



Neutral Citation Number: [2019] EWHC 486 (QB)

Case No: C40YP770

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
ON APPEAL FROM HER HONOUR JUDGE SARAH RICHARDSON
SITTING AT THE KINGSTON-UPON-HULL COUNTY COURT

Leeds Combined Court Centre
1 Oxford Row, Leeds LS1 3BG

Date: 4 March 2019

Before:

MR JUSTICE DINGEMANS

Between:

Martyn Clarke
- and -
Hull City Council

Claimant

Defendant

Corin John Furness (instructed by **Thompsons solicitors**) for the **Claimant and Respondent**
Daniel Edwards (instructed by **Plexus Law**) for the **Defendant and Appellant**

Hearing date: 26 February 2019

Approved Judgment

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

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THE HONOURABLE MR JUSTICE DINGEMANS

Mr Justice Dingemans:

Introduction

1. 20 December 2013 was the last day of the winter term. On that day Martyn Clarke, who ran the special teacher unit at Ganton School, Hull and who was employed by Hull City Council (“the Council”) was involved in the restraint of a pupil known as “AS” after AS had been unlocked from a cubicle in the washrooms into which he had locked himself. Mr Clarke claimed that he had been repeatedly kicked in his knee by the pupil as he was being escorted to the bus and suffered injury which had accelerated problems caused by degenerative changes in his knee. On 30 April 2016 Mr Clarke’s employment as a teacher was terminated and he suffered a loss of earnings.
2. Mr Clarke brought a claim for damages against the council for breaches of the duty to take reasonable care for Mr Clarke’s safety at work. So far as is material it was alleged that the teacher behind Mr Clarke should have intervened to stop AS kicking Mr Clarke. The council denied breaching duties owed to Mr Clarke and denied that any breach of duty caused the injuries suffered by Mr Clarke. Contributory negligence on the part of Mr Clarke was alleged.
3. The action was heard by Her Honour Judge Sarah Richardson (“the judge”) at Kingston-upon-Hull County Court on 28 and 29 June 2018. Judgment was reserved and given on 2 July 2018. The Judge gave judgment for Mr Clarke in the sum of £35,000, having made a reduction of 30 per cent to take account of Mr Clarke’s contributory negligence.

Issues on the appeal

4. The council appeals on the basis that: (1) the finding of fact made by the judge to the effect that Mr Clarke was repeatedly kicked in the left knee by AS was wrong; (2) the judge was wrong to find that the council was in breach of duty by failing to identify which kicks were seen by a fellow teacher; and (3) the judge had wrongly found that the breach of duty had caused Mr Clarke’s injuries in circumstances where the judge had not found which of the kicks by AS had caused the injuries suffered by Mr Clarke.
5. Mr Clarke resists the appeal, asserting that: (1) the findings of fact were properly made by the judge; (2) the breach of duty was proved by the findings of fact made by the judge; and (3) it was common ground at the trial that causation was proved if Mr Clarke was repeatedly kicked and the council should not be entitled to raise this matter on appeal. Mr Clarke also served a Respondent’s Notice to affirm on the basis that the judge should have found that the breach of duty caused Mr Clarke’s injury and made a material contribution to Mr Clarke’s injury.
6. I am very grateful to Mr Daniel Edwards on behalf of the council and Mr Corin Furness on behalf of Mr Clarke, and their respective legal teams for their helpful written and oral submissions.

Proceedings at the trial

7. Both parties had obtained medical reports from consultant orthopaedic surgeons being Mr Cox for Mr Clarke and Mr Getty for the council. Mr Clarke had described to both experts that he had suffered repeated kicking from the pupil causing severe pain in the knee and a collapse going to the floor, see paragraph 1.1 of Mr Cox's report and paragraph 9.22 of Mr Getty's report.
8. In the course of his report Mr Cox noted, at paragraph 12.1 that "Mr Clarke describes an injury incident on 20/12/13, I have called this an accident for convenience, in which he sustained acute soft tissue injury consistent with contusion to the inner side of the left knee in relation to his being repeatedly kicked ...". Mr Getty recorded, at paragraph 9.22 of his report, that Mr Clarke had reported that Mr Clarke had been kicked repeatedly and that "after 4 or 5 blows, Mr Clarke developed immediate severe pain on the inside of the left knee, and fell towards the floor ... he can not remember whether he fell on to the floor, but somehow he regained his balance". Mr Getty also recorded at paragraph 9.24 that Mr Clarke "had continued pain on the left knee" and at paragraph 9.25 that "the pupil was continuing to kick him all the way down towards the bus, and also he was kicking the right ankle, but the latter was not a particular problem" suggesting that the repeated kicking to the knee was a problem. Mr Getty recorded the history that he had obtained from Mr Clarke and noted possible scenarios for the injury at paragraphs 29.32 and 33 of his report. These were no kicks and the problem caused by the stress of controlling the pupil at a crisis, and the alternative being "repeated kicks to the left knee, which would cause him injury, developing symptoms again from constitutional osteoarthritis in the left knee".
9. Mr Cox had commented on bone bruising found on a MRI scan saying "the injury, essentially, appears to have caused the onset of symptoms from the previously quiescent constitutional degenerative condition involving the left knee. The injury has also evidently caused bone bruising at the medial femoral condyle ... it is caused by significant contusion of the bone and it is reasonable to conclude that the index injury caused the bone bruising". Mr Getty had commented on oedema in the left medial femoral condyle found on the MRI of the left knee taken on 7 January 2015 saying "the question of whether the oedema is related to trauma or relates, in fact, to degenerative arthritic change, should be clarified by a musculoskeletal radiologist".
10. The orthopaedic surgeons had met and produced a joint statement. In the joint statement they agreed "it is for the court to decide if there was or was not an accident". They also agreed "if it is accepted that there was an accident, then this was a soft tissue accident. There is no evidence of bony injury. Both experts note that there was bone bruising. Both experts, on the balance of probabilities, think the main issue here is mechanically based, as indeed were the opinions of the two treating orthopaedic surgeons". At the hearing of the appeal there was some discussion about what was meant by "mechanically based". The treating orthopaedic surgeons were Mr Bunola and then Mr Raman, who had been approached for a second opinion. Mr Bunola considered that there was a meniscal injury and Mr Raman thought that there was a mechanical problem of the knee giving way, as appears from paragraph 29.3 of Mr Getty's report.
11. The experts also noted that Mr Clarke had degenerative changes in his left knee from arthritis and were of the opinion that there was an acceleration period in the case. The

note recorded “Both experts are agreed, there is no way of objectively identifying an acceleration period. It is an estimate based on all the evidence available, together with the experts’ experience in managing patients with the given complaint in question.” Mr Cox thought Mr Clarke’s current state had been accelerated by 3 years and Mr Getty thought that the acceleration period was 6-12 months. Both experts recognised that the view advanced by each other would be held by a reasonable body of competent surgeons or practitioners.

12. The parties agreed quantum, subject to liability, in the sum of £50,000.
13. The trial took place on Thursday 28 and Friday 29 June 2018. The evidence at trial on behalf of Mr Clarke was from: Mr Clarke; Sue Pullen a trainer in the Team Teach technique employed at Ganton school; and Ms Shakesby who had worked as a teacher for the council. The evidence at trial on behalf of the council was from: Eddie Wharton, then deputy headteacher and now headteacher at Ganton school; Sue Jones, then headteacher at Ganton school; Andrea Windass, a teaching assistant at Ganton school; and Julie Venus, community learning co-ordinator and now community safeguarding co-ordinator at Ganton school. There was a dispute of fact about whether Mr Clarke had been repeatedly kicked by AS.
14. In his evidence at trial Mr Clarke had given evidence that his knee had given way and he had fallen to the floor. In his evidence at trial Mr Wharton said after he had got down from a chair to let AS out of the cubicle in which he had locked himself “I was a couple of seconds behind” and said he had a clear view of Mr Clarke and did not see any kicking. Mr Wharton said he would have stepped in if he had seen any kicking
15. After Mr Wharton had given evidence the judge heard closing submissions. Mr Edwards was appearing on behalf of the council. There is a transcript of closing submissions. Mr Edwards started by raising the issue of contributory negligence noting that Mr Clarke had not communicated with his colleagues in accordance with the Team-Teach training that he had received. Mr Edwards then posed 3 questions for the judge to address: proof of the mechanism of the injury; the adequacy of the council’s assessment of risk; and finally whether there was a breach of duty. For understandable reasons the essential thrust of Mr Edwards’ submissions was directed to upholding the factual case for the council that there had not been repeated kicking of Mr Clarke so that Mr Clarke’s case as to the mechanism of the injury would fail.
16. In the course of his submissions Mr Edwards said “... if AS is kicking the claimant from a yard or two from the cubicle to the bus and Walton is walking behind and does nothing they fall to the ground and he does nothing, then the defendants will be liable It’s a staggering scenario but that’s how the claimant can win this case ...”. It is common ground that the reference to “Walton” on the transcript is a transcription error for “Wharton”.
17. At trial Mr Corin Furness in his submission on behalf of Mr Clarke referred to the apparent concession that Mr Clarke would succeed in his claim if he was repeatedly kicked saying “It isn’t for the claimant to prove how many kicks he received, nor precisely where they were received ... the claimant’s case is he was kicked repeatedly on a series of occasions during the course of that manoeuvre and that is, in my submission, all the claimant needs to prove and if the court accepts that evidence, the

claimant's claim succeeds for reasons fairly conceded by my learned friend at the end of his submissions."

18. At the conclusion of Mr Furness' submissions Mr Edwards noted two points of law and raised Mr Furness' characterisation of the concession. Mr Edwards said "... I don't think we disagree; may be I misheard my learned friend, I think he said at one stage, I made a concession on the liability if the claimant was repeatedly kicked". The judge said "No, he said if he was kicked and" before Mr Furness said "Walton saw it and ... and did nothing, ignored it, then [inaudible] proven". Mr Edwards then said "I apologise, I agree it". The Judge said "That is how I understood it" and Mr Edwards repeated "And I would agree with that."

The judgment

19. On 2 July 2018 the judge gave an oral judgment which has been transcribed. The judge recorded that Ganton School is a school for children with special educational needs. Mr Clarke ran the special teacher unit where he taught 5 pupils with profound and multiple learning difficulties. A pupil at the school, but who was not part of the special teacher unit, was called AS who had a Positive Behavioural Support Plan ("PBSP") to assist with serious behavioural problems. Mr Clarke had the assistance of 4 regular teaching assistants and others on whose services he could call. The background to the incident was set out.
20. The judge identified in paragraph 8 of the judgment that Mr Clarke needed to prove first the mechanism of the injury "namely was the claimant repeatedly kicked in his left knee by AS" and secondly whether there was a breach of the defendant's duty to take reasonable care for the claimant's safety at work." In paragraph 15 it was recorded that "the claim is vigorously disputed by the defendant who submitted that, on a balance of probabilities, the claimant was not able to establish that he was repeatedly kicked by AS in the left knee. In relation to breach of duty it was submitted by the defendant that this is a case where the risks and consequences of the risks had been properly identified, together with methods of eliminating or reducing the risk. In any event, it is said that that the claimant failed to show any causative link between any alleged breaches identified by the claimant either in his particulars of claim or at paragraph 16 of his skeleton argument and any injury that the claimant sustained."
21. At paragraph 16 the judge noted that there was no disagreement between the parties as to the applicable law. The judge referred to relevant authorities before recording at paragraph 22 that "the issues that this court must decide depend, of course, upon the court's view of the evidence and the facts".
22. The judge identified who had given evidence and then noted that the incident had occurred on 20 December 2013. The judge recorded that Mr Clarke and Mr Clarke's witnesses had signed statements on 23 October 2017 and the council's witnesses had signed statements on 13 November 2017, which was "a significant passage of time between the incident itself and the signing of all of those witness statements".
23. The judge found that all of the witnesses on both sides were "decent, upright individuals who do or did a demanding job in what were clearly at times very difficult

circumstances ... they all did their best to assist the court and, in my view, none of them were deliberately dissembling or seeking to mislead the court.”

24. The judge noted “there were, however, some deficiencies in the witness evidence” specifically identifying some deficiencies in Mr Clarke’s evidence, particularly in relation to the first two times he had put AS into an elbow hold and whether a screwdriver had been used to open the toilet cubicle door into which AS had shut himself. The Judge also noted some problems with the council’s witnesses saying “by the same token, it is clear from the evidence that the defendant’s witnesses had all discussed the events subsequent to them occurring, either collectively between themselves and/or one to one ... it made it difficult for the court to assess how much each of those witnesses were giving evidence from their recollection of events and how much they were relying upon their discussions and conversations with others”.
25. For those reasons the judge started by looking “at contemporaneous evidence and any objective or independent evidence” which the judge did from paragraph 38 of the judgment. The judge placed particular reliance on an incident reporting form dated 6 January 2014 completed by Mr Clarke at a time before it was known that the incident would cause the long term problems that it had. The Judge also relied on the fact that on 8 January 2014 Mr Wharton had completed a school incident report which noted that Mr Clarke was “kicked on knee, injured” suggesting Mr Wharton had accepted Mr Clarke had been kicked on the knee and injured, rather than just recording that this was what Mr Clarke said had happened. The judge also relied on the entry in the medical records showing that on 28 February 2014 the history was given as “kicked in knee repeatedly”.
26. In paragraph 46 of the judgment the judge had set out part of Mr Cox’s report in which he had said “the injury has also evidently caused bone bruising ...”. At paragraph 47 the judge recorded “whilst this evidence does not of itself prove the Claimant’s case, it is clearly objective and independent evidence which is consistent with the claimant’s case”. The judge had recorded that AS had a propensity to kick staff noting that the PBSP for AS identified behaviour including “hitting and kicking staff and objects, mainly doors and windows”.
27. The judge recorded that all of the council’s witnesses had accepted “albeit reluctantly” that it was possible for AS to have kicked Mr Clarke in the left knee. The judge had been caused concern with one part of Mr Clarke’s evidence, namely that he had fallen to the floor when his knee had given way, because it would have been noted by the council’s witnesses. The judge considered that there were two possibilities, either the knee had not given way or that Mr Clarke felt something happen and his recollection of the magnitude of that element was mistaken. The judge considered the second scenario to be more likely and concluded at paragraph 55 “having carefully pondered matters and weighed up the evidence and considered the evidence as a whole, I have come to a conclusion on a balance of probabilities that the claimant was repeatedly kicked in the left knee by AS. He, therefore, succeeds in establishing the mechanism for the incident”.
28. The judge then turned to the allegations of breach, giving reasons for dismissing the various ways in which the claim had been put before turning, in paragraph 78, to the last allegation which was “the final allegation is one which both counsel agreed was very different, both in its nature and form; that is that, had Mr Wharton exercised

reasonable care and seen AS kicking the claimant, Mr Wharton should have stepped in and taken over restraint from the claimant. That allegation is dependent upon the court's finding of what Mr Wharton saw or should have seen if he was exercising reasonable care for the claimant's safety."

29. As to breach of duty the judge said, at paragraph 79, "I have already found that Mr Wharton followed the claimant, Andrea Windass and AS down the corridor as they made their way towards the reception area and, thereafter, to the bus. Having found, as I have, that AS repeatedly kicked the Claimant in the left knee, in my clear view, Mr Wharton should have seen this happen from his position following the claimant (and he most probably did). Had Mr Wharton exercised reasonable care he should have stepped in and/or taken over restraint from the claimant. He did not. On that basis, the claimant succeeds in establishing a breach of duty."
30. The judge then turned to the issue of contributory negligence in paragraph 80 of the judgment. The judge noted that it was necessary to consider "causative potency and blameworthiness". At paragraph 85 of the judgment the judge recorded Mr Clarke's evidence that he was kicked repeatedly in the left knee and felt an incident of sharp excruciating pain and that the walk along the corridor would have taken more than a few seconds to undertake. At paragraph 86 the judge made a finding contributory negligence at 30 per cent "taking all of those matters into account and the fact that the claimant did not indicate to Andrea Windass that he was being kicked and that he was in extreme pain".

Legal principles to be applied by appellate courts when reviewing findings of fact

31. It is well-established that appellate courts have to be very cautious in overturning findings of fact made by a trial judge, see *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. This is because trial judges have seen the witnesses and taken into account the whole of the evidence as opposed to indulging in impermissible island hopping on to parts only of the evidence, and because duplication of effort on appeal is undesirable and increases costs and delay, see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26.
32. For those reasons appellate courts will only interfere if the trial judge was plainly wrong, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600. This means making a finding of fact which had no basis in the evidence, or showing a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence so that the decision cannot reasonably be explained or justified.

Judge entitled to find that Mr Clarke was repeatedly kicked

33. The council contended that the finding that Mr Clarke had been repeatedly kicked was against the weight of the evidence or inconsistent with other factual findings made. Mr Edwards relied on the facts that: the judge found that the council's witnesses were decent and upright persons doing their best to assist the court; the judge had accepted the council's cases on most disputed issues of fact apart from the repeated kicking; the judge had rejected Mr Clarke's account of falling to the floor; and the judge had made a fundamental mistake in relying on Mr Cox's conclusion that the bone bruising had

been caused by the index injury when that had been overtaken by the joint statement in which the issue had not been agreed.

34. In my judgment the judge was entitled to make the finding of fact that Mr Clarke had been repeatedly kicked by AS. The judge had found all of the witnesses, including Mr Clarke's witnesses, to be decent and upright persons doing their best, but had properly noted deficiencies in all of the evidence. The judge had carefully evaluated the facts and made findings which were partly in favour of the council and partly in favour of Mr Clarke. The judge had paused to reflect on concern caused by Mr Clarke's evidence that he had fallen over in paragraph 51 of the judgment, noted different scenarios and concluded, in paragraph 54 that Mr Clarke did feel something happen to his knee but that his recollection of the magnitude of this element of the injury was inaccurate. The judge had based her finding that Mr Clarke had been repeatedly kicked on contemporaneous documents which were produced at a time before the consequences of Mr Clarke's injury had become clear, and before litigation was in contemplation. Those documents consistently referred to "repeated kicking" and the judge was entitled to rely on them.
35. Further the judge was entitled to rely on the evidence of the bruising to the bone, which was agreed to be present by both consultant orthopaedic surgeons. Mr Getty did not attribute it to the index event but accepted that it might have been caused by that in his report, but Mr Cox did attribute it to the index event. On a careful analysis of the phrase "mechanically based" in the joint statement it does not appear that either Mr Cox or Mr Getty were abandoning their respective positions, and there was nothing else in the joint statement to suggest that Mr Cox had abandoned his evidence on this point nor that Mr Getty had abandoned his views. Both experts had made it clear that the issue was one for the judge to determine. If the parties had wanted the experts to set out their respective positions in the joint statement on bone bruising after the production by the experts of the minute of matters agreed and not agreed the parties could have asked or applied for that to be done.
36. In these circumstances in making the determination about what happened the judge was entitled to take into account the evidence from Mr Cox. It is plain from the judgment as a whole that it was not a conclusive piece of evidence, this is because the critical evidence appears to have been the contemporaneous reports from Mr Clarke, which were not contradicted at the time by the other employees of the council, to the effect that Mr Clarke had been repeatedly kicked. Mr Edwards was inviting me to look at one piece of evidence in isolation from all of the evidence on which the judge had based, and been entitled to base, the findings of fact.

Judge entitled to find a breach of duty

37. Mr Edwards submitted that the Judge was wrong to find that there was a breach of duty in paragraphs 78 and 79 of the judgment because: Mr Clarke had not told anyone he was being kicked, as found in paragraph 80 of the judgment; Mr Clarke had not broken his hold on AS, as found in paragraph 81 of the judgment; none of the council's witnesses had seen the kicking; and Mr Clarke could not say where Mr Wharton was at the time. It was submitted that the judge should have identified exactly where Mr Wharton was when the kicking started. It was said that this ground was related to the third ground of appeal, but it requires independent consideration,

38. In my judgment having found that Mr Clarke was repeatedly kicked, for the detailed reasons given in the judgment, the judge was entitled to find that Mr Wharton should have seen the kicking, and probably did, and should have stepped in and taken over restraint from Mr Clarke. This was part based on Mr Wharton's evidence about what he would have done if he had seen any kicking. The situation with AS was obviously difficult, which may explain why Mr Wharton did not do what he should have done, but there was evidence on which the judge's findings were properly based.

Relevant principles of law relating to causation

39. The principles relating to causation were not in doubt. The claimant is required to establish a causal link between the negligence of the defendant and the injuries suffered. It is sometimes enough to prove that defendant was negligent and that the loss which ensued which was of a kind likely to have resulted from such negligence, see *Drake v Harbour* [2008] EWCA Civ 25 as approved by *Vaile v London Borough of Havering* [2011] EWCA Civ 246; [2011] ELR 274 at paragraph 32 where it was said "it may be difficult for Mrs Vaile to show precisely what she or the school could have done to avoid the incident if she had been appropriately instructed in suitable techniques for dealing with ASD children but the probability is that, if proper care had been taken over the relevant three year period, she would not have met the injury she did".
40. Mr Furness made reference to the decisions in *Bonnington Castings v Wardlaw* [1956] AC 613 and *McGhee v National Coal Board* [1973] 1 WLR 1 and submitted that it was sufficient to prove that the defendant's negligence materially contributed to the claimant's loss. In my judgment this is not a material contribution case. This is because it is either possible to show that it is probable that the repeated kicking permitted by the negligent failure to intervene caused Mr Clarke's loss being the soft tissue injury, or it is not.

Relevant principles of law relating to concessions made by a party

41. The effect of a concession by counsel on points which can be taken on appeal has been considered in a number of authorities including *Ex parte Firth*, *In re Cowburn* (1882) 19 Ch D 419 at 429 and *BT Pension Scheme Trustees Ltd v British Telecommunications plc and Secretary of State for Business, Innovation and Skills* [2011] EWHC 2071 (Ch) at paragraph 44. It is common ground that: the resiling party has the burden of establishing that the previously foregone point should be raised; it is harder to raise a point which has been expressly conceded; if prejudice will be caused to the other party by the point being taken then it is unlikely that the party will be allowed to resile from the concession; and the greater the risk of prejudice the less likely it is that the party will be allowed to resile from the concession. At paragraph 115 of *Fage v Chobani* it was noted that a judge need not "deal at any length with matters that are not disputed".

Judge right to make implicit finding of causation

42. It is common ground that the Judge did not make an express finding of fact that the negligent failure to intervene and stop AS kicking by Mr Clarke caused the soft tissue injury. Mr Furness submitted that this was because the point had been conceded below by Mr Edwards on behalf of the council. Mr Edwards submitted that the

concession that he had made at trial had been narrowly focussed on a factual situation which the judge had not found proved, and that when it became apparent that Mr Furness had misunderstood the extent of the concession the point had been clarified and the judge should have made proper findings of fact about causation.

43. As noted above Mr Edwards had submitted to the judge that “if AS is kicking the claimant from a yard or two from the cubicle to the bus and Walton is walking behind and does nothing they fall to the ground and he does nothing, then the defendants will be liable”. It is also right to note that the judge rejected the evidence of a fall to the ground but did find that AS was repeatedly kicking Mr Clarke and that Mr Wharton was behind and should have intervened.
44. The judge was entitled to reject the evidence of a fall to the ground but find that Mr Clarke felt something happen to his knee but was wrong about whether he fell to the ground. It might be noted that when giving his history to Mr Cox, Mr Clarke remembered developing immediate severe pain of the inside of the left knee and could not remember whether he actually fell on to the floor as appears from paragraph 8 above. Mr Edwards submitted that when Mr Clarke developed the immediate severe pain this must have been the time when Mr Clarke suffered his injury, and that Mr Wharton might still have been on his chair having opened the cubicle at this point, meaning that there could have been no negligent failure to intervene before the injury had been caused.
45. In my judgment it was apparent from the submissions made at trial that Mr Edwards was not taking the point at trial that the kicking before the fall to the floor, which was when the immediate severe pain developed according to Mr Clarke’s account, was not negligent because Mr Wharton was still on the chair. Mr Edwards did not submit that the judge should identify whether there was injury from the kicking caused before any negligent failure to intervene had occurred. It might be noted that although the exchanges at the end of counsel’s submissions between Mr Edwards, Mr Furness and the judge were very cryptic and rapid, the importance of the fall to Mr Edwards’ concession was not highlighted. In my judgment this was not just because the exchange was short and cryptic but because whether there was a fall or not added nothing to what was accepted not to be in issue. At the hearing of the appeal Mr Edwards was not able to explain why if the point about the injuries being caused by kicks before there was any negligent failure to intervene was a good one, it had not been taken at trial. In my judgment this explains why the judge did not make an express finding about this point in the judgment. As was made clear in paragraph 115 of *Fage v Chobani* what the judge needs to deal with will depend at least in part on what is in issue at trial.
46. However it is also right to record that, in my judgment, Mr Edwards was correct to accept that if there had been a negligent failure to intervene to stop repeated kicking by AS then liability, which necessarily includes causation, would be established. This is because the agreed evidence from the consultant orthopaedic surgeons was that if the judge accepted that there had been an accident then “this was a soft tissue accident”. Mr Cox had expressly said in his report that he used accident for convenience to mean a “soft tissue injury consistent with contusion to the inner side of the left knee in relation to his being repeatedly kicked”. Mr Getty had referred to the repeated kicks to the left knee at paragraph 29.33 of his report.

47. The judge accepted that there had been repeated kicking. The judge found that the failure to intervene to prevent the repeated kicking was in breach of duty. It was therefore inevitable, on the evidence at trial, that the judge would find that the repeated kicking caused the soft tissue injury suffered by Mr Clarke. This was sufficient to establish causation and the parties had sensibly managed to agree a global figure for quantum. There was nothing in the expert evidence to suggest that the soft tissue injury was caused by only some of the repeated kicking and that some of the other repeated kicking was of no effect. Therefore the judge was right to make the implicit finding that causation was proved.
48. It might be noted that the approach adopted by the council to causation at the trial meant that, when it came to issues of contributory negligence, there were no submissions to the effect that Mr Clarke's failure to call out for help or release AS was not causative of his loss because the soft tissue injury had already been suffered. The way that contributory negligence was dealt with was, as was the implicit finding of causation made by the judge, properly based on the evidence available to the parties.

Conclusion

49. For the detailed reasons given above I find that: (1) the judge was entitled to make the finding of fact that Mr Clarke was repeatedly kicked by AS; (2) the judge was entitled to find that there was a breach of duty because of the failure to intervene to prevent AS from repeatedly kicking Mr Clarke; and (3) the judge implicitly found that causation was established which, given the evidence and the way in which the issues had been addressed at trial, was a proper finding to make. I therefore dismiss the appeal.