the risk of self-harm and that observation may be the more appropriate course.
>
> 182. I have held that Police Sgt Bailey and the police officers' primary actual motivation was the belief that they were required to remove the clothing where the detainee had not answered risk assessment questions simply because that itself would suggest a risk of self-harm, although this was also combined with a fear that the claimant had threatened to attack officers already. I have come to a conclusion that neither the decision to forcibly remove the clothing, nor the method of that being affected by an instant transport and immediate forcible removing by stripping and cutting off the claimant's clothes, was either reasonable or proportionate. I also have concluded that the fear that there was a real likelihood or possibility that the claimant, if given time to reflect, would self-harm or be violent to police officers was not a reasonable belief for the Police Sgt Bailey and the police officers to hold.
>
> 183. I come to those conclusions for the following main sets of reasons. Firstly, the taking of these decisions by the police had no urgency unlike the assault situation in the custody suite. The claimant was handcuffed, had leg restraints on him and at that point posed no threat to anyone. If the leg restraints were removed then it is true that the claimant would have been able to

stand up and move around and potentially seek to injure himself by head banging and the like, but the same would apply whether he was wearing clothes or not. It seems to me that these were circumstances where plenty of time was available for the police to reflect, assess and take considered decisions rather than the sort of decisions which had to be taken in the custody suite.

184. Secondly, the police had plenty of resource to use in terms of police officers available to restrain and hold the claimant. That was clear with regards to what happened in the custody suite and what happened in each of cells 26 and 28. This was not a situation where the police had limited resource in terms of the number of officers available.

185. Thirdly, unlike in the *Pile* case the claimant had [not] clearly expressly refused to consent.

186. Fourthly, I am unable to see any reason as to why Police Sgt Bailey or the other police officers should reasonably have concluded that there was any risk of self-harm by reason of use of the claimant's clothing. Firstly, the claimant had done nothing to suggest any desire to self-harm, there was no history before the police or otherwise, long-term or short-term, of any previous episode of self-harm unlike in the *PD* case. Secondly, I note, and bear in mind, that the claimant had not answered any of the risk assessment questions. In fact, the claimant had not actually said that he was never going to do so, he had simply sought to insist that the police officers answer him first and deal with his complaint first. But it does not seem to me that that matters. The claimant was under no obligation to answer any of the questions. The mere fact that somebody does not answer questions on a risk assessment does not mean in any way that they are any risk to themselves. The question as to whether they are at any risk to themselves needs to be considered in all the circumstances, and it does not seem to me that there are any particularly relevant circumstances which suggested any risk of self-harm.

187. It seemed to me at times that the police case was getting close to saying that if somebody says that they are not going to answer risk assessment questions, the police should then consider that they are at risk of self-harm and should forcibly strip them. That is a somewhat extreme way of putting the police's submission, and I am sure Mr Stagg would say that that is not an accurate way of putting it, but it does seem to me that in the circumstances of this case the police's actual case was getting close to that. It simply does not seem to me that it is a justified jump from the fact that somebody is not prepared to answer risk assessment questions to say that they are therefore at such a risk of self-harm by way of use of their clothing that it should be forcibly removed from them.

> 188. I do note that the claimant had been reasonably perceived, as I have already held, as to have previously threatened violence and then resisted once he was forced down and submerged by police officers on the custody suite floor. However, while I have held that the police officers could reasonably think that there was such a threat in what was then a fast moving situation, it seems to me that they needed now to reassess the situation at leisure and in a calm way. The reassessment would include whether the claimant ever was actually making a threat, but, even if they had come to the conclusion that that was still the case, that did not lead to any reason to suppose that the claimant might harm himself or that he might threaten self-harm in due course. It seems to me that the question of self-harm, if it was to be considered, was such a question as needed to be considered on the basis of observing the claimant first and seeing whether or not there was any real risk."

26. The Recorder went on to state that he considered that the beliefs that the purpose of removal of clothing was to prevent the Claimant using it to harm himself or police officers both lacked any reasonable basis and also were potentially irrational, but even if there was any rational basis for the beliefs and reason to consider that there was risk of self-harm or of violence to police officers, he did not consider that the removal of clothing was either reasonable or proportionate. He found that both the forcible removal of the clothing and the way in which it was removed and their consequences all amounted to assault/battery without legal justification.

Findings in relation to Phase 3

27. Finally, in relation to Phase 3 (cell 26) the Recorder found that the police were entitled to enter the cell and search the Claimant for the glove and had a legal basis to do so provided by Section 54 of PACE. Furthermore it was reasonable and proportionate for PC Chapman to go in with three other officers because it was a fast moving situation, it was unclear what exactly was going on, the Claimant was in a very agitated state and behaving in a way which was potentially unpredictable. Furthermore, he found that the punches delivered by the officers to the Claimant were justified for the legitimate purpose of obtaining the glove by forcing the Claimant to open his hand and, subsequently to ensure that the Claimant had not put something in his mouth which needed to be removed. The claims relating to the events in cell 26 were therefore dismissed.

The Submissions for the Appellant

28. For the Appellant, Mr Stagg referred to the relevant provisions of PACE (Sections 35 (1), 39, 54 and 117), to the Code of Practice and to the College of Policing Guidance. He also referred to the relevant case law. He made it clear that, on this Appeal, he was not seeking to challenge the Recorder's primary findings of fact although he did challenge the Recorder's counter-factual finding as to what the Claimant would have done had he been offered the opportunity to remove his clothing voluntarily. His challenge was more to the evaluation of the facts which the Recorder found. In his oral submissions, Mr Stagg addressed the question of risk assessments which a custody officer is obliged to carry out under paragraphs 3.6-3.9 of Code C in the Code of

Practice, incorporated by Section 39 of PACE. These provide that the custody officer is responsible for initiating an assessment to consider whether the detainee is likely to present specific risks to custody staff, any individual who may have contact with the detainee or to the detainee himself. It refers to the obligation to take reasonable steps to establish the detainee's identity and information about the detainee which is relevant to their safe custody, security and welfare and risks to others. It seems to me that these provisions of the Code of Practice are likely to form the basis for the proforma questions: see paragraph 9 above in this Judgment. Thus, Mr Stagg submitted that the law places a heavy burden on the police to ensure that those in custody are kept safe whereby it is critical for custody officers to obtain as much information as possible. He reminded the court that self-harming in police custody is all too common, including suicide. He submitted that it is reasonable for a custody officer to adopt a precautionary approach where questions are not answered. Thus, in the absence of answers to the fundamental questions asked in the proforma relating to the safe management of people in custody, a custody officer would be entitled to assume a significant risk of self-harm or of harm to others, including through the use of clothing.

29. Mr Stagg submitted that the learned Recorder misdirected himself in law in construing Section 54 PACE as requiring reasonable belief that the removal of clothing was a necessary step to prevent the clothing being used to cause physical injury to the Claimant or to the police and that they must act proportionately and reasonably. He referred to the provisions of PACE generally and he submitted that the scheme of the Act is such as to make it clear explicitly when there must be a reasonable basis for a belief. Thus, Section 54(4) provides:

> "Clothes and personal effects may only be seized if the custody officer –
>
> (a) Believes that the person from whom they are seized may use them -
>
> (i) To cause physical injury to himself of any other person."

30. Thus he submitted that all the Section requires is belief, not reasonable belief. He pointed, in contrast, to the provisions made for entry to premises to carry out searches and to arrests. Thus, Section 17 PACE provides:

> "**17. Entry for purpose of arrest etc**
>
> …
>
> (2) except for the purpose specified in paragraph (e) of subsection (1) above, the powers of entry and search conferred by this Section –
>
> (a) Are only exercisable if the Constable has reasonable grounds for believing that the person whom he is seeking is on the premises … "

31. Section 24 PACE provides:

"**24 Arrest without Warrant: Constables**

(1) A constable may arrest without a warrant –

a) Anyone who is about to commit an offence;

b) Anyone who is in the act of committing an offence;

c) Anyone whom he has reasonable grounds for suspecting to be about to commit an offence;

d) Anyone whom he has reasonable grounds for suspecting to be committing an offence.

(2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.

(3) If an offence has been committed, the constable may arrest without a warrant –

(a) Anyone who is guilty of the offence;

(b) Anyone whom he has reasonable grounds for suspecting to be guilty of it."

32. Reference may also be made to Section 117 PACE which provides:

"Where any provision of this Act –

a) Confers a power on a constable;

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."

33. Furthermore, Mr Stagg submitted that there is good reason for the low threshold of Section 54(4) whereby the belief of the custody officer need only be actually and honestly held. Thus, the custody officer may not have access to sufficient information to make a reasoned judgment. Furthermore, quick decisions may need to be made – custody officers need to be able to take decisive action to safeguard detainees. The consequence is that a challenge to a custody officer's decision can only be based upon the assertion that the custody officer did not have the belief at all or that the custody officer had adopted a rigid policy without any regard to the individual circumstances of the detained person. He submitted that the injection of the requirement of reasonableness by the Recorder is seen at paragraphs 181, 182, 186 and 192 of the Judgment and constituted a clear misdirection of law.

34. Mr Stagg further submitted that the learned Recorder may have been confused by evidence given by Sgt Bailey as to how a decision is recorded into finding that there was a policy that those who refuse to answer the risk assessment questions should have their clothing removed. I shall return to this part of the Sgt Bailey's evidence and the Recorder's conclusions in relation to it at paragraph 47 below.

35. In relation to the use of force (see Section 117 of PACE at paragraph 31 above), Mr Stagg submitted that the law uses the word "necessary" flexibly, taking its meaning from the context. Thus in some contexts it may mean indispensable; in other contexts it may mean "reasonably necessary". He submitted that the learned Recorder's reasoning in this case about whether the use of force was necessary is divorced from the need for quick and decisive action and that the Recorder should have held that the use of force was necessary for the purposes of Section 117 PACE. He submitted that the learned Recorder was wrong to find that there were alternatives to the use of force. The context was that the Claimant had been angry, upset and agitated throughout: he had been drinking; he said he had been racially abused; he had wet himself; he was angry at the custody desk, he had refused to answer questions and was determined to give his version of the events at the public house. He had been lawfully taken to the floor and later he refused to hand over the latex glove when in cell 26 and challenged officers to retrieve it in circumstances whereby considerable (but lawful) force was required. This was the context for whether force was necessary to remove the Claimant's clothing. Mr Stagg submitted that the Recorder was wrong to suggest that there were alternatives particularly when it was inconceivable that the Claimant should be left trussed up in a position of potential positional asphyxia whilst time was taken to consider whether removal of clothing was necessary. An officer had been bitten, the Claimant was behaving erratically and violently, and decisive action was required. He submitted that the decision of the Recorder was divorced from reality. Finally, he submitted that the Recorder, in reaching his decision, took irrelevant factors into account. One of those was the "right to silence". He submitted that the right to silence is appropriate to questions going to the matter for which he had been arrested, deriving from the caution which an arrested person is given. However, these were not questions relating to the offence for which he had been arrested but questions relating to the risk assessment and it would be quite wrong for a custody officer, met with silence in response to such questions (or a refusal to answer them) simply to shrug her shoulders and say: 'well, he has a right of silence'. The reference to the right of silence was, Mr Stagg submitted, wholly inapposite. The suggestion that, asked to remove his clothes voluntarily, the Claimant would have consented was contrary to common sense and all the evidence before the Recorder as to the Claimant's conduct. Thus, Mr Stagg effectively submitted that it was ludicrous to suggest that a man who had refused to hand over a latex glove would voluntarily have agreed to remove all his clothes.

36. In summary, Mr Stagg submitted that the learned Recorder, dealing with Phase 2, engaged in a wholly inappropriate, over-elaborate and internally contradictory analysis whereby, having misdirected himself as to the law, he reached a conclusion which was unsustainable and should have found that the force used during Phase 2 was lawful.

Submissions on behalf of the Respondent

37. For the Claimant (Respondent), Mr Wand sought to uphold the decision and reasoning of the Recorder, submitting that the making of a decision to seize the Claimant's clothes and to use force to effect seizure was not a decision that needed to be taken

instantaneously and in the moment. He submitted that a decision to seize a detainee's clothes rendering that person naked, particularly where force is to be used in the process and where it occurs within the security of a custodial environment, is a decision that requires calm and careful consideration to the greatest extent possible given that the forcible removal of clothes will likely be a humiliating and degrading experience and is a significant exercise of police power. Mr Wand submitted in particular that there was no error of law on the part of the Recorder in importing a test of reasonableness into Section 54(4) of PACE and that the learned Recorder was correct to do so notwithstanding the absence of any express reference to reasonableness within the statute. He contrasted the removal of a piece of clothing, and the removal of a person's entire clothing which engages Code C of PACE, Annex A paragraph 10. This provides that a strip search may take place only if it is considered necessary to remove an article which a detainee would not be allowed to keep and the officer reasonably considers the detainee might have concealed such an article. He submitted that whilst this was not a strip search as such, it is appropriate to adopt the approach identified for strip searches and, so doing, reasonableness is to be implied as a requirement. Mr Wand further submitted that there is an obvious and desirable rationale for this approach: a much higher level of protection is required when a person is required to remove their clothes fully because of the humiliating and degrading experience entailed, particularly where force is used, and the law should promote an interpretation which only allows such intrusion into a detainee's personal dignity where there are reasonable grounds to do so.

38. In relation to the evidence of Sgt Bailey, Mr Wand submitted that the Recorder was entitled to interpret what she said as meaning that she was following a procedure, that the decision was "somewhat automatic". Looking at the custody record, there was no suggestion that the Claimant posed a specific risk to himself or others by reason of his clothing albeit he was being generally violent. In the absence of any such reference, Mr Wand submitted that the Recorder was justified in finding that the test in Section 54(4) was not satisfied.

39. Mr Wand submitted that his (and the Recorder's) approach and interpretation of Section 54(4) of PACE is supported by the judgment of Pitchford LJ in *D -v- Chief Constable of Merseyside* [2015] EWCA Civ 114 where he said:

> "33. … Ms Sikand argued that, read as a whole, Section 54 contemplates the seizure of clothing pursuant to the power under subsections (3) and (4) as the end result of a 'search' conducted under the power given by Section 54 (6) or (6A), whether the officer is looking for property other than clothing or is seizing the clothing itself. I consider that Ms Sikand is right. In my judgment, reading Code C, paragraph 4 together with Section 54, the Code applies to the exercise of all the powers given to custody officers in Section 54, including the power to remove and seize clothing under subsections (3) and (6A). It would make little sense for paragraph (4) to apply to clothing retained as a result of search for some other thing but not to clothing removed because it was itself liable to seizure under subsection (4).

> 34. Code C paragraph (4) proceeds on the assumption that when performing his responsibility under Section 54 (1) it may be necessary for the custody officer to require the removal of the detainee's clothing. Section 54 (6A) treats an examination of the detainee in order to 'ascertain' whether the detainee has clothing that should be seized under Sections (3) and (4) (a) as a search. While the word 'search' may not describe exactly what PS Gilmour ordered in the Claimant's case, in my opinion it was a search for the purpose of Section 54 and Code C, paragraph 4. Paragraph 4.1 states that when the custody officer considers it necessary that more than outer clothing should be removed, Annex A applies.
>
> 35. Annex A, paragraph 10 provides that a strip search should take place only when the officer reasonably considers that the detainee may have 'concealed' an article that she would not be allowed to keep. Paragraph 10 fails to provide for those situations, anticipated by Section 54, in which the custody officer wishes to seize any clothing that may be used by the detainee to harm herself. That is a lacuna in the Code, but paragraph 11 of Annex A applies to any strip search, not just to those strip searches carried out in compliance with paragraph 10. Since it is my view that the Claimant was searched within the meaning of Section 54 (6A) and that, by Code C, paragraph 4.1, and Annex A, paragraph 9, she was strip searched, the search was to be conducted, so far as the context allowed, in accordance with Annex A paragraph 11. It is entirely to be expected that Annex A should protect all those in custody whose clothing is removed under a power given by Section 54."

40. Relying on that passage, Mr Wand submits that the applicability of Annex A, paragraph 10 effectively imports the concept of reasonableness into Section 54(4) given that the entire removal of the detainee's clothing is equivalent to a strip search.

41. If reasonableness is to be imported into the test in Section 54(4) of PACE, Mr Wand submitted that the Recorder was correct in deciding that Sgt Bailey did not hold a 'reasonable belief' that the Respondent might use his clothing to cause physical injury to himself or to police officers and that it was therefore unnecessary for his clothing to be removed. He submitted that for the Claimant not to have answered risk assessment questions was not a sufficient basis for such a belief as the belief needs to be directed specifically to the question of whether the detained person might use his clothes to harm himself or others. Thus he submitted that there must be some positive indication that the detained person may use his clothes to cause harm and there must then be a considered decision to a reasonable standard. Thus, whilst he acknowledged that the threshold set by Section 54(4) is a low one, he submitted that it is not as low as that for which the Appellant contends. Furthermore he submitted that the Recorder was entitled to conclude that there were alternatives to simply removing the Claimant's clothing. The Claimant should have been asked if he was willing to remove his clothes but was denied that opportunity.

42. Even if the test simply requires a genuine belief rather than a reasonable belief, Mr Wand further submitted that the Recorder would have been entitled to conclude that there was no genuine belief either. He pointed to the absence of any reference in the custody record to the danger that the Claimant would use clothing to harm himself or others [but as to this, see my conclusion at paragraph 49 below] and to the Recorder's conclusion that the decision to do so was 'somewhat automatic'.

43. In relation to the use of force, Mr Wand submitted that, having heard the evidence, the learned Recorder was in the best position to assess whether it had been necessary for force to have been used by the police officers to remove the Respondent's clothing. The Recorder was alive to the point about positional asphyxia and rejected the argument that the Claimant would not have listened to any warnings and would not have calmed down stating:

> "I do not see any reason as to why the Claimant would not [have listened and calmed down]; he would have had no choice but to listen but, in any event, he could not make a choice unless he had been given it and had options explained to him. It seems to me that a restrained Claimant would have been likely to have eventually calmed down, as he did from time to time in the holding cells, and to have listened."

44. In his witness statement, the Claimant had stated that nobody had explained to him why they were doing it and he was not asked if he would remove his clothes. He said:

> "Had I been given the opportunity I would have agreed to remove my clothes."

He repeated this in his evidence. Mr Wand also referred to the guidance from the College of Policing which referred to the fact that exchanging clothing may increase a risk of self-harming and 'leaving a detainee in their own clothing can help to normalise their situation. Some observation or observation within closed proximity (Level 3 or 4) may be a more appropriate control measure.'

45. Thus, Mr Wand submitted that it could not properly be argued that the learned Recorder's assessment of the evidence was flawed or that the conclusion he reached was in any way unsupported or illogical, nor that he misdirected himself in law and on that basis it was not properly arguable that the learned Recorder's decision was wrong for the purposes of Part 52 CPR.

Discussion and Decision

46. In my judgment, the starting point is to decide whether the learned Recorder misdirected himself in importing into Section 54 (4) PACE the concept of reasonableness. That he did so is not in doubt: at paragraph 118 of his Judgment, the learned Recorder, setting out the key points and terms of approach of law, stated in terms:

> "Fourthly, that in terms of those beliefs, what is necessary is that has to be both a reasonable and an honest belief."

This then reappears in numerous places: eg, at paragraph 182 he said:

> "I have come to a conclusion that neither the decision to forcibly remove the clothing nor the method of that being affected by instant transport and immediate forcible removing by stripping and cutting off the Claimant's clothes was either reasonable or proportionate."

Again, at paragraph 186, he said:

> "Fourthly, I am unable to see any reason as to why Police Sgt Bailey or the other police officers should reasonably have concluded that there was any risk of self-harm by reason of use of the Claimant's clothing." (Emphasis added).

And at paragraph 192, the Recorder said:

> "I consider that the beliefs that the purpose of removal of clothing was to prevent the Claimant using it to harm himself or police officers both lacked any reasonable basis and also were potentially irrational."

47. In my judgment, despite the provisions of Annex A, paragraph 10, to PACE Code C, there is no proper basis for implying into Section 54 (4) a requirement of reasonableness. As Mr Stagg submitted, the drafters of the legislation and Parliament were perfectly alive to the ability explicitly to import into any decision or action by the police the requirement of reasonableness: see paragraphs 17 and 24 PACE. It can only be concluded that the omission of such a criterion from Section 54(4) was deliberate, in order to set a low threshold. Furthermore, one can envisage a clear rationale and good policy grounds for so doing: not only can items of clothing be used as a ligature for a detainee, eg, to hang himself or to asphyxiate a police officer but also this can happen in but a few moments with tragic consequences. For the reasons which Mr Stagg submitted, namely that the custody officer may not have access to sufficient information to make a reasoned judgment and that quick decisions may need to be made for the protection of the detained person and others, it is understandable that the law should set a low threshold of actual and honest belief rather than reasonable belief. I therefore conclude that, in setting a standard of reasonable belief, the learned Recorder misdirected himself in law.

48. Furthermore, and in any event, I consider that the learned Recorder was wrong in his conclusion that Sgt Bailey did not have reasonable grounds for her belief under Section 54(4) of PACE. The relevant passage in the evidence of Sgt Bailey bears close consideration. This is the transcript:

> "MR WAND: Just before we come on to deal with matters containing your statement custody record, another matter to deal with initially: you were asked – I'll go back to the start for clarity. You said you could hear yourself saying cell 26.
>
> A. Yes.
> Q. You said you couldn't hear anything else.

A. No.

Q. And you were asked what would you have said.

A. Yes.

Q. You said I – something along the lines of what would have been said is that there was a self-harm suit in the cell.

A. Yes.

Q. But you don't remember saying those words.

A. No.

Q. So your answer is yes.

A. It's ---

Q. Assumption?

A. It's standard procedure. Every time anything – an incident happened like this, it was standard procedure somebody would take them to the cell and they'd be changed in a self- harm suit.

RECORDER DAGNALL: Sorry, it's standard procedure to …?

A. If, if there was a – find a person you couldn't risk assess, it would be authorised for them to be changed into a self-harm suit as we couldn't assess whether they was going to be a risk to themselves or anyone else. Most officers knew if you said to a cell they'd be changed into a self-harm suit. There'd normally be one there ready.

MR WAND: Let's deal with that – we'll deal with that point now. Are – is your evidence that it is Essex Police's procedure that if a detainee does not answer any risk assessment questions that it automatically follows that they are strip-searched?

A. Not automatically, no. And it's not a strip-search in the sense of a full strip-search. It's just the changing into self-harm clothing. It's not a proper search you would do if you're looking for drugs.

Q. But you'll accept all of Mr Carter's clothes ---

A. Yes.

Q. --- were removed.

A. Yes. That's why we'd have to record it as a strip-search.

Q. So it's a strip ---

A. To change into other clothing, but it's not a strip-search in the sense of looking more closely for things hidden.

…

Q. So looking at that entry, is your evidence that the reason that Mr Carter was strip-
searched was that he couldn't be assessed?

A. He was fine and to – could be assessed. That's the main, the main reasons.

Q. So tell me what does violence have to do with this?

A. If, if somebody's just standing there and refusing to answer the questions, you have time to then look at their previous history and see whether you think they're a risk, but if they're not answering your questions and being violent to the officer, you've got to be aware that they might harm themselves or other officers, which gives you more reason why they should change into self-harm clothing to prevent injury to anyone.

Q. So the violence is just relevant to the lack of the ability of you to do a risk assessment?

A. Part of that is, yes.

Q. And so if a person is violent and that is the reason they don't answer the questions ---
A. Yes.

Q. --- are you saying that it automatically follows therefrom that they are strip-searched?

A. Not automatically. It depends how, how they're being violent. So any information officers have given me, if they're somebody that's known to me and I can look at their previous history it – every situation is different.

Q. You first said it – as how they're being violent.

A. Mm.

Q. Well we've just gone through the fact that the violence is only relevant ---

A. Mm.

Q. --- to the not being able to assess them.

A. No.

Q. The violence isn't relevant to whether they are likely to self-harm, is it?

A. It can be because some people can be violent in custody where they're hitting officers and also trying to punch themselves in the face so they can, they can be doing both.

Q. Had you seen Mr Carter hit himself in the face at any point?

A. I hadn't. No.

RECORDER DAGNALL: Sorry, what hadn't you seen?

A. Sorry?

RECORDER DAGNALL: What ---

A. I hadn't seen him hit himself.

Q. Did you have – were you told at all that Mr Carter had any mental health issues?
A. No. Unfortunately there wasn't enough time to get any information. I tried

> to speak to him myself about the injuries on his face. I didn't know how they had been sustained and that's why I was trying to get information from him so I could assess him properly.
>
> Q. You didn't have any concerns about his mental health, did you?
>
> A. He wasn't – given that he wasn't speaking to me to be able to find out if there was
>
> any concern so, no. He wasn't at the desk long enough for me to assess him.
>
> Q. You didn't believe that he was suicidal.
>
> A. I had, I had no idea. He wouldn't answer me about the injuries to his face, how they occurred. He wouldn't speak to us. He then behaves like that. I had no idea whether he'd got any intention to self-harm while he was in custody.
>
> Q. So the reason for him being placed into – the reason for him being stripped to allow him to be – to put on a self-harm suit is only because you did not know.
>
> A. We didn't know. He wasn't helping. He wouldn't explain anything to us. It was for his and everyone's safety and due to him being violent as well.
>
> Q. What do you mean everyone else's safety?
>
> A. Well the officers' because the way he was reacting to the officers when they were standing at the desk and I was trying to talk to him, it was how he was reacting. You don't know whether if they're behaving like that a detention officer goes round to visit them, they take their clothes off and they try and use it as a ligature on an officer. You don't know. See, if you can't assess them as being violent and there's no risk assessment, for everyone's safety
> they're given a self-harm suit to wear."

49. Given the above evidence, from a witness whom the Recorder found to be honest and truthful, I have considerable misgivings in relation to the learned Recorder's conclusion that Sgt Bailey did not have a reasonable belief that the Claimant might use his clothing to cause physical injury to himself or another. At paragraph 171 of his judgment, the Recorder said that Sgt Bailey did not explain as to what the individual treatment might be in circumstances which would involve a deviation from a general policy to put into an anti-self-harm suit in the circumstances with which she was faced, but that is not right: Sgt Bailey said that

> "…if somebody's just standing there and refusing to answer the questions, you have time to then look at their previous history and see whether you think they're a risk"

and she also said

> "Not automatically. It depends how, how they're being violent. So any information officers have given me, if they're somebody

> that's known to me and I can look at their previous history it – every situation is different."

In my judgment, the learned Recorder did a significant disservice to the evidence which Sgt Bailey actually gave, and her evidence constituted a coherent, and in my view eminently reasonable, account of her thought processes including the fact that the decision was not automatic but depended on the information available to her.

50. Furthermore, in my judgment, Mr Wand's suggestion that the custody record and Sgt Bailey's evidence pointed away from her having the Section 54(4) criteria in her mind is simply wrong. As I have stated, there is, in the custody record, the following entry:

> "A strip search was authorised by Sgt 42161 Bailey at 17:25 on 14/12/2017 for the reason to remove an article which the detainee is not allowed to keep on the grounds of the officer has reasonable grounds for believing that a strip search is the only means of removing the item(s). THE DP IS VIOLENT AND HAD TO BE TAKEN TO THE CELL. A STRIP SEARCH IS ONLY BEING AUTHORISED FOR THE PURPOSE OF CHANGING HIM INTO ANTI-SELF-HARM CLOTHING AS HE CANNOT BE RISK ASSESSED. THIS WILL INVOLVE THE EXPOSURE OF INTIMATE PARTS OF HIS BODY." (Emphasis added)

Sgt Bailey explained to the court below that the words not in capitals are part of the computerised system and form the only way of entering the event. However the words in capitals are Sgt Bailey's own words and, as it seems to me, the clue lies in the reference to 'anti-self-harm clothing'. The purpose of changing someone into anti-self-harm clothing is to avoid the risk of the detained person using his own clothing to harm himself, hence the need for anti-self-harm clothing. Thus, the purpose of removing the Claimant's clothes is clearly expressed by Sgt Bailey in this entry in the custody record.

51. Given the Claimant's refusal to answer Sgt Bailey's questions about risk, and the clear and obvious risk should some of those questions be answered in the affirmative, eg whether he has any indications of self-harm and whether he is suffering from mental illness, it seems to me that a custody officer is entitled to take a precautionary approach and assume that these questions, if addressed, would, or may well, have been answered in the affirmative. In my judgment, the learned Recorder significantly misdirected himself in referring to the detained person's right of silence. This was a wholly irrelevant consideration given that the right of silence relates to a right of a suspect not to incriminate himself and thus relates to questions concerning the offence for which he has been arrested. Questions pursuant to a risk assessment of the kind which the Code of Practice requires the custody officer to undertake are in a quite different category: they relate to the safety of the detained person and others, and involve considerations which have been proved in the past to raise matters of life and death. In my judgment, particularly with a detained person who is agitated and violent, a custody officer would be entitled to take the approach, or even follow a policy, which dictated that such a person should have their clothes removed and be put in an anti-self-harm suit unless there was some positive indication pointing away from the need for such precautions.

52. In the circumstances, even importing into the decision to remove the Claimant's clothing a concept of reasonableness, in my judgment no judge could reasonably have determined that Sgt Bailey lacked such reasonable grounds.

53. In addition to the decision to remove the Claimant's clothing, there is also the decision to use force to do so. By Section 117 of PACE, where any provision of the Act confers a power on a constable, 'the officer may use reasonable force, if necessary, in the exercise of the power'. The first question is whether the use of force was necessary and the second question is whether, if it was, the amount of force used was reasonable. In his Judgment, the learned Recorder concluded that force was unnecessary because the Claimant could and should have been given time to calm down, he should have had explained to him that a decision had been made to put him into anti-self-harm clothing and he should have been given the opportunity to consent and co-operate in this. Again, I agree with Mr Stagg's submissions in relation to this aspect. This was a detainee who had refused to answer questions in relation to risk assessment, who had been drinking, who was being uncooperative and whom the officers had reasonably believed needed to be immobilised with rear-stacked handcuffs and leg restraints. In addition, the Claimant had bitten the hand of one of the officers. In my judgment it was wholly unrealistic to leave such a detainee trussed up in a cell in the hope that he might calm down and see reason. Furthermore, Sgt Bailey and the other officers had every reason to believe that there was some urgency in getting the Claimant into an anti-self-harm suit. Although officers had been available for the purpose of restraining the Claimant, it did not at all follow, as the Recorder suggested, that there were therefore sufficient officers to observe the Claimant in his cell whilst he decided what to do and hopefully calmed himself down. In my judgment, the custody sergeant and the officers were justified and had a reasonable belief that the use of force was necessary. Given that the use of force was necessary, I consider that the amount of force used was reasonable and it was not suggested otherwise by the learned Recorder.

54. It follows from the above that this Appeal should be allowed and that Judgment should be entered for the Appellant.

The Appeal on Quantum

55. There is, in addition, the Appellant's appeal against the quantum of damages which, in the result, I do not need to consider. In the event that the Respondent should seek permission to appeal from the Court of Appeal, that permission be granted and that the appeal be allowed, there will then be an opportunity for the Defendant, in a Respondent's Notice, to argue that the Award of Damages was too high. I can indicate that, had I needed to consider the quantum of damages, I would have been of the view that the learned Recorder also erred in awarding a sum of this magnitude arising out of the events of Phase 2 alone but I would prefer to leave it to the Court of Appeal to determine whether that is right and, if so, what the level of damages should have been, should they ever be seized of this matter.