Neutral Citation Number: [2020] EWHC 1428 (QB)

Case No: QB-2010-000113

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ

Date: 08/06/2020

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

GLENYS GOODENOUGH & ANOR	**Claimant**
- and -	
CHIEF CONSTABLE OF THAMES VALLEY POLICE	**Defendant**

- -
- -

James Laddie QC and **Raj Desai** (instructed by **DPG Law LLP**) for the **Claimant**

John Beggs QC and **Aaron Rathmell** (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing dates: 3, 4, 5 and 6 March 2020

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Approved Judgment – Ancillary Matters

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be at 10:30 on Monday 8 June 2020.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. On 26 March 2020, I handed down judgment on the substantive issues in dispute between the parties in this case. It can be found at [2020] EWHC 695. I have since received detailed written submissions from the parties relating to ancillary matters which fall to be addressed in this judgment.

2. In very brief summary, Robin Goodenough died in police custody shortly after the car which he had been driving had been stopped and the officers involved had used force upon him in the process of extracting him from the vehicle. Two distinct claims were brought by the claimants who are his mother and sister:

   (i) in the tort of battery; and

   (ii) in respect of an alleged breach of rights under Article 2 of the European Convention on Human Rights ("ECHR") arising from flaws in the investigation which followed Mr Goodenough's death.

   I dismissed the first claim but found the second to have been made out.

3. My findings have now given rise to three ancillary disputes the resolution of which forms the subject matter of this judgment. They comprise:

   (i) permission to appeal;

   (ii) remedy for breach of Article 2; and

   (iii) costs.

4. I propose to deal with each in turn.

PERMISSION TO APPEAL

5. I have completed Form N460 refusing permission to appeal for the reasons hereafter set out. The procedural position is not entirely straightforward and so I have taken the somewhat unusual course of providing more detailed reasons than would normally be required or appropriate and have incorporated them in this judgment. There are four grounds of appeal which fall for consideration.

Ground 1 – "Ashley 3"

6. In my substantive judgment, I concluded that the officers against whom the allegations of battery had been raised had successfully proved that they had acted in self-defence and the defence of others. This was based upon the evidence of their perceptions at the time, which I found to have been genuine and objectively reasonable, that the deceased was going to injure officers by driving the vehicle at them and/or by the deployment of a weapon.

7. I went on, however, to hold that, albeit only with the benefit of hindsight not available to the officers, it had not been proved that the deceased had actually been preparing to drive his vehicle at the officers or was reaching for a weapon.

8. The question arises as to whether these findings of fact went far enough to provide the defendant with a defence in law or whether the absence of an actual, as opposed to a reasonably but erroneously perceived, threat was fatal to such a defence.

9. This was not, however, an issue which I was called upon to resolve because the claimants conceded that I was bound by Court of Appeal authority on the point. In ***Ashley v The Chief Constable of Sussex Police*** [2007] 1 W.L.R. 398 Sir Anthony Clarke MR formulated the relevant test thus at paragraph 61:

> "…my conclusion is that a defendant has a defence of self-defence to a claim for battery if he shows, first that he mistakenly but reasonably thought that it was necessary to defend himself against attack or the risk of imminent attack, and secondly that the force he used was reasonable."

10. That case proceeded on appeal to the House of Lords on the Chief Constable's challenge to the finding that an honest belief, even if unreasonable, could not establish the relevant defence. The House of Lords dismissed the appeal but three of their Lordships noted that no cross appeal had been brought against the Court of Appeal's finding that no actual threat was required to be proved as an ingredient of the defence.

11. If, as the claimants continue to concede, the decision of the Court of Appeal in ***Ashley*** is binding on me[1] then it must also be binding on the Court of Appeal by the application of the well-known principles laid down in ***Young v Bristol Aeroplane Company Limited*** [1946] A.C. 163. That position would appear to be supported by the observation of Lord Neuberger in the House of Lords in ***Ashley*** at para 90:

> "As the Ashleys have not challenged the Court of Appeal's conclusion on this issue, it appears to me that in this case it should be left open in your Lordships' House."

12. The claimants' application for permission to appeal deals with the issue very shortly:

[1] It was not, for example, argued before me that the rejection of the need for an actual imminent threat of attack, as opposed to a reasonable belief, was not a necessary finding to support the decision to allow the appeal and may therefore have been categorised as being obiter.

> "If permission had been sought in relation to Ground 1 alone ("Ashley 3"), we would have sought a "Leapfrog Certificate" but given that there are further and alternative grounds, it would appear inapt to do so. In the light of the matters raised above, it is submitted that permission should be granted in respect of all four grounds of appeal."

13. The defendant makes no response to this proposed procedural approach.

14. I am not entirely persuaded that it would necessarily be "inapt" for the claimants to have sought a leapfrog certificate and, at the same time, apply for leave to appeal to the Court of Appeal on the remaining grounds. The position the claimants now find themselves in as a result of rejecting this option is that I am now being invited to give permission to appeal to the Court of Appeal on a point of law upon which they have already conceded that, at that level, they are bound to lose.

15. In ***Ceredigion C.C. v Jones*** [2005] EWCA Civ 986, Maurice Kay LJ observed:

> "56. I agree that Section 13(2) of the [Administration of Justice Act 1969], considered on its own with no other guidance, appears to provide that where any leave is granted under the section, then an appeal lies from the decision to the House of Lords, and no appeal lies to the Court of Appeal. But another possible reading is that an appeal shall lie on some issues to the House of Lords and shall lie on another issue or issues to the Court of Appeal, if so ordered. It may be that in 1969 it was not usual for leave to appeal to the House of Lords — or for that matter to the Court of Appeal — to be granted in part and refused in part. But it is by no means uncommon today. The statute of 1969 is to be construed in the circumstances of today, so as to allow for the possibility of a partial grant of leave. I would readily apply that interpretation.
>
> 57. It is plain, if I may say so, that the latter interpretation was adopted by the House of Lords. Otherwise they would have been depriving the Council of a right to appeal to the Court of Appeal, for which the judge had granted leave in the event that leave to appeal to the House of Lords was not granted; and they would have done so without a hearing."

16. The House of Lords in ***Jones*** dismissed the appeal against the decision of the Court of Appeal without the need further to consider the concept of two appeals proceeding in parallel.

17. In ***Beedell v West Ferry Printers Limited*** [2001] C.P. Rep. 83 the Court of Appeal faced an unusual procedural conundrum. The appellant had been given permission by the single judge to appeal from a decision of the EAT

to the Court of Appeal. Permission, however, had been granted in ignorance of a recent Court of Appeal case which had decided the relevant issue of law in a way which had rendered the appeal in Mr Beedell's case hopeless at Court of Appeal level. The respondent applied to set aside the permission of the single judge. The Court of Appeal dismissed this application holding:

> "14. I have no doubt that the correct approach to the exercise of our discretion — bearing in mind the overriding objective — is to refuse to set aside the permission to appeal. If we followed the course which Mr Swift invites us to follow, the consequence would be, in effect, that this court would be making an unappealable decision in an area recognised by the Court of Appeal in its judgments in Foley to be the subject of considerable controversy in unfair dismissal cases.
>
> 15. That would not be a just result. If we take the alternative course which Mr Millar accepts is inevitable of dismissing this appeal, we will be able to entertain an application for permission to appeal; and if we refuse that, it will be open to Mr Beedell to petition the appellate committee for permission to appeal. It will be a matter of discretion for the court which hears the application for permission to appeal to decide, if it grants permission, what conditions, if any, should be attached to that permission. That is not a matter which, in my view, should concern us at this stage. We are deciding simply whether to set aside the permission, or to refuse to set aside the permission and dismiss the appeal in consequence of the concession which has been made."

18. In ***Beedell***, the determining factor in the Court of Appeal's approach was that the effect of section 54(4) of the Access to Justice Act 1998 in that case would have rendered it impossible to appeal against a refusal of permission to appeal. No such consideration arises in the instant case.

19. It is to be noted in this context that CPR 52.6 gives this Court a discretion as to whether to grant permission which must, of course, be exercised according to the overriding objective. In this case, I exercise my discretion against giving permission. Having chosen not to proceed down the leapfrog route, the claimants continue to concede that this ground of appeal will inevitably fail before the Court of Appeal. Accordingly, the Court of Appeal will have to adjudicate on the claimants' prospects of success in considering any subsequent initiative to appeal to the Supreme Court. Rather than grant permission to pursue a doomed appeal, I consider that the appropriate course is to leave the claimants, if so advised, to seek permission from the Court of Appeal itself so as to enable that Court to entertain the fullest possible range of procedural options. I also bear in mind that neither the House of Lords in ***Ashley*** nor this Court had the

advantage of hearing competing arguments as to the strength of the legal point upon which the claimants here seek to promote this ground of appeal. Furthermore, any future application for permission to the Court of Appeal would be a freestanding application and not an appeal against my refusal and so the Court of Appeal would not be constrained by my approach to this application.

20. A further point is that in this case, the entirety of the justification for the reasonable belief of the police officers arose from a deliberate and criminal course of activity on the part of the deceased. In these circumstances I am not persuaded that the appeal would have a real prospect of success regardless of the legal issue relied upon by the claimants. The defendant seeks to argue that I did not make any finding of fact that the officers were actually mistaken in their perception that the deceased was an immediate threat to them. I note, however, that I made specific findings at paragraphs 56 and 61 of my judgment. Such findings were made on the basis that the burden of proof on this issue, if legally relevant, would lie on the defendant in accordance with the formulation of the Court of Appeal in ***Ashley*** at paragraph 37. My findings are that the defendant did not discharge this notional burden.

Ground 2 – Erroneous and unbalanced approach to the Evidence as to the Plausibility of the Officers' Account

21. This ground of appeal amounts to little more than a complaint that I rejected the claimants' case on the facts. This I did equipped with all the advantages of a trial judge which an appellate court lacks.

22. The challenges facing an applicant for permission to appeal against findings of fact were recently summarised by the Court of Appeal in ***Kalma v African Minerals Ltd, African Minerals (SL) Ltd*** [2020] EWCA Civ 144:

> "48. …The Supreme Court has regularly explained that, unless a critical finding of fact has no basis in the evidence, or is based on a demonstrable misunderstanding of relevant evidence, or a failure to consider such 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: see Henderson v Foxworth Investments Limited [2014] UK SC 41 , Lord Reid at paragraph 67; Volcafe Ltd v Cia Sud Americana de Vapores SA [2018] UKSC 61 , Lord Sumption. This applies equally to findings of primary fact and any inferences to be drawn from them: see Staechelin v ACLBDD Holdings & Others [2019] All ER 429.
>
> 49. Moreover, in the cases summarised by Lewison LJ in Farge UK Limited and Another v Chobani and Another [2014] EWCA

> Civ 5, various practical reasons are set out for why this should be so. Amongst other things, Lewison LJ noted that, whilst the trial judge will have regard to the whole of the sea of evidence presented to him, an appellate court would only ever be "island-hopping". In his memorable words, "The trial is not a dress rehearsal. It is the first and last night of the show."

23. I am entirely satisfied that none of the five examples given in the claimants' written application for permission to appeal comes close to satisfying the criteria for a successful challenge to a judge's findings of fact. Throughout the trial, Mr Laddie QC sought to subject selected parts of the documentary evidence and, in particular, the accounts given by the officers involved to a process of sedulous textual exegesis and was doubtless disappointed when my judgment did not fully reflect his enthusiasm for minute detail. There is, however, a point beyond which reasoned and proportionate analysis lapses into unwelcome prolixity. As the Court of Appeal held in ***Customs and Excise Commissioners v A and Another*** [2003] Fam. 55:

> "82 A judge's task is not easy. One does often have to spend time absorbing arguments advanced by the parties which in the event turn out not to be central to the decision-making process…
>
> 83 However, judges should bear in mind that the primary function of a first instance judgment is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. The longer a judgment is and the more issues with which it deals the greater the likelihood that: (i) the losing party, the Court of Appeal and any future readers of the judgment will not be able to identify the crucial matters which swayed the judge; (ii) the judgment will contain something with which the unsuccessful party can legitimately take issue and attempt to launch an appeal; (iii) citation of the judgment in future cases will lengthen the hearing of those future cases because time will be taken sorting out the precise status of the judicial observation in question; (iv) reading the judgment will occupy a considerable amount of the time of legal advisers to other parties in future cases who again will have to sort out the status of the judicial observation in question. All this adds to the cost of obtaining legal advice.
>
> 84 Our system of full judgments has many advantages but one must also be conscious of the disadvantages."

Ground 3 – Error as to the Nature of Belief required for Self-defence

24. The claimants seek to draw a distinction between the concept of "under imminent attack" and "under imminent threat of attack". This, in the circumstances of this case, is a distinction without a difference. The House of Lords in ***Ashley*** referred to the concept as one which involved imminent

threat. The terms are used interchangeably in the authorities because they are synonymous.[2]

Ground 4 – Erroneous Approach to Proportionality

25. The judgment applies the right test. At paragraph 54, for example:

> "PC Shatford's decision to use force to extract Mr Goodenough from the vehicle was reasonable and proportionate in the circumstances and the suggestion that he should have held off was unrealistic."

26. As with Ground 4, the substance of the complaints made are in respect of matters of fact thinly disguised as matters of law.

REMEDY FOR BREACH OF ARTICLE 2

27. The basis upon which I concluded that there had been a breach of Article 2 is set out in paragraphs 64 to 80 inclusive of my judgment.

28. The issue now arises as to what remedy lies in respect of this breach.

29. The claimants contend that an award of between £10,000 and £12,500 for each claimant would be appropriate. The defendant argues that no compensation should be awarded and that the proper result would be limited to a declaration.

30. The power to award damages is derived from section 8 of the Human Rights Act 1998 which, insofar as is material provides:

> "**8 Judicial Remedies.**
>
> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

[2] For what it is worth, see the OED definition of imminent: Of an event, etc. (almost always of evil or danger): Impending threateningly…

> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> The court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining—
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

31. Article 41 provides:

> "**Just satisfaction**: If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

32. A Practice Direction relating to just satisfaction claims was issued by the President of the Court on 28th March 2007. The introduction provides:

> "1. The award of just satisfaction is not an automatic consequence of a finding by the European Court of Human Rights that there has been a violation of a right guaranteed by the European Convention on Human Rights or its Protocols. The wording of Article 41, which provides that the Court shall award just satisfaction only if domestic law does not allow complete reparation to be made, and even then only "if necessary" (s'il y a lieu in the French text), makes this clear.
>
> 2. Furthermore, the Court will only award such satisfaction as is considered to be "just" (équitable in the French text) in the circumstances. Consequently, regard will be had to the particular features of each case. The Court may decide that for some heads of alleged prejudice the finding of violation constitutes in itself sufficient just satisfaction, without there being any call to afford financial compensation. It may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even not to make any award at all. This may be the case, for example, if the situation complained of, the amount of damage or the level of the costs is due to the applicant's own fault. In setting the amount of an award, the Court may also consider the respective positions of the applicant as the party injured by a violation and the Contracting Party as responsible for the public interest. Finally,

> the Court will normally take into account the local economic circumstances.
>
> 3. When it makes an award under Article 41, the Court may decide to take guidance from domestic standards. It is, however, never bound by them.
>
> 4. Claimants are warned that compliance with the formal and substantive requirements deriving from the Convention and the Rules of Court is a condition for the award of just satisfaction."

33. The Practice direction goes on to address the topic of damage in general:

> "7. A clear causal link must be established between the damage claimed and the violation alleged. The Court will not be satisfied by a merely tenuous connection between the alleged violation and the damage, nor by mere speculation as to what might have been.
>
> 8. Compensation for damage can be awarded in so far as the damage is the result of a violation found. No award can be made for damage caused by events or situations that have not been found to constitute a violation of the Convention, or for damage related to complaints declared inadmissible at an earlier stage of the proceedings.
>
> 9. The purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, until now, considered it inappropriate to accept claims for damages with labels such as "punitive", "aggravated" or "exemplary"."

34. The Practice Direction then proceeds to discuss pecuniary and non-pecuniary damages which broadly reflect the common law distinction between special and general damages respectively. No special damages are claimed in the instant case. On the issue of non-pecuniary damages, the Practice Direction states:

> "13. The Court's award in respect of non-pecuniary damage is intended to provide financial compensation for non-material harm, for example mental or physical suffering.
>
> 14. It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. If the existence of such damage is established, and if the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law.
>
> 15. Applicants who wish to be compensated for non-pecuniary damage are invited to specify a sum which in their view would

> be equitable. Applicants who consider themselves victims of more than one violation may claim either a single lump sum covering all alleged violations or a separate sum in respect of each alleged violation."

35. I have been afforded considerable assistance in the application to the principles outlined above to the circumstances of this case by the detailed analysis of Green J (as he then was) in ***DSD v The Commissioner of Police for the Metropolis*** [2015] 1 W.L.R. 1833:

> "18. In relation to any claim for an award of compensation the starting point for the analysis is to answer the question whether a non-financial remedy is necessary "just satisfaction"? In the present case I have already made declarations in favour of each Claimant to the effect that their Convention rights have been violated: Liability Judgment paragraphs [298] and [313]. The importance of declaratory relief in an appropriate case is not to be underestimated. It provides a formal, reasoned, vindication of a person's legal rights and an acknowledgment in a public forum that they have been wronged. It is an integral part of the democratic process whereby a public body can be called to account. Case law suggests that there are (at least) two components to the question whether a financial award should supplement a declaration. First, it is necessary to consider whether there is a causal link between the breach and the harm which should appropriately be reflected in an award of compensation in addition to a declaration? Secondly, and regardless of the answer to the first question, it is necessary to consider whether the violation is of a type which should be reflected in a pecuniary award?"

36. The formulation of what circumstances will suffice to establish a causal link between the harm in respect of which compensation is claimed and the human rights violations with which it is associated is an elusive one. It is clear, however, that the approach to this issue in this context is less stringent than is usually applied under the common law of tort. As Green J observed in ***DSD***:

> "25 …In any event precision in establishing causation is not an identifiable hallmark of Strasbourg case law. As the analysis of the jurisprudence at section E below clearly shows the court, without recourse to any expert or medical evidence, quite regularly simply assumes that a claimant must have suffered some form of generalised anxiety, stress, distress or anguish warranting compensation which falls short of any recognised medical condition."

37. In this case, I am satisfied that I am entitled to conclude that the serious shortcomings of the investigation probably added to the very considerable

distress and anxiety suffered by the claimants in the aftermath of Mr Goodenough's death. There is, therefore, a sufficient causal connection to fulfil this requirement of the approach provided for under section 8 of the 1998 Act.

38. Furthermore, this is not one of the cases in which the claimants have already benefitted from a common law award capable of subsuming any remaining potential claims under the Human Rights Act. The potential claim relating to the psychological impact on the claimants of the Human Rights Act breach lies outside the parameters of the harm which would fall to be compensated for under the common law of tort and through the application of the provisions either of the Law Reform (Miscellaneous Provisions) Act 1934 or the Fatal Accidents Act 1976.

39. Accordingly, the circumstances of this case potentially give rise to a compensatory award by way of just satisfaction. The defendant relies on a number of contentions to steer me away from this course. By dealing with the matter in this way, I am not, of course, implying that the defendant thus bears any burden of proof or persuasion.

40. The defendant rightly points out that Article 2 investigations are not exclusively for the benefit of the family of the deceased but are also there to serve the public interest. This is undoubtedly true but this is likely to be so in all cases of this type. The existence of a significant public interest does not displace the legitimate interests of the family.

41. The defendant also points to the judgment of this court as vindicating the claimants' Article 2 rights in a powerful way. Be that as it may, it is in all cases a prerequisite of the making of an award of damages under section 8 that the court has already found that any act (or proposed act) of a public authority is (or would be) unlawful. The specific weight to be given to this factor is not significantly greater than that which it would be generally afforded in cases of this type.

42. The defendant goes on to draw a distinction between procedural rights and substantive rights of which it is said that only the former are engaged in this case. I am not persuaded that this is a helpful approach on the facts of this case. In ***DSD*** the Court found:

> "26. In relation to DSD I did not find in the liability judgment that the defendant was responsible for the actual assault on her. This occurred at a very early stage in the series of attacks perpetrated by Worboys. My conclusion was that at that stage no act or omission on the part of the MPS in the course of its investigation could have prevented the attack. It follows that the harm to be compensated for in the case of DSD is the post-assault

> mental suffering that she sustained as a consequence of the police investigation."

43. So too in this case, the breach of Article 2 did not lead to the loss of life but did amount to a serious failure of investigation with a resultant impact on the close relatives of the deceased.

44. The defendant also points out that the breach of the investigative duty was not such as to prevent this Court from finding that there was no liability in tort in respect of the actions of the officers involved in the incident and that there was substantial additional judicial scrutiny applied in the context of the criminal trials and the hearing in the Administrative Court before Mitting J. Reference is made by way of contrast to the case of ***Ramsahai v Netherlands*** [2008] 46 E.H.R.R. 43 in which the failings in the investigation were more numerous and serious. Indeed, it is not difficult to envisage investigative measures more seriously flawed and more likely to have a substantive impact on the outcome of the subsequent legal process than arose in the present case. I regard the points made by the defendant in this regard to be mitigating features but not sufficiently strong as properly to preclude the awarding of damages.

45. I take the same approach to the defendant's reliance upon my finding that there was no actual collusion between the officers but a risk of contamination of their evidence. I readily accept that it never occurred to the officers that there was any impropriety in the way in which they set about investigating the death of Mr Goodenough and that national policy offered little or no assistance to them at the time. Nevertheless, the shortfalls were sufficiently serious even by the standards of the time to attract strong, and in my view, justified criticism from the Hampshire Police in their independent report.

46. Finally, the defendant seeks to argue that, upon a proper construction, the pleadings do not encompass a claim for damages in respect of the alleged breach of Article 2. I am not attracted to this contention and note, notwithstanding the lay out of the claim for damages, that the prayer for relief seeks damages under the Human Rights Act.

47. Stepping back from the detail of the parties' respective arguments and taking all relevant matters into account, I remain satisfied that this is a case in which it is appropriate to award damages. I must not, however, lose sight of the issue of causation in the quantification of such damages. The Judicial College Guidelines for the Assessment of Damages provides for categories of psychiatric harm and the awards within the less severe bracket range from £1,440 to £5,500. Bearing in mind that the award of damages under the Human Rights Acts encompasses a broader palette of elements of

anxiety and distress than would be incorporated for consideration under a common law claim, I would pitch my assessment towards the higher end of the range on the relatively limited information before me. In all the circumstances, I make an award of £5,000 for each claimant.

48. In addition, I am persuaded that a formal declaration to be set out in the order of the Court is appropriate and I adopt the wording suggested by the claimants:

> "The Defendant breached the Article 2 investigative duty by failing to take steps to prevent the key police officer witnesses from conferring prior to providing their first written accounts, for the reasons outlined in the judgment."

COSTS

49. Both parties have enjoyed distinctly mixed fortunes in this litigation. I have been provided with very detailed submissions on costs which set out their respective positions. I do not intend to rehearse the entire contents of these submissions here. The parties can rest assured that I have considered them with care. I will, however, set out the most important factors:

    (i) The defendant won on the central issue relating to the common law claim;

    (ii) However, causation was an important aspect of this defence and the defendant abandoned it during the course of the trial;

    (iii) The claimants also sequentially abandoned various aspects of their claims both in common law and under the Human Rights Act;

    (iv) The claimants were successful in their human rights claims although they did not succeed in establishing the full extent of the breaches alleged.

    In so far as the parties rely upon more finely articulated details in their submissions, I record that they were not such as to have a salient impact upon my final decision whether taken singly or as a whole.

50. The defendant seeks to persuade me to award costs in its favour. The claimants argue for an issues based order.

51. I am not persuaded that the defendants should be entitled to all of their costs. The issue of causation involved the instruction of experts and will have generated a significant amount of costs. Unhappily for the defendant, however promising this line of defence may at first have appeared to have been, it crumbled to ashes when its expert gave evidence. It would simply be unfair to subsume this aspect of the case into the broader question of

breach of duty thus involving no adverse impact on the defendant's claim for costs.

52. Furthermore, the finding in favour of the claimants on the Human Rights issue, although on the facts subsidiary in terms of costs, was a significant part of the case as a whole.

53. Against this background, the claimants seek an issue based award of costs. This approach is not without some attraction but would be likely to result in the expenditure of yet more money in attempting to tease out the various and probably contentious costs attributable to each issue. The risk of a further and disproportionate assessment hearing is increased.

54. Accordingly, to reflect the matters to which I have referred above and those which are further particularised in the parties' written submissions, I will order that the defendant have an order in his favour in the sum of one half of his costs against the claimants.

55. In ***Lockley v National Blood Transfusion Service*** [1992] 1 W.L.R. 492 Scott LJ identified the following principles to be applied to cases in which a claim for a set off is made by a defendant against the damages and costs of a legally aided party. He observed:

> "1. A direction for the set-off of costs against damages or costs to which a legally aided person has become or becomes entitled in the action may be permissible.
>
> 2. The set-off is no different from and no more extensive than the set-off available to or against parties who are not legally aided.
>
> 3. The broad criterion for the application of set-off is that the plaintiff's claim and the defendant's claim are so closely connected that it would be inequitable to allow the plaintiff's claim without taking into account the defendant's claim. As it has sometimes been put, the defendant's claim must, in equity, impeach the plaintiff's claim.
>
> 4. Set-off of costs or damages to which one party is entitled against costs or damages to which another party is entitled depends upon the application of the equitable criterion I have endeavoured to express. It was treated by Mr. Justice May in Currie v. Law Society as a "question for the court's discretion" (see page 1000 A-B). It is possible to regard all questions regarding costs as being subject to the statutory discretion conferred on the court by section 51 of the Supreme Court Act 1981. But I would not have thought that a set-off of damages against damages could properly be described as a discretionary matter, nor that a set-off of costs against damages could be so described.

> 5. If and to the extent that a set-off of costs awarded against a legally aided party against costs or damages to which the legally aided party is entitled, cannot be justified as a set off (i) the liability of the legally aided party to pay the costs awarded against him will be subject to section 17(1) of the Act and Regulation 124(1) of the Regulations; and (ii) the section 16(6) charge will apply to the costs or damages to which the legally aided party is entitled."

56. Applying these criteria, I am satisfied that it is appropriate, with one exception, for the defendant's costs order in this case to be set off against the damages award and any earlier interlocutory costs orders made in favour of the claimant. The exception to which I refer is the costs relating to a claim brought by the second claimant in false imprisonment which was settled following the second claimant's acceptance of a Part 36 offer. This claim was, in my view, sufficiently distinct from the matters which fell for determination within the context of the rest of the litigation that the damages and costs relating thereto should be paid by the defendant and not extinguished by the application of a set off.

57. Beyond the application of the set off, there shall be no further enforcement of the defendant's costs order against the claimants without the permission of the court.

CONCLUSION

58. For the particular benefit of those readers who have turned straight to the final paragraph of this judgment because they are more immediately interested in the result than the reasoning behind it, I have decided:

    (i) Permission to appeal is refused;

    (ii) Each claimant is awarded damages in the sum of £5,000 by way of just satisfaction in respect of the breach of Article 2; and

    (iii) The defendant is awarded one half of its costs against the claimants.