Neutral Citation Number: [2022] EWHC 2419 (KB)

Case No: QA-2021-000237

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 September 2022

Before :

THE HON. MR JUSTICE BOURNE

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Between :

WOKINGHAM BOROUGH COUNCIL	**Appellant**
-and-	
MUHAMMAD SOHAIB ARSHAD	**Respondent**

- -

David Green (instructed by **Weightmans**) for the **Appellant**
Muhammad Sohaib Arshad (the **Respondent** acting in person)

Hearing date: 20 July 2022

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Approved Judgment

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.

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The Hon. Mr Justice Bourne:

Introduction

1. This is an appeal by Wokingham Borough Council ("the Council") against the judgment of HHJ Melissa Clarke, given on 15 October 2021 in Oxford County Court in favour of the Claimant, Mr Arshad. The Council is represented by Mr David Green of counsel, whilst Mr Arshad represents himself.

2. The background facts can be summarised as follows:
   i. Mr Arshad was a taxi driver and had held a hackney carriage vehicle licence ("HCVL") from the Council since 2006. In late 2016 he needed a new vehicle because his former licensed hackney carriage vehicle was too old to be licensable.
   ii. The Council requires all such vehicles to comply with its licensing policy. The policy covers various matters, one of which is accessibility of vehicles to wheelchair users. For a licence to be issued, the vehicle must be able to accommodate a fully grown adult passenger whilst seated in their wheelchair i.e. there must be adequate headroom, without seats having to be removed. There must be easy access into and egress out of the vehicle for all persons, in particular the elderly and disabled, with provision of additional handholds or grab rails and a portable step if necessary.
   iii. Mr Arshad provisionally decided to purchase a second-hand Ford Galaxy. In December 2016 he contacted the Council's licensing team, told them the make and model of the new car and asked if it would be approved as wheelchair accessible.
   iv. A technical officer, Mr Joplin, responded by email, saying: "... provided the vehicle has correct documentation a ford galaxy would be an appropriate vehicle and I believe we have other ford galaxy's on the fleet."
   v. Mr Arshad responded, thanking Mr Joplin and stating that the vehicle he intended to purchase was not a "floor down/ cut down vehicle", but just an "original seven seater". He did not receive a response.
   vi. Mr Arshad bought the car and installed vehicle ramps and fixing points for a wheelchair safety belt. He submitted his HCVL application which included an Individual Vehicle Approval certificate relating to the adaptations. That certificate indicates conformity with certain EU norms but those do not include passenger headroom. The Council issued Mr Arshad with a new HCVL on 16 February 2017.
   vii. The Council became aware almost immediately that the car might not comply with the policy, and Mr Arshad was asked to bring it in for inspection.

viii. At an inspection on 27 February 2017 it transpired that there was inadequate headroom for a wheelchair user. Mr Arshad was informed that his HCVL would be suspended as the vehicle was not fit for purpose. He was sent a suspension letter on 2 March 2017 which informed him of a right of appeal to a Council sub-committee.

ix. Returning from a visit to Pakistan, Mr Arshad converted his HCVL to a Private Hire Vehicle Licence on 15 June 2017 and began working as a private hire driver through a company called Prestige Cars. He also made a complaint to the Council, that he had been given wrong advice by them, that the policy was ambiguous and unclear and that other licensed vehicles were not compliant.

x. The appeal panel's decision, issued on 20 September 2017, upheld the decision that the vehicle was not fit for purpose and the suspension of his HCVL. It recommended that the Council carry out checks on all existing HCVL licensed vehicles. The appeal panel decision notice informed Mr Arshad that he had a right of further appeal to the Magistrates' Court, but he did not exercise that right.

xi. Meanwhile, the Council identified other potentially problematic vehicles and sought to inspect them. Nine vehicles were identified as non-compliant and their drivers were issued with suspension letters. Six of them appealed to the appeal panel and were permitted to continue to operate under their HCVLs pending the outcome of their appeals.

xii. The Council rejected Mr Arshad’s complaint on 18 December 2017.

xiii. Following a committee meeting on 21 March 2018, the Council set about drafting a revised policy which would make clear the size of wheelchair that vehicles must accommodate and the necessary dimensions of the interior of vehicles. It also decided not to issue any more suspensions.

xiv. The Board which heard the other six appeals identified shortcomings and a lack of clarity in the policy and decided that although the vehicles were non-compliant, drivers could retain their licences “until a change in legislation or policy”.

xv. Mr Arshad complained to the Local Government Ombudsman, which found that the Council was at fault because it had given him wrong advice. It rejected a complaint of discrimination on grounds of religion. It recommended a fresh appeal hearing and the payment of £500 compensation.

xvi. The Council accepted the recommendations. The fresh appeal resulted in the issue of a new licence to Mr Arshad on 28 August 2018.

xvii. The judge found that Mr Arshad has since given up his work as a taxi driver. He told me that this occurred a couple of years ago.

3. According to the expert report of a psychiatrist, Dr Balu, Mr Arshad's loss of his licence and his consequential loss of livelihood and status precipitated a Depressive Disorder involving mild to moderate depression without psychotic symptoms.

4. Mr Arshad brought a claim in the County Court alleging that he had been treated unlawfully in various ways. The judge recounted that at a hearing before Deputy District Judge Lindsay on 7 January 2021, the causes of action were identified as:
   i. Discrimination on the grounds of race or religion;
   ii. Negligence (in the provision of advice that the Ford Galaxy would be an appropriate vehicle);
   iii. Breach of duty (in the carrying out by the Council of their statutory duties relating to hackney carriage licensing).

5. Although Mr Arshad consulted solicitors on some occasions, he could not afford legal representation throughout the litigation and has represented himself both at trial and on this appeal. In view of the complexity of the issues, that has been very difficult for him, but he has set about it in a serious and committed way. He successfully instructed the consultant psychiatrist, Dr Balu, to provide an expert report which addresses diagnosis and causation of his medical condition. The Appellant addressed some questions to Dr Balu under CPR Part 35 and Dr Balu incorporated the answers into a revised version of his report.

6. The trial took place on 16 and 17 September 2021. It was a hybrid trial, attended by Mr Arshad via CVP because he was awaiting the results of a Covid test. Dr Balu was not called to give oral evidence.

7. Only the negligence claim succeeded. Moreover, only one significant head of claim succeeded, namely the claim for general damages for personal injury consisting of psychiatric illness. Claims for consequential financial loss failed because the losses and/or causation of them were not proved. The claim for aggravated and exemplary damages was not made out on the facts.

8. The judge assessed damages for pain, suffering and loss of amenity ("PSLA") in the sum of £42,500 and also awarded £290 for prescription charges and sundry litigation expenses. It seems to me that the latter two items were, and could only be, parasitic on the successful personal injury claim.

9. Finally the judge ordered the Council to pay costs of £6,270.60 to Mr Arshad. She did not order him to pay any costs despite the failure of his other claims.

10. On 28 March 2022, Martin Spencer J gave permission for the Council's appeal to advance on three grounds, namely that Judge Clarke was wrong, in law and fact, to find that:
    i. there was a relationship between Mr Arshad and the Council giving rise to a duty to take care to avoid causing him psychiatric damage;
    ii. psychiatric damage (as distinct from mere upset or distress falling short of a diagnosable psychiatric condition) was a reasonably foreseeable consequence of the negligent advice being given; and
    iii. Mr Arshad's psychiatric injury was caused by the giving of advice by the Council (rather than the events which followed the giving of that advice).

11. Permission was refused for two other grounds, namely that the judge erred in her assessment of the damages for PSLA and in her decision as to costs. Martin Spencer J also refused permission for a cross-appeal by Mr Arshad, who contended that his claims for discrimination and breach of statutory duty and for aggravated and exemplary damages for "mental torture and humiliation" should have been allowed to proceed.

12. Both Mr Green and Mr Arshad renewed the applications which did not find favour with Martin Spencer J and I return to them below.

The Council's Appeal

Ground 1

13. Mr Green argues that the judge was wrong to find that the Council, when giving Mr Arshad the advice that the Ford Galaxy was a suitable vehicle, owed him a duty to take care to avoid causing him psychiatric damage.

14. The judge correctly directed herself to apply the three stage test in *Caparo Industries plc v Dickman* [1990] 2 AC 605, i.e. that a duty of care would arise if (1) it was reasonably foreseeable that negligent advice would cause Mr Arshad harm of the kind which he suffered, (2) that there was a relationship of "proximity" between him and the Council and (3) it was fair, just and reasonable to impose a duty on the Council to take care to avoid causing him that kind of harm.

15. However, Mr Green complains that Judge Clarke nevertheless did not actually apply that test.

16. First, he points out that when purporting to apply the test, the judge did not consider whether psychiatric damage, specifically, was a reasonably foreseeable consequence of the Council's conduct. That question was not considered until a much later stage of the judgment, after the finding

of duty and breach, when the judge came to consider which heads of loss would attract an award of damages.

17. I agree with Mr Green that foreseeability of the damage should have been considered at the first stage. See, for example, *Caparo* at 627 per Lord Bridge:

> "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."

18. Since the only proven losses were, or were entirely parasitic upon, the psychiatric illness, that was the relevant damage. The judge did of course rule, later in the judgment, that psychiatric harm was reasonably foreseeable and therefore it might be said that the order in which the questions were asked did not affect the answers to them. However, it does seem to me that asking the questions in the right order might have led to a more intense focus on the difficulty which this issue presented.

19. Reasonable foreseeability of psychiatric injury is the subject of ground 2, and I place it temporarily on one side. In this case it is agreed that the first condition for a duty, namely a relationship of proximity between the parties, was satisfied. The next question under ground 1 is whether it was fair, just and reasonable to impose a duty of care.

20. As Mr Green reminds me, it is necessary to begin by asking whether the relationship between claimant and defendant is one in which the Courts have recognised the existence of such a duty. Where, as in this case, it is not, the Court must proceed cautiously, extending the scope of the duty of care incrementally and by analogy with the classes of relationship where a duty has been recognised. As Lord Reed said in *Robinson v West Yorkshire Chief Constable* [2018] AC 736 at [27]:

> "The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgment in those circumstances that involves consideration of what is fair, just and reasonable. As Lord Millett observed in *McFarlane v Tayside Health Board* [2000] 2 AC 59, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper."

21. However, the judge did not overtly embark on that incremental type of analysis. Instead she applied the familiar test for liability for negligent misstatement as set out in *Hedley Byrne v Heller* [1964] AC 465, finding in particular that the Council voluntarily assumed responsibility for the reasonably foreseeable consequences of the statements of Mr Joplin.

22. In arriving at that conclusion, the judge considered and rejected a submission by the Council that, by analogy with *Reeman v Department for Transport* [1997] PNLR 618, CA, a duty should not be found. Mr Green submits that she was wrong to distinguish *Reeman*.

23. *Reeman* concerned the requirement that a fishing vessel, before it could put to sea, must have a certificate of seaworthiness issued by the Department of Transport. A certificate in that case was issued negligently in 1977, based on arithmetical errors by a Department surveyor. The same individual re-surveyed the vessel in 1986 and failed to carry out new tests, as he should have done, relying again on his original erroneous calculation. A new certificate was issued in February 1986, valid until September 1989. Thereafter the vessel passed through various ownerships. In 1987 it was acquired by the claimant's brother-in-law. In June 1989, the validity of the certificate was extended to February 1990. The claimant bought the vessel from his brother-in-law in July 1989. In October 1990 the vessel failed a test and the certificate was withdrawn. It transpired that she could not be made seaworthy without major expenditure which the claimant could not afford. The result was "a financial disaster which is none of their making and which would not have occurred had the Department exercised proper care in the manner in which it carried out its statutory duties" (per Phillips LJ, 636A).

24. By the time the case reached the Court of Appeal, it was agreed that the Department's surveyor would have known that a potential purchaser would rely on the certificate as demonstrating that the vessel was seaworthy, and that it was reasonably foreseeable that a negligent survey could cause financial loss to such a purchaser.

25. Overturning the decision at first instance, the Court of Appeal ruled, first, that there was not the necessary relationship of proximity. The Court considered the purpose for which the negligent statement (i.e. the certificate) was given, which was the statutory purpose of promoting safety at sea by preventing the use of unseaworthy vessels. It was not "to inform those who may, in the future, consider entering into commercial transactions, such as purchase or charter, in relation to the certified vessels" (per Phillips LJ at 631A). Then, citing *Caparo*, Phillips LJ referred to "the importance of the advice being given to an identifiable class if the necessary proximity was to exist" (631G), and ruled that

future potential purchasers were not such a class, because the "membership" of the class could not be ascertained at the time the certificate was given. Mere foreseeability that information probably would be "relied upon by others than those for whom it is provided" was not enough to create proximity (632E).

26. The Court also ruled that it would not be fair, just and reasonable to impose a duty. To do so logically would be to recognise such a duty "in respect of the wide range of analogous cases where authorities certify that property complies with safety requirements" (634G). The purchaser of a ship could instead protect his position by commissioning a survey or seeking a collateral warranty from the vendor.

27. The present case concerns the relationship between a licensing authority and a prospective applicant for a licence who seeks advice. The Council had no statutory obligation to give the advice and did not give it pursuant to any statutory duty. The advice contained reassurance to Mr Arshad that the vehicle would be considered suitable for licensing. He relied on the advice when purchasing it and, it seems to me, the Council knew that he would do so.

28. Judge Clarke distinguished *Reeman* from this case because the certification there was a direct exercise of a statutory duty, whereas the advice given by the Council in this case was not. Mr Green argues that this was wrong because the advice had an obvious and close connection with the statutory licensing duty. The duty was the only reason why the advice was sought and given in the first place, and the service of giving advice existed solely to further the objectives of the statutory licensing scheme.

29. Judge Clarke also distinguished *Reeman* because the Court of Appeal found a lack of proximity whereas in this case proximity was conceded. However, Mr Green contends, that does not prevent the cases being analogous for the purposes of the "fair, just and reasonable" test.

30. In my view the judge was right to find that *Reeman* was very different from the present case. The important principle emerging from *Reeman* is that statutory certification of property such as a ship does not give rise to a duty of care towards a third party, i.e. not the holder of the certificate, such as a potential purchaser of the property. The present case concerns neither a statutory certification nor any allegation of a duty to a third party. Instead it concerns advice given, outside the certification process, to an identified individual. That context, indeed, is why proximity was found to exist in this case. The most that *Reeman* could contribute to the present case would be a suggestion that caution may be needed before imposing a duty on a certifying authority because of the potentially wide

application of such duties. However, I do not draw the analogy for which Mr Green contends.

31. Before turning to the judge's conclusion, I then consider whether this case does fit into, or resemble, any category of case in which a duty has been found.

32. Somewhat closer, in my view, is *Welton v North Cornwall District Council* [1997] 1 WLR 570. There an environmental health officer inspected the claimants' guest house for the purpose of the Food Safety Acts and food hygiene regulations. To secure compliance with the regulations, he told them to execute substantial building works, under threat of closure, and they incurred considerable expenditure by doing so. It transpired that 90 per cent of the works were not necessary for compliance.

33. The Court of Appeal upheld the finding at first instance that in these circumstances the local authority owed a duty of care to avoid causing economic loss to the claimants. The Court found that, regardless of the statutory backdrop, this was a case of "assumption of responsibility" by the officer and therefore of liability for negligent misstatement under the principle in *Hedley Byrne v Heller* [1964] AC 465. The existence of a related statutory duty did not exclude the relationship from that principle. Rose LJ at 580-581 referred to three possible types of conduct by a statutory enforcement authority. The first was enforcement action, which did not arise. The third, which did, was the imposition, outside the legislation, of requirements enforced by threat of closure. Of more interest for present purposes is the second type, as to which Rose LJ said:

> "Secondly, there is the offering of an advisory service: in so far as this is merely part and parcel of the defendants' system for discharging its statutory duties, liability will be excluded so as not to impede the due performance of those duties: see per Lord Browne-Wilkinson in *X (Minors) v. Bedfordshire County Council*, at p. 763. But, in so far as it goes beyond this, the advisory service is capable of giving rise to a duty of care; and the fact that the service is offered by reason of the statutory duty is immaterial: see per Lord Browne-Wilkinson, at p. 763."

34. Ward LJ added at 585-586:

> "I find the approach of Lord Steyn in *Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd* [1996] A.C. 211 to be helpful. Looking at the matter from the point of view of the plaintiffs, they had no other remedy than this action. They have undoubtedly suffered damage which would be recoverable on *Hedley Byrne* principles and an important element of public policy is that such damage should be

> compensated. From the point of view of the defendants, the court is not intruding upon the manner in which they exercise their discretionary powers. The burden of performing the advisory service carefully, which is the burden cast upon those in the private sector, is not so onerous or demanding upon a fair allocation of finite resources as to make it unreasonable to expect care to be taken. Finally, from the point of view of the public at large, public safety is important but in the special circumstances of this case it does not seem to me that it would be imperilled if the need for justice to the plaintiffs were given its proper place. So I conclude that fairness, reasonableness and justice and all the material aspects of policy inextricably wrapped in those concepts lead me to uphold the duty of care imposed upon the defendants in this particular case."

35. Judge LJ agreed, saying at 589A:

> "Nothing in the decisions suggests that the Hedley Byrne principle has been undermined merely because advice has been given by employees of local authorities carrying out their statutory duties."

and at 589H:

> "If it had been necessary to deal with public policy considerations on the facts of what actually happened in this case, policy demands that the plaintiffs should have a remedy to compensate them for damages caused by the instructions of an official vested with authority who not only directed them negligently as to what was required to achieve compliance with the statutory provisions, but also gave them inaccurate information about the true extent of his authority and omitted any reference to their own rights under the statutory provisions. It would be neither just nor fair nor reasonable to hold that a duty of care did not exist or that liability could not be established."

36. The present claim is not precisely analogous with *Welton* because there, the offending conduct was a positive instruction rather than just advice and was tendered officiously in a way which positively misled the claimants. But it is an instance of the *Hedley Byrne* duty extending to a statement made by a local authority official in the context of, but nevertheless outside, a statutory regulation process.

37. Rose LJ's reference to the case of *X* was to this passage in the opinion of Lord Browne-Wilkinson at [1995] 2 AC 633, 763, dealing with the existence of a duty of care where a parent complained that a local authority's psychological advice service had failed to advise her about her child's special educational needs:

> "I turn then to the other duty of care which, it is alleged, the defendant authority owes directly to the plaintiff. There the position

is wholly different. The claim is based on the fact that the authority is offering a service (psychological advice) to the public. True it is that, in the absence of a statutory power or duty, the authority could not offer such a service. But once the decision is taken to offer such a service, a statutory body is in general in the same position as any private individual or organisation holding itself out as offering such a service. By opening its doors to others to take advantage of the service offered, it comes under a duty of care to those using the service to exercise care in its conduct. The position is directly analogous with a hospital conducted, formerly by a local authority now by a health authority, in exercise of statutory powers. In such a case the authority running the hospital is under a duty to those whom it admits to exercise reasonable care in the way it runs it: see *Gold v Essex County Council* [1942] 2 K.B. 293. For these reasons, I can see no ground on which it can be said at this stage that the defendant authority, in providing a psychology service, could not have come under a duty of care to the plaintiff who, through his parents, took advantage of that service. It may well be that when the facts are fully investigated at trial it may emerge that, for example, the alleged psychology service was merely part and parcel of the system established by the defendant authority for the discharge of its statutory duties under the Act of 1981. If so, it may be that the existence and scope of the direct duty owed by the defendant authority will have to be excluded or limited so as not to impede the due performance by the authority of its statutory duties. But at this stage it is impossible to say that the claim under this head must fail."

38. The authorities therefore lead to the conclusion that when public officials give advice, they may, depending on the circumstances, owe a duty of care and be liable for economic loss caused by a negligent misstatement.

39. Judge Clarke accepted that a significant part of the losses claimed (though not, in fact, the losses for which damages would be awarded) were pure economic losses which would not normally be recoverable in negligence save for negligent misstatement, applying *Hedley Byrne*. She accepted also that *Hedley Byrne* would require Mr Arshad to show that the Council voluntarily assumed responsibility for the consequences of its advice. Having rejected the comparison with *Reeman*, she found that Mr Joplin knew that Mr Arshad would rely on his advice when deciding whether to buy the Ford Galaxy and that he would act on it promptly. Having found that he did so rely, she concluded:

"I am satisfied that in those circumstances it is fair, just and reasonable to impose a duty because:
i) Mr Arshad has no other course of redress;
ii) The Council had put in place a Policy which suffered from a lack of specificity of the disabled access provisions of the Policy such that it was unclear what vehicle would satisfy them;

> iii) that may have been fair when the Policy was first introduced, and the Council carried out its own inspections of vehicles to ensure compliance with the Policy, but although it ceased inspections of the vehicles, it did not amend the Policy to enable prospective licence applicants to know whether their intended vehicles complied with the disabled access provisions;
> iv) nor did it put in place a list of compliant vehicles as it could have done and has since done;
> v) instead it relied upon prospective licence applicants obtaining an IVA Certificate for their vehicle which the Council wrongly assumed ensured compliance with the disabled access provisions of the Policy, when it did not."

40. Mr Green submits that point (i) was incorrect because Mr Arshad had the further option, which he did not take, of an appeal to the magistrates court against suspension or revocation of his licence. I do not agree. Such an appeal was not a remedy for the Council's negligent advice. If the vehicle did not comply with accessibility requirements – and the negligence is demonstrated by the fact that it did not – then a further appeal would have been dismissed.

41. Mr Green also attacks the judge's points (ii) to (v), categorising them as findings of breach of a duty rather than reasons for imposing a duty. Again, I disagree. All four points are reasons why a person in Mr Arshad's position was dependent on getting accurate advice from Mr Joplin and why he could not be expected to question or go behind that advice.

42. So, although the judge may not have followed the approach of analogy and increment, it seems to me that her reasoning was consistent with that which has been adopted in claims for economic loss which are otherwise comparable. As I have said, advice was given to an identified individual precisely to enable him to comply with what was, at the time, a rather opaque policy. It would have been easy for the Council either to give correct advice or to make any advice subject to caveats requiring Mr Arshad to make specific checks for himself. The policy has since been changed and therefore the circumstances of this case will not recur for the Council.

43. I therefore agree with the judge to the extent that it was fair, just and reasonable in these circumstances to impose a duty of care to avoid the economic loss which plainly would be a reasonably foreseeable consequence of the negligence.

44. However, that leaves the questions of whether there was a duty to avoid causing psychiatric harm and, in particular, of whether such harm was reasonably foreseeable. I therefore consider that ground 1 stands or falls with ground 2.

Ground 2

45. Mr Green contends that Judge Clarke should have found that psychiatric illness, as opposed to mere anxiety, upset or distress, was not a reasonably foreseeable consequence of the negligent advice. Since psychiatric illness was the only damage which was found to be proved (including prescription charges and litigation expenses), the inquiry as to a duty of care should have ended there and the claim should have been dismissed.

46. As I have said, Mr Green first complains that the judge took matters in the wrong order. Although she correctly began her analysis at paragraph 58 of her judgment by identifying foreseeability of loss as the first ingredient of a duty of care, the question then disappeared from the analysis. Only after finding that it was fair, just and reasonable to impose a duty of care did she return to foreseeability of loss when assessing quantum. At paragraph 95, she said:

> "The Council further submits that psychiatric illness was not a foreseeable consequence of a taxi licensing decision, but it is not the taxi licensing decision which was the negligent act. It was the advice. I am satisfied that it was foreseeable that incorrect advice could result in a threat to long-serving drivers' very livelihood, leading to such significant stress and anxiety that it would manifest as depression or other psychiatric injury as happened in this case. The Council had Mr Arshad's ability to work in his chosen profession in its hands, and so principals [sic] discernable from authorities relating to psychiatric injuries at work find a parallel in these particular circumstances. The evidence of Mr Arshad's other witnesses set out in clear terms the difference in Mr Arshad's mood and confidence following the suspension and I accept that evidence."

47. Whilst I agree that this question should have been asked at the outset, Mr Green rightly recognises that he must overturn the judge's actual finding of reasonable foreseeability if ground 2 is to make any headway.

48. Relying on *Hatton v Sutherland* [2002] ICR 613 at [23], to which I return below, Mr Green submitted that "psychiatric disorders are, by their nature, serious departures from normal psychological functioning, and they are thus bound to be less foreseeable than e.g. physical injuries or damage". So, he said, a claimant must surmount the high bar of showing some specific susceptibility on his part, known to the defendant, or that the situation resulting from the negligence was so inherently stressful that psychiatric illness was a generally foreseeable consequence.

49. It is necessary to look closely at what the authorities decide.

50. In *Page v Smith* [1996] AC 155, a motor collision caused no physical injury but triggered a psychiatric illness in the claimant. The House of Lords held that where a defendant owes a duty of care not to cause personal injury it mattered not whether the injury suffered as a result of the defendant's negligence was physical injury or psychiatric injury and liability would be established without the necessity to prove as an independent part of the cause of action that psychiatric injury, in the absence of physical injury, was foreseeable. This was a departure from the previously used test of whether it was reasonably foreseeable that the negligent conduct would cause psychiatric harm to a person of reasonable fortitude.

51. *Frost and others v Chief Constable of South Yorkshire* [1999] 2 AC 455 concerned the claims of police officers who suffered psychiatric injury as a result of tending to victims of the Hillsborough disaster which was caused by the negligence of their employer. A discrete issue was whether such claims fell within the duty owed by an employer not to expose employees to unnecessary risk of injury in the course of their employment. The majority of the House of Lords rejected that head of claim. Lord Griffiths at 463-4 agreed that in a case such as *Page* where a claimant was a "primary victim", i.e. one who was or reasonably believed himself to be imperilled by the defendant's negligence, it was sensible to regard psychiatric injury as part and parcel of personal injury generally. In a case of a secondary victim who was a bystander to a traumatic event, no question of physical injury arose but the question would be whether personal injury in the form of psychiatric injury was reasonably foreseeable (along with the "controls" on such cases, namely that the claimant must have close ties of love and affection with the victim, must have been present at the accident or its immediate aftermath and must have acquired the psychiatric injury by directly perceiving the accident or aftermath: *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310). Lord Griffiths added that the limits which the law regarded as necessary to impose on the recoverable consequences of negligence meant that those not directly imperilled by the negligent conduct could not recover damages in reliance on their status as employees. Lord Goff, dissenting, reviewed the history of liability in tort for psychiatric injury. He noted that it has long been the law that where the psychiatric injury suffered by the plaintiff is consequential upon physical injury for which the defendant is responsible in law, the defendant will be bound to compensate the plaintiff in respect of the former even if unforeseeable. However, he rejected a proposition that being within the range of foreseeable physical injury was a condition for such liability. He viewed the police officers as primary rather than secondary victims and therefore not subject to the "controls" which apply to claims by the latter, and considered that

psychiatric injury was a foreseeable consequence of negligence by their employer. Lord Steyn at 492-8 rejected the suggestion, based on *Page v Smith*, that no distinction is or ought to be made between principles governing the recovery of damages in tort for physical injury and psychiatric harm. Policy considerations explained why there were "different rules for the recovery of compensation for physical injury and psychiatric harm". Those considerations were (1) the difficulty of distinguishing between psychiatric injury and mere emotions such as grief, (2) the danger of psychiatric injury being unconsciously triggered in claimants by the prospect of compensation, (3) the potential width of the class of claimant for "pure psychiatric harm" and (4) the danger of liability on defendants being disproportionate to tortious conduct "involving perhaps momentary lapses of concentration". Employee status did not enable claimants to bypass "the ordinary rules of the law of tort which contain restrictions on the recovery of compensation for psychiatric harm". Recognition of the officers' claims would be too substantial an expansion of "the existing categories in which compensation can be recovered for pure psychiatric harm". Lord Hoffmann at 502 observed that "… if the foreseeability test was to be taken literally and applied in the same way as the test for liability for physical injury, it would be hard to know where the limits of liability could be drawn. In all but exceptional cases, the only question would be whether on the medical evidence, the psychiatric condition had been caused by the defendant's negligent conduct." He noted the authorities which instead took a restrictive approach to liability for psychiatric injury, and at 507 rejected the proposition that an employment relationship justified a different approach.

52. In *McLoughlin v Jones*, psychiatric illness was assumed to have resulted from the negligence of the claimant's solicitors who failed properly to defend him in criminal proceedings, leading to his wrongful conviction and imprisonment. The court at first instance decided a preliminary issue of whether the illness was a reasonably foreseeable consequence of the negligence (or was too remote a consequence of any breach of contract to be recoverable) in the defendants' favour. The Court of Appeal overturned that ruling and remitted all issues for trial. Brooke LJ referred to *Frost*, to *Walker v Northumberland County Council* [1995] ICR where an employee recovered damages for a mental breakdown caused by the strain of doing the work his employer required him to do, and then to the "battery of tests" arising from House of Lords cases. First he considered the "purpose test", noting that the purpose of the solicitors' engagement was that they should minimise the risk of their client being convicted and suffering the consequences of conviction. Then, on the "assumption of responsibility test", he found it reasonable to conclude that the solicitors had assumed responsibility for those consequences. He was not assisted by the "distributive justice" test which was considered in *Frost* with regard to the relative merits of

different categories of claim. Finally he thought the three-stage *Caparo* test would be satisfied on the facts. He held that, because the individual client was known to the solicitors, the "person of reasonable fortitude" test should not apply. The question (at 1328) was whether a person in the defendant's position would perceive a sufficient likelihood that the claimant would suffer psychiatric injury. Hale LJ (as she then was) explained that the "controls" used to limit liability to secondary victims, including the assumption that the victim is a person of reasonable fortitude, do not apply in a case where the claimant suffers psychiatric illness directly because of the acts or omissions by the defendant towards him. She referred to the four reasons given by Steyn J in *Frost* why the law was still reluctant to treat mental disorders in the same way as any other personal injury. The test, Hale LJ said at [59], should be whether:

> "… psychiatric injury to this claimant should be the reasonably foreseeable result of the defendant's negligence. In deciding this issue, the context of loss of liberty and the character and personality of the claimant are of particular importance. Psychiatric evidence may be helpful, although of course not determinative."

In finding that there was at least a triable issue of whether the harm had been foreseeable, Hale LJ drew a contrast with *Cook v Swinfen* [1967] 1 WLR 457 in which a claimant's claim against her solicitors failed because psychiatric injury was held, on the facts, not to be a reasonably foreseeable consequence of the solicitors' negligent handling of her divorce proceedings.

53. Then, in *Hatton v Sutherland*, the Court of Appeal considered what the test should be for claims by employees for damages in respect of psychiatric injury caused by stress arising from their employment. It was not an easy question because many jobs are stressful by their nature without the employer thereby being at fault in any way. The answer was that there were no special control mechanisms applying to such claims, though they gave rise to difficult issues of foreseeability, causation and breach of duty, and that the correct test (at [25]) was "whether a harmful reaction to the pressures of the workplace is reasonably foreseeable in the individual employee concerned. Such a reaction will have two components: (1) an injury to health; which (2) is attributable to stress at work."

54. Hale LJ, giving the judgment of the Court, explained at [23]:

> "Mr Owen, for the employer in Mr Bishop's case, saw this as a question of defining the duty; Mr Lewis, for the employer in Mrs Jones's case, saw it as a question of setting the standard of care in order to decide whether it had been broken. Whichever is the correct

analysis, the threshold question is whether this kind of harm to this particular employee was reasonably foreseeable. The question is not whether psychiatric injury is foreseeable in a person of 'ordinary fortitude'. The employer's duty is owed to each individual employee, not to some as yet unidentified outsider: see *Paris v Stepney Borough Council* [1951] AC 367. The employer knows who his employee is. It may be that he knows, as in *Paris*'s case, or ought to know, of a particular vulnerability; but he may not. *Because of the very nature of psychiatric disorder, as a sufficiently serious departure from normal or average psychological functioning to be labelled a disorder, it is bound to be harder to foresee than is physical injury*. Shylock could not say of a mental disorder, 'If you prick us, do we not bleed?' *But it may be easier to foresee in a known individual than it is in the population at large*. The principle is the same as in other cases where there is a contractual duty of care, such as solicitors' negligence: see *Cook v Swinfen* [1967] 1WLR 457 and *McLoughlin v Jones* [2002] 2 WLR 1279."

[emphasis in original]

55. Hale LJ (at [20]) also approved this conclusion by Simon Brown LJ in *Garrett v Camden London Borough Council* [2001] EWCA Civ 395:

"Many, alas, suffer breakdowns and depressive illnesses and a significant proportion could doubtless ascribe some at least of their problems to the strains and stresses of their work situation: be it simply overworking, the tensions of difficult relationships, career prospect worries, fears or feelings of discrimination or harassment, to take just some examples. Unless, however, there was a real risk of breakdown which the claimant's employers ought reasonably to have foreseen and which they ought properly to have averted, there can be no liability."

56. From all of this I conclude that whilst there were no special "controls" at play in a claim of the present kind, it was necessary for the judge to consider reasonable foreseeability in light of the policy considerations identified by Lord Steyn in *Frost*. The judge was required to ask (by analogy with *Hatton*) whether the circumstances of the negligent advice should have been recognised by Mr Joplin as entailing not just a prospect of a stressful situation in Mr Arshad's work, but a "real risk of breakdown". If personal characteristics of Mr Arshad had been known to him, they would have been relevant to that question. Since it seems that they were not, I consider that the hypothetical question for Mr Joplin was whether there was such a real risk in the case of a person of reasonable fortitude.

57. The same approach is seen in *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] IRLR 112. There, an employer unlawfully suspended an employee from his post in response to a

disciplinary allegation without giving him an opportunity to state his case, the ultimate effect of which was that he never returned to work. The Court of Appeal held that whilst the *Hatton* test in an employment case could be applied to a one-off event such as the unfair imposition of a disciplinary sanction, this employer without knowledge of pre-existing vulnerability to psychiatric harm could not reasonably have foreseen that psychiatric harm would ensue. Underhill LJ said at [125]:

> "I start from the position that it will in my view be exceptional that an apparently robust employee, with no history of any psychiatric ill-health, will develop a depressive illness as a result even of a very serious setback at work."

58. There was not a great deal of evidence available to the judge. It is not suggested that Mr Joplin knew anything about Mr Arshad which should have made him anticipate a particular susceptibility to psychiatric illness. Nor did Dr Balu enter into any detailed discussion of the likelihood or otherwise of such illness being caused in a case like this. His report simply said:

> "The connection between work related stress, unfair treatment at work and serious mental health problems including depression, anxiety is well documented in several studies. In my opinion, Mr Arshad's deterioration in mental wellbeing can be directly attributed to problems at work, (Precipitant of depressive episode) which started with his loss of licence in 2017 and the associated events."

59. Thus the medical basis for the judge's conclusion was by reference to work-related stress. In my view, this case therefore was to some degree analogous to the employment cases. To the extent that it differed, it seems to me that the Council was in a more arm's length relationship with Mr Arshad than an employer would have been.

60. Applying the approach taken in cases such as *Hatton* and *Yapp*, I have reluctantly concluded that the judge's analysis quoted at paragraph 46 above was not sufficient. Mr Arshad was subjected to a serious setback relating to his work, but that setback needed be considered in detail. The effect of the negligent advice crystallised in the suspension in February 2017. The illness had arisen by April 2017 and therefore was not triggered by later events, such as the differential treatment of Mr Arshad on the one hand and the other drivers with appeals on the other, which I accept must have had a further impact on him. The suspension must have been worrying for him, but it did not prevent the operation of his HCVL pending appeal. Nor, at any stage, did it prevent him from working (as he did) as a private hire driver. Whilst the judge said that these events threatened his livelihood, and to some degree they did, I consider that they were no more serious than the disciplinary action in

Yapp. *Yapp* shows that even a serious threat to a person's career, by itself, is not enough. Meanwhile the judge's analysis did not expressly recognise the caution with which courts have approached the question of a duty not to cause pure psychiatric harm. I doubt that the judge had the benefit of the detailed comparisons with other cases which I have had.

61. As in *Yapp*, it seems to me that an appellate court is now in broadly as good a position as the judge was to decide the question of reasonable foreseeability.

62. I acknowledge both the difficulty which this question posed for the judge in the circumstances of the trial and, with great regret, the consequences of this appeal for Mr Arshad. However, it seems to me that whilst any serious setback may be capable of causing a degree of psychiatric harm to anyone, psychiatric injury in this case was not so reasonably foreseeable as to make it appropriate for a local authority, giving discretionary pre-application advice on a licensing matter, to owe a duty of care not to cause pure psychiatric harm.

63. Grounds 1 and 2 therefore succeed, despite Mr Arshad's very real reasons for being aggrieved by the Council's conduct towards him.

Ground 3

64. By this ground Mr Green argues that the necessary chain of causation was not proved. The tortious conduct was the giving of negligent advice about the Ford Galaxy in December 2016. Mr Green puts his case in the proposition that the illness flowed not from the advice itself but from the consequences of having followed that advice. This ground is now academic but I shall concisely set out my conclusion on it.

65. It is necessary to piece the facts together. Mr Arshad's licence was suspended in February 2017 although he could still drive pending his appeal. Dr Balu's account of the history given by Mr Arshad includes the following:

> "His taxi work was his main source of income and he believes that the taxi licence was suspended unfairly which put a lot of pressure on his life in general. He also faced significant financial problems as his tax credits and childcare credits were stopped. His Universal Credit application was refused as he could not keep up his National Insurance contribution. He found it very difficult to maintain his family without work and his father had to pay for his family upkeep and pay for them to go back to Pakistan for a few months. Due to airline regulation, he could not bring back all the three children to the UK and hence he had to leave one of the children in Pakistan with his sister in law. He finds it very painful to accept the fact that he is not even able to keep his family together because of difficult

financial situation brought on by the issues with his taxi licence, for no fault of his. He first met a psychiatrist in Pakistan in April 2017 for the treatment of his depression and was prescribed antidepressant medicines. He was continuously taking medicines and when he ran out of his supplies in December 2018 his depression got worse. He suffered from low mood and occasional suicidal thoughts but he had to keep working to fund his family's needs. Although he got his taxi licence back in August 2018, he was temporarily suspended in 2019 for not keeping wheelchair ramps in his car. He said that the council had classified his car as not suitable for wheelchairs and could not understand why they penalised him for not keeping wheelchair ramps in his car. He was the chairman of Wokingham Hackney drivers association and was blamed for things which he was critical about. He said that the council officials never had the courage to apologise for any of their wrongdoing and their denial of injustice had caused immense distress, anxiety and depression. Because of the immense pressure, he had to resign as the chairman of the association and decided to end his 15 year career as a taxi driver without knowing what to do next in his life. He has lost so much confidence to the point that he is not able to consider going back to chair the association in spite of repeated invitations from his fellow taxi drivers."

66. Mr Green points out that Mr Arshad did not experience the financial pressures and longer hours of working as a private hire driver until June 2017.

67. Judge Clarke said the following about the evidence of fact:

> "83. Mr Arshad's evidence was that the effect of being suspended and then losing his HCVL affected caused him immense distress and anxiety and adversely affected his physical and mental health, compounded by the needs of his infant triplets [born in January 2017], money worries and longer hours away from home doing private hire work … In oral evidence he said that because of a crisis in his mental state after his suspension, he was unable to make any decisions …".

68. The judge also found that, just before the vehicle was inspected in February 2017, Mr Arshad's father had booked for the family to go to Pakistan from 26 March to 29 May 2017. As to this:

> "85. Mr Arshad' s oral evidence was that his father had booked the tickets because he wanted the family to go to Pakistan, but he, Mr Arshad, was resisting it because he thought the children were too young to travel. He said the tickets were bought without his knowledge, and after he was suspended and he was struggling to cope he had no option but to agree with his father, take the tickets and fly to Pakistan ….

> 86. I accept Mr Arshad's evidence about his mental health after the suspension of the licence. I have heard his evidence that he consulted a psychiatrist and I have seen the prescription for anti-depressants that he was given. I also consider that his evidence that he was struggling to function, worried about finances because his wife was no longer earning, and stressed by the presence of three tiny children who he felt unable to properly support was honestly given … I do not think he was lying about his father wanting him to go to Pakistan, Mr Arshad resisting because of the age of his children, but when his mental health and his financial condition began to worsen, allowing his father to take over and direct the family to Pakistan. Of course I have found that his financial condition worsening was not because of the suspension but because his wife had stopped working."

69. The judge then set out the psychiatric symptoms as described by Dr Balu. In respect of causation she said:

> "95. The Council submits that the depression is not caused by a tortious act, but I am satisfied that the Council's negligence as found, namely in providing him with incorrect advice that his Ford Galaxy was an appropriate vehicle to be licensed as a hackney carriage was causative of Mr Arshad's psychiatric injury, because if that incorrect advice had not been given, Mr Arshad would not have bought it and would not later have had his licence suspended and then revoked."

70. She went on to make her observations about foreseeability which I have discussed above.

71. Mr Green argues that the advice itself did not cause any distress or illness. He draws a parallel with *Grieves v F T Everard & Sons Ltd and another* [2007] UKHL 39, [2008] 1 AC 281. There, an employee was negligently exposed to asbestos dust. The caused him to develop pleural plaques. Pleural plaques show that asbestos fibres have penetrated a person's lungs and therefore that the person is at risk of developing an asbestos-related disease, but they do not in themselves amount to an actionable injury. The detection of pleural plaques and consequent perception of future risk of disease caused Mr Grieves such anxiety that he developed a psychiatric illness. The House of Lords ruled, first, that where the employer had no knowledge of how a particular employee might react to such a situation arising many years after the exposure, the test was whether it was reasonably foreseeable that a person of reasonable fortitude would suffer psychiatric illness, and second, that it was not reasonably foreseeable that such a person would suffer such illness as a result merely of the apprehension that asbestos-related disease might occur in future. As Lord Hope put it:

> "55 Secondly, the causal chain between his inhalation of the asbestos dust and the psychiatric injury is stretched far beyond that which was envisaged in *Page v Smith* [1996] AC 155. That case was concerned with an immediate response to a sudden and alarming accident, for the consequences of which the plaintiff had no opportunity to prepare himself. In this case Mr Grieves inhaled asbestos dust for about eight years. It was not until the end of that period that he became worried. This was because of the risk that he or his wife or daughter might contract a disease in the future. And his depression did not occur until he was told 20 years later about the results of his chest x-ray. He believed then that his worst fears were being realised. But this was because of the information that he had now been given by his doctor, not because of anything that happened or was done to him by his employers while he was inhaling the asbestos. His exposure at work was not to stress, but to risk …".

72. In my judgment the present case is quite different and there was no lack of immediacy. The negligent advice immediately caused Mr Arshad to buy a non-compliant car. That promptly caused his licence to be suspended and his business to be disrupted. That, in combination with other factors and within a fairly short period, caused him to develop a stress-related depressive condition.

73. As a matter of law, there is no obstacle to recovering damages where bad advice has led to a person entering a flawed transaction which in turn causes them to suffer loss of a reasonably foreseeable kind. It is normal for the loss to flow not directly from the actual giving of the advice but from its immediate consequences. The barrier to this claim was foreseeability, not causation.

74. Nor was the claim defeated by the existence of other factors which contributed to the harm. Into that category could fall the behaviour of other taxi drivers who joked about Mr Arshad's situation, which the statement of one witness connected with "his stress". Be that as it may, that witness did not give live evidence, the judge did not rely on his evidence and it could hardly have displaced the evidence of Dr Balu as to medical causation.

75. I perceive no error in the judge's conclusions as to causation and ground 3 therefore fails.

<u>The Council's renewed application for permission to appeal</u>
<u>Ground 4</u>

76. Mr Green sought my permission to renew ground 4, by which he contends that the judge in assessing damages for pain and suffering

made an over-generous award, applying the wrong category from the Judicial College guidelines.

77. This ground too is now academic but again, I shall address it concisely.

78. The Judicial College guidelines (15th edition which was in force at the time of the trial) set out categories for psychiatric damage. They indicated that where post-traumatic stress disorder was involved (so not in the present case), that would push awards towards the upper end of each relevant bracket. Relevant factors included (i) the effect on the claimant's ability to cope with life, education and work, (ii) the effect on his relationships with others, (iii) the extent to which treatment would be successful and (iv) future vulnerability. The three potentially relevant brackets were then defined as follows:

> "(a) Severe £51,460 to £108,620
> In these cases the injured person will have marked problems with respect to factors (i) to (iv) above and the prognosis will be very poor.
>
> (b) Moderately Severe £17,900 to £51,460
> In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases involving psychiatric injury following a negligent stillbirth or the traumatic birth of a child will often fall within this bracket. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category.
>
> (c) Moderate £5,500 to £17,900
> While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.
> Cases of work-related stress may fall within this category if symptoms are not prolonged."

79. Thus the differences between brackets (b) and (c) are "significant problems" continuing as opposed to "marked improvement by trial", and a prognosis that is merely "much more optimistic" than "very poor" as opposed to "good".

80. The judge, awarding £42,500, put the case about two thirds of the way up the "moderately severe" bracket. Mr Green contends that it should have been in the "moderate" bracket or, at any rate, lower in the bracket. He points to the diagnosis of "mild to moderate depressive disorder", the

absence of any PTSD, the absence in the psychiatric evidence of any prognosis, the lack of any direct evidence about ability to cope at work and to Mr Arshad's positive family relationships.

81. My impression is that the award was generous. Mr Green makes logical criticisms of it. Ground 4 is arguable and I grant permission for it.

82. Nevertheless, having considered ground 4, I dismiss it. Here, too, the judge had a difficult task. She heard evidence of fact from a litigant in person by CVP and read a somewhat cursory report from an expert who was not called to give oral evidence. It was of course for Mr Arshad to prove his case, but the judge had to grapple with the material before her and do justice. In my judgment it was open to her to find that the psychiatric condition has lingered and, although it is responding to treatment, that the prognosis is uncertain. It was also open to her to find that it has combined with difficult family circumstances to prevent Mr Arshad from ever returning to his original occupation as a hackney carriage driver and as chairman of the drivers' association. In those circumstances the threshold conditions for bracket (b) were satisfied. It was for the judge, having heard Mr Arshad's evidence, to decide where in the bracket to place it. I cannot conclude that she was plainly wrong.

Ground 5

83. Again, this ground is now academic because the judge's original costs order must be entirely revisited. I set out my brief conclusion.

84. The judge, as I have said, allowed one head of claim in Mr Arshad's favour and dismissed the other claims. She made an award of costs in his favour. She did not award the Council any costs despite its victory on many of the issues.

85. Although I have seen only a sketchy note of the argument and decision on costs, it seems that there was some discussion about "qualified one-way costs shifting" or "QOCS".

86. Where a person brings a personal injury claim, CPR rule 44.14 provides that orders for costs made against them may be enforced without permission but only up to the amount of any damages and interest awarded to them. However, the effect of rule 44.16(2)(b) is that such costs orders can be enforced to their full extent, with the court's permission and to the extent that the court considers just, if the claimant has also made a claim other than a personal injury claim.

87. The Council argued that this exception applied because, in addition to his claim for personal injury in the form of psychiatric illness, Mr

Arshad also brought claims for financial loss and claims for discrimination and breach of statutory duty.

88. It seems that the judge rejected this argument because (1) Mr Arshad was a litigant in person and (2) he had suffered psychiatric injury.

89. Mr Green submits that these reasons were irrelevant because (1) the status of litigant in person is irrelevant to the application of the CPR and (2) any claimant in his position will have some injury and the fact that it was a psychiatric injury in the case made no difference.

90. It seems to me that inviting the judge, and inviting this Court, to apply the exception to QOCS was to put the cart before the horse. The QOCS rules concern only the extent to which a defendant can enforce a costs order. But in this case the Council did not obtain any costs order. The question of enforcement never arose.

91. I put this to Mr Green who said that if necessary, he would ask permission to amend ground 5, substituting an argument that the judge should have exercised her discretion to make some costs order in the Council's favour to reflect its successes, and that she should then have applied the QOCS exception.

92. I cannot permit that amendment. It is a different legal argument. Mr Arshad as a litigant in person was quite unable to deal with it without notice. And in any event, where the judge had awarded him damages of £42,500, it was within her discretion to treat him as the successful party and not to award costs against him, and therefore any appeal against that order would have faced an uphill struggle.

93. In the circumstances I refuse permission for ground 5.

Mr Arshad's renewed application for permission for a cross-appeal

94. Mr Arshad made oral submissions to me and helpfully summarised his proposed grounds of appeal, numbered from A to E, in a written document.

95. By ground A he challenges the dismissal of his claim for discrimination on grounds of race or religion. In particular he contends that the judge erred by not applying a reversed burden of proof and requiring the Council to prove that there had not been discrimination on a proscribed ground.

96. The short answer to that point is that, whether or not the judge correctly identified the burden of proof, she made clear findings of fact in the Council's favour. On the evidence she was entirely satisfied that neither

race nor religion was the reason why Mr Arshad was treated differently from others. It follows that the incidence of the burden of proof could not have changed the outcome.

97. Mr Arshad also pressed on me the strength, as he saw it, of his discrimination claim on the facts. Nevertheless, the factual evidence was before the judge and I am satisfied that she did not fail to have proper regard to any of it.

98. By ground B he objected to Judge Clarke's conclusion that the statutory licensing duties in this case could not sound in any claim for damages. He referred me to sections 165 and 167 of the Equality Act 2010, which require local authorities to publish lists of vehicles which are designated as wheelchair-accessible and drivers of such vehicles to provide such access. He submitted that there was no public policy reason for not making the duties actionable, that harm was foreseeable, that proximity between the local authority and drivers was admitted and that imposing liability was fair, just and reasonable.

99. In particular, Mr Arshad impressed on me that the Department for Transport had issued statutory guidance on the application of sections 165-167, that the Council had not followed it and that this guidance document was not before the judge at the trial.

100. Leaving to one side the question of whether regard can be had to the guidance on appeal if it was not cited at trial, I have looked carefully at the guidance and in my judgment it does not contain anything which bolsters the suggestion that breaches of the Council's duties with regard to licensing should be compensatable in damages. I perceive no arguable error in Judge Clarke's careful analysis of this legal issue.

101. By ground C, Mr Arshad contended that the Council's conduct had violated his rights under ECHR Article 1 of protocol 1 and under Articles 6, 8, 9, 10 and 14.

102. The short answer to that contention is that those claims were not before the judge. They cannot now be raised on appeal.

103. The same is true of a claim for misfeasance in public office, which Mr Arshad urged on me in his oral submissions.

104. By ground D Mr Arshad points out that on three separate occasions, on 27 November and 17 December 2018 and 31 January 2019, he served documents on the Council which he describes as "legal notices", requiring them to put matters to rights and stating that if they did not respond, he would regard them has having accepted that they were at fault.

105. This again cannot change my view of the case or of the judge's judgment. It is perfectly clear that Mr Arshad's claims have always been opposed. There is no sign that the judge was asked to rule that the Council had made any implicit admission by not responding to any document.

106. By ground E Mr Arshad objects to the judge's approach to damages and in particular, I think, to her refusal to award aggravated damages or exemplary damages. He submits that the facts are such that an award of that kind should have been made.

107. That, however, cannot sit with the factual findings which the judge made and which, it seems to me, she was entitled to make after hearing the evidence.

108. None of the grounds of the cross-appeal is arguable and I therefore refuse permission.

Conclusions

109. The Council's appeal is allowed.

110. When this judgment was circulated in draft, I invited written submissions on a consequential order. Mr Arshad and Mr Green duly responded. Mr Green provided a draft order for which I am grateful.

111. Mr Arshad also made further written submissions inviting me to change some of the conclusions set out above. Those submissions repeated matters which he had raised earlier. They did not persuade me that I have made any error and I did not find it necessary to invite a further response from Mr Green. Any application for permission to appeal would have to be made to the Court of Appeal under CPR 52.7(1).

112. It is clear that Mr Arshad's claim must be dismissed and the judge's award of damages set aside. An interim payment of £10,000 by the Defendant must be repaid.

113. It is equally clear that the Defendant as the successful party should have an order for its reasonable costs here and below.

114. However, the CPR provisions about "QOCS" apply to this claim because it included a claim for damages for personal injuries. I have already referred to CPR 44.14 (1) which provides:

> "(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such

> orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant."

115. So in this case where there is no award to the Claimant, the Defendant's costs order cannot be enforced unless an exception applies. As I have said, an exception applies in this case by virtue of CPR 44.16:

> "(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –
> (a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or
> (b) a claim is made for the benefit of the claimant other than a claim to which this Section applies."

116. The proceedings included the claims for financial loss arising from the various causes of action to which I have referred above, and these non personal injury claims were not "a claim to which this Section applies". This is therefore not a case in which the Defendant's costs order is automatically not enforceable. Instead, enforceability is a matter for the Court's discretion.

117. Neither party has suggested that I should remit that question to the trial judge and in my judgment, it is in the parties' interests and in the interests of justice for me to determine it.

118. The Court of Appeal gave guidance on the exercise of the discretion in *Brown v Commissioner of Police of the Metropolis and another (EHRC intervening)* [2019] EWCA Civ 1724, [2020] 1 WLR 1257. There, Coulson LJ referred to "mixed" proceedings, i.e. those with claims in additional to a personal injury claim, and said:

> "57. But in such proceedings, the fact that there is a claim for damages in respect of personal injury, and a claim for damage to property, does not mean that the QOCS regime suddenly becomes irrelevant. On the contrary, I consider that, when dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the finishing point too, of any exercise of the judge's discretion on costs. If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a "cost neutral" result through the

> exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will—in one way or another—continue to apply …
>
> 58. It is however important that flexibility is preserved. It would be wrong in principle to conclude that all mixed claims require discretion to be exercised in favour of the claimant, because that would lead to abuse, and the regular "tacking on" of a claim for personal injury damages (regardless of the strength or weakness of the claim itself) in all sorts of other kinds of litigation, just to hide behind the QOCS protection (as Foskett J warned in *Siddiqui* [2018] 4 WLR 62)."

119. In *Brown*, as in this case, there were genuinely mixed claims so that the proceedings could not just be characterised as a personal injury claim with some consequential economic loss. There, as here, the personal injury claim failed. Other claims succeeded but fell short of a Part 36 offer made by the defendant. Coulson LJ ruled that the claimant should not be able to avoid the usual costs consequences of that, merely because she had an unsuccessful personal injury claim.

120. However, in this case the arguments in favour of a costs-neutral outcome do not consist only of the fact that Mr Arshad had an unsuccessful personal injury claim. He was the victim of negligence, although suffering loss of a kind which I have ruled was not reasonably foreseeable. The situation arose in part because of the defective nature of the Council's policy. He was then also the victim of treatment which, for no apparent good reason, was different from that of other drivers in an analogous position. Meanwhile the fact that he had an unsuccessful personal injury claim, though not entitling him to automatic protection, still provides some protection under the rules by subjecting enforcement to the discretion under CPR 44.16. It does seem to me that the personal injury element was a substantial part of the claim. That claim failed not because it lacked factual merit, but because of the legal issues around claims for psychiatric harm which are challenging for lawyers, let alone for litigants in person.

121. Bearing in mind all the facts, and what I have been told about their impact on Mr Arshad and his personal and financial situation, I am not persuaded that it is "just" to permit any enforcement of the costs order against him.

122. It will be scant consolation to Mr Arshad, but I must end by recording my sympathy for the great difficulties which he has endured through no fault of his own.

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Claim No: QA-2021-000237
F84YJ610

On appeal from **OXFORD COUNTY COURT (HHJ Melissa Clark)**

B E T W E E N :

MUHAMMAD SOHAIB ARSHAD

Claimant/Respondent

-and-

WOKINGHAM BOROUGH COUNCIL

Defendant/Appellant

ORDER

BEFORE The Honourable Mr Justice Bourne

UPON considering the Appellant's appeal

AND UPON considering renewed applications for permission to appeal and to cross-appeal from the Appellant and the Respondent respectively

AND UPON hearing Mr David Green of counsel for the Appellant and the Respondent in person

IT IS ORDERED THAT:

1. In respect of the Appellant's renewed application for permission to appeal:

   a. permission is granted in respect of Ground 4;

   b. permission is refused in respect of Ground 5.

2. In respect of the Respondent's renewed application for permission for his cross-appeal, permission is refused.

3. The Appellant's appeal is allowed and the Respondent's claim is consequently dismissed.

4. The Respondent do pay the Appellant's costs, here and below, on the standard basis, such costs not to be assessed or enforced without further order.

5. The Respondent shall, by 4pm on 20 October 2022, pay to the Appellant £10,000.00 as reimbursement of the payment on account of the judgment sum below.

29 September 2022