Neutral Citation Number: **[2023] EWHC 707 (KB)**

Case No: G90MA212

IN THE HIGH COURT OF JUSTICE

KINGS BENCH DIVISION

MANCHESTER DISTRICT REGISTRY

(Sitting at Liverpool Civil and Family Court)

Liverpool Civil and Family Court

Date: 22/02/2023

Before

HIS HONOUR JUDGE GRAHAM WOOD KC

Between :

COLETTE OLIVIA ASHTON	**Claimant**
- and –	
THE CITY OF LIVERPOOL YOUNG MEN'S CHRISTIAN ASSOCIATION	**Defendant**

Gerard Martin KC and Matthew Stockwell (instructed by **Potter Rees Dolan, a Hugh James Business**) for the **Claimant**

Christopher Kennedy KC and Zoe Thompson (instructed by **Clyde and Co Solicitors**) for the **Defendant**

Hearing dates: 9th to 13th January and 18th January 2023

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APPROVED JUDGMENT

His Honour Judge Graham Wood KC

Introduction

1. On the late afternoon of 1 August 2017, Colette Ashton, the Claimant in this action, was seen to be hanging by her fingertips from a window sill on the fourth floor of the Liverpool YMCA, in Leeds Street, just outside the city centre, and heard crying for assistance before falling, after a short period, and landing on the first floor ledge of the building, sustaining serious injuries. How she came to be hanging from the window in the first place has been the central issue in this case, and in particular whether any liability attaches to the Defendant, the occupier of the building for the consequences. The Defendant's case is that she deliberately exited the fourth floor window of the room which she occupied in an impulsive attempt to kill herself, before having a rapid change of mind, whereas the Claimant's case is that she fell from the window, the opening of which was not restricted, when trying to retrieve washing which had been drying.

2. It is not in dispute that the fall itself was accidental, even if the Defendant's case is that the Claimant was intentionally outside the window, and therefore it is appropriate to refer to this incident as an "accident".

3. This issue has been the subject of extensive evidence from oral witnesses, as well as expert witnesses in engineering, psychiatry and pain management, and substantial documentation in a trial on the question of liability which lasted five days. I heard the submissions of counsel on Wednesday 18th January and reserved my judgment for a detailed consideration of the evidence, which is now provided.

4. For ease of reference and shorthand purposes for the most part I will refer to the key witnesses set out in the *dramatis personae* below, by initials.

Collette Ashton (Claimant)	CA
Hannah McQuillan (daughter)	HM
Laura Gutteridge (eye witness)	LG
Zoe Dailly (eye witness)	ZD
Paul Rigby (CA boyfriend)	PR
Ellie McNeill (YMCA CEO)	EM

Jacki Darlington	JD
Mick Reynolds	MR
Alice Phipps (support worker)	AP
Chris Murphy (maintenance operative)	CM
Mark Garner (housing manager)	MG

Background and undisputed facts

5. CA is now 50 years old, and was 45 at the time of the accident. She has led what has been consistently described as a chaotic lifestyle. She had a daughter at 16 years of age and another child four years later from a different relationship, but was not able to care for either of them, and they were looked after by her parents. There is some indication that her mother was a victim of domestic violence at the hands of her husband, CA's father, and it is said that he had a drink problem. This was not confirmed by either of the parents who gave evidence. In her early teenage years CA began drinking heavily herself, and taking a range of class A and class B drugs. She developed addictions, leading to mental health problems and criminal involvement, principally shoplifting, because of the need to fund her lifestyle. There were periods spent in prison and CA rarely had a settled abode. In the past, she had been known to self-harm, and there was some documented evidence of a suicide attempt following a miscarriage.

6. Her addictions and mental health difficulties were compounded by a physical disability which arose from a below right knee amputation, necessary when CA developed MRSA as a consequence of her frequent IV drug use. She became a significant wheelchair user, and would often find herself homeless, sleeping rough on the streets. At the relevant time (2017) CA was in a relationship with Paul Rigby, another addict and rough sleeper who passed away approximately a year later.

7. The Defendant is a charitable not-for-profit organisation which provides short and medium stay accommodation for vulnerable adults who would otherwise have been homeless. It owned and managed the hostel in Leeds Street on the edge of Liverpool city centre, the building which has been the focal point of this claim. Whilst described as a caring organisation, essentially the Defendant provided support but not social care as such for the individuals who were housed at the hostel. These individuals, who were single and homeless, had a variety of needs, many of which were complex, and were usually those who could not be accommodated by other services. The Defendant had a contract with Liverpool City Council and Sefton Council to provide such accommodation and was considered to be a "last

port of call" for these vulnerable individuals. Accommodation would be provided for up to 18 months although in some cases it could be much longer.[1]

8. The building itself is a modern (approximately fifteen years old) structure with accommodation set out over some six floors above the ground level which contains common areas, lounges, administration etc. Some of the accommodation is comprised in self-contained small flats with modest kitchens and bathrooms, and the rest in bedrooms with shared facilities. The floors are allocated to different types of unit with the fourth floor, D level, assigned to the self-catering flats. There was 70 separate units in total.

9. According to the unchallenged evidence of EM, the Defendant's CEO, skilled support staff are employed to provide levels of support planning to enable the residents to gain greater independence and eventually move on. This is not hands-on care, as such, but adopts a relational approach to understand the complex needs of the various individuals living there, and to help them manage their problems, including addictions, by accessing other services.

10. CA entered into an excluded license agreement with the Defendant on 11th January 2017 entitling her to occupy flat D01 on the fourth floor. Prior to this she had been living rough following her release from Styal prison in 2016. The court has not been made aware of the nature or length of the prison sentence, and has only general information that the Claimant had a history of criminal offending. It would seem that although she had this accommodation available throughout 2017, it was not used continuously, and there were times when she preferred to stay out, presumably living rough on the streets. She had been in a relationship with Paul Rigby who also had accommodation at the hostel.

11. Flat D01 was specifically designed for disabled users. The room comprised a lounge/ bedroom, with a separate small kitchen area and bathroom area. The rectangular room which led from the corridor measured 3.5m by just under 3m and had a window 1.55 m wide and 1.42 m high, with six separate sections one of which was the opening casement, 0.77 m wide and 0.726m high. This casement was immediately above a sill which was 0.66 m from floor level. This was relatively low, but was a feature for a disabled user to enable access to the window. The windows in the other rooms for the non-wheelchair users and those without disabilities were significantly higher.

12. This window looked out onto Leeds Street, but not directly, being perpendicular to the rest of the units on the fourth floor. Although each of the floors had projecting steel structures from the main face of the brickwork/stonework, these were design features (or *brises soleil*),

[1] CA was resident there for at least three years after the accident

it would seem, and not intended to provide any interruption for falling objects (or persons) ejected from the levels above. In other words the drop from the fourth floor, and the Claimant's window, was three floor levels to the canopy or parapet extension which overlay the ground floor.

13. It is clear from the design of these windows that they were not meant to be opened beyond a limited distance, sufficient to provide ventilation, preventing any risk to the occupier or person using the window. The nature of the mechanism provided to restrict the opening has been hotly disputed on the evidence which I will consider later in this judgment. However, it is accepted that on either side of the opening casement, which moved outwards, with the lower leading edge moving upwards, and the higher trailing edge downwards, there were two built-in restrictors comprising hinged metal arms with one end connected to the window frame and the other to the opening casement. Both these ends were welded onto plates or brackets which were riveted in their respective positions, so that when fully extended the hinged restrictor arms would not allow the window to open more than approximately 100mm. However, it is common ground that these restrictors could, with the use of a special tool, or by someone with special knowledge as to how they could be slid out of position, be disconnected to enable the window to open wider for the purposes of cleaning.

14. Within CA's flat unit was a washer dryer, provided to enable the Claimant to do her own laundry.

15. I deal now with the undisputed facts relating to CA's accident. It would seem that PR had been staying overnight on 31st July/1st August at the flat. At some point during the morning, a decision was made to go to London Road, as neither had any money for alcohol, and CA needed to collect prescription medication (methadone). It was also hoped that if possible some money could be borrowed from PR's sister to buy alcohol. A two litre bottle of cider was purchased and/or shoplifted and consumed by one or both of them, and later CA made her way back to the hostel, seemingly on her own. Her mood and behaviour when she arrived at the hostel is disputed, but it is not particularly challenged that she was intoxicated, or at least behaving as if she had been drinking when seen by the staff at reception. She made her way up to her room and was apparently upset or even angry in respect of something which had occurred with PR earlier in the day, at one point enquiring whether he had returned to the hostel, and whether he was with another female service user.

16. At approximately 5.30pm, or shortly thereafter, members of the public who were passing by the hostel, including a pedestrian walking from Pall Mall onto Leeds Street, and drivers proceeding along the busy traffic towards the Wallasey tunnel on the dual carriageway, noticed CA "hanging" from the window ledge or some projecting part below the fourth floor window, facing inwards. One of these witnesses even took a photograph on his

mobile phone which depicts the scene. Whilst hanging, CA was heard to cry out for help. Staff within the hostel also became aware of CA's predicament but before any assistance could be provided, and after a period of hanging described as up to three minutes, she did in fact fall approximately three floors, striking her body on the projecting metal structure on the way, before landing onto the ledge or panoply which overhangs the ground floor. The emergency services were called, and access was gained to CA at first floor level through the window of one of the flats in the same part of the building as CA's flat. She was conscious, but clearly seriously injured, and conveyed thereafter by ambulance to a hospital where she was admitted to intensive care. Whilst the injurious consequences are not relevant on a liability only trial, it will be necessary to consider the treatment which CA received, including medication, and the effect which that is likely to have had upon her in the days after the accident, because of the focus on the admission which is alleged to have made at hospital to the Defendant's staff that this was a suicide attempt by her. The expert evidence of the anaesthetists and the psychiatrists is pertinent to this. I will return to it later in my judgment.

17. In addition to the involvement of the paramedics/emergency ambulance crew, several police officers attended and assisted. At that stage the investigation was open, and whilst no suggestion was ever made of a suicide attempt at the time, there was a suspicion that there may have been some criminal involvement, with the implication of PR. This suspicion required CA's room to be secured as a potential crime scene for a short period of time and for the whereabouts and movements of PR to be established. It became clear quite quickly from CCTV that he had not been in or near the room at the relevant time and therefore he was eliminated as a suspect, and the criminal enquiry abandoned. However, a statement was taken from PR. Regardless of the precise cause of the fall, the incident remained a serious one, and with the possibility of CA's injuries proving fatal, it is quite remarkable, as has been noted by others, that the state of the room and the window was not established from an evidential point of view, with the taking of photographs and a closer examination of the point from which she fell. This court has not been assisted by any contemporaneous physical evidence, which has made the fact-finding process all the more difficult. [2]

The issues

18. Before I turn to consider the evidence on the disputed issues, it would be helpful to identify what those issues are. There is broad agreement in respect of the legal aspects which I will consider in more detail later in this judgment, and some of the questions which fall to be asked involved mixed issues of fact and law.

[2] Whilst the police could face some criticism in this regard, in view of the investigation which would be necessary by the building owners and managers, essentially the defendant who at that time had no explanation as to what had it is not clear what evidence he is referring to happened, it was equally incumbent on them and no difficult task, to thoroughly examine the room and the window, and to preserve photographic evidence.

(1) How did CA exit the window of flat DO1?

19. The central question here is whether it was a deliberate or accidental. There is no suggestion that from the point at which the Claimant came to be hanging onto the window ledge/sill, or some other projection she was desperate not to fall and was crying out for help. The only person who knows precisely what happened is CA herself, and it is for this reason that not only her recall from the witness box and in her statements, but also from the various accounts which she has given from time to time are relevant to this question and have been scrutinised closely.

20. Another disputed aspect, the determination of which will depend upon any finding as to whether CA deliberately climbed out, is the causal mechanism involved in an accidental tumbling or rolling out the window. The evidence of the engineers is relevant to this aspect to a limited degree.

(2) In what condition were the window and the restrictors at the time of the incident?

21. There are several sub-questions addressed by the evidence in respect of this issue which is purely evidential. It appears to be common ground that if the original restrictors had been functioning, and had not been disconnected, they would have prevented the window from opening more than ten centimetres, and it would have been impossible for CA to have fallen/climbed out. Further, whilst it is not in dispute that they must have been disconnected, there is conflicting evidence as to whether this had been by CA or someone else on her behalf or at her request, for instance by deliberately damaging them. Regrettably , as indicated above, the court is not assisted by the absence of independent objective evidence, i.e. photographs.

(3) What work/maintenance had been undertaken to the opening casement of the window in flat DO1 prior to the incident?

22. The court has received a significant amount of evidence in relation to the systems of maintenance and inspection in operation at the hostel, how complaints and reports of defects were dealt with, and in particular specific works which were said to have been undertaken, albeit not obviously documented, in relation to the provision of extra strong restrictors which would have made the opening of the window beyond its limited range virtually impossible save to the most determined person, which if correct would represent a more than adequate

discharge of any duty found to be owed by the Defendant occupier in this regard. Also relevant to the pre-accident history, and the scope of any duty is the knowledge on the part of Defendant as to the way these windows were used, either by being regularly opened beyond their restrictors, or for the purposes of hanging out of washing.

(4) Was the condition of the window a danger and such as to give rise to a reasonably foreseeable risk of injury?

23. This is a purely legal question which will be addressed on the basis of the factual matrix as established. It only arises in the event that CA establishes on a balance of probabilities that she did not exit the window deliberately. At one point, Mr Martin KC, leading counsel for the Claimant, was contending for a residual liability even if this had been a suicide attempt, but accepted during his closing submissions that this was no longer realistic, not least because it had been acknowledged that the YMCA was not providing a care setting.

(5) If there was such a reasonably foreseeable risk of injury, did this amount to a breach of the common duty of care owed to the Claimant under the Occupiers Liability Act 1957?

24. This is another purely legal question. The Defendant no longer pursues its argument that the Defective Premises Act 1972 applied, accepting that there was shared occupation in relation to the flat unit so as to give rise to a duty in principle.

(6) If the Defendant was in breach of duty, was it causative of the accident?

25. Again a legal question.

(7) Is there a defence available to the Defendant under section 2(5) of the OLA?

26. This requires a consideration of the doctrine of *volenti non fit injuria* on the basis that CA voluntarily accepted the risk by adopting a practice which she knew was dangerous. The burden is on the Defendant.

(8) If the Claimant establishes primary liability, should there be any reduction for contributory negligence?

Evidence on disputed issues

The fall

27. This addresses issue (1) above. CA's account of the day of the accident is that she had spent the morning with her boyfriend PR in or around London Road. They had been in that area to collect a prescription of methadone for her, and also because Paul's sister lived nearby. It was hoped that the sister could provide some money for alcohol, but at some point CA and PR became separated. CA admitted that she probably acquired a 2 litre bottle of cider shoplifting which was consumed, and that she also took some street heroin and some crack, before returning to the YMCA later in the afternoon. She has no recollection of any exchange of words with the staff at the reception desk, and although she and PR had regular arguments, she could not remember any particular falling out on that occasion. However, she did admit that when she got back to the hostel, she was distressed, but had not made any reference to killing herself.

28. This particular evidence came from Karen Leather who described CA as being under the influence of drink when she returned, and was abusive, banging on the counter, and demanding that her boyfriend be contacted, believing he was with another female. She went to the lift, threatening to "*kill herself*", although this was a regular occurrence, particularly when she was drunk, and not taken especially seriously. It was pointed out to Ms Leather in cross-examination that her account was inconsistent with that of Dale Murray, another staff member, who had been there when CA returned, and who did not recall any threat by CA to kill herself. Further, in a debrief document on the following day, when she had been present at a meeting chaired by JD, Ms Leather was recorded as saying:

> "….CA was not in a good mood leading up to the incident and was intoxicated and demanding that her partner who also lives in the YMCA be called so that she could see him as she thinks he is having an affair with another female resident but at no point raised staff concerns that she would do anything to harm herself" [3]

29. In her statement, CA gives a clear account of how she came to fall out of the window. She describes intending to retrieve a peach coloured blazer which had been hung on one of the handles of the window, which had been opened to allow it to dry, and a pair of jeans on the other. She had rested both the knee of her left leg and the stump of her right leg on the

[3] 2/19

window ledge, and when reaching out to grab the handle with her right hand to close the window and bring the clothes in, the handle slipped downwards and she lost her balance, thus falling through the gap. She does not make any reference to hanging onto the ledge or any part of the window but describes an immediate fall.

30. In evidence to the court, CA was somewhat more vague. She could not recall ever saying that she sat on the window ledge, or that she had opened the window wide because she was hot. Her recollection was admittedly "foggy" but she was sure that she had not deliberately gone out of the window. She could remember most of the incident up until she fell onto the ledge, and although it was not in her statement, she did recall that after falling through the gap she had turned to grab something as her legs went out of the window. She could not remember what it was, but believes it must have been the window ledge. CA accepted that this was not in the Part 18 information which she had provided[4] and thought that she may have mentioned to a solicitor at some time about *turning* after falling through the window. In the course of her evidence in court CA described having her arms outstretched, in other words facing the open window, with her knees on the inner ledge, at the point before she fell. Further, when it was put to the Claimant that in an account given to Josie Jenkins [5] and in a neuropsychiatric assessment on 18 August 2017[6] she had been inconsistent as to whether she was hanging washing out or bringing it in, CA contradicted herself, before finally accepting that she was probably putting the washing out.

31. Apart from CA herself, whose evidence was obviously put under significant scrutiny and whose credibility is challenged, the only other witness who claimed to have seen the initial exit from the window was Zoe Dailly, a front seat passenger in a car in Leeds Street, whose account was that she "*saw the Claimant coming out of the window, and then hanging by her arms*". The statement does not elaborate on this, and in cross-examination she was unable to say whether the action of coming out of the window was deliberate or not.

32. There is a curious record in the police incident log, an entry at the time 18.03, which states "*inft witnessed male throw himself out of the window at the a/1 fell 3 to 4 floors now on a balcony*." It is not clear who the informant might be, but clearly the record is incorrect in the gender of the victim, and did not describe that the victim was hanging from the ledge for a period of time. This is a record relied upon by the Defendant as supporting a deliberate exit, although it cannot be attributed to any individual.

33. There were no other eyewitnesses to the "exit" as such, but several witness to the immediate aftermath, including the process of CA hanging, and the eventual fall. In particular

[4] 1/86
[5] 2/352
[6] 2/541

Laura Gutteridge had been walking along Leeds Street, when she became aware of a commotion, seeing CA hanging onto the building and shouting repeatedly "*can somebody help*" and "*don't let me fall*". (This is also a witness who referred to having seen clothing hanging from windows on previous occasions when passing by the building, an issue which may become relevant to the Defendant's knowledge of such a practice).

34. John Joseph White, whose evidence was admitted and who was not called, provided a statement with a similar description of CA hanging outside the building. He was responsible for taking the photograph on his mobile phone which graphically depicts the same. There are records of other occupants of the building, and staff members, who are aware of the Claimant hanging prior to falling, at which point the emergency services were called.

35. Thus the evidence of the incident itself, prior to the point at which CA came to be hanging, is somewhat sparse, and largely circumstantial, outside the account of CA herself. It appears to be common ground that whatever mechanism was involved she must have exited (ie deliberately or accidentally) through the gap of the open window head first, with her legs following, and somehow turned her body so that she was then facing the building. The Defendant asserts that this was a last-minute change of mind, having deliberately tipped herself out through the window, whilst the Claimant's case is that in a desperate attempt to save herself from falling having stumbled or lost her balance, she was able to grab the window sill or some other part of the building.

36. It is therefore necessary at this point to consider the evidence said to support a deliberate suicide or serious self-harm attempt, relied upon by the Defendant and set out in some of the records which were produced in the days and weeks afterwards, comprising admissions supposed to have been made by the CA. To put this evidence in context, it is helpful to identify every account by way of explanation which the CA provided in the aftermath starting with the earliest in time including those accounts which contradict any suggestion of a suicide attempt.

37. In the police records there is a log entry ("occurrence enquiry log report")[7] with the occurrence related to a vulnerable adult, which mistakenly fixes the event time at 22.10 (coinciding with the entry), and it gives the following account:

> "Victim has returned to her room intoxicated on the fourth floor of the YMCA felt sick, opened bedroom window and sat on the window ledge. Victim has lost her balance and fallen out of the window to the first floor balcony banging her head on the way down causing significant Injuries. Ambulance have attended and taken her to Fazkerley Hopsital Trauma ward. Doctors have confirmed she has broken 6 bones In her back and her hip is also broken."

[7] 1/175

38. This account is inconsistent with the CA's evidence to the court about her reasoning for the opening of the window, but it does not suggest a suicide attempt. Inspector Fenna, in his evidence, confirmed his statement that whilst any officer could have inserted the entry, he would have expected the account to "*have been provided by Colette herself*".

39. Turning to the medical and hospital notes, first of all, there is the history taken by the paramedics, and found in the ambulance records. It is brief (2/534) and reads:

> "PT fell at 18:00 hours on fourth floor approximately 20 m, hit multiple railings on way down. PT landed on flat roof right side."

She was said to be alert on examination.

40. This was followed an hour later with an examination and history taken by an admitting doctor at Aintree and found in the hospital notes at 2/1058. It is said that this history could only have come from CA, whose lowest level of consciousness was 13/15 on the Glasgow coma scale. It is an entry relied upon by the Claimant's counsel and reads:

> "…(female) alleged she slipped off fourth floor window (indecipherable) she was out of building, she was hanging two metal bars with her both upper limbs. Then she slipped and fell onto her back on a flat roof which was filled with many needles."

41. In neither of these records is there a mention of a suicide attempt. In fact in none of the earlier records is self-harm or suicide attempt postulated as a reason for a fall or a suggestion made that this was a deliberate action on the part of the Claimant.

42. The references to attempted suicide appear in the Defendant's own records, which are clarified by several witnesses who dealt with conversations they had with CA as she was in hospital and recovering. There were three significant and key witnesses for the Defendant on the issue. The first was Mick Reynolds (MR) who was the housing manager for the Liverpool YMCA at the relevant time. He provided general evidence of his role, and the support which was provided for the residents at the hostel, and although he did not have day-to-day dealings with the Claimant he certainly knew her, and her chaotic lifestyle, as he described it. He was not on duty at the time of the incident, but made aware of it by Kevin Waldron. He made some initial enquiries to establish what happened, but there was no indication at the time that this was a suicide attempt by CA. He had some input in the SIR, (Serious Incident Report) at least in verifying it before it was finalised, and this tasked him with finding out what had happened. The YMCA had never had to deal with an incident like this previously. He

arranged to visit CA in hospital. In his statement he believed that this is followed on a visit by Jackie Darlington (JD) but accepted that the records suggested otherwise, with JD visiting on 4th August.

43. On 3rd August he attended with Mark Garner, (MG) who gave him a lift to the hospital. He denied that this was purely a fact-finding visit, although he did want to establish what had happened, and the welfare of CA was also an important consideration to him. No contemporaneous notes were taken of the conversation which he had with her, but entries were put on the Mainstay computer program (see below) when he and MG returned to the office. MR thought that CA did not appear to be in a great place "emotionally" but was coherent. In his statement he said that he was surprised that she had only suffered a couple of hairline fractures, but accepted in cross-examination that the injuries were far more extensive, including a head injury, spinal fractures, ribs, sternum and lower limb. He did not establish from the nursing staff what medication CA was on at the time. MG's account is that she gave a specific response about an argument with her mother, relating to her younger son coming out of jail, but she was very upset, believing that she was being blamed by her mother for the way her son had turned out. MR stated that CA did not use the word "suicide", but stated that she "went out of the window" over and over again, and in answer to the question "did you mean to do it" she said "yes". MR paid particular attention to her facial expressions which convey more than the words. As indicated, his entry in the Mainstay system for the visit at 15.24, entered at a later point under the entry "support planning" at 2/353 is significant for 3rd August at 15.24:

> "Colette said that this episode with her mum triggered her to climb out the window and attempt suicide. She regrets this now and realises she is lucky to be alive. We spoke with Collette for some time, we asked her to not dwell on things for now, she is medicated/scripted and has requested various items which we will organise and take in tomorrow."

44. Immediately after the conversation, MR reported this to the nursing staff, being concerned about the suicide disclosure, and the suitability of a continuing placement at the YMCA hostel. It is noteworthy, and a point emphasised by counsel for the Claimant, that there is no entry in the nursing record of any such disclosure. MR is supported in his account by MG.

45. On 4th August CA was visited in hospital, as indicated above, by JD. The record reads:

> "We spoke about the incident and Collette recalls using then drinking and feeling hot in her room so decided to open the window wide and she then fell out. I asked if going out of the window was intentional but she is **now** saying it wasn't.[8] Collette doesn't remember falling."

[8] My emphasis

46. On 6th August Josie Jenkins visited CA in hospital. This witness did not give evidence but provided a statement which was not challenged. Her entry is in the Mainstay records (2/352).

> "When I spoke to Collette about the clothes I had brought for her she said she said that when she fell out of the window she was trying to get her washing. I asked if she had hung her washing out of the window to dry it, but she didn't answer."

47. Thus within six days of the accident CA had given several conflicting accounts of what had occurred. However, there is a further and somewhat unusual conversation relied upon by the Defendant arising from the evidence of Kevin Waldron who visited CA in the hospital approximately two weeks after the incident to bring her a wheelchair. His evidence is that she kept saying "*I'm sorry*" and "*I bet you hate me for what I have done*", which caused him to form the impression that she was referring to a deliberate suicide attempt. This particular conversation is not set out in the relevant Mainstay entry[9] although it does confirm that Mr Waldron did indeed attend on CAwith a wheelchair.

48. When finally seen by a registered mental nurse in neuropsychiatry, on 21st August 2017, CA was asked about the accident, and denied that it was a deliberate suicide attempt.

49. CA was discharged from hospital and returned to live at the hostel. There was no further discussion about the incident, it would seem, until 12th March of the following year. On this occasion it was Alice Phipps (AP), CA's support worker, who was dealing with her, and it would appear that there were ongoing discussions that day when CA's mental state was somewhat up and down. She does not deal with these discussions, or the entries put into the Mainstay system in her witness statement but there are two pertinent entries. The first of these is at 12.07. CA been talking about "*ending her life*" had been on the telephone to her mother .[10]

> "When Colette finished her call I epxlained (*sic*) why I had returned and was she still on board with our plan to keep her safe, she discussed again that she had intentionally thrown herself from her window a few months ago and that this was serious."

50. A little further on in the same entry:

> "I asked Colette if she had made any plans to harm herself and she said she had decided to throw herself in front of a car or bus. she then said 'ive done it before and you know ill do it again'. i asked for clarification on this and asked what she meant and Colette said 'when I threw myself out the window'. I

[9] 2/503

[10] 2/435

> asked Colette if when she had gone out the window this was an intentional suicide attempt and Colette said it was and began talking about suing YMCA. I advised Colette that is not why I want to know i only need to assess the risks and from what she is telling me i am very concerned that she is going to harm herself."

51. AP accepted in cross-examination that CA was in a very emotional condition at the time of these important disclosures, and was also making other references which indicated that she might have been delusional, believing that there was a gang of youths outside the hostel in a car with machetes.

Expert medical evidence relating to the Claimant's state of mind and ability to give a reliable account

52. It is appropriate at this stage to identify the evidence of the medical experts on the disputed issue as to whether CA was capable of providing a rational and reliable account in the light of the medication she had been receiving, alcohol withdrawal symptoms and the level of pain attributable to her injuries. This is comprised principally in the reports and evidence of the respective psychiatrists, Dr Carr for the Claimant and Dr O'Brien for the Defendant, and the anaesthetists/pain specialists, Dr Simpson for the Claimant and Dr Padfield for the Defendant. These were all desktop reports, and none had the opportunity of meeting CA or interviewing her.

53. One focus of the evidence of the psychiatrists was the effect of alcohol withdrawal, bearing in mind that CA was alcohol dependent, and had a previous history of alcohol withdrawal seizures. Dr Darren Carr, for the Claimant, who is a consultant neuropsychiatrist, deferred to the opinion of an anaesthetist, in relation to the effect of the painkilling drugs, but was able to express his views in respect of the administration of chlordiazepoxide and the cognition of the Claimant during the alcohol withdrawal phases. He also noted a previous psychiatric history which included a diagnosis of borderline personality disorder and treatment with medication for depression and some psychotic symptoms, including compulsory hospital admission.

54. In his report he referred to several factors, in conjunction with alcohol withdrawal symptoms, which had the potential to lead to confusion and the ability to give an accurate account; in particular the GCS, which was reduced, and which supported a significant brain injury unlikely to have been evidenced before the fall because of CA's ability to cling onto the building side, and which could be expected to give rise to a period of disrupted cognition, with retrograde or anterograde amnesia. Whilst he deferred to the court on whether or not CA was deliberately deceptive in the accounts which she gave, his view was that the numerous inconsistencies which were observed and well documented had been apparent from the

outset, and in particular in the immediate aftermath of the accident. He concluded that all these factors may have contributed to impaired recollection and post-traumatic amnesia.

55. Dr Carr maintained his opinion in the joint report that the effect on cognition was multifactorial, including the factors of the head injury, alcohol withdrawal and the illicit drug use which had been long-standing in conjunction with the prescribed drugs for pain as they operated on the central nervous system. In relation to the CIWA-Ar scores which were used to identify evidence of alcohol withdrawal symptoms, Dr Carr disagreed with the Defendant's psychiatrist, Dr O'Brien, that this was unsupportive but indicated the contrary. This particular aspect was pursued in cross-examination with him by counsel. Dr Carr referred to the fact that the CIWA scores were high on 8th August 2017 (described as severe) suggested that they could not have been any less than severe in the days before, and when considered in conjunction with the polypharmacy, even if by then she had become opioid tolerant, all factors had the potential to impact in a fluctuating way on cognitive function.

56. Dr Carr did not believe that the Claimant's ability to make requests for specific needs was something to be equated with a good level of cognitive function. Any impairment would lead to problems in memory, that is laying down memory in the first place, and this would have been compounded by the effect of the medication which was being administered to treat the pain. He thought that the number of inconsistent accounts was suggestive of the Claimant having little or no recall.

57. For the Defendant, Dr O'Brien relied upon his expertise and experience as a psychiatrist who had previously worked on alcohol dependency units. He believes that CA is a person with a long history of polysubstance dependence which together with early life problems has given rise to mental health problems in the longer term. He was unable to identify any clear diagnosis of a schizoaffective disorder, but notes that she had been treated with antipsychotics, and particularly recently, also receiving on a number of occasions, psychotropic medication for depression. Dr O'Brien believed that the Claimant is likely to have had EUPD (emotionally unstable personality disorder) because of the evidence of impulsivity in her psychiatric history, and her behaviour in attempting suicide (alleged) could be accounted for by such impulsivity. He referred to numerous previous episodes of self-harm and a documented suicide attempt in 2003.

58. Dr O'Brien's conclusion was that there was nothing in any of the contemporaneous records to suggest that CA was disorientated, psychotic, was suffering from complex withdrawal or the effects of medication which might have indicated that she was unable to give an accurate account of her memory of events. She had engaged with all the teams who were treating her and there was no suggestion of any altered state of consciousness. In terms

of her propensity to commit suicide, he regarded her as somebody at significant risk (assessed long-term at about 10% and thus higher than the general population).

59. In his evidence to the court, Dr O'Brien accepted that there were high CIWA scores for alcohol withdrawal on 8th August 2017, and he agreed that this was surprising. However, there were no observations immediately after these scores which could be said to be significant. On 2nd and 3rd August it was also relevant that she was not reported as showing any signs of alcohol withdrawal, although he acknowledged that at this time she was receiving a lot of painkilling medication which may have had a masking effect. It is to be noted, he said, that she was able to cooperate with the alcohol liaison nurse on 2nd August. Dr O'Brien also accepted that some people withdrawing from alcohol could have hallucinations but the absence in this case of any contemporary evidence did not support such a conclusion.

60. The Defendant also instructed a consultant neurologist, Dr Charles Clarke, described as an expert in cold injury, who prepared a desktop report, but did not give evidence before the court. However, he engaged in a discussion with Dr Carr, having expressed his opinion that whilst there may have been a traumatic brain injury, this was not recognised by the hospital in the treatment of CA at the time, and that it could not have been significant. In terms of whether any such injury might have impacted on the Claimant's ability to give a coherent account, he concluded that if the evidence of Mr Reynolds as to the exchange on 3rd August 2017 was accurate, this suggested that there was little or no effect from any TBI. He had a joint discussion with Dr Carr and both maintained their respective positions which were not significantly far apart, with Dr Clark pointing out that even if radiological evidence of a subdural haematoma was established, (which it was not) a patient could still be lucid and alert with such an injury.

61. Dr Karen Simpson (for the Claimant) considered the extensive range of drugs which were administered over several days following CA's admission to hospital, and in particular oxycodone (opioid-based), paracetamol, pregabalin, and ketamine, as well as the chlordiazepoxide to deal with alcohol withdrawal, and addressed their effect in the light of the injuries, including a potential head injury, to arrive at the conclusion expressed in paragraph 4.18 of her report:

> "The question of whether COA was in a position to be able to give an accurate account of herself to the YMCA visitors on the afternoon of 03.08.17 does not have a simple answer and it would be difficult to provide a binary response to such a complex question. However, considering the facts in the case, including her past history of mental and physical health problems, her drug and alcohol use, the effects of trauma including head and chest injuries, the likelihood of prescribed drug side effects and interactions taken together with the potential for alcohol and drug withdrawal, would lead me to advise the court that it was much more likely than not that she was cognitively impaired when she

> was visited by Mr Reynolds and Mr Garner on 03.08.17 and that it is quite possible that she was in a distressed and suggestible state."

62. In cross-examination by counsel, Dr Simpson was asked about the demonstrated pain scores on the 0 to 10 scale, particularly those for the period immediately prior to the visit by the YMCA staff on 3rd August. Where the pain score reduced from 10 to 4 on the pain assessment chart,[11] this was likely to be attributable, according to Dr Simpson, to the administration of morphine, suggesting that even though CA may have been habituated to it through many years of opioid addiction, it still had a profound effect.

63. Dr Simpson also emphasised the effect of ketamine which could cause a disassociation and influence thinking, but it was well known as a drug which potentiated the effect of opiates. Therefore together with metabolic effects, this may the overall effect on the brain even more unpredictable.

64. Dr Padfield, the pain management specialist instructed by the Defendant, prepared another desktop report. He reviewed all the medical and personal records relating to CA going back over many years as well as the various witness statements disclosed in the action. He accepted that alcohol could lead to disinhibition and emotional lability but he did not think that it could account for unintentional dissembling. Acknowledging that the oxycodone (self-controlled) was insufficient, he observed that there was no record of CA being particularly sedated when visited by MR and MG. He did not accept any particular head injury, despite the CT evidence of a frontal subdural, and considered that at most the Claimant had a mild concussion or contusion to the frontal cortex, making it unlikely that the Claimant would have constructed an elaborate misleading scenario. He accepted that pain levels would be very high at the time of the visit but again this was less likely to have led to fabrication, but more likely a frank and true account. He disagreed with the conclusions Dr Simpson about the effect of the cocktail of the various painkilling medications on CA's cognition.

65. Dr Padfield maintained his position in his oral evidence, but was not extensively cross- examined. He accepted, however, that whilst a 10/10 score on the pain scale would be excessive, and make a person feel suicidal, it is unlikely to have affected what was on their mind.

The condition of the window / restrictors and the nature of any work undertaken by the Defendant

[11] 2/996

66. As I have already indicated, there is no contemporaneous objective evidence in the form of photographs or an independent inspection of the room to determine the condition of the window immediately after the fall, and therefore it is necessary to consider the accounts of the various witnesses, including the Claimant herself, about the window and any maintenance that had been undertaken in the period leading up to her accident.

67. In her statement, CA explained how she would regularly hang clothes out to dry from the two handles of the opening window casement, because the washer dryer in her room was not working, a matter which she had reported to the staff. She did not think that this was safe. As far as the safety restrictors were concerned, they were not working at the time, nor had they been when she moved into the room in January 2017, allowing the window to swing open freely. Otherwise, it was not necessary to open the window, because the room was sufficiently ventilated. She accepted that after the accident, new safety catches (restrictors) were fitted, as well as other safety measures. These were cord type restrictors, locked into place, one white and one brown on either side of the window.

68. In evidence to the court, CA stated that she had reported the absence of a working restrictor to Chris Murphy, although accepted that this was not something which she mentioned in her statement. She had made her solicitor Richard aware she had complained about the restrictor as well as PR, and could not understand why it had not been included. As far as clothes laying around her flat were concerned, this was something that had been going on for some time, as well as being hung from the window, a matter which would have been well known to staff who would come into the room, although it is not something which she specifically mentioned to Alice Phipps. In particular, CM had told her that it was not safe to hang things outside. CA did not accept that AP was somebody to whom she could have reported a problem with the window restrictor and she specifically denied that anything had been done to the window on 20th July or before, including the replacement of the restrictor.

69. AP was not directly involved in maintenance or inspection, although in her evidence she confirmed that on her weekly welfare checks of each room, if repairs were required she would report them. In particular, if she saw the window of any resident open beyond its restrictor she would push it back into place. In her statements she does not explain how this might have happened, and did not elaborate in oral evidence, save to explain that putting the windows "*back into place*" was relatively straightforward, and simply a matter of clicking the restrictors back in. There was no need for this to be included in the records as a repair. She had never seen CA's window open beyond its restrictor during any of her visits and was not aware of any report about such a problem. Further, she had never seen any clothes hanging from the window, and was not aware of the practice. She did accept that on one occasion she had been asked to help retrieve some pants belonging to CA which had fallen onto the ledge

and that there were photographs available from the Google Street images taken in about May 2017 which suggested that some windows were open on the front elevation, but this is something which regularly happened and would be addressed by her if she saw it.

70. It does not appear to be in dispute that some window restrictors were vandalised or tampered with by residents. This is dealt with by Ellie McNeill in her evidence (fourth statement), but she accepted that there had been no risk assessment in relation to persons falling out of windows where the restrictors had been interfered with. The problem related to rubbish being thrown from windows, and in particular people in the street being struck by such items.

71. EM was asked in her evidence about the Amis software program for the maintenance and repair records, which had been decommissioned, and which was no longer accessible.[12] She accepted that such records as remained were limited, and did not enable the scrutiny of the entries which were only general and not specific. The decision to decommission had been hers.

72. The principal witness for the Defendant who dealt with the state of the windows, and maintenance generally, was Chris Murphy. CM was still employed by the YMCA, but at a different location. He gave evidence that his first involvement in relation to the restrictors was following an email received from MR on 10th July 2017. This is said to be highly relevant:[13]

> "Hi Chris,
>
> Can you go around today and ensure all windows are closing properly and not pushed wide open, resident (*sic*) are throwing crap out which is getting stuck in the metal girder around the front of the building.
>
> Once you have done this can you leave a notice in each room telling them not to tamper or open the window beyond the safety setting, if we need to look for an additional chain to put on the frame to stop them from forcing them open then do so.
>
> Cheers,
>
> Mick"

73. In response to this email CM stated that he checked all the restrictors twice on the five landings within the hostel over a period of 11 days and put up notices requesting residents not to interfere with the restrictors. He specifically recalled that there was a problem in D01

[12] it is a point emphasised by the claimant through counsel that there has been a lack of candour in relation to disclosure and in particular material which might have enabled a more detailed examination of the maintenance records to confirm or refute CA's account of a report of a problem with the window restrictors.

[13] 2/181

(CA's room) and arranged for it to be replaced, by involving external contractors (JJ Kelly builders). He produced an invoice purportedly showing the replacement of the white original restrictor with a brown restrictor which was dated 14 July 2017. This invoice[14] refers to supplying and fitting new restrictors, hinges and handles to windows at a cost of £216 net of VAT but does not identify any room where such repairs were carried out, nor does CM refer to there being any other problem with the window in terms of hinges or handles. In relation to his record-keeping, CM acknowledged that he did not log either this repair, or his other inspections on the Amis system, but instead recorded the details in a maintenance log book which was kept at reception. Regrettably, the document has since been misplaced.

74. Under questioning by counsel, CM stated that he had not been asked to put either the window problem in D01 or the repair on the system, and was happy that the logbook was sufficient. He was present when JJ Kelly carried out the repair, and recalled that it involved a brown restrictor. As far as the handles were concerned, there were none in place, and he accepted that this would have been obvious on any visual inspection. However, it was not something which he had ever mentioned in a statement previously nor was it in any record. In this respect the evidence of James Morrison who attended room D01 immediately after the Claimant's fall might be relevant. Not only did he believe that the window restrictors were part of the original structure, i.e. there was no new cord or cable type restrictor in place, but also that if the handles were missing this is something that he would have noted.

75. CM was also asked about an enquiry which he had made for two dozen window restrictors on 24th July. This was intended to be the pre-emption of a problem in case all the restrictors needed to be replaced.

76. CM was taken to the general maintenance records which did exist on the Amis system, and accepted that they did not allow for an interrogation as to specific detail, being simply screenshots, and that there were a number of entries which were associated with his name, and which could be relevant to repairs or complaints, but there was no entry for 20th July the date when the windows, and in particular the window in D01 was supposed to have been rechecked.

77. It is apparent that a few days after the accident 224 white cable restrictors were purchased from Amazon at a cost of just over £2000. There is an invoice available.[15] EM was responsible for this order and evidence was given by Paul Sandison, an independent contractor, that he undertook work to the room D01 in early August because a repair was required, and this involved the installation of cord restrictor with a key. He could not recall whether it was a white or brown restrictor, but was able to confirm that the restrictor

[14] 1/230

[15] 2/208

previously in place was not functioning. He was aware of the incident with CA. Clearly if there had been a new restrictor of the type described by CM put in place by a previous contractor a couple of weeks earlier, that had either been bypassed or broken, and if there had been a need for a further repair, it would have been a cord/key type restrictor. On the basis of the expert evidence (which I shall refer to later in this judgment), it would have taken considerable force to have damaged it. Mr Sandison does not say in his evidence, nor was he asked whether he was responsible for replacing the restrictors in all the rooms.

78. The only other witness whose evidence is relevant to the window condition, and any work that was undertaken, is Mick (Michael) Reynolds (MR). He was the Defendant's housing manager at the time, responsible for most aspects of facilities management relating to the staff and the property. MR was responsible for sending the email referred to above to CM. (It was he who attended the hospital together with Mark Garner and who elicited the alleged admissions of a suicide attempt from CA). In relation to the window restrictors, he gives evidence that there had been issues with the windows and the restrictors arising largely from residents kicking or forcing them open. He stated that the rooms were the subject of weekly checks when one such check was undertaken following his email to CM on 10th July he believed there to be no problem with CA's window, but in this respect contradicts CM. He was concerned that no record had been kept of the windows which had been checked by CM , and he told him off, requiring him to make a note of such checks. However, he accepted that nothing had been entered onto the system. MR was clearly under the impression that they would have been carried out on 14th July, but he accepted that his statement did not make a mention of this, nor was there an independent record. Following the incident, he accepted that he did not retain the restrictor, if it had been damaged, but was fairly sure that it must have been vandalised or kicked off by CA's boyfriend PR who had forced the window open. This was confirmed by his conversation with CA in hospital, who apparently told him that the window had been kicked open by PR.[16] He accepted that after the incident all the new restrictors which were put in place on the windows could only be opened or bypassed with the key.

79. As far as he was concerned, the windows were safe with the original restrictors that had been put in place, although he did acknowledge that residents could force these open beyond their restriction. His reason for sending the email was not a concern about safety, so much as causing rubbish to be thrown onto the flat roof adjacent to the first floor. Although MR was of the belief that the windows were regularly kicked or forced open, he gave evidence that the restrictors could be bypassed by simply pressing the clips on the restrictors, and he had been informed of this by some of the residents.

80. I should make brief reference to the photographic evidence relied upon by the Claimant in support of her contention that windows were regularly open and that the hanging

[16] the court has not been taken to any entry in the records supporting this aspect of the conversation

of clothing outside the windows was a common occurrence of which the Defendant should have been aware. First the Google Street images, as I have already indicated, were sourced for May 2017.[17] These show several windows (approximately five) clearly open beyond the 10th cm restriction on the front elevation of the hostel. One of them is likely to include the Claimant's window, as well as one above that. Further, one of them appears to show a pinkish coloured garment hanging out of a higher level casement, but adjacent to the unit occupied by CA. Second is the image taken on the mobile phone of the witness John White which depicts the Claimant hanging from the structure before she fell, just below her window. There are two items purported to be clothing as described by the Claimant also shown in the photograph. One is a pair of jeans, or a similar blue item, approximately 4 feet behind her on the projecting railing, and the other is a pink coloured garment at first floor level. Whilst the blue item is unlikely to have come from the window which CA exited, the pink item would be in the likely place expected if it had fallen, as CA appears to have described.

The building experts

81. The last area of evidence which requires consideration is that of the two building engineers, Mr Collier for the Claimant, and Mr Billingham for the Defendant. It is appropriate to deal with it when considering their evidence in relation to the window and its condition at the time of the fall, together with their suggested implications for the responsibilities of the building owner and occupier[18] although the respective experts posit different theories in relation to the mechanics of the fall.

82. Mr Philip Collier received instructions in April 2020, was not able to visit the hostel until May 2022 when he inspected the room and the window. He provided a detailed and lengthy report which includes measurements and photographs, and the nature of the restrictors which were then in place, providing an indication of the previous installation. Much of this report rehearses the evidence already referred to above and does not require further elaboration.

83. The earlier restrictors, he noted, did not require a key, and could be bypassed by persons who understood the particular mechanism, but that it was not a straightforward process. The windows could be released and opened for the purposes of cleaning. In respect of the new cable fittings which had been installed after the accident, it would have required an extremely significant force to break the cable, or to remove it from the window frame, and probably only with the use of a hacksaw or bolt cutters. Trying to remove it from the frame is likely to have caused damage to the frame itself, unlike the previous metal arm restrictors.

[17] 2/26 ff

[18] there is no significant dispute between the experts on the engineering aspects.

84. Mr Collier found that his inspection was hampered by the lack of contemporaneous photographs. He considered the safety implications of window openings where there was a risk of falling, particularly for vulnerable people and children, by reference to the British Standard Code of Practice and the subsequent British Standards (1991 and later) and the recommendation of a restriction of opening to 10 cm to prevent any such risk, although such windows should be capable of open by manipulation particularly if they represented a route of escape the fire. He also dealt with safety implications of low window sills particularly where the lowest part was 1020 mm above floor level with a recommendation of protection in the form of a safety rail. Mr Collier considered a number of more recent publications and recommendations in nationally available guidance, which acknowledged the need to ensure windows from which persons could fall were the subject of risk assessment, and constructed in such a way as to prevent opening beyond a restricted limit which could not be defeated by a determined or vulnerable adult.

85. Mr Collier did not regard the original window restrictors which were in place as adequate to prevent a determined interference although he accepted that the cord type restrictors subsequently put in place were sufficient for this purpose. His conclusion, which was dependent upon a number of factual findings as to the state of the window at the time the CA fell, was that this incident could have been avoided completely if robust, tamper-proof opening restrictors had been fitted to the material window.

86. Mr Andrew Billingham on behalf of the Defendant, provided a similar assessment, and considered all the evidence in relation to the restrictors, and the description of the Claimant's fall. His report was helpful in identifying by drawings the pivot mechanism of the opening casement, showing that the maximum gap between the lower edge of the window and the frame would be 520mm when fully open, but that the upper end would drop, thus diminishing the space between the lower sill and the window. This would have an effect on the mechanism of any fall, preventing individuals who were upright from accidentally falling through the gap. Thus he postulates in paragraph 4 of his report mechanism which could not have been consistent with an over balancing and a falling out, as he believed the CA to be asserting, but a deliberate climb out of the window. This would explain how she ended up facing the building. He believed this account was supported by lay witness evidence describing the CA climbing out. [19] He was satisfied that the original plate restrictors built into the frame were sufficient safety measures and could not easily be overcome.

87. In respect of the joint report, a significant area of disagreement between Mr Billingham and Mr Collier related to the application of the guidance from the Care Quality

[19] It is not clear what evidence he is referring to; possibly the police report; possibly Zoe Dailly who describes CA "coming out of the window".

Commission. However, that is a matter no longer pursued by the Claimant, and it does not require further consideration.

88. The experts disagreed, but not to any significant extent, on the adequacy of the original plate restrictors which were hinged, and fixed to the frame, requiring two clips to be depressed for release. Mr Collier did not accept that these were sufficient, although Mr Billingham noted that even the more robust cord restrictors could be overcome by a determined individual, relying on the evidence of Paul Sandison.

89. The dispute related largely to the mechanism of the fall, as it was described, although both experts deferred to the fact that details will be determined by the evidence which is accepted by the court. Mr Collier took the view that if the Claimant fell as she described, that is when kneeling on the sill and not pitching out headfirst, it is feasible that she would have been able to arrest her initial fall, and some movement would have been a sliding sideways. Mr Billingham disagreed, on the basis that if she had fallen while reaching out for clothes, her hands would be furthest away from the building and lower than any other part of her body, with gravity taking effect. Thus he stood by the mechanism of fall which he postulated in his report.

The Law

90. Because the Defendant no longer pursues an argument that the duty owed by the YMCA falls to be considered under the Defective Premises Act 1972, the relevant statutory provisions are section 2 (1) and (2) of the Occupiers Liability Act 1957. The appropriate elements are set out below.

> **2. Extent of occupier's ordinary duty**
>
> (1) ……
>
> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
>
> (a) an occupier must be prepared for children to be less careful than adults; and
>
> (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
>
> (4) ……
>
> (5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) .....

91. The scope of the duty is defined in subsection (2) and requires a broad assessment on an objective basis not only in relation to the steps that have to be taken, but the degree to which the visitor's safety might be at risk. Subsection (3) has a subjective element to it in the sense that regard must be had to the care which might be exercised by the visitor. Whether a vulnerable adult should be considered in the same context as a child, that is one who would be less careful, is addressed later in this judgment.

92. In the case of **Reeves v Commissioner of Police of the Metropolis [2000] 1 AC 360**, Lord Hope, whilst defining the limitations on the scope of the duty, identified the more exceptional situations in which the duty might extend to deliberate acts on the part of the visitor, particularly where he or she might have been young or of unsound mind. However, in the course of closing submissions, Mr Martin KC for the Claimant accepted that if the court's finding is one of a deliberate suicide attempt, i.e. intentionally exiting the window, this basis would be too precarious to support liability in an area where the law was far from settled, and accordingly he did not pursue the line of argument in his original skeleton that a duty was both owed and breached in such circumstances.

93. Subsection 2 (5) above is the incorporation into the statute of the doctrine of *volenti*. Whilst its application would very much depend on the findings that are made by the court, it may be relevant to the conduct of CA in exposing herself to the danger of falling from an knowingly unrestrained window by leaning out to retrieve clothing which had been hung from the window handles.

94. The Claimant has abandoned any claim under the Health and Social Care Act 2008, accepting that this was not an environment in which anything other than personal support was provided for the building occupants, and that there was no aspect of personal care.

95. Otherwise, there are no discrete or intricate points of law which need to be resolved in this case, which turns substantially on the factual findings that are made. Nevertheless some examples are relied upon by counsel of the application of the section 2(1) common duty of care in cases which are said to be similar, involving falls from heights, and insofar as they may be of assistance I will highlight a few of them.

96. In **James v White Lion Hotel 2021 EWCA Civ 31** a claim was brought on behalf of the estate of the deceased, who fell from a hotel bedroom window when staying there as a guest. The sash window was of a low height and close to the bed on which he was sitting smoking a cigarette. There was a conviction under the Health and Safety at Work Act 1974 in relation to a risk assessment upon which the judge placed significant reliance at first instance. This was appealed on the basis that it was inappropriate to do so, and it was further argued that the judge should have applied the principle that a person of full age and capacity who chose to run an obvious risk (i.e. sitting close to a dangerous window) could not found in action against the occupier under section 2(2). Although it was held on appeal that the trial judge should not have relied on the conviction as an evidential basis in civil proceedings, nevertheless the finding on primary liability was upheld because the running of such an obvious personal risk did not provide an absolute principle which precluded establishing a breach of duty against the occupier. It was one of several factors which had to be considered in the context of the reasonableness analysis and balance under the subsection, together with a number of other matters, including the low cost of remedial work and the fact that the accident occurred in a hotel room when the visitor might have been expected to be off guard.

97. The Claimant places some reliance on this case as addressing similar principles which must be considered by this court, in particular, in the judgment of Nicola Davies LJ at paragraph 68:

> "68. The assessment of whether there is liability under section 2 is essentially a factual assessment based upon the particular circumstances of each case. In this case it involved addressing a number of questions of fact and mixed questions of fact and law, namely:
>
> i) Was there a danger due to the state of the premises;
> ii) Was there a breach of duty in respect of that danger to the deceased;
> iii) Was that breach of duty the cause of the deceased's fall;
> iv) Should a finding have been made pursuant to section 2(5) that the deceased was not owed the duty by reason of his voluntary acceptance of the risk created by the danger?"

98. The appeal court considered a number of authorities relied upon by the appellant occupier, including the leading case of **Tomlinson v Congleton [2004] 1 AC 46**, and also **Edwards v Sutton LBC [2017] PIQR P2** and **Geary v Wetherspoon [2011] LLR 485**, all cases where the injured party had taken significant risks in the use of the premises whilst a lawful visitor. Having found that the trial judge's factual findings provided a sound basis for the conclusion that there had been a breach of the common duty of care to the deceased, Nicola Davies LJ addressed the appeal point on the potential preclusion of the duty, concluding that these authorities did not provide unequivocal support for the occupier's proposition that the section 2 duty was so precluded. At paragraph 83 she said:

> "83. For the reasons given, I do not read *Tomlinson* or *Edwards* as being authority for a principle which displaces the normal analysis required by section 2 of the 1957 Act: the analysis undertaken by the judge at [63] of his

> judgment. What a Claimant knew, and should reasonably have appreciated, about any risk he was running is relevant to that analysis and, in cases such as *Edwards* and *Tomlinson* , may be decisive. In other cases, a conscious decision by a Claimant to run an obvious risk may, nevertheless, not outweigh other factors…"

99. Reliance is also placed upon the case of **Pollock v Cahill [2015] EWHC 2260 (QB)** in which a blind person was severely injured after falling from a bedroom window of the house in which he was staying. The window sill internally was at a relatively low level. There was a significant factual dispute as to how the window came to be opened, which was resolved in favour of the Claimant, but insofar as the Claimant had no recollection as to how he fell, an issue arose as to the mechanics. William Davis J (as he then was) addressed the circumstances relevant to the degree of care required on the part of the building owner towards the visitor, i.e. subsection (3) and concluded:

> 51…….It is argued on behalf of Mr Pollock that the reference to "such a visitor" requires the occupier to have regard to any known vulnerability. That is clearly correct. If Mr Pollock had been a sighted person, the open window would not have rendered the premises unsafe. It was the fact that he was blind that made them so.

100. It is said that CA had her own vulnerabilities as an addict with a psychiatric history and unpredictable behaviours, and that she should be considered in a similar vein.

101. Although it is a case cited in respect of contributory negligence, **Spearman v Royal United Bath Hospitals NHS Foundation Trust [2017] EWHC 3027** also involved a serious injury sustained by a vulnerable person falling from a height, in this instance a hospital roof. The Claimant was a type I diabetic and hypoglycaemic, and was being treated in hospital in a highly confused and reduced state of consciousness when he walked away from the treatment room, eventually making his way onto the flat roof of the hospital, where he climbed onto some benches and over the protective fence, falling a significant distance and sustaining serious injuries. Spencer J reviewed evidence in relation to the risk assessments which were carried out by the hospital, and those which should have been carried out, as well as a body of lay evidence and identified the issues, which were not dissimilar to those in the present case. Having concluded that the duty of care was owed as a lawful visitor, and not a trespasser, the judge considered whether there was a breach of duty under the OLA 1957. He concluded at paragraph 62:

> "62. In a sense, breach of duty is one of the easier issues for the court to decide. If, as I have decided, the Defendant was under an obligation to carry out a risk assessment in order to identify and assess the risks to patients, and to take reasonable measures to prevent such risks, it did not do so. In my judgment, this duty included identification and assessment of the risk of vulnerable patients getting to the roof space from the Accident and Emergency Department unaccompanied and causing themselves injury. However, no risk assessment was carried out at all…."

102. The purported absence of a risk assessment which was adequate is relied upon by the Claimant in the present case.

Respective submissions

103. Both leading counsel provided extensive written submissions on the evidence and the approach to the legal questions which arose. It would be disproportionate for the purposes of this judgment for me to set out in any great detail those submissions which I have considered carefully and which have been elaborated in part in oral argument. However, it may be helpful to identify the headline points on behalf of each party.

Claimant

104. Mr Gerard Martin KC together with Mr Matthew Stockwell appeared for the Claimant. Mr Martin invited the court to approach the mixed issues of fact and law on a similar basis to that endorsed by the Court of Appeal in **James**.[20] During the course of submissions, as indicated, he acknowledged that a finding of attempted suicide as the mechanism of the fall would make it difficult to establish a breach of duty, despite the qualification in **Reeves**[21], and therefore accepted that liability would depend upon a finding that the exit from the window had not been deliberate.

105. Counsel was highly critical of the manner in which important documentary evidence, including maintenance records, had been handled by the Defendant in the aftermath of the accident. He maintained the position that it was open to this court to draw adverse inferences, relying in particular on the 5th edition of Matthews and Malek on Disclosure, chapter 17 and **Re Mumtaz Properties Limited [2012] 2 BCLC**. The responsibility to preserve or record the condition of the room from which CA had fallen was particularly apposite and the absence of any information as to the condition of windows at the pertinent time had made investigation particularly difficult, especially when it was not known how or why she had fallen prior to the alleged attempted suicide disclosure.

106. Insofar as a central question was whether or not the condition of the window was a danger, and gave rise to a reasonably foreseeable risk of injury in all the circumstances of the case, it was particularly crucial for the maintenance records to be examined, and such

[20] *Supra* para 96

[21] *Supra* para 92

evidence as was available was woefully inadequate. The Defendant sought to rely upon the oral evidence of CM and MR, but this was not credible in a number of respects, particularly when any work including the replacement of the original restrictors could have been easily verified by proper record keeping. If it was to be suggested that the installation of a new restrictor which was not capable of being overcome by residents had been achieved by 14th July, this was contradicted by the evidence of AP, who would have been aware of a tamperproof restrictor at a time, but was not.

107. In relation to the mechanism of the fall, Mr Martin KC acknowledged that CA had given inconsistent accounts in relation to whether she was hanging her washing out or retrieving it, but relied upon the photographic evidence provided by Mr White which suggested that clothing had indeed fallen onto external parts of the building structure, (the pink blazer and the blue jeans) and it is unlikely that this was the only occasion on which clothes had been hung from the window, or fallen from the window, thus negating the Defendant's assertion that this was a practice which was never followed. Similarly in relation to the frequency of windows being forced open, or disconnected so as to be open beyond the inbuilt restrictors, reliance was placed upon the Google photographs suggesting that this was not an isolated or rare occurrence as the Defendant's witnesses appeared to imply.

108. Counsel relied upon the eyewitness account of Zoe Dailly and contemporaneous records, including the reference in the police log from an anonymous caller, that this was not a controlled or measured exit from the window, but rather an accidental or head first fall.

109. Significant reliance is placed upon the absence of any other contemporaneous records suggesting that this was a deliberate act, and the fact that there was no suspicion at the time of a suicide attempt as opposed to an accident. At no point is there ever recorded in the hospital records or other emergency documentation that the Claimant had been trying to kill herself, and this is a factor which if evident would have led to the implementation of a number of further investigations. Mr Martin submits that insofar as reliance is placed upon the oral testimony of MR, who elicited the admission of a suicide attempt by CA on 3rd August, this is lacking in credibility, not only because his account of her being coherent, seemingly not seriously injured and able to express herself, is inconsistent with the objective evidence of the medical records, and the assessment of the experts as to the amount of painkilling medication which she was receiving, but also because it is not recorded in the medical or nursing records, despite MR's evidence that he reported it to nursing staff. Mr Martin stops short of suggesting that the Claimant might not have given the impression of a deliberate suicide attempt, but submits that anything she said at this time could not have been taken seriously because of her state of mind and cognition, and is inconsistent with numerous other accounts given by way of explanation as to the mechanism. Further, he emphasises that MR in his testimony did not actually elicit the words "*attempted suicide*" but inferred this

from body language and facial expressions, despite including in the mainstay records a more positive account.

110. Otherwise, the court is invited to prefer the evidence of the Claimant's medical experts as to the combined effect of the medication, head injury and alcohol withdrawal, suggesting that any account which she purported to give at this time could not be relied upon.

111. Mr Martin KC submits that relevant to this question is the evidence of CA's daughter, HM, which rang true, and the fact that if her mother had been attempting to kill herself when she fell from the window, their relationship was sufficiently close for her to have found this out in subsequent discussions.

112. In terms of the condition of the window, and the dangers which it presented, counsel referred to its position, with a low sill, the disability of the Claimant, not only physical but also her general vulnerabilities, and the absence of appropriate risk assessment undertaken by the Defendant at any time which specifically addressed the risk of a fall from the window. It was axiomatic that at some stage the risk had been acknowledged that the windows could easily be opened past their restrictors (as installed) if the Defendant had sought to replace the original restrictors at some point prior to 1st August, and by 14th July as is alleged, although in this respect the court is asked to reject the evidence that any repair had been carried out to the Claimant's window. Mr Martin accepts that if there had been a restrictor in place of the cord type with a locking mechanism, which was tamper-resistant, he could not maintain any argument that the window was a danger.

113. The absence of a risk assessment, says Mr Martin, is also relevant to the question of breach, as is the Defendant's knowledge of CA's vulnerabilities. It was insufficient for the Defendant to rely upon a reactive system of complaints from occupants who clearly had complex needs and vulnerabilities, and the duty was to be proactive in terms of repair, and ensuring that the windows was safe. In simple terms this boils down to the provision of adequate and suitable window restrictors, and it was a factual issue which could and should be resolved in favour of the Claimant, he submitted.

114. In terms of any potential defence under section 2 (5), if this court accepts that CA was using the room with which she had been supplied, and the condition of the window was as contended, there was nothing unusual or capable of amounting to a voluntary acceptance of risk when hanging out clothing because a washer dryer was defective. CA's vulnerabilities were also relevant in this respect. Even if CA did not have such vulnerabilities, the rejection by the Court of Appeal in **James** that the obvious running of a risk precluded the establishment of a duty under section 2(1) was also relevant to the issue of *volenti* and section

2(5). The nature of the accommodation provided here to vulnerable individuals with complex needs created a more compelling context not only for breach of duty but also a rejection of a section 2(5) defence.

115. Assuming liability was established, in respect of any contributory negligence, Mr Martin relied on the case of **Spearman** where there was no reduction. Vulnerability was again relevant. Even if the court was not so persuaded, any reduction should be small or negligible.

Defendant

116. Mr Christopher Kennedy KC and Ms Zoe Thompson appeared on behalf of the Defendant and provided similarly detailed and helpful submissions. There was little disagreement as to the issues which the court was required to resolve.

117. Mr Kennedy's principal and overarching submission was that CA had failed to establish her case which was highly dependent on her oral evidence, as she was the only person who knew precisely how she had come to fall. The court should pay close attention, submitted Mr Kennedy, to the pleaded case appearing in both the Particulars of Claim and the further information, which sought to assert a mechanism for the fall which was not borne out by the Claimant's oral testimony. In short, she was not credible in a number of respects. He relied upon a history of dishonesty (criminal offending) drug and alcohol habit, and a lack of frankness in many aspects of her evidence, particularly in her statements. For example she had not admitted the use of heroin and methadone on the day of the accident. CA sought to diminish the extent to which she might have been drunk on the day and her approach was self-serving, with an eye to bolstering her case. There was so many inconsistencies in CA's account including gaps between the pleaded case and her oral evidence and even on a generous interpretation the fact that she could not recall salient features did not enable this court to make any positive findings in her favour.

118. CA's lack of credibility, it is said, was relevant not only to this court's determination as to how the accident might have happened, but also the reports of disrepair upon which she relied. In particular, insofar as she claimed that a repair had been reported to CM, this was an example of fabrication, when the evidence clearly established that any repair issues would be picked up by AP.

119. Even if the court could not conclude that CA had been dishonest in her recollection and in her evidence, the fact that she was an habitual drug and alcohol abuser was relevant.

This is bound to have affected recall and the court should exercise caution in respect of such individuals.

120. There was a lack of any independent corroboration of the Claimant's account submitted Mr Kennedy. The only direct eyewitness, ZD, does not determine whether the exit from the window was accidental or deliberate, and the language used in her statement is equivocal. It was unlikely to have been her whose account was recorded by the police. LG's evidence could not establish that the hanging out of washing was a regular occurrence, bearing in mind, in particular, that there was only one record on the Defendant's system. Further, it would not have been in the occupier's interests not to recall this as a regular occurrence. Insofar as reliance was to be placed upon the evidence of family members, in particular her daughter HM that she would have been told if CA had been intending to kill herself, in reality this was a family in which the mutual support was more strained than suggested, making it implausible that this would have been the case.

121. Mr Kennedy asked the court to review the various accounts which are supposed to have been given at different times by CA in the aftermath of the accident, and to bear in mind that when first admitted CA had a near-normal GCS, followed by a normal GCS. The account referred to in the log and confirmed by Inspector Fenna was inconsistent with the Claimant's pleaded case, even if it precluded any suicide attempt. In fact reliance can be placed on the first direct account given to MR and MG who were careful witnesses, and who knew CA had no reason to fabricate an account which was subsequently recorded in their own computer system and before there was any contemplation of litigation. It was submitted that the evidence supported her cogency despite the injuries and the medication, and that these were experienced individuals in dealing with safeguarding disclosures. It was a plausible explanation and corroborated by the circumstantial evidence by reference to the way the Claimant had been behaving at the time, including her intoxication, an argument with PR, and a falling out with her mother. She had a labile temperament, and with impulsive behaviour was likely to have done things without giving any particular thought on the spur of the moment, including potential self-harm.

122. Insofar as the Claimant sought to rely upon the medical evidence, there had been no clinical examination, but these were desktop reports, and in any event where there were conflicting views, especially in relation to the effect of alcohol withdrawal, Dr O'Brien's greater experience in this regard was important. Mr Kennedy asks the court to prefer Dr O'Brien's evidence to that of Dr Carr and submits that there is no compelling evidence of cognitive impairment which could suggest that the account was given with a confused or suggestible state of mind and was one which could not be relied upon. Counsel did not make any submissions in relation to the expert evidence of the pain specialists.

123. It was submitted that it was not open to this court to draw inferences about the mechanics of CA's fall from the window and the Claimant should not be permitted to go beyond her pleaded case. Whilst the Defendant's expert Mr Billingham's carefully constructed analysis as to how the exit from the window could have happened should be preferred to that given in oral evidence by Mr Collier who had not expressed an opinion in his original report, or even the joint exchange, there is no obligation on the Defendant to make such a suggestion. The court should not feel constrained to fill gaps in its knowledge or understanding on the basis of limited evidence, or facts which were not proved by postulating theories as to possibilities in respect of the mechanics. Mr Kennedy relied upon the approach of the Court of Appeal in the case of **Graves v Brouwer [2015] EWCA Civ 595**, which included the disapproval in the earlier **Popi M** case of the famous Sherlock Holmes theorem.

124. In respect of the evidence relating to repairs, and the condition of the window at the relevant time, the court is invited to reject any suggestion by CA that she had reported a problem with the original restrictor. There was clear evidence that PR had forcibly overcome the restrictor, and this court could find on a balance of probabilities, accepting the evidence of CM, that the original had probably been replaced with a more robust restrictor.

125. Mr Kennedy KC submitted that the scope of the duty under the Occupiers Liability Act should be considered in the context of the service which the Defendant was providing, namely not as a care institution but as accommodation for service users who were supported, and who could make their own life choices. The fact that some were vulnerable or likely to be intoxicated through drugs or alcohol did not impose a higher duty on the occupier as a service provider, and a distinction could be drawn between the lawful visitor to the YMCA, such as CA, and the vulnerability of individuals, such as the blind visitor in the **Pollock** case. Insofar as alcohol and drug addiction was self-inflicted, Mr Kennedy relied upon the observations of the court in **Campbell v Advantage Insurance [2022] QB 354**. Although this was a case involving contributory negligence, the duty of the tortfeasor should be assessed by reference to that which was owed to the reasonably prudent and sober individual. There could not be a duty to protect residents from the consequences of their own intoxication.

126. There is a further argument pursued by the Defendant in relation to the desirable activity undertaken by the YMCA in the provision of the accommodation facility for these adults with problems. The Compensation Act 2006, and the Social Action Responsibility and Heroism Act 2015 were pertinent, and should leave this court to ensure that the worthwhile activity undertaken by the Defendant was not curtailed by imposing onerous tortious responsibilities.

127. Mr Kennedy submitted that the risk of the Claimant falling out the window as a known wheelchair user, was not reasonably foreseeable, did not represent a danger and in any

event was not foreseen, and in any event it was not reasonable to expect of the Defendant to take any steps to prevent such an occurrence. Further reliance was placed upon section 2 (5) on the basis that the Claimant on her own evidence knew that she had to be careful in and around the window, because she had requested the replacement of the allegedly broken restrictor, and was probably party to the defeating of the restrictor through PR.

128. If the court is minded to make a finding of primary liability against the Defendant it is submitted, the choices made by the Claimant are relevant to any apportionment for contributory negligence which in this case should be very high. This was an accident the responsibility for which could be laid substantially on the door of the Claimant and counsel contended for 80%. This case could be distinguished from that of **Spearman** where the court found that the Claimant could not be taken to have appreciated the danger that he was in (where contributory negligence was not established).

Discussion

129. There is a superficial attraction to Mr Kennedy's submission that the liability question stands or falls on the credibility of the Claimant who must establish the facts substantially on the basis of her case as pleaded on a balance of probabilities and insofar as she may fail to do that, she cannot succeed in her claim. I agree that in most cases where a Claimant is an unreliable or incredible witness (in the sense of lacking in credibility for whatever reason) a claim is likely to fail *in limine* especially where there is no direct corroborative evidence as to the circumstances in which the injury was sustained. This must be particularly so where there is a disconnect between the pleaded case and the oral evidence and the pleaded assertions simply cannot be established.

130. However, this is not a case where the resolution of liability can be made on a simple binary determination of a single issue; the factual context is not straightforward, and it cannot be ignored that CA was a highly vulnerable individual with complex needs, based largely around her addictions and poor mental health, as well as physical disabilities, and it is inevitable that such an individual could not be assessed by reference to the normal standards expected of a person giving an account of something that happened to him/her several years earlier both in terms of recall and reliability. Whilst the claim has been pleaded with a significant degree of specificity, and the Claimant's written statement is largely in accordance with the pleaded claim, there is little doubt that the Claimant did not come up to proof in a number of respects in establishing the precise factual background and her account should be approached with a great degree of caution. She agreed in her oral evidence that she had little or no memory of what happened, and save for standing by her account that this was not a deliberate fall from the window, there were so many inconsistencies in the explanations given, (a feature which has been characteristic from the moment that the CA was conscious

following the fall), that if this was simply a binary question she could not succeed with her claim.

131. In my judgment, whilst the pleaded case must provide the tramlines and the essential matrix for the claim, it cannot and should not create a straitjacket, as long as the essential premises on which the claim is based can be established. This is particularly so where the evidence is bound to be circumstantial and where a reliable account from a vulnerable individual is unlikely. It seems to me that the essential factual and legal premises based on the pleaded case advanced are threefold, giving rise to these assertions: (1) her exit from the window was accidental; (2) the condition of the window, that is opening beyond its restrictor, meant that the premises were not reasonably safe for her as a visitor; (3) the Defendant failed to discharge its duty to take reasonable care in all the circumstances by ensuring that the windows could not be opened in such a way. Of course these assertions are nuanced, and include additional issues as to whether the condition had been created directly or indirectly by the Claimant, and whether the Defendant had taken steps to install an appropriately robust tamperproof restrictor prior to the accident.

132. Accordingly, I consider for the purposes of this case whether or not the Claimant can prove those premises even if she cannot establish them effectively on the basis of her own testimony.

The fall

133. I start by reference to that which cannot be in dispute. The Claimant was first observed by passers-by on the late afternoon of 1st August hanging from a window ledge or some other part of the structure. She was facing the wall. By whatever means she got to that point, there is no doubt that before she fell she was desperate for help and assistance, crying out to all who could hear her. Therefore even if there had been a suicidal intent or attempt in passing through the window, there was an extremely rapid change of mind. The Claimant could not have passed through the window if it had been working as intended, that is restricted to a maximum opening gap of 10 cm. Whilst no system is fool-proof and even the most robust restrictors can be bypassed by a determined individual, if the type of restrictor allegedly put in place by the Defendant prior to this incident (on or before 14th July) had been rendered inoperative, this could only have been through such a determined effort by the Claimant or someone on her behalf. At no point was the Claimant when in a state of reasonable consciousness (GCS 13/15) reporting to anybody within the emergency services, or on her first admission to hospital that this had been a deliberate suicide attempt.[22] The police elicited an account, almost certainly from her, which suggested an accidental fall, albeit involving a different mechanism that which was later advanced.

[22] see paragraphs 39-41 above

134. Aside from the account allegedly given to MG and MR on 3rd August, upon which the Defendant relies, but which is disputed by the Claimant, on 4th August she was asserting that this was an accidental fall when visited by JD, and two days later on 6th August when seen by Josey Jenkins, similarly she was giving an account of accidentally slipping out of the window, on this occasion making reference to retrieving washing for the first time. When spoken to by a mental health professional who would undoubtedly have the greatest experience in eliciting a suicidal ideation, on 21st August, when an enquiry was made about attempted suicide, this was denied.

135. Whilst there is further reliance placed upon a repeated admission, or acknowledgement of deliberately exiting the window in March the following year,[23] it is against this undisputed factual background that the purported admission on 3rd August should be considered.

136. Although counsel for the Claimant sought to challenge the integrity and accuracy of the reporting of a suicide attempt admission on the part of the Claimant by both MG and MR in the hospital, this stopped short of any suggestion that it had been fabricated by them. Further, it should be noted that the account in the Mainstay records appears to provide some degree of elaboration to the words allegedly used by CA, and MR accepted in his evidence that there was no direct use of the word "suicide" reasonably acknowledging that it was his interpretation on the basis of an answer to the question "*did you mean to do it*" when she replied *yes* that he arrived at such a conclusion. MG was more robust, as indicated. The Claimant, of course denied that she had ever given such an impression or communicated a deliberate intention.

137. This is the context in which I must consider the answer to the first question and in particular whether CA did convey an explanation to MR and MG that this was an attempt at suicide, either directly, or by implication. I accept the accuracy of the account given by MR, and that it was not unreasonable for him to conclude that CA was indicating a deliberate exit from the window. I found MR to be a straightforward witness, who made reasonable concessions. Nevertheless, I do not accept that the word "suicide" was ever spoken by CA, and insofar as MG stated that it was, in my judgment he was wrong. It is more likely than not that this was his interpretation of what was said after subsequently viewing the Mainstay records. In any event, it was not unreasonable for either MR or MG to have made the entry which they did for 3rd August even if it was expressed in more emphatic terms and did not record the precise words of the conversation.

[23] see paragraph 49 and 50 above

138. However, although I accept MR's account and the truthfulness of his impression, I am unable to accept, on a balance of probabilities, that he reported the suicidal ideation to the nursing staff at the hospital. It is not something which was included in his written statement. If he had reported it, in my judgment it is likely that it would have been noted in a record, as clearly of great importance to any future care plan and vigilance. In this respect, I have come to the conclusion that he was mistaken in his recollection about such a report.

139. Whilst the absence of any report to the hospital may be an indication that MR was not convinced this was a genuine suicide attempt, it is inevitable that the Mainstay entry would have informed the staff at the YMCA moving forwards, and it was not unreasonable for them to take at face value a report of attempted suicide and to devise a support plan for the Claimant accordingly.

140. However, this admission does not, in my judgment determine the question as to whether or not the fall from the window was deliberate or accidental. This involves a far more nuanced consideration, and I have come to the conclusion for a number of reasons, which I now set out, that the Claimant, as she has always contended within these proceedings and on most of occasions save for those noted above, did not deliberately exit this window but fell accidentally, despite making comments at the hospital that might have been interpreted that this was an act of self-harm.

141. First, whilst impulsivity may have been a trait of her personality disorder, there was no doubt that when she returned to her room in a drink and drug intoxicated state, this was a common and not unusual condition. She had a previous history of self-harm and one suicide attempt after a major life event 14 years earlier, but there was no prior indication of a reaction of such a nature to what was probably a commonplace occurrence, namely an argument with a boyfriend, or significant upset involving her family. The question of triggers for suicide were considered by the psychiatrists and I do not find Dr O'Brien's opinion, based upon a strong history of previous impulsivity and lability, as he describes it in the joint report, to be a sufficient basis for the extreme step which would have been taken through impulsivity. He acknowledges that only the Claimant would know her intention at the time, although this is not accepted by Dr Carr. Neither psychiatrist is able to identify any clear trigger. Accordingly, on the basis of the circumstantial evidence it seems to me unlikely that CA would have made her way to the window and sought to climb out/throw herself out, particularly when at that time she was on her own in the room. It is germane that although Karen Leather suggested otherwise in her oral evidence, the record from the reception indicates that she was not behaving in any way which gave a cause for concern, nor was there any suggestion of self-harm.

142. Second, it seems to me implausible that the Claimant would have changed her mind so quickly in an intoxicated state and with the physical disabilities which she had. If she had intended to exit the window deliberately and impulsively with a view to killing herself, the most likely route would have been headfirst, and the fact that neither expert can postulate a mechanism which would have allowed this to have happened, presupposes that intentionally climbing out of the window would have enabled the Claimant to reflect on how she could avoid falling four floors, by holding onto some part of the building structure. This implies a knowledge and presence of mind on her part, which is difficult to accept in her condition.

143. Third, there is no obvious mechanical explanation for this fall, despite the Defendant expert's theory. Whilst the Claimant may have struggled to pass through (deliberately or otherwise) the side hinged/pivoted window which was unrestricted if standing up or kneeling upright on the windowsill, because of the effect of the gap being narrowed as the upper edge tilted downwards towards her, it does not follow, in my judgment, that if she was carrying out the action of leaning towards one of the handles to retrieve washing, as she asserted in her statement, (if not in evidence in court), with both her good leg and her stump on the sill itself, she would not have been in a position to roll or tumble out. The Defendant's expert Mr Billingham appears to suggest that this would not have been possible because of the narrow gap. I respectfully disagree. In fact it seems to me quite feasible that CA having limited dexterity or ability to control her movements in a state of intoxication, would have been otherwise than in an upright position, and probably inadvertently creating a body shape that was capable of rolling or tumbling through the gap which was now created. In my judgment this is a far more likely explanation than a deliberate climbing out. I accept that little reliability can attach to the accounts which she gave to this court, but there is a pertinent and telling account, very much closer to the accident which provides some assistance. She gave an unprompted reply when speaking to Josey Jenkins a few days later that she had fallen when reaching out for her washing. Although this is one of a number of conflicting accounts by way of explanation, in fact it is closer to the very first account seemingly given to the police officer, that the Claimant had "sat on the window ledge and lost her balance".

144. The other mechanical explanation on which of the Defendant relies is that the Claimant could not have turned 180° to face the building if her fall had been accidental, as this this would have inevitably involved her climbing out in preparation for jumping or dropping as part of a suicide attempt. Again I do not agree with this hypothesis, as advanced by Mr Billingham. In fact it is equally consistent with a tumble or fall from a sitting/stretching forward position through the window gap with CA grabbing the first projecting part of the structure she could find, as it is with a measured climbing out. Further, as I have indicated above, it appears to be within moments of exiting that the Claimant was crying out for help, suggesting a sudden and unexpected exit rather than a more measured and a deliberate plan to attempt suicide.

145. Fourth, the presence of clothing as depicted in the photographs cannot be easily dismissed as coincidental and appears to implicate washing/ clothing in the incident, if not the jeans/ trousers, at least the pink/peach jacket. Although evidence of the witness LG suggests that the hanging out of washing from windows was a common occurrence, and probably more than once or twice as she appeared to concede in cross examination, in my judgment it is unnecessary to make any determination as to whether this was something known by the building occupiers, and to which they should have reacted. It is more important in the sense that it provides a plausible explanation as to why the Claimant may have been near the open window. Whilst the court can draw little comfort from the credibility or reliability of the Claimant in her testimony, I do not accept that she had sufficient presence of mind or cunning to identify the type of clothing later shown in photographs as her own. In my judgment it is more likely than not that the retrieving of or putting out clothing to dry was a factor in the Claimant's fall, as she suggested within days of the accident to Josey Jenkins. At that point she would not have known that a photograph taken by a passer-by would confirm the presence of laundry at or near to the area of her fall.

146. Fifth, in the light of the numerous inconsistent accounts that have been given by CA as an explanation for how she came to fall, it is difficult to have any confidence that any single account is accurate. In addition to identifying inaccuracies in her evidence not only in relation to how she came to fall but also more generally in reporting problems with her room, which suggested dishonest fabrication, Mr Kennedy submitted that the fact that the CA was an habitual drug and alcohol abuser would have had an effect on her ability to recollect matters accurately, and thus touched upon reliability. In my judgment, this would have equal application to the purported admission of a suicide attempt on 3rd August. There is no compelling reason why that explanation should be more accurate than others which the CA gave both before and after her meeting with MR and MG. In this respect, the observation of Dr Carr, the neuropsychiatrist instructed on behalf of the CA, is pertinent to the fact that the number of inconsistent accounts given by her was suggestive of the CA having little or no recall.

147. It is also pertinent to consider the most contemporaneous accounts to the police and to the hospital doctor, which are most likely to have come from the CA. Whilst they could also be dismissed as fabrications, or incorrect recollections, in my judgment they carry more weight in terms of veracity, despite the unreliability of CA. Even allowing for the pain in which she would have been, it seems implausible that she would have been constructing an untruthful account (i.e. accidental rather than deliberate exit from the window) so soon after she had fallen.

148. The sixth reason arises from my assessment of the expert medical evidence. I have touched briefly on this above. I do not believe that a detailed analysis of the psychiatric evidence or the pain specialist evidence is necessary because of the acknowledged limitations

by all the experts, none of whom examined the CA when being asked to deal with questions on a hypothetical basis. It is accepted that there were a number of variables in terms of the effect of the treatment. In respect of the psychiatric evidence, the difference between the experts is largely in relation to the impact of the alcohol withdrawal process, and the medication which the Claimant was receiving in respect of that, because other aspects (the extent of any head injury and the effect of painkilling medication) were not strictly within their expertise.

149. Nevertheless, I found the approach of Dr Carr which considered holistically the effect of all aspects likely to impact on cognition to be helpful, rather than to consider them in isolation to one another, and his conclusion that taken together they are likely to have led to impaired recollection and post-traumatic amnesia was a reasonable one. I found him to be an impressive witness particularly when dealing with the question as to whether or not CA's ability to make specific requests for her needs was indicative of a good level of cognitive function. Dr Carr did not believe that the Claimant's ability to make requests for specific needs was something to be equated with good cognitive function, in that any impairment would lead to problems in laying down memory in the first place, and this would have been compounded by the effect of the medication which was being administered to treat the pain. Dr O'Brien, on the other hand, whilst undoubtedly correct in his assessment of CA's mental state based upon her previous psychiatric history, and the identification of impulsivity in EUPD, was seemingly focused on a motive for her to attempt suicide (impulsivity) rather than the collective impact of all the elements which may have contributed to an impairment of cognition, or the ability to recollect.

150. In relation to Dr Carr's reference to high scores on CIWA on 8th August, and thus no less serious withdrawal effect in the days leading up to this, Dr O'Brien's observation that there was no indication in the medical records of significant withdrawal symptoms, such as psychosis or disorientation presupposes that in the light of all the treatment which the Claimant was receiving, such symptoms would have been of interest to the medical or nursing staff. It is to be noted that she was not the subject of any significant psychiatric assessment until a number of days later.

151. In respect of the pain specialists, there was no stark area of disagreement. However, similar considerations apply to my assessment of their evidence. I found Dr Simpson to be careful in her approach, acknowledging that there was no binary answer to the question of cognitive impairment, and like Dr Carr she considered all the aspects holistically, that is the high levels of pain medication, the effect of trauma from her injuries, alcohol withdrawal symptoms, a possible head injury, and the Claimant's previous mental history when arriving at a conclusion that she was probably cognitively impaired, and could have been in a suggestible and a distressed state when spoken to by MG and MR. On the other hand, Dr Padfield was more reluctant, like Dr O'Brien, to consider the aspects collectively, and I found

his conclusion that the extreme pain, requiring an extensive cocktail of painkillers was more likely to have led to the Claimant giving an accurate account, to be illogical and unscientific, and to an extent trespassing on the province of the fact finding tribunal.

152. In the circumstances, I have come to the conclusion on a balance of probabilities that the medical evidence supports that CA was in a confused and poor state of cognition as a consequence of her alcohol withdrawal, and the high levels of painkilling medication which she was receiving. There is insufficient evidence to implicate the consequences of a head injury, although it is possible that this was also contributing to the inability of the Claimant to give a lucid account in respect of any questions which were asked of her. I do not accept that she was coherent and making sense as suggested by MR and MG. Whilst this may have been their impression, in my judgment it was incorrect.

The state of the window / repairs and maintenance undertaken

153. On the basis of my conclusion that CA did not deliberately exit the window, and that no reliance can be placed upon an account of attempted suicide or self-harm, I now turn to consider the window condition, and its relevance to the accident. I propose to deal with the second and third questions identified at paragraph 20 and 21 above. It seems to me that resolution of these issues is more straightforward, because there is no challenge that the window was in its unrestricted state at the time that the Claimant fell, ie CA could not have passed through the window if its opening was effectively restricted.

154. The Defendant's case, of course, is that the window was not simply restricted by the inbuilt restrictors (or ought to have been if they had not been deliberately bypassed) but also by an additional and very robust restrictor installed by an independent contractor just over two weeks earlier.

155. Insofar as the Claimant asserts that not only were the window restrictors in her room not working, but also that she had reported this to CM (but not AP), for the reasons that I have given above, she is not a credible historian, and little reliance can be placed on her evidence. Therefore, what other evidence is there in relation to the condition of the window prior to the accident? It is axiomatic from the photographic evidence available from May 2017 that the opening of the windows beyond the restrictors was a regular occurrence. It seems to be highly unlikely that it was only on the day that the images were captured that windows were open. I find on a balance of probabilities that in the summer months the windows in many of the units were opened beyond the restrictors, implying that there was no effective restriction to the intended 10 cm in many of these units however that was being caused.

156. The fact that the photographs also appear to show the window in the Claimant's unit three months prior to the accident in an open position, and thus with an ineffective restrictor does not necessarily mean that that condition continued between May and the date of the accident for her window. However, the Defendant's own evidence in relation to the window in D01 is contradictory. AP asserts that on her weekly checks and attendances on CA on no occasion did she ever note the window restrictor not to be working, although it was not included in a routine inspection. Of course if she had inspected at the time of the Google photographs, this cannot have been correct. CM, on the other hand, specifically noticed a problem in CA's room D01 during the course of his eleven day inspection of all the units, including, it would seem, the absence of any window handles, something which was not identified by any other witness. MR, despite not undertaking any inspection himself, believes that at the time of his email of 10th July there was no specific problem in CA's room. Thus a somewhat confusing picture is created on the basis of the Defendant's own witness evidence, and this is the context in which Mr Murphy's purported repair and the email is to be considered.

157. In my judgment, it is unnecessary for this court to draw any adverse inferences, as the Claimant's counsel has invited on the basis of a lack of adequate disclosure of relevant documents, because the Defendant's case that a specific repair was carried out to the Claimant's window cannot be established on the evidence. It is clear that as the Claimant, on my finding, fell from a clearly open and unrestricted window, the evidential burden must be on the Defendant in the circumstances. My reasons for such a conclusion are these.

158. First, the JJ Kelly invoice upon which reliance is placed, is general and not specific. It could relate to any room within the hostel, or even more than one, and it appears to suggest a problem more extensive with the room than that is supported by any other evidence, (i.e. hinges and handles).

159. Second if a repair had been carried out which involved a cable type restrictor, as CM implies, it seems likely that this would have been noted by Mr Morrison who attended D01 immediately after the accident. According to his evidence the restrictors he observed were the original restrictors built into the frame.

160. Third, the opening of CA's window, if CM is correct, would have involved the destruction of the cable restrictor (brown) by the occupant or another. It is extraordinary that there is no contemporaneous (ie immediately after the event) evidence that this took place, especially if it is suggested that it must have involved a hacksaw or bolt cutter, as the evidence of the engineers appears to imply.

161. Fourth the contractor (Sandison) who came in only a matter of days after the accident to fit new restrictors of the cord variety with a lock and key, whilst noting that even the more robust type can be bypassed, recalls room D01, but does not refer to any previous cord restrictor in place. It seems likely that he would have remembered if he had been dealing with such a situation.

162. Fifth, the evidence of CM, on whom this assertion depends, was unsatisfactory in a number of respects. It is surprising when there was a perfectly good system for dealing with maintenance and repairs (Amis) that he chose to keep a handwritten log, which regrettably has gone missing. He did not share the obvious and justified concern of MR that the original window restrictors were inadequate, when it was clear that windows were being regularly opened, and such restrictors could easily be bypassed. Further, he did not see any safety issue in the opening of the windows beyond the restriction, despite the fact that many residents were vulnerable, and in some cases, as in the case of CA, the window was only a very short distance from the floor.

163. Insofar as he recalls missing handles in the room, in my judgment he cannot be correct in this recollection. I do not need to determine whether CM was deliberately misleading the court, or simply mistaken in his recollection. I am satisfied that there was a repair carried out at some point to one of the rooms within the hostel, but I have concluded that the evidence simply does not establish that it was the Claimant's room; on a balance of probabilities I am satisfied that it could not have been.

164. In the absence of any specific alteration to the window prior to the accident, I am further satisfied that the only restrictors in place were those originally installed to the frame, and they are unlikely to have been functioning adequately. Whether this was as a result of a defect in the sense that the restrictors were broken (as the Claimant had implied) or because they were easily bypassed to enable the windows to be opened by the occupant is immaterial, in my judgment. I am satisfied that they were ineffective, that windows were regularly opened for greater ventilation or for a host of other reasons, including, perhaps, to jettison unwanted items on the part of these vulnerable individuals.

165. Any dispute between the expert engineers as to the adequacy of the original plate restrictors is therefore more perceived than actual. Whether as designed they were fit for purpose does not really matter; in many settings they may well have been, but here they were clearly not, because they were easily overcome, and did not act to restrict the Claimant's window at the time of the accident. It is here that the next question becomes relevant.

Was the window condition a danger, so as to give rise to a reasonably foreseeable risk of injury?

166. I do not find this a difficult question to resolve. CA's unit was on the fourth floor, and there was a significant fall to the first floor parapet. Whilst most open windows for the able-bodied residents would present only a minimal risk because of their height from the floor, for the Claimant the situation was different, occupying a disabled room with a low sill. Although she was a wheelchair user, it is not suggested that she was unable to move around her room and exit the chair to use the furniture, including the bed, bath, etc. The opening of the window beyond 10 cm, to anyone accessing the sill from a wheelchair exposed such a person to a risk of falling through the gap which was created. Although Mr Billingham's observation is a valid one that the leading/upper edge of the window would reduce the gap and create an obstruction for any person in an upright position, as I have already indicated that would not be the case if he or she was sitting on the sill, or more supine, as this Claimant would have been on my finding. Further, the condition of the occupant cannot be ignored. Not only was the Claimant intoxicated, probably by drink and drugs, which was a regular state for her, she was otherwise vulnerable, and unable to make sensible choices and be as aware of the risk and danger as others might have been. In the circumstances I find that the window condition did give rise to a reasonably foreseeable risk of injury from tumbling or falling out, as happened to the Claimant.

Did the Defendant breach their common duty of care owed to the Claimant as a lawful visitor to their premises?

167. There are two elements which are to be considered here. The first relates to the Defendant's knowledge of any potential danger and the second to the reasonableness of the steps which could be taken to eliminate that danger.

168. Counsel for the Claimant was critical of the absence of any specific risk assessment undertaken by the occupier which might have identified a risk of falling from height if a window was not functioning properly. Whilst it is correct that a detailed and properly undertaken risk assessment in relation to the condition of the individual units and potential dangers to occupiers would normally be a requirement if a Defendant is to discharge its duty of care in the circumstances, in a sense this issue does not need to be resolved nor does any breach depend upon its absence. This is because the Defendant was actually aware of windows which were open beyond the restrictors in many instances, but as a consequence of that knowledge addressed a different problem, and one that was not focused on the safety of the residents, namely the jettisoning of rubbish through the windows.

169. Insofar as it is necessary to make any finding about their knowledge, and this is not clear from my earlier findings, I am satisfied on a balance of probabilities that open windows and non-working restrictors were problems known to the Defendant for a considerable period of time prior to the Claimant's accident, and not simply when it was addressed in the MR email. It is inconceivable that a cursory inspection of the building in the previous months would not have revealed many open windows, as evidenced by the Google photograph. In the circumstances, in terms of the Defendant's knowledge, it is surprising that the specific risk to the safety of the residents was not addressed, bearing in mind their vulnerabilities and the fact that many might behave in an unpredictable or foolhardy way, especially when intoxicated. This is especially true when considering the specific knowledge of the CA's vulnerabilities and complex needs, in conjunction with the fact that she was occupying a room where the window was a very short distance from the floor. It seems to me that the Defendant occupier adopted a blinkered approach to the foreseeable risk, and the obvious danger that arose in the circumstances.

170. The second element, of course, relates to the nature and extent of the remedial steps which could have been taken to overcome the risk. In my judgment, they were simple and straightforward. In fact, if I had accepted the evidence of Mr Murphy, which I do not, this would have represented an adequate discharge of the duty, even if the purpose of fitting the robust cord type restrictor was not aimed the safety of the residents, so much as preventing the jettison of rubbish. The cost was relatively low, as the disclosed invoices show, and the work could be undertaken in a short period of time without disrupting the occupation of the residents.

171. It is in this context that the special qualification sought by the Defendant should be considered, that is whether the worthwhile activity of the YMCA in providing a service for vulnerable individuals should be curtailed by the imposition of an onerous duty, applying the Compensation Act 2006, and the Social Action Responsibility and Heroism Act 2015. In my judgment there is a simple and straightforward answer to this. The duty said to be breached is no more than one which requires the integrity and safety of the units to be preserved. It does not impose any higher or more burdensome responsibility. In fact, the Defendant appears to have acknowledged the inadequacy of windows which could be overcome by the residents with little effort and the need to ensure that the restrictors were working properly. I cannot see any basis for saying that extending their responsibilities to defeat the actions of vulnerable residents who want their windows open amounts to a curtailing of their worthwhile activities. These particular statutory provisions are far more apposite to activities which involve an inherent element of risk, but one which is balanced by the very significant benefit gained, such as school field trips, forest activities, and the provision of sporting experiences for those without privileges.

Is there a defence available to the Defendant under section 2(5) of the OLA?

172. It is important that the *volenti* defence is distinguished from the considerations of failures to take care which arise when dealing with contributory negligence. Here it is said that CA freely accepted the risk of falling out of the window and therefore cannot avail herself of any breach of duty in relation to the state of the premises. I agree with Mr Martin KC that is necessary to acknowledge the action which the Claimant was undertaking at the time. Whilst the precise reason for the Claimant being near the window or on the sill remains unclear on her evidence, on the basis of my finding that this was not a deliberate attempt to climb out, as counsel says it is likely to be an activity which she had undertaken on a number of previous occasions. As a vulnerable resident with little appreciation of inherent risk (and also intoxicated) it is difficult to see how this a conscious and voluntary acceptance of an obvious risk by her. I agree that the situation is analogous to that in the **James** case, and probably provides a more compelling case for precluding a *volenti* defence. As indicated by the court in **James**, there is a high hurdle for a Defendant to overcome. In my judgment, in this case they have not, and the defence does not succeed.

To what extent is the Claimant to blame? (Contributory negligence)

173. Counsel correctly identifies three components to this issue, namely blameworthiness, causative potency, and whether the reduction of any damages award on such a basis is just and equitable.

174. In terms of blameworthiness, one of the main planks upon which the Defendant seeks a substantial reduction for contributory negligence is that CA was party to the defeating of the restrictor. This appears to be based upon the evidence of MR to the effect that CA had told him in the days afterwards and about the time that she made the so-called admissions that her boyfriend had kicked or otherwise dislodged the window restrictors. It is not a matter which was pursued either in chief or in cross examination in any detail, and there is no record in the Mainstay system of this account. I have already found that there was little which the Claimant said that could be described as reliable, but in any event it seems to me that any involvement of the boyfriend in defeating the restrictors by violently kicking or otherwise dislodging them would only have relevance if I had been satisfied that the restrictor had been replaced with the more robust variety. I was not so satisfied, and in fact it seems to be far more likely than not that this problem with the original restrictors not functioning had been present for some time and should have been picked up on a reasonably cursory inspection. In fact it probably was picked up by CM, although not appropriately actioned. In any event, bearing in mind the clients who are using the hostel, even if there had been some intervention by PR at some stage to make the window more accessible, in my judgment it is not something which could be visited at the door of the Claimant in terms of any significant blameworthiness.

175. As far as the failure to report any disrepair is concerned, in my judgment, again bearing in mind this client group (vulnerable adults) I do not attribute any significant blameworthiness to the Claimant, especially, as I have found, the restrictors had been ineffective for some time (from at least May 2017).

176. The third matter, however, is more significant. The Claimant became voluntarily intoxicated, that is she was responsible for her own state when she returned to her room. She cannot rely upon her own intoxication. She was aware that her window was not functioning properly, because she was using it in some way to dry washing. Whether she was simply sitting on the sill, or actually trying to retrieve the washing is immaterial in this respect, because had she been sober, she might have appreciated the risk of over balancing and falling through the gap. It seems to me that despite her vulnerable state, she must accept some responsibility for her own actions in this regard.

177. In terms of apportionment I have been referred to the case of **Spearman**, in which the trial judge declined to make any deduction for contributory negligence in the case of a hospital patient whose state of mind did not allow him to appreciate the danger which he was in by accessing the roof. It seems to me that although the Claimant would have been less appreciative of danger than a person who did not have her vulnerabilities, had she not been intoxicated and probably in a highly emotional and upset state, she would not have allowed herself to be exposed to such a risk of falling. I cannot draw any comparison with the Claimant in **Spearman**, who was "ill" or "of unsound mind" because of his hypoglycaemia. The Claimant was in a different category altogether and any confusion arose from her intoxication through drink/drugs.

178. The balancing exercise which I have to undertake weighs two important elements. Whilst this accident was manifestly avoidable by the Claimant exercising greater care, nevertheless the task of carrying out an appropriate and efficient installation of effective window restrictors when the Defendant should have appreciated the danger to occupants was a proportionately simple one at minimal cost. Furthermore, the Claimant's vulnerable status, whilst not excusing her from personal responsibility, is a matter to be taken into account in apportioning the larger share of the blame to the occupier.

179. In all the circumstances, in my judgment, an equitable apportionment would be one whereby the Defendant bears 65% responsibility for this accident, with a reduction of 35% in respect of contributory negligence on the part of the Claimant.

Conclusion

180. It is my determination that a duty was owed to the Claimant as a lawful visitor under the OLA 1957, and that this duty was breached on the part of the Defendant in failing to ensure that the windows were appropriately restricted and not capable of being easily opened by visitors who were vulnerable and being supported in this accommodation to enable them to develop greater levels of independence. The Claimant cannot escape some share of responsibility, and the apportionment is as indicated above 65/35.

181. I give judgment for the Claimant accordingly invite the parties to draw up an appropriate order to reflect this. This judgment is provided in draft form in the first instance to allow for any typographical corrections to be notified.

HHJ Wood KC

22nd February 2023