Neutral Citation Number: [2020] EWHC 3260 (QB)

Case No: QB-2019-002067

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2020

Before:

MR JUSTICE JAY

- -

Between:

IAIN TORRANCE **Claimant**

- and –

REBECCA BRADBERRY **Defendant**

- -
- -

Nigel Edwards QC and Ayesha Smart (instructed by **KB Legal**) for the **Claimant**
Jeremy Carter-Manning QC and Ben Smiley (instructed by **Mills & Reeve LLP**) for the **Defendant**

Hearing dates: 4th – 6th, 9th – 12th, and 16th – 17th November 2020

- -

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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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 1st December 2020 at 10.00am.

MR JUSTICE JAY

MR JUSTICE JAY:

A. INTRODUCTION

1. At the heart of these proceedings for professional negligence lie criminal trials for sexual offences. The Sexual Offences (Amendment) Act 1992 applies and nothing may be published which might lead to the identification of the complainant in those proceedings. It follows that I will be using ciphers throughout this judgment where appropriate.

2. Miss Rebecca Bradberry ("the Defendant"), instructed by Gareth Webb & Co LLP ("the solicitors"), acted for Mr Iain Torrance ("the Claimant") at his trial for rape at the Crown Court sitting at Dorchester in 2013. In fact, there were two trials because the first trial was adjourned on 30th January 2013 owing to perceived difficulties with one strand of the bad character evidence relating to the Claimant's co-accused, ML, who was facing different charges of a sexual nature involving the same complainant, AB. Following a second trial which started on 9th July 2013 the Claimant was found guilty by the jury on 22nd July 2013 and sentenced to six years' imprisonment.

3. The Defendant gave negative advice as to the merits of an appeal against conviction. Eventually, different counsel was instructed by a different firm of solicitors, and she gave positive advice. On 27th February 2015 the Court of Appeal, Criminal Division ("the CACD") (Laws LJ, Jay and Edis JJ) allowed the appeals of both ML and the Claimant on the basis that this strand of bad character evidence should not have been admitted. Lest there be any surprise, I should state that my previous involvement in this case was not regarded by the parties as grounds for recusal, and nothing has occurred during this trial to cause me to doubt the wisdom of their assessment. At the retrial, which commenced on 30th November and concluded on 11th December 2015, the Claimant, as well as ML, was acquitted.

4. The Claimant now brings this action against the Defendant raising various complaints of breach of duty but alleging in essence that her handling of her client's case was woefully inadequate. It is contended that with competent representation the Claimant would either have been acquitted or have stood a better chance of acquittal.

5. The Claimant also sued the solicitors, but this claim was compromised in March 2020 on confidential terms which are the subject of a Tomlin Order.

6. The trial was conducted with the agreement of the parties across the medium of Microsoft Teams in circumstances which were sub-optimal. This has meant that the hearing took longer than perhaps it should have done, but from the outset I took the view that I would and should do nothing to speed things up. The sensitivities of this case were and are evident: a man eventually acquitted who passionately believes that he was let down by his lawyers; a barrister whose professional reputation is on the line. Although the parties may consider that they have been deprived the benefit of a trial within a proper court room, I hope that they feel that I have done my best to ensure that the process has operated as smoothly as possible.

B. THE PARTIES

7. The Claimant was born in Falkirk, Scotland in 1971. His father was Scottish and his mother, Mrs Mary Rutherford, who gave evidence in a measured and dignified manner, is of part Jamaican descent. I mention this only because it is relevant to the Claimant's defence at his second trial. The Claimant is a man effectively of good character with the one minor blot on his escutcheon being a caution for affray in October 2007. The Claimant married Ms Deborah Moody in August 2000 and had two children with her before separating in January 2006. In the summer of 2006 the Claimant began a relationship with Ms Sarah Welsh and she remains his partner. It is largely through her loyalty and unswerving endeavour that the Claimant was able to get his case before the CACD so that his conviction might be quashed.

8. The Defendant is a barrister currently practising at Western Barristers Chambers in Taunton, Somerset. She was called to the bar in October 1996 and has specialised in criminal law since 1998 or thereabouts until fairly recently. At the relevant time, the Defendant was practising at Octagon Chambers and was its head for a number of years after 2009. In June 2019 the Defendant was appointed a Recorder on the Western Circuit specialising in family law. This claim apart, she has not had a complaint made against her.

C. THE CRIMINAL PROCEEDINGS

9. What follows is a largely neutral summary of the criminal proceedings beginning with a summary of AB's allegations. This summary is derived primarily from the contemporaneous documents. Where there are disputes between the parties about relevant matters, I will to the extent necessary seek to identify what the conflicting evidence is rather than reach conclusions upon it. I will undertake that latter exercise at the relevant time. Given the quantity of evidence in this case, I have been selective, directing my focus to what I believe really matters. However, in my assessment of this case as a whole I have taken into account all the evidence and the parties' helpful submissions upon it, appreciative of the observation of Mr Nigel Edwards QC for the Claimant that criminal trials often turn on fine margins.

AB's Allegations

10. AB is the step-sister of ML. She was born on 21st October 1986 and ML was born in 1973. The family relationships and dynamics in the criminal trial were not altogether straightforward but it would not be helpful to go into these, save to say that AB's mother DD was married to Mick L who was ML's father.

11. In early November 2011, a number of years after the events of which she complained, AB made numerous allegations of sexual offences against ML, one of these being the offence of rape. She also made an allegation of rape against someone described as ML's friend, Iain, whom she had apparently recognised on Facebook from photographs taken at a birthday party. The circumstances in which the Claimant was identified or recognised, and the manner in which other members of the family got to know about AB's various allegations, was the focus of much evidence in the criminal trial, but it is unnecessary to cover this.

12. Before AB was formally interviewed by the police, on 8th November 2011 she told PC Arak-Newman that her rape by Iain occurred when she was 15 and had been left at

home alone. AB added that "this was during a period when her stepfather and mother had split up for a short period".

13. AB gave an ABE interview on 10th November 2011. After telling the police officers what she claimed had happened with ML, AB said that there was an occasion when he brought a friend of his to her house, namely 7 Bath Orchard (which is in Bridport), and that she was 15 at the time. AB added that ML's girlfriend Lisa was then living at the house. This was a relationship that his wife, KL, knew about. AB could not be sure when this occurred, but she was clear that it happened after her dad died. The evidence at trial would be that Mick L died in August 2002. AB then said that the event she was about to describe may have taken place when she was 16. She could not be sure that it took place in 2002 rather than in 2003.

14. AB told the police officers that Iain, ML's friend, was about his age. He was white, of medium to large build, not fat, had really brown or black curly hair and spoke with an accent she could not identify beyond the fact that it was English. Finally, she said that the man whom she encountered was "like five 10/11, maybe even a bit taller" although she could not be 100% sure. In a somewhat garbled sequence of questions and answers in the ABE, AB said that ML, Iain, Lisa and herself were in the house, which other evidence in the case indicates was a relatively small "two up two down". AB said that "we was downstairs" and that Lisa was upstairs. AB said that she then went upstairs. AB did not state in her interview, at least expressly, that she saw Iain with ML when "we was downstairs", but that would certainly be one interpretation of her evidence. The ambiguity was not resolved, not least because the police officer asked a leading question at an inopportune moment.

15. AB's recorded interview continued:

> "Um, I was in my bedroom and Michael opened my door and he said to Iain, who's stood right behind him, 'You could, you could do whatever you want to her,' and shut the door behind, behind it."

16. The police officer asked whether AB had ever seen Iain before and the answer was no. AB added:

> "I knew of his name … only because, like, I'd heard Karen and Michael speak about him … I hadn't seen him before."

17. AB told the police officers that she could not believe what ML had said, and that Iain was drunk. She continued:

> "Iain did, he pushed me onto the bed and he took my clothes off and I remember him being the strongest person. I said, 'I don't want, I don't wanna do this'. He just, he just told me to shut up (*cries*). I remember [ML] walking back, back in and he said, 'I'll have a go after you'."

18. AB's imprecision as to when this offence was committed led to the indictment dating 18th October 2012 spanning a wide period, from 1st January 2002 to 31st December 2003.

19. No police statement was taken from Lisa, whose last name at the time was Wilment. No police officer came to speak to her until November 2015. The reason for this inactivity is unclear, although it may be speculated that the police assumed that Lisa could not add anything. AB had said at interview that she did not call out during the course of the rape.

ML's Interview

20. ML was also interviewed by the police on 10th November 2011. He denied all of AB's allegations including her claim that Iain raped her. He did accept that Iain was, or had been, a friend but on my reading of the interview he was claiming not a particularly close one and more in the nature of an acquaintance. During the course of his interview ML denied that he harboured any romantic or inappropriate feelings towards AB, and added:

> "I saw her in the same way as I saw [his other siblings], the same way as I see my own children today … This is my sister. I wouldn't have sex with my sister."

When officers put to ML AB's account of the rape by Iain, he said:

> "No way … No I wouldn't do that to my sister. I wouldn't do that at all. I wouldn't do that to my daughter. I wouldn't do that to anybody, no way. I would rather kill than do that to anyone, to my sister, or to even any member of my family."

The Claimant's Arrest and Interview

21. The Claimant was arrested on 7th December 2011. At Yeovil Police Station he was represented by Mr Ian Mathieson of the solicitors. Before his interview the Claimant told Mr Mathieson that 10 years ago he was living in Beaminster and was a friend of ML. Since then he became aware that ML was "charged and convicted of having sex with an under-age female and has spent a period in custody". More precisely, the position was that in October 2002 ML was arrested for the offence of having unlawful sexual intercourse with a girl under 16, contrary to s.6 of the Sexual Offences Act 1956. He pleaded guilty to this offence and was sentenced to six months' imprisonment on 23rd April 2003. The parties have used the acronym "USI" to describe this offence.

22. The Claimant's instructions to Mr Mathieson continued:

> "At the time he and [ML] went out drinking once or twice a fortnight and occasionally became involved with females they met whilst they were out. Each of them were having affairs at the time and covered up for each other with their respective partners.
>
> However, he was only aware of meeting [AB] on a few occasions and never became intimate with her in any way. Most of the times he saw her were when he was visiting [ML's] address at the same time as he was. There were always a

> number of other people around at the time. The only incident that he is aware of happened at a family party in Bridport, possibly at the home of [ML's] mother. There were a large number of people there when [ML] asked him if he wanted to come upstairs and have fun with some girls up there. He went upstairs and in a bedroom saw two or three females lying dressed on a bed. One of them was [AB] and [the Claimant] felt uncomfortable. He immediately left the room where he spoke to [ML's] mother who was outside the door. He does not believe he has seen [AB] for about 10 years."

The Claimant also told Mr Mathieson that he assumed that he was being accused in an attempt to harden the allegations against ML.

23. Mr Mathieson's assessment was that his client's police interview was consistent with these instructions. Even so, it would be right to say that at the very least he clarified a number of matters. The party in Bridport was at the home of ML's stepmother and AB's mother (Mr Mathieson may have been confused about this). The Claimant mentioned the party because it was an occasion on which AB may have seen him, although he was standing outside the bedroom door. AB's account was that the rape happened in Bridport but she could not have been saying that it took place on this specific occasion: the address was different and many more people were present. The Claimant told the interviewing officers that he met AB "a couple of times" (by implication, in addition to a possible meeting at the Bridport party) at the home of ML and KL in Beaminster when he came round for a chat and a cup of tea. The Claimant added that he had met ML at a karaoke night and they became friends; he was no more specific than that.

24. The interviewing officer generated a modicum of confusion as to whether AB was saying that 7 Bath Orchard, Bridport was the home address of ML and KL. Clearly it was not. The Claimant stated that he had never gone to 7 Bath Orchard. In fact, he was confused about this because the party he was referring to seems to have taken place at the home of DD and AB, which is where the alleged rape took place. Contrary to what he said at interview, it took place in Bridport, not Beaminster.

The Police Statement of KL

25. According to her statement to the police dated 12th November 2011:

> "I can't believe what is being alleged against Michael and his old friend Ian. I don't even believe that Ian even really met [AB] and if he did it would have been down at our local pub."

The Solicitors' Involvement Before the Defendant Met the Claimant

26. On 8th May 2012 the Claimant was charged at Weymouth police station with the offence of raping AB. Unfortunately, the solicitors' client care letter to the Claimant which followed contained an egregious error:

> "Firstly, any allegation of rape is a very serious matter and has to be dealt with as such. In your case we have no legal issues

> because it is a simple factual dispute. Your position is you can't remember ever meeting the girl and you certainly did not go to the house where the incident took place and you certainly have not raped her or had sexual intercourse with her in any way."

Putting to one side the confusion about whether the Claimant had been to the property, it was clear from his instructions that he had met AB.

27. The solicitors undertook to investigate the case against the Claimant "in considerable detail and [to] represent you robustly at any trial if it follows".

28. On 24th May 2002 the Defendant was instructed. She was provided with copies of the advance information, the police station notes taken by Mr Mathieson, and of the client care letter mentioned at §26 above. It is clear from the available evidence that the Defendant was not misled by that letter and nothing therefore turns on it.

29. On 13th August 2012 the prosecution papers were reviewed by Ms Janice Taylor, an employee of the solicitors with evident legal experience but without a formal solicitor's qualification. An attendance note of that consideration is available. It is a reasonably competent summary of the Crown's witnesses. Ms Taylor noted that AB's partner DP had said that "complainant told her about another male involved called Iain". This was approximately one year before the November 2011 revelations. On the other hand, according to AB's ABE she had told DP of someone else who assaulted her "but never told him the name". Ms Taylor noted the description AB had given of her assailant, in particular the detail that he was/is white (this is capitalised in the attendance note). Finally, she observed:

> "Statement made by KL … does not corroborate [the Claimant's] account that he met [AB] a couple of times at their address whilst she was present."

The Conference on 13th August 2012

30. A conference took place at the Defendant's chambers on 13th August 2012. Ms Taylor took an attendance note and the Defendant's notes of the conference have been retained. The latter's notes are incomplete in the sense that they do not purport to record the advice the Defendant was giving whilst she was speaking. The conference lasted about one hour.

31. The Defendant advised that Ms Sarah Welsh, being a potential witness in the case, should not be physically present in the conference room. According to her witness statement, Ms Welsh had assisted the Claimant in preparing notes which would enable him to give instructions on relevant issues. These included details of his previous contact with ML and AB, and querying whether Lisa Wilment would be questioned.

32. The Claimant's legal team was aware that the PCMH would take place on 17th August and that the defence case statement would be required.

33. The Defendant's opening advice was that:

> "To a degree we can distance ourselves from [ML]. The complainant's allegation against [the Claimant] is somewhat vague. The complainant cannot remember whether the offence took place in August 2002 or 2003."

34. In her oral evidence the Defendant explained what she meant by this. Her main concern was that this was a case of "guilt by association": that AB was alleging a raft of sexual offences against her step-brother, and if the jury accepted AB's account against him, there was always the risk that they would accept it against the Claimant. This was particularly so in a situation where the Claimant and ML were on friendly terms and covered up for each other's affairs. I did not understand the Defendant to introduce into the mix the following consideration: that AB was saying in terms that ML invited his friend to do whatever he wanted with her. AB knew that "Iain" was ML's friend even if, apparently, she had not met him. Both ML and the Claimant were denying that this invitation was ever proffered, but AB's evidence on this topic ran the risk of making it difficult for the two defendants' cases to be disentangled. This was particularly so if the Claimant and ML were close friends at the time, because if AB's evidence were right then the Claimant was a good candidate for being the rapist.

35. The Claimant told the Defendant that his instructions were as per his police interview. Ms Taylor's note continues:

> "[The Claimant] … believes the only time he met her was at a house party and not as she describes. He says that he can remember the party in fact the mother apparently flashed her breasts at him unfortunately though he cannot remember the address where the party took place and from recollection he believes the party was for someone's birthday, believe it was step-sister's."

Ms Taylor's note about there having been only one encounter is not consistent with the police interview and I do not believe was what the Claimant said at this conference. In any case, the Defendant's understanding was not coloured by this attendance note. The Claimant agrees that he gave instructions about AB's mother acting inappropriately, but (according to him) she was drunk and exposed her black bra.

36. The Defendant explained to the Claimant that the absence of any complaint by AB until she mentioned it to her partner in 2010 appeared surprising. The Defendant went through the various opportunities AB had to disclose this occurrence in non-judgmental environments. She also explained to the Claimant, as was her duty, the sentencing guidelines for an offence of this sort on the alternative hypotheses as to AB's age at the material time, as well as the likely credit for guilty plea.

37. The Claimant's instructions to the Defendant as to when he met ML were as follows:

> "He believes he met him after the father [Mick L] died and to help with this the timeline refers to him dying in August 2002.

> [The Claimant] believes that he met ML in August 2003. He met him at karaoke and they sang a duet and [ML] dedicated it to his father. The party, he thinks, was 12 months later.
>
> As to her description of him, [the Claimant] instructs that he is the same build now as he was 10 years ago. He has a Scottish accent he is 6' 1" and is NOT white."

38. The Defendant's own notes do not add materially to Ms Taylor's. Neither has stated *where* the Claimant met ML "at karaoke". That detail came out on 18th October 2012.

39. The Claimant's evidence before me was that both Ms Taylor's attendance note and the Defendant's own notes are deficient. First, he told the Defendant that he had met AB on at least four occasions, one of these being at the same Pickwick pub where he first met ML (albeit on a different occasion). It follows that the Claimant certainly did not say (as per the attendance note) that there had been only one prior encounter, and that was at the party. Secondly, he told the Defendant about information given to him by KL to the effect that AB had told KL that she had been raped by a fireman, a married man with whom she was having a relationship but then took advantage of her. KL's information was that this fireman matched AB's description of her assailant. Thirdly, he told the Defendant that Lisa was a vital witness and he provided details of her surname. His oral evidence was that when he read the case papers and saw mention of Lisa, that was a "eureka moment".

40. In her evidence before me the Defendant denied that these instructions were given. She was aware that AB's account involved Lisa – to the extent that Lisa was in an adjacent bedroom – but no further information about her was given. According to para 9 of the Defendant's witness statement, she was told that the Claimant knew nothing of Lisa beyond being introduced to him by ML as his "mistress" and that she lived in a caravan with her partner. Given these instructions the Defendant did not advise her instructing solicitors to track Lisa down; if this were to happen, her expectation was that the Claimant would have to find her.

41. Ms Taylor's attendance note is not explicit as to the advice the Defendant gave, if any, in relation to her conduct of the trial and the defences that would be run.

42. After 13th August 2012 there were no further pre-trial conferences although the Defendant considered that there would be sufficient time on the first day of the trial to address any outstanding matters. However, a lot was to happen in this case between August and the first day of the trial, and in my view it is somewhat surprising in a matter of this complexity that the Defendant did not seek at least one additional pre-trial conference at her chambers. However, this is not a pleaded allegation of breach of duty, and even had it been I would have been slow to criticise the Defendant's exercise of judgment as regards how best to prepare for a criminal trial of this sort.

Between the Conference and the Trial

43. The Defendant had drafted her client's defence case statement by 14th August 2012 although it was not signed by him until 18th October. According to this document, the nature of the Claimant's defence was that he did not rape AB but accepted that he knew her and attended a party at her family home. Under the heading, "[t]he accused

takes issue with the Prosecution in relation to the following matters", it is said that the Claimant did not meet AB in 2002/3 (the Defendant was working from the dates given in conference) and that he does not match her description of the assailant. The defence case statement further pleaded that the family party was about a year after the Claimant's meeting with ML, approximately one year after the death of his father, and that he believed that it was a party for AB herself, which would fix the likely date as being in October 2004. Finally, the defence case statement observed that AB had not been consistent in her account, and it sought disclosure of the counselling notes from the Hughes Unit.

44. The PCMH took place at Dorchester Crown Court on 17th August 2012 and the Defendant attended. The hearing was conducted by HHJ Jarvis who was to be the trial judge. According to the Defendant's email sent to Ms Taylor dated 25th August, the judge and CPS counsel "had their awkward heads on". The directions ordered were fairly standard and a direction was included, whether standard or not, that "any section 41 applications by 28th September". This was a reference to s.41 of the Youth Justice and Criminal Evidence Act 1999, the provision which restricts cross-examination about a complainant's previous sexual history. The Defendant's email does not refer to the timetable for the service of defence bad character evidence, but it is clear from other documentation that HHJ Jarvis ordered that this be filed and served by the same date. In due course the Defendant did prepare an application that AB's previous conviction for an offence of dishonesty be admitted, but no section 41 application was made, despite a letter from the CPS dated 28th September 2012 inquiring whether the solicitors still intended to serve one on the Crown.

45. No application to sever the indictment was made at the PCMH and none was ever intimated. The time for making the application was either at the PCMH or on the first day of the trial, with proper advance notice being given. Without a bad character application by the Crown against ML, any severance application would have been wholly speculative.

46. On 18th October 2012 a two-hour meeting took place at the solicitors' office between Janice Taylor and the Claimant. Again, Ms Welsh was not present but she had assisted her partner in preparing briefing notes. Ms Welsh told me that these included all the matters that the Claimant wished to raise. Ms Taylor's manuscript notes of this meeting have recently been made available. The Claimant's instructions were that his first meeting with ML took place in the Pickwick pub in Beaminster. The note is open to more than one interpretation but in my view the fairest reading is that this was towards the end of 2002. They joined together in a karaoke accompaniment to a song by Neil Diamond. The note records:

> "fair to say an associate rather than a good friend."

It also provided this piece of information:

> "[KL] told me and Sarah at March of this year. [AB] made an allegation she had been raped when still at school at Bridport … - guy lived round corner Fireman. Intimate with him – he went back to house when parents [unclear] – had sex with him and then left. Felt been taken advantage of. Don't know if reported to police."

47. The Defendant's evidence was that this information was not transmitted to her. In any case, I point out that AB's hearsay account was not unequivocally to the effect that she had been raped. Nor is there the suggestion that AB's description of her assailant matched the fireman rather than the Claimant, although that may be implicit.

48. On 26th October 2012 Ms Janice Taylor wrote to the Claimant purportedly enclosing his draft proof of evidence and a separate document entitled "Comments on the Witness Statements". Unfortunately, it seems that these documents were not enclosed under cover of the letter: the evidence from the Claimant and Ms Welsh, which I accept, is that these did not arrive until 14th January 2013. The Claimant provided some manuscript instructions in a handwritten letter dated 17th January. Most of his instructions related to points of detail which were not critical. However, the Claimant was now able to say that the first meeting with ML was likely to have been in late 2002 when his wife was pregnant, several months after Mick L's death in August 2002.

49. The Claimant's proof of evidence was signed on 23rd January 2013, but it was amended at least twice during the course of the proceedings. The amended versions are not available. The following points are salient:

    (1) The Claimant stated that he met AB on a couple of occasions: the first on the birthday of the daughter of KL and ML, when he popped in for a cup of tea and a cigarette; the second at the party in Bridport.

    (2) On that second occasion the Claimant was warned by ML that "if anyone touches my sister [AB] I'll kill them".

    (3) He never saw AB after that occasion.

    (4) His meetings with ML were always sporadic.

50. Neither the Claimant's proof nor the "Comments" document referred to Lisa, the fireman or meeting AB at the Pickwick pub.

Trial 1, 28th – 30th January 2013

51. The Claimant' first trial began on 28th January 2013. Contrary to the Claimant's recollection, the solicitors were represented by Mr Brendon Owen and not Ms Taylor. The former's attendance note is available but I consider that I must treat it with a measure of caution: it is by no means complete. The Defendant did not take contemporaneous notes of the instructions given to her by the Claimant or any advice she may have given to him.

52. On 21st January 2013, which was very late, the Crown had made an application to adduce bad character evidence against ML. This application had two limbs. Starting with the more straightforward, an application was made under s.101(1)(d) of the Criminal Justice Act 2003 to adduce evidence of the USI conviction in 2003 as relevant to propensity. Subject to any issues of prejudice, this was a strong application although on my reading of the material it is not altogether clear what submissions were made about it. But the Crown also sought to adduce material which went right

back to 1988 when ML was 15. As Laws LJ was in due course to explain in February 2015:

> "[ML was subject to a full care order in November 1988]. Mr Watson was a care worker having it seems some responsibility for [his] case. The Watson document was a one page document signed by Mr Watson recording on the face of it admissions by [ML] of sexual activity with his brother and sister [this was his full sister and for obvious reasons not AB] …
>
> Mr Watson was not available and despite efforts could not be found. The Watson document was however referred to in a witness statement dated 7th February 2013 by a Mr Arthur Ruby who had been a social worker involved in [ML's] case. The contents of the Watson document are double hearsay …"

53. There were obvious evidential difficulties concerning the Watson document even before any judicial steps were taken onto the minefield of section 101(1)(f).

54. The Crown sought to adduce this evidence through gateways (d) and (f). The latter provision applies where the evidence is necessary to correct a false impression made by the defendant. The contention was that ML's answers at interview that he had no sexual interest in his (step) sister AB was undermined by his admission back in 1988 that he kissed his sister's private parts.

55. Submissions on the Crown's bad character application were made on the afternoon of 28th January. A copy of HHJ Jarvis' ruling is not available although the Defendant has kept what appears to be a reasonably full and certainly legible note of what happened. She did not contribute to the debate between bench and bar. According to Mr Owen's attendance note, which I believe is consistent with the Defendant's note:

> "HHJ Jarvis rules that on what he has had submitted to him he finds no propensity or false impression proved but allows the Crown to make further investigations."

56. On 29th January there was a conference between the Defendant and her client which appears to have lasted 15 minutes. The following section of the attendance note is material:

> "RB clarifies that IT did not meet ML until after [ML's] father had died in August 2002. IT confirms that it was around Xmas 2002 that they met. IT wishes RB to know that [AB] had an affair with a fireman who had sex with her but then said that he could not commit to her and left. Could this be the man that she describes in her interview? RB explains that we have a fine line to tread in this case. We are saying that it was not us and that is it. We do not know why [AB] is saying what she says, it may be to bolster her case against ML. We shall have to wait and see what KL says in the witness box. RB explains that it will be necessary to tread carefully in cross-examination with [AB] because we do not want to alienate the jury."

57. At around 2:50 pm on the second day of the trial, the Crown returned to its bad character application. The debate between bench and bar was as before, with no contribution from the Defendant. The upshot was that HHJ Jarvis gave the Crown until the following morning to obtain further details. Some progress was made in a different direction in that the Defendant was able to make her application to adduce evidence of AB's bad character. That was successful.

58. On 30th January 2013, which was a Wednesday, the Crown informed HHJ Jarvis that some progress had been made with their inquiries, but they now sought an adjournment in order to complete them. The options were to adjourn until Monday 4th February or to discharge the jury and order a retrial. According to the solicitors' typed attendance note:

> "Counsel for ML objects. RB for Torrance unable to object. HH rules that the jury shall be discharged and there be a retrial."

59. At my invitation the Defendant decoded her notes of this segment of the proceedings. As I have said, these notes are legible and not difficult to follow, but they cannot be treated as complete. They are no substitute for a transcript. It is clear that counsel for ML opposed the application to adjourn and invited the judge to draw a line under the Crown's inquiries. HHJ Jarvis ruled that the USI limb of the bad character application "can be admitted by agreement". One possible interpretation of this is that all parties had in fact already agreed to allow the evidence in under gateway (a). As for the Watson document, the judge appears to have been concerned by ML's failure to recall why he went into care in the late 1980s. The judge was uncomfortable about the trial continuing whilst the Crown was investigating. There was some merit in adjourning until Monday, although he noted that if further investigations disclosed further evidence the defence may wish to undertake their own inquiries. The alternative was to discharge the jury which in the end the judge felt was the tidiest way of addressing this situation. One interpretation of the Defendant's note is that "most" at the bar did not favour this course, giving rise to a possible inference that she did make a submission about it.

60. What is clear from Mr Owen's attendance note was that the Claimant was "disappointed" by this turn of events. If that was all he felt, or appeared to be feeling, he would have been sensing and exhibiting a remarkable degree of self-restraint. The reality was that his trial was being put off for an indeterminate period for a reason which he would have found difficult to understand and had nothing to do with him. On 4th February 2013 Mr Gareth Webb of the solicitors came to write to the Claimant expressing his own disappointment and advising that the trial was relisted to start on 9th July 2013 at Dorchester Crown Court.

The Second Trial: July 2013

61. Nothing appears to have happened between the end of January 2013 and the first day of the second trial, which was a Tuesday. The time estimate for the trial was 7 days, which is relevant to one of the allegations of breach of duty advanced by the Claimant.

62. The attendance notes of Mr Owen are available as are the contents of the Defendant's blue books. I have read the transcripts of the evidence twice and have sought to do the best I can to sense the ebb and flow of the proceedings, primarily with a view to understanding how and why it came about that the Claimant was found guilty. Of course, a transcript cannot speak, it cannot sense and it cannot feel. It is no more than a faithful written record of a process which, when occurring in real time as it were, is multi-dimensional. Furthermore, as the Defendant was to demonstrate during the course of her cross-examination, the transcript is in fact incomplete.

63. Reading and studying the entirety of the transcripts at least twice was not beyond the call of duty even though the present case is not some rerun of the criminal trial. I have conducted this exercise because it is particularly germane to the Claimant's case on causation. For the purposes of this judgment, I can be more economical. I will focus on those sections of the transcript which are relevant to the Claimant's case on breach of duty and will also provide some brief impressions as to how and why the case went so disastrously wrong for the Claimant.

64. On the first day of the trial, Mr Owen's attendance note records the following:

> "9:55am Conference. Counsel advised that the Prosecution had found very little extra, it is basically the same as last time. It is whether the Judge will allow the evidence in. The effect upon client if it was allowed in would be possible guilty by association. The same hurdle as before. IT wished to advise Counsel that he had set up his own cleaning business, employing staff with a van and uniforms. Better that the jury should hear about his work rather than being unemployed. End 10:05
>
> …
>
> Case resumed 12:11 in absence of the jury.
>
> [The Crown] makes a bad character and hearsay application in respect of ML. [Co-defendant's counsel] argues against the applications. Miss Bradbury makes no submissions. HHJ Jarvis grants the applications as per the Watson document."

The "very little extra" could be a reference to the social worker's evidence (see §52 above) but that is not clear.

65. Fortunately, a transcript of the proceedings is available. Counsel for ML made a variety of submissions, some rather better than others, but he did make the point that the Watson document fell far short of being of sufficient quality to be admissible under gateway (f). He further submitted that adducing this evidence would be grossly prejudicial and that it should be excluded in any event. When counsel for ML had concluded his submissions, HHJ Jarvis said this:

> "Judge: Thank you. Anything you want to say on this Miss Bradberry? I do not think that it affects you, but –

> Miss Bradberry: No your honour, it doesn't."

The Defendant's evidence was that her assessment of the judge's tone was that he was not expecting a contribution from her.

66. HHJ Jarvis held that the Watson evidence was admissible as a business or other document under s.117 of the Criminal Justice Act 2003, that ML had failed to explain which facts he disputed and which he accepted, and that the answers he gave at his police interview were misleading and creative of a false impression. So, the evidence went in and subsequently some admissions were agreed. I infer that counsel for ML was now, perforce, on a damage-limitation exercise although his client was still cross-examined by counsel for the Crown about what happened in 1988.

67. At the conclusion of his ruling, HHJ Jarvis added this:

> "I am slightly concerned, because I take on board what it is that [Counsel for ML] says about the last two extracts of the interview with the police, because where on the one hand the sort of sexual misconduct which is revealed [the transcript contains an error] in the Watson document could, if the jury chose, have resonances in relation to the earlier pages, there is nothing in the Watson document which resonates with the introduction of a friend, the door of the complainant's bedroom and introducing the friend to the complainant and I am uneasy about pages 193 and pages 204 and I may invite further submissions as to how [the transcript contains an error] the Court should address that."

The "last two extracts" of the police interview is a reference to ML's answers to the suggestion that he invited his friend to do as he pleased with AB. This did not in fact form part of the Crown's bad character application, as was pointed out to the judge by ML's counsel. The latter strongly submitted that the bad character evidence (sc. his client showing a sexual interest in his siblings when aged 15) had nothing to do with any assertion that ML would not introduce a friend to his own sister; and that no false impression was capable of being engendered. Having acceded to an application which the Crown had not actually made, HHJ Jarvis appears to have had second thoughts about it. Irrespective of the legal merits of all of this, the adduction of this piece of bad character evidence was coming uncomfortably close to the metaphorical door of the Claimant.

68. AB was cross-examined by the Defendant on 11th July 2013. Before then a five-minute conference had taken place between the Defendant and her client. Mr Owen's attendance note of this conference makes little sense, the parties were not asked about it, and I therefore exclude it from account.

69. Counsel for ML conducted a thorough cross-examination of AB in difficult circumstances. She broke down sobbing on numerous occasions. According to the Defendant's evidence, it was extremely hot and stuffy in court. It was ascertained that Count 1 on the Indictment, the allegation of rape against ML, had taken place weeks or months before Count 6, which was the allegation of rape against the Claimant. This brought the date of that rape, assuming that it occurred, beyond the anniversary of

AB's 16th birthday. Counsel then sought to exploit an apparent contradiction in AB's evidence. On the one hand, she was saying that she still trusted ML. On the other, she agreed that by then she had already been raped by ML. This was a perfectly reasonable question to ask but its impact was somewhat diluted by AB dissolving in tears.

70. The Defendant then cross-examined AB. The following points came out:

(1) AB could not remember initially telling the police that this incident had occurred after her stepfather and mother had split up for a short period. Counsel for the Crown then objected to the question, and HHJ Jarvis pointed out that "we need to know who she means by stepfather".

(2) AB gave contradictory answers about whether Lisa was present in the house that night.

(3) AB, after saying that four people were in the house, could not state where they were.

(4) AB adhered to her evidence that she had never seen the Claimant before, and that he was therefore a stranger to her.

(5) It was put to AB that she had in fact met the Claimant before, both at ML's house and at 7 Bath Orchard. She had no recollection of the former and denied that at the party at 7 Bath Orchard the Claimant was standing outside the door.

(6) The issue of identification was clearly explored, in particular that her assailant was white and English.

(7) It was put to AB that at no stage did she call out to Lisa, and at that moment she paused, thereafter giving no explanation.

(8) It was put to AB that she told a police officer that "this person had actually engaged in various sexual acts", but she denied that.

(9) AB agreed that, aside from her partner DP, she had told no one about the Claimant. She clarified that she told DP the Claimant's first name only when she saw the Facebook page.

(10) It was put to AB that this incident did not happen and that she had made this allegation against the Claimant in order to make the situation as bad as it could possibly be for ML.

(11) AB's previous convictions for dishonesty were put. She denied that she was guilty. She accepted that it was at her instigation, albeit on police advice, that a letter from DP was obtained which accepted sole responsibility.

71. On 12th July at lunchtime the Claimant asked Mr Owen how the fact that it was now established that AB was over 16 at the material time impacted on the sentence. The Defendant gave advice about that and it was passed on to the Claimant.

72. Mr Owen's attendance notes appear to show that the Defendant's conferences with her client during the course of the trial were relatively brief. If they are all added up the total comes to approximately one hour. The Claimant's evidence to me was that he found it difficult to gain access to his barrister and felt that she was not engaging with him. The Defendant's evidence was that she was accessible and not sparing with her time. My only comment at this stage is that the attendance notes probably do not record all the interactions between barrister and client, and that in any criminal trial with a defendant on bail there are always gaps in the process which enable exchanges to take place – unless, that is to say, the Defendant was positively avoiding them.

73. Two particular passages in the attendance note are worthy of express mention:

> "15th July 2013
>
> 3:55pm Conference to discuss points made. IT anxious that RB brings out various issues in her closing speech. RB assures him that she has all the points ready. Ends 4:00pm
>
> 17th July 2013
>
> 9:15am. Liaise with RB Conference. The notes are gone through one by one and the amended proof of evidence is once again amended."

74. The Defendant cross-examined PC Arak-Newman on just one topic. He agreed that the mention of the name "Iain" to AB in November 2011 caused a look of confusion on her face. The significance of this was that AB was adamant that no one in the family could have known about "Iain", and PC Arak-Newman's source of information could not be fathomed. The Defendant did not cross-examine PC Arak-Newman about his note to the effect that AB was placing the rape during the period her stepfather and mother had split up for a short period, rather than (as was her evidence at trial) after his death.

75. Turning to the evidence of ML, he said in chief that he did not meet the Claimant until 2005. In answer to the Defendant's questions, he gave the impression that the Claimant was not a particularly close friend and, in answer to a (perfectly proper) leading question, that they did not meet until the end of 2003. The Claimant had by then revised his instructions to bring this back in time to the end of 2002. The Defendant put to ML the occasions on which AB was in the presence of the Claimant (viz. at the Laws' home, and at the party at 7 Bath Orchard) and the witness agreed.

76. Unfortunately for ML, and also the Claimant, he was cross-examined by the Crown about the dates and blurted out that he met the Claimant a month or two before his father died, "maximum a few months before". He was also cross-examined about the crucifix he was wearing which was in the eyeline of the jury. What was described as this "outward statement" was not visible in a photograph said to be taken at a housewarming party which could have been before his father died in which (1) there was no obvious "necklace" (to adopt HHJ Jarvis' term deployed in the presence of the jury), and (2) the Claimant was present.

77. KL also gave evidence. She was asked questions by the Defendant on two topics but the occasions on which AB may have encountered the Claimant before the rape she describes were not really explored. When cross-examined by the Crown, KL's evidence was that her husband met the Claimant in 2000/1 at karaoke at the local pub. It was definitely before 2002 when the pub changed its name.

78. The Claimant gave evidence over less than an hour on 17th July 2013. He pinpointed the date of his first meeting ML as being near the end of 2002, at the Pickwick pub. He knew this because his ex-wife was pregnant with their son, who was born in March 2003. The Claimant said that he met ML every six weeks or so. Asked the open question of how many times he believes he met AB the Claimant answered as follows:

> "I'll say probably about three times ever.
>
> Q: And where, if you can remember, when did those occasions take place?
>
> A: Well, I know I certainly, when I used to pop in to see [ML] just after I met him, there'd be occasions there. His family would be there. I'd pop in for a quick cup of tea. I think I met her once or twice on those occasions whilst there was family round. And the last time I met her was a sort of party that [ML] invited me to. I'm sure he said it was a birthday party, and that was at his step mum's house, DD, and that was probably I would say, some time in 2003."

79. The Defendant also asked the Claimant whether he was aware of a girl called Lisa. The Claimant said that he was, and that he knew her as ML's girlfriend.

80. Counsel for ML also asked the Claimant about Lisa. After some hesitation, the Claimant agreed that he might have met Lisa for the first time at the party at 7 Bath Orchard, but he then said that he could not remember whether Lisa was there or not, but "I get the impression that Lisa may have been upstairs". Counsel's point was that Lisa, who was of course ML's girlfriend at one stage, may have been the subject of the "laddish comment", "let's go upstairs and have some fun" (see §22 above). The Claimant's evidence was not particularly helpful either to him or to his co-accused.

81. When cross-examined by the Crown, it was suggested to the Claimant that he was trying to downplay the quality of his friendship with ML and to push forward in time the date on which it started. One witness had put the date of their meeting as early as 2000, and I have already referred to KL's evidence on this topic. The Crown asked questions about the party at 7 Bath Orchard and the laddish remark, and then moved seamlessly to the occasion on which AB was saying the rape occurred. Regrettably, at that point it seems to me that the Claimant and counsel were at cross-purposes: the Claimant's mind was still focusing on the party (at which many people were present); counsel had moved on to a different occasion where, at most, only four people were present, if this event occurred at all. Maybe the judge should have intervened at that point; maybe there should have been re-examination about it. But the confusion reigned for a period and it may have redounded to the Claimant's disadvantage.

82. After the lunch adjournment, HHJ Jarvis received a note from the jury. The question was: "did [the Claimant] know about [ML's] court case and sentence?" The Claimant's instructions to the Defendant were that he only knew this well after the relevant events. The Claimant was not particularly quick on his feet when taxed with this question, and his leaden footedness somewhat irritated the judge. The Claimant then said that he did know about the court case and the sentence ("he was given six months or something like that"), but he did not say when. There was no re-examination.

83. At the conclusion of the Claimant's evidence, Mr Owen's attendance note records that the statements from three character witnesses were read out. Somewhat surprisingly, the Claimant denies that this happened.

84. The Defendant gave her closing speech on Thursday 18th July 2013. This was the eighth day of the trial which was by now overrunning. I have studied the transcript and have the following brief observations about it. The Defendant made the appropriate points about the vagueness of AB's account, the inconsistencies in it, her possible motive for lying, and the poor quality of the identification evidence. The Defendant's advocacy style, at least on this occasion (but I suspect almost always), is understated and crisp. She is careful, measured and avoids hyperbole. I can see that the Defendant likes to run with her best points and to winnow out the chaff. Criticism is made in the Claimant's opening submissions that the speech took less than 30 minutes. The timings on the transcript bear that out, but there is no merit in any implied aspersion of undue brevity (which is not pleaded in any event) and I say no more about it.

85. Mr Owen's attendance note does not go beyond 17th July. There is no record of any discussion between bench and bar about HHJ Jarvis' legal directions. However, the first supplementary bundle contains what appears to be the first draft of the judge's directions with the Defendant's manuscript annotations. It is safe to infer that there was some discussion with the judge about his directions, although I cannot say one way or the other whether the Defendant contributed to it.

86. HHJ Jarvis' legal directions were impeccable save in relation to ML's bad character. He directed the jury that the 1988 admissions regarding sexual activity with his siblings were being admitted to correct the false impression given at police interview that he was a straightforward family man with no interest in family members. The judge also directed the jury that they had to be sure that he was trying to create a false impression before the police officers. If the jury could not be sure of the circumstances in which he was being taken into care, then it would follow that he was not trying deliberately to mislead anyone and "you won't hold those answers against him".

87. In relation to the section of his police interview in which he stated that he would not have introduced a friend to AB, the judge directed the jury that "they are so very different from the sibling misconduct reported in 1988 that you will probably feel that his answers to that part of the allegations were not creating a false impression".

88. This last direction matches the draft that was under consideration by the Defendant either on 17th or 18th July 2013. The Defendant's failure to correct what the judge was minded to say is not a pleaded allegation in this case, and I refused an application to

amend para 17 of the Particulars of Claim at the close of the Claimant's case. It was far too late and potentially unfair to the Defendant. I am entitled to say, however, that the judge's direction may not have gone far enough. There is a more than reasonable argument that he should have said categorically that there was no basis for concluding that ML was seeking to create a false impression in this particular respect, and it should have been spelled out that in any case the bad character evidence was only admissible against him and not against the Claimant.

89. On Friday 19th July 2013, with the jury still out and no verdict apparently in sight, the Defendant was constrained to raise a professional difficulty with the judge. The position was that she had a long-standing commitment to represent a youth charged with the offence of rape in Taunton. This was not the sort of brief that could be returned at the last moment. The precise sequence of events is unclear and in truth does not really matter. Taunton was refusing to put back the trial one day, to start on Tuesday 23rd July. The Defendant therefore sought the permission of HHJ Jarvis that, in the event that the trial did leech into the following Monday, she might be covered by competent counsel who would be properly briefed. The Defendant had in mind her husband, Mr Lawrence Wilcox, who was not otherwise engaged. HHJ Jarvis expressed concern about this.

90. The Claimant's evidence was that he was presented with no option. He asked the Defendant if he had a choice in the matter and was told that he did not. The Defendant's evidence is that she explained the position both to her lay client and to Mr Webb. The latter wanted her to go to Taunton; the Defendant accepted that there was nothing more that she could do for him in this trial. The Defendant's back sheet was endorsed with the wording, "IT happy to release". I deduce that HHJ Jarvis reluctantly assented to this.

91. On Monday 22nd July 2013 the Claimant was found guilty on the jury's unanimous verdict and sentenced to six years' imprisonment. ML was acquitted on the rape charge but was found guilty on the remaining five counts. He was sentenced to nine years imprisonment.

The Aftermath of the First Trial and the Advice on Appeal

92. According to Mr Wilcox's email to Mr Webb:

> "Matters were explained to the [Claimant] in the cells afterwards. He was gracious and expressed gratitude for representation during the trial. He will go to Dorchester prison. I phoned his partner afterwards at his request.
>
> …
>
> I advised that trial counsel would advise on appeal against conviction in due course (at this request) but put him on notice that grounds could only be advanced if in the opinion of trial counsel they were properly arguable."

93. The Defendant was informed by Mr Webb that he would travel to Exeter prison to see the Claimant on Monday 29th July, and that he required her advice on appeal to show

to his client. The upshot was that the Defendant's brief advice was ready on 28th July. The only point she made was that, although the legal rulings in relation to ML had no direct affect on her client, her main concern in the case had always been of guilt by association. In her opinion, the Watson document should not have been admitted. This may have impacted on the jury's assessment of ML, and rendered it more likely that they would prefer AB's evidence over his. Unless the defence of mistaken identification succeeded (which did not depend on the jury believing AB), the Claimant was at risk of going down with ML – which was exactly what happened.

94. On 29th July Mr Webb was constrained to inform the Claimant that the advice on appeal had been negative. At Exeter prison the Claimant told Mr Webb that:

> "At the outset of this matter he indicated that KL … had indicated to him that the complainant had been raped or sexually assaulted by another man around about the same time as the alleged offence."

This information was transmitted to the Defendant for comment.

95. On 31st July 2013 the Defendant emailed Mr Webb stating that she had no recollection of these instructions being given at the outset of the trial. However:

> "I do recall that after the jury had been sent out that [the Claimant] mentioned that KL did say something about [AB] having complained to her that around the time she disclosed to her that she had been raped."

The Defendant told Mr Webb that she had advised the Claimant that this information had come too late (the jury was now out) and that it did not necessarily help him. The Defendant also warned the Claimant, "not for the first time, that KL's account of events was not consistent with his instructions". The Defendant also said that she understood that ML would be appealing and that she had asked his counsel to furnish her with a copy of his advice on appeal because that might affect the Claimant's ability to appeal.

96. By the time this case was before the CACD, Mr Webb was informing that court that the Claimant had informed him that "the victim had been raped by a big strong man who was a fireman, when she was 16" (see his letter dated 9th May 2014).

97. In an email dated 6th August 2013 Mr Owen recorded that he had got on very well with the Claimant and that "they had had many hours of discussions during the trial". The pronoun "they" could refer just to Mr Owen and the Claimant, and in my view this record cannot avail the Defendant.

98. The solicitors were disinstructed in early August 2013. The Defendant's involvement in this matter was limited to her providing assistance to the CACD in the usual way.

The Appeal Proceedings

99. The Claimant, now with fresh solicitors and counsel, submitted an out-of-time application for permission to appeal against conviction. The grounds of appeal were

somewhat discursive and did not address the bad character evidence. It was said that the judge should have ordered severance, that the *Turnbull* direction was deficient, and that fresh evidence was available.

100. The fresh evidence came in the form of witness statements from Sarah Welsh and KL. The former's evidence related to Lisa. According to Ms Welsh, the Claimant believed that her name was Lisa Wilmot. Ms Welsh's sleuthing brought her to the door of Lisa Wilment. The circumstances were explained to her and Lisa said "[t]hat never happened", and that she had never been to Bath Orchard with ML and the Claimant. Although she agreed to provide a statement, by the following day she was no longer sure that she wanted to, having discussed this with members of the family. She feared intimidation. Thereafter, the Claimant's solicitor was unable to get hold of her. KL's evidence was that she and ML first met the Claimant in 2000/1. They met at a local pub and became really close friends. KL believes that AB and the Claimant would have met at karaoke night on one or more occasions, and there was also an occasion between April and July 2003 when they met at KL's home during the period when her husband was in prison and AB was living with her. KL did not mention the fireman.

101. On 29th July 2014 Henriques J considered the application for permission to appeal under s.31 of the Criminal Appeals Act 1968. Referring the matter to the Full Court he made the following observations:

> "Grounds of appeal must be drafted with greater particularity than those demonstrated in your particularised grounds of appeal at page 3 of your application. No valid or arguable criticism can be made of the judge's direction on identification nor can it be argued that the judge should have ordered severance. I refer the applications to extend time and to call fresh evidence to the Full Court. These applications should be listed together with the appeal of ML. In the event of [ML's] appeal succeeding you may wish to draft a ground of appeal contending that the applicant was adversely affected by such an error on this direction as the Court may find in the case of [ML]."

102. The point is made on behalf of the Claimant that, given the absence of any application to sever the indictment, it is hardly surprising that Henriques J expressed himself in the terms in which he did. Although I was initially disposed to think that Henriques J was expressing the opinion that this was not a proper case for severance in any event, I now think that it would be safer to proceed on the premise most favourable to the Claimant.

103. After a delay which has not been explained, the appeal came before the Full Court on 27th February 2015 ([2015] EWCA Crim 356). The reason the CACD allowed ML's appeal against conviction was as follows:

> "For the Watson document to be properly admitted to correct any impression given by L in interview … the judge would have to be satisfied that a reasonable jury could conclude beyond a reasonable doubt that the supposed confessions were true. The judge acknowledged as much in his summing-up, but

> in our judgment that is in reality an impossible position on the facts here. Given all the circumstances which we have summarised, it cannot be said that a reasonable jury could conclude to the criminal standard of proof that the contents of the Watson document were true. The summing-up moreover falls short of making it clear what use precisely the jury might make of this material."

104. Laws LJ might have added that the judge would have to be satisfied that a reasonable jury could be sure that in November 2011 ML remembered what he said in an informal setting some 23 years beforehand, when he was only 15 and undoubtedly in emotional turmoil: see *R v Renda* [2005] EWCA Crim 2862, at para 25. It must be proved to the criminal standard that the false impression was made deliberately. Although the summing-up directed the jury on that basis, this was really an impossible position on the facts, and in my view the Watson evidence should have been withdrawn from the jury on that basis alone.

105. As for the appeal of the Claimant, the CACD's view, without hearing submissions from counsel then representing him, was that the putative fresh evidence did not fulfil the rigours of s.23 of the Criminal Appeal Act 1968. However:

> "The cases against the two were inextricably linked. The Crown case against T, as we have recited, was that L took him into the complainant's bedroom and in effect invited him to have sex with her. The admission of the Watson document against L could clearly have weighed with the jury and induced them to accept such a scenario or made it more likely that they would accept such a scenario. L's encouragement of T was integral on the facts to the Crown's case against T. The point is perhaps emphasised by the complainant's own evidence which the judge noted … that L said to T, 'I'll have a go after you'."

106. I have carefully considered whether the outcome on the Claimant's appeal would have been the same had the judge given impeccable directions which explained in more lapidary and user-friendly terms the use the jury could properly make of the evidence admitted under gateway (f), emphasised that this evidence was only admissible against ML and had nothing to do with the Claimant, made it crystal-clear that the only saliency of the bad character evidence went to ML's sexual interest in members of his family, and had explained that the jury should not convict solely or mainly on the basis of the bad character evidence. Had he done so, it is certainly arguable that the Claimant's appeal should have been dismissed because, even though bad character evidence was wrongly admitted, the Claimant would have been insulated from its effects. But as a matter of elementary justice, that is an outcome which would not necessarily have appealed to the CACD in a situation where the appeal was being allowed against the primary defendant. However, it is relevant to Mr Edwards' submission that, because the CACD found that these cases were "inextricably linked", the prejudice inhering to the admission of the bad character evidence necessarily applied to both co-accused and severance was, therefore, the only option. I will therefore be returning to this issue.

107. The CACD ordered a retrial and on 11th March 2015 the Claimant was released on bail.

The Third Trial

108. The third trial took place between 30th November and 11th December 2015 before HHJ Johnson QC sitting with a jury. The Claimant was now represented by Mr James Newton-Price (now QC) and ML by Miss Anne Brown.

109. The transcripts begin on 2nd December 2015, so what happened before then is unclear. Mr Newton-Price filed a skeleton argument seeking to exclude the bad character evidence against ML (now limited to the USI) on the ground that it unfairly prejudiced the Claimant, and in the event that this application failed, severance. It is clear that the Claimant was advised that the severance application was unlikely to succeed, but he was told that it was the best strategy to pursue.

110. In the result, the USI evidence was not adduced in the third trial. Whether HHJ Johnson gave a ruling to that effect, or whether the Crown – having lost badly in the CACD – gave up on the point does not I think matter. I reject the Defendant's suggestion that it is not a safe inference that the matter was not pressed by Mr Newton-Price. It must have been, and whether he was required to develop his case orally is neither here nor there.

111. The scenario was now rather different. ML was no longer facing an allegation of rape. The Watson document was dead and buried. New counsel had the obvious benefit of reading what had happened in the second trial and could adapt their questioning accordingly. This was a different judge and a different jury, and the atmosphere in court may well not have been the same. Any mistakes made first time round would not be repeated.

112. Mr Newton-Price adopted a rather different strategy. I asked the Claimant to explain what was different about the third trial, and after some thought he was able to tell me that the defence was no longer mistaken identity. That had been obvious to me from the first time I read these papers, particularly in view of Mr Newton-Price's closing speech to the jury, but I wanted to hear it from the Claimant, assuming that was the evidence he would give. The new strategy was that AB well knew the Claimant having met him before, was able to recognise him on the night (if it were him), gave a reasonably accurate description of the Claimant, and (if it were not him, which was the Claimant's case) was flagrantly lying.

113. I will be analysing this further in due course but at this juncture make two brief observations. This strategy was as bold as it was clear. It rested on the ability of counsel, and this included Miss Brown, to demolish AB as a witness. There was no longer a degree of inherent tension in the Claimant's case, but he was now binding himself more closely to ML and that was not free from risk. The strategy would only work if AB were kept under a very tight rein when cross-examined and if Mr Newton-Price executed it perfectly. My second observation is that it is not the Claimant's case before me, nor on reflection should it have been, that this was the only sensible and rational strategy that could be pursued, in the sense that any failure to attempt it amounted to a breach of duty. Mr Edwards, who is a bold, brave and resourceful

advocate, did not wish to go that far (despite some misguided encouragement from me at one point).

114. It is unnecessary to examine much of the detail of the third trial. Mr Edwards submitted that it is relevant to the issue of causation but in my judgment its salience is no better than marginal. For the purposes of the causation issue, the correct comparison is between (1) what the Claimant's chances of an acquittal were at the outset of the second trial, and (2) what they became as the result of any established breach of duty. Put crudely, the loss of the chance is the difference between the two, and involves a comparison between the actual and the hypothetical, always framed in terms of the second trial and not a trial in different circumstances before a different tribunal.

115. Mr Newton-Price's strategy was consummately executed. His cross-examination of AB did indeed keep her on a very tight leash and his closing speech was clear and precise.

116. In the circumstances, I will mention a limited number of points.

117. First, my overall assessment is that Ms Brown's cross-examination of AB was rather more effective than was ML's barrister's in the second trial. ML's evidence was less evasive and, if I may be permitted to say so, counsel for the Crown was perhaps less effective than he had been.

118. Secondly, by December 2015 AB was no longer as tearful and labile as she appeared to be in the second trial. Mr Newton-Price took her directly to her bereavement counselling and rammed home the point that there had been no complaint about the Claimant until 2010 at the earliest, notwithstanding the existence of safe opportunities in which to discuss any trauma. AB gave unsatisfactory evidence about "we was downstairs" and the location of Lisa in the house. She was quickly taken to her previous inconsistent statements in the PC Arak-Newman material and denied that she had made them. She was also asked closed questions about the previous occasions on which she met the Claimant, which she denied. By now, the Claimant's dates were less confused and the cross-examination on this topic could be more focused. Mr Newton-Price also put to AB that she was a liar and that she was motivated to lie in order to improve her case against ML.

119. Thirdly, although she was now divorced from ML, KL also gave evidence. She agreed that the Claimant and ML were close friends (cf. the attempt at the second trial by both of them to distance themselves from each other), said that the Claimant and AB met at the Pickwick pub (where the latter sang with a beautiful voice, which the Claimant when he gave evidence was now able to remember) and (in line with her statement which was before the CACD) said that the Claimant and AB met at her home.

120. KL did not give evidence about any fireman.

121. Mr Newton-Price advised that an application should be made for Lisa Wilment to be witness summonsed. She remained a reluctant witness as DC Austin's recent notes had made clear. She feared reprisals from AB's family. HHJ Johnson QC granted this application. Ms Wilment did obey the summons but Mr Newton-Price decided not to

call her. According to the Claimant, this was because the view was taken by his legal team that his case was already strong enough. I think that the safer inference is that Mr Newton-Price assessed that it would be too risky to call a reluctant witness whose answers in cross-examination by the Crown could not be predicted. Mr Newton-Price did not apply for Lisa Wilment's evidence to be admitted under s.116(2)(e) of the Criminal Justice Act 2003: that her refusal to give evidence was based on fear. The inference must be that he did not believe that such an application could succeed.

D. THE CLAIMANT'S CASE

122. By way of summary, the Claimant's pleaded case is as follows:

(1) A failure to consider, advise upon and make an application to sever the indictment in the event of the Crown applying to adduce evidence of ML's bad character; alternatively to oppose the application to adduce evidence of his bad character. There was an inextricable linkage between the cases of the criminal defendants, and the bad character of ML was bound to cause the Claimant prejudice, as the CACD found.

(2) A failure to object to the jury being discharged at the first trial, thereby failing to "take the opportunity to reinforce the unfairness to the Claimant of the introduction of any bad character evidence relating to [ML]".

(3) A failure to obtain or utilise the counselling records from the Hughes Unit: AB should have been cross-examined about them.

(4) A failure to cross-examine AB about her previous inconsistent statement to PC Arak-Newman, that the rape occurred after her stepfather and mother had split up for a short period.

(5) A failure to cross-examine AB on the "we was downstairs" remark at police interview. If she had met the Claimant she could clearly have identified him.

(6) A failure to advise that Lisa Wilment be interviewed by the solicitors, alternatively by the police.

(7) A failure to advise that KL be interviewed and/or that written questions be submitted to her: she could have given helpful evidence, including in particular evidence contradicting AB's account that she had never met the Claimant.

(8) A failure to cross-examine KL as to how AB had the opportunity to meet the Claimant at the Pickwick pub and at her house before the alleged rape.

(9) Like failures in relation to ML.

(10) A failure to advise that live character witnesses be called and that more than one character witness be read.

(11) A failure to attend the last day of the trial (described as "a service failure").

(12) A failure (also described as "a service failure") to advise the Claimant that he had reasonable prospects of appealing the conviction on the grounds subsequently affirmed by the CACD.

123. On reading the papers before the trial, it was readily apparent that the Claimant's pleadings, which had not been drafted by counsel appearing before me, left something to be desired. The Claimant's skeleton argument sought to broaden the scope of the pleaded allegations of breach, and at the outset I was asked to rule on the Defendant's application that the Claimant be confined to his pleaded case. Although I was sympathetic to the proposition that the Claimant's legal team should have some measure of slack, I had no option but to rule that the pleadings defined the ambit of this discourse and that it would be unfair to the Defendant to expect her to deal with new points. It would be fair to say that during the course of this trial Mr Edwards, acting always in the best interests of his client, sought to stretch these parameters as far as he possibly could. By the end of the trial, it was clear that the Claimant was seeking to place before me a somewhat broader argument.

124. In essence, the Claimant contended that on this particular occasion the Defendant failed to represent her client's interests fearlessly and with sufficient vigour. She did not listen to his instructions, she was dismissive, and took it upon herself to run with misidentification as the primary line of defence. It is not denied that identification was, or at least could be, an issue, but the complaint is that the Defendant fell woefully short of deploying it properly as part of a well-conceived trifecta: namely, lines of defence which also embraced AB's previous inconsistent statements and the proposition that she was lying. It is clear, submitted Mr Edwards, that the Defendant took a "policy decision" to adopt as low a profile as possible, leaving it to co-defendant counsel to do most of the heavy lifting. The implementation of this self-denying ordinance was particularly unfortunate, so it is said, when it came to the circumstances leading to the adjournment of the first trial and the judge's decision to admit the bad character of ML in the second.

125. In my judgment, important aspects of this formulation were not prefigured in the pleadings and have been ruled out by my decision at the start of the trial that the Claimant be confined to what he has pleaded. However, the Defendant was cross-examined as to these matters, both parties made submissions about them, and ultimately I have decided that I should deal with them. To do otherwise would generate a sense of grievance in the Claimant which in my view could be avoided.

126. Most of the Claimant's complaints, pleaded or otherwise, may be described as "micro" points. As I will show, they are not particularly good points either. The Claimant's best points, as I think Mr Edwards well appreciated, are: (1) the Defendant failed to seek to persuade HHJ Jarvis not to adjourn the first trial, (2) the Defendant failed to contribute to the bad character applications brought by the Crown against ML, either by objecting to them or by applying for severance, (3) the Defendant failed to advise, given that ML had a solid ground of appeal on the basis of the wrongful admission of the Watson document, that the Claimant should have travelled in his slipstream, and (4) the Defendant's approach to her defence of her client was far too passive.

E. THE LEGAL FRAMEWORK

Introduction

127. It is convenient to deal with the general legal framework at this stage. Narrow points of criminal law germane to specific issues (e.g. severance) will be addressed in chapter G below.

128. The Defendant's duty of care to the Claimant is not in issue. The focus before me has been on the relevant standard of care.

129. A mass of authority was brought to my attention, most of it of little or no assistance. Jurisprudence dealing with the scope of a solicitor's duty when advising on a particular transaction does not bear on the real issue in this case, namely the definition of the standard of care required of a barrister when conducting a criminal trial. Nor is to relevant to consider the authorities collected by *Jackson & Powell on Professional Liability, 8th Edition*, paras 12-007 and 12-008 which relate, for example, to a tax barrister's duties when advising on an intricate matter in the comfort of her chambers in Lincoln's Inn. Although the provisions in the BSB Code of Conduct dealing, for instance, with a barrister's duty to act fearlessly in the interests of her client and not to serve the interests of a co-defendant have some indirect relevance, it is unnecessary to refer to them specifically.

The Standard of Care

130. In general terms the standard of care required of the Defendant was that expected of a reasonably competent junior counsel of her seniority and purported experience: see Lord Carswell in *Moy v Pettman Smith* [2005] 1 WLR 581, at para 62. I would respectfully add this modest addition, "holding herself out as competent to conduct cases of this type and complexity".

131. In *Saif Ali v Sidney Mitchell & Co* [1980] AC 198, the House of Lords was considering the extent of a barrister's immunity from suit in relation to his conduct of the "cause in court". The standard of care in the territory where the immunity was not applicable was, however, addressed.

132. In the opinion of Lord Wilberforce:

> "Much if not most of a barrister's work involves exercise of judgment—it is in the realm of art not science. Indeed the solicitor normally goes to counsel precisely at the point where, as between possible courses, a choice can only be made on the basis of a judgment, which is fallible and may turn out to be wrong. Thus in the nature of things, an action against a barrister who acts honestly and carefully is very unlikely to succeed."

I read this final sentence as expressing more a prediction of the outcome than the legal test.

133. In the opinion of Lord Diplock (at p.220D-E; 220H-221B):

> "No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-

> informed and competent member of that profession could have made. So too the common law makes allowance for the difficulties in the circumstances in which professional judgments have to be made and acted upon.
>
> …
>
> If subsequently a barrister is sued by his own client for negligence on what he advised or did in the particular case, he has the protection that the judge before whom the action for negligence against him will be tried is well qualified, without any need of expert evidence, to make allowance for the circumstances in which the impugned decision fell to be made and to differentiate between an error that was so blatant as to amount to negligence and an exercise of judgment which, though in the event it turned out to have been mistaken, was not outside the range of possible courses of action that in the circumstances reasonably competent members of the profession might have chosen to take."

These statements of principle remain the law.

134. Lord Salmon (at page 231D-E) envisaged the position similarly:

> "The barrister is under no duty to be right; he is only under a duty to exercise reasonable care and competence. Lawyers are often faced with finely balanced problems. Diametrically opposite views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent."

135. In *VG v Denise Kingsmill* [2001] EWCA Civ 934, Sir Murray Stuart-Smith provided a helpful contextual analysis:

> "63. The circumstances in which barristers and solicitors have to exercise their judgment vary enormously. On the one hand decisions have frequently to be made in court with little time for mature consideration or discussion. That is a situation familiar to any advocate. It is one in which it may be very difficult to categorise the advocate's decision as negligent even if later events proved it to have been wrong. Or in a very complex case it may be that in advising settlement too much weight is given to some factors and not enough to others. Here again a difficult judgment has to be made; and unless the advice was blatantly wrong, i.e. such as no competent and experienced practitioner would give it, it cannot be impugned and the prospects of successfully doing so would seem very slight."

136. Thus, as a matter of basic common sense, there is a contextual distinction between decisions made in the hurly-burly of a trial and those where mature consideration is possible. The test is always the same – was the course of action taken, or not taken, "blatantly wrong" – but in the application of it the circumstances in which the barrister was operating will be relevant.

137. The *locus classicus* in this area is *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 in which the advocate's immunity from suit in respect of court proceedings was abrogated. Lord Steyn considered that Sir Thomas Bingham MR's dictum in *Ridehalgh v Horsefield* [1994] Ch 205 (at p.236), a decision on wasted costs, was applicable to a barrister's standard of care in a negligence action:

> "Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him."

Lord Steyn added (at 682C):

> "The courts can be trusted to differentiate between errors of judgment and true negligence. In any event, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome."

138. In the opinion of Lord Hope held (at pp.718H and 726D-G):

> "The courts have been careful to point out that advocacy is a difficult art and that no advocate is to be regarded as having been negligent just because he has made an error of judgment during the conduct of the case in court.
>
> …
>
> While the advocate owes a duty to his client, he is also under a duty to assist the administration of justice. The measure of his duty to his client is that which applies in every case where a departure from ordinary professional practice is alleged. His duty in the conduct of his professional duties is to do that which an advocate of ordinary skill would have done if he had been acting with ordinary care. On the other hand his duty to the court and to the public requires that he must be free, in the conduct of his client's case at all times, to exercise his independent judgment as to what is required to serve the interests

> of justice. He is not bound by the wishes of his client in that respect, and the mere fact that he has declined to do what his client wishes will not expose him to any kind of liability. In the exercise of that judgment it is no longer enough for him to say that he has acted in good faith. … He must also exercise that judgment with the care which an advocate of ordinary skill would take in the circumstances. It cannot be stressed too strongly that a mere error of judgment on his part will not expose him to liability for negligence."

139. In the opinion of Lord Hobhouse (at p.737G-H):

> "The standard of care to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made."

140. In *Dunhill v W. Brook & Co (A Firm) and another* [2018] EWCA Civ 505, Sir Brian Leveson P. described the task of a judge considering a professional negligence claim against a solicitor and barrister as follows (at paras 51-52):

> "51. The difficulty in cases such as the present, however, is that the task of the judge was not to apply facts, as found, to the legal landscape as he or she found it to be but, rather, to exercise an evaluative judgement in relation to the thought processes and professional assessment of lawyers engaged in the extremely difficult task of the moment, namely how to deal with the issues raised by the changed dynamic and risks of success or failure in a case which was then, immediately, due to be tried.
>
> 52. In that regard, the fact that another solicitor or member of the Bar would have acted differently is not to the point. As Sir Murray Stuart-Smith said, the relevant advice must have been such that no competent and experienced practitioner would give it. Mr Willems accepts that, as a consequence, the bar which he must overcome is set high."

141. The final authority I should touch on is the decision of Buckley J in *Popat v Barnes* [2004] EWHC 741 (QB), which I am taking out of chronological sequence. The case concerned decisions made by a barrister in a case with facts fairly similar to the present. On my reading of his judgment, Buckley J applied the law as set out in *Saif Ali*. I do not consider it necessary to address the particular problems that arose in that case concerning the trial judge's legal directions and trial counsel's failure to correct him.

142. In my judgment, Mr Ben Smiley on behalf of the Defendant was quite right to emphasise the difficulties the Claimant faces. The Claimant must show that what the Defendant did, or failed to do, was "quite plainly unjustifiable" or "blatantly wrong". When it comes to decisions she made, or did not make, in court the law must have regard to the pressurised environment and the need to make rapid decisions. When it

comes to decisions made, or not made, outside court the legal test may not fluctuate but the context is less forgiving. A barrister must act in accordance with her instructions, interpret them properly and explain her advice to her client, but it is not incumbent on her to take every point a client may wish. Furthermore, in the present context of professional liability in the realm of tort, it is not sufficient for a claimant to say that "my barrister ignored my instructions". What must be demonstrated at all turns is that what the barrister did, or failed to do, was blatantly wrong. Ignoring instructions may well be blatantly wrong, but by no means always.

143. The issue of hindsight must also be addressed. The difficulties that the Claimant faces cannot be overstated, and the answer to every criticism that is made here cannot be: the court has the advantage of hindsight. However, it is the task of the court in a case such as this to attempt a degree of cognitive empathy. Sitting in the gentle calm of one's room at the Royal Courts of Justice, having spent many hours pondering the minutiae of quite a complex case with the assistance of able counsel, runs the risk of over-dissection and over-analysis, both of which borne out of greater time to reflect than was available to the Defendant and the knowledge of all that has happened both before and since.

144. One aspect of the jurisprudence that requires some attention is the difference between mistakes, errors of judgment, and negligent errors. The authors of *Jackson & Powell* (including, I note, Mr Smiley) appear not to be convinced that barristers should be treated in any different way to solicitors, or I would add, doctors: see paras 12-023 to 12-028. It is debatable whether there is a difference between the *Bolam* test in a clinical negligence setting and the "blatantly wrong" test that applies to barristers, at least in a forensic as opposed to a purely advisory setting. What is clear on the authorities is that barristers can make mistakes which are not negligent and that they can make judgmental errors which are not negligent. The substance matters more than the taxonomy. A claimant can only succeed if the mistake, or error, whether by commission or omission, is deemed to be blatantly wrong. This is a situation where adverbs matter.

Loss of a Chance

145. Here, most of the legal principles are not in dispute.

146. In *Hall v Simons*, Lord Hoffmann observed (at p.687D):

> "If a client could sue his lawyer for negligence in conducting his litigation, he would have to prove not only that the lawyer had been negligent but also that his negligence had an adverse effect upon the outcome. This would usually mean proving that he would have won a case which he lost."

147. In a case like the present, proving that the Claimant would have been acquitted but for the Defendant's breach of duty is somewhat of a tall order. The Claimant may succeed if he could persuade me to the requisite standard that he lost the chance of a better outcome.

148. The leading case in this area is the decision of the Supreme Court in *Perry v Raleys* [2020] AC 352.

149. Lord Briggs' tripartite analysis is familiar. There are three stages. First, there is the question of what the Claimant would have done had he been advised differently by the Defendant. That is determined on the balance of probabilities. Secondly, there is the question of what witnesses would have said and done, had the Defendant adopted a different course of action. Thirdly, there is the question of what the judge and/or jury would have done had different evidence been adduced and different submissions advanced. The last two questions are not determined on the balance of probabilities but on a loss of a chance basis, because they depend on what others would have done.

150. The Claimant must prove that he has lost a "real and substantial chance" or a chance that is more than "merely negligible", following which the court must then evaluate that chance: see the judgment of Lord Briggs, at para 34. I would prefer not to have to allocate a percentage figure to any "real and substantial chance".

151. Following the analysis of Morgan J in *Thomas v Albutt* [2015] PNLR 29, at paras 463-470, the correct approach is to assess the Claimant's chances of an acquittal *ex ante*, and then evaluate what they became following any established breach on the part of the Defendant. Thus, if the Claimant's prospects of an acquittal were 50%, and they fell to 40%, the loss is 10%.

152. In *Harrison v Bloom Camillin* [2000] Lloyd's Rep PN 89, Neuberger J (as he then was) stated that in a case of multiple contingencies each must transcend the "real and substantial chance" threshold and a claimant's prospects of success on each issue must be multiplied. Mr Edwards, who I understand has a statistical background, questioned the correctness of this. In the circumstances of this case, given my conclusions on breach of duty and the consequent parsimonious approach I will be taking to causation, a multiplicative approach is appropriate. On these premises, each contingency is independent of the others. Had I found for the Claimant on more than one of the "micro" points, then there might have been an element of addition.

F. IMPRESSIONS OF THE WITNESSES

153. The Claimant's live witnesses were himself, Ms Sarah Welsh and Mrs Mary Rutherford. He also relied on the read evidence of Mr Michael Fowkes, Mr George Torrance and Ms Isabel Welsh. The Claimant was intending to call Mr Adrian Davies but he did not respond to emails and his evidence was not adduced.

154. The Defendant gave oral evidence and she also relied on two reports from an employment consultant, Mr Keith Frost.

The Claimant and his Witnesses

155. The Claimant is a pleasant and engaging man who did not appear remotely overawed by the experience, nor did he seem troubled by the duration of his sojourn in the virtual witness box. His answers tended to be long-winded and imprecise, but I suspect that is his way. I would not go so far as to say that he was deliberately evasive, but on numerous occasions he failed to answer the question. By the end of his cross-examination, I had concluded that the Claimant was not a reliable witness. This impression was not altered by the lengthy re-examination.

156. The Claimant has spent the last nine years living and breathing this case at its various stages, for 20 months in very uncongenial circumstances. He was arrested in November 2011 but his first trial did not begin until January 2013. That trial was adjourned and he was retried six months later. He was in prison between 22nd July 2013 and 11th March 2015, and his eventual acquittal was not secured until December 2015. I do not know exactly how and why it came about that he decided to sue his previous legal team, but it is obvious that he harbours a massive sense of grievance. The Claim Form was issued in October 2018 and it has taken just over two years for the matter to come to trial. In the meantime, there has been much anger, frustration, incomprehension and discussion with his partner and others, all of which is entirely understandable. The State does not pay compensation in circumstances such as these, and the Claimant would be entitled to feel that someone must pay.

157. In my opinion, what has happened here is not so much that the Claimant has decided that someone must pay and therefore the ends justify the means – he will lie to get his just desserts – but rather that he has persuaded himself by excessive rumination that certain things happened when they did not. This process has been reinforced by his private interactions and discussions with his partner which, albeit entirely comprehensible at a human level, have led to a complete loss of objectivity.

158. Another important consideration, and it flows from my last observation, is that many of the Claimant's putative best points and "eureka moments" were not, on analysis, good points at all. I will be examining some of these matters subsequently, but it is convenient at this stage to look at the issue of the fireman, both because it so vexes the Claimant and it happens to be unpleaded.

159. The fireman story was always extremely implausible and its detail has fluctuated. If AB were in a relationship with a married fireman when she was 15 or 16, was it KL's understanding that he took advantage of her on one occasion (which might or might not amount to rape) or did he unequivocally rape her? If the suggestion was that this fireman matched the description AB was giving of her assailant on the occasion the subject of Count 6, that had nothing whatsoever to do with the intimate relationship KL was describing. Furthermore, there would no longer be any room for mistaken identity: if AB was describing the fireman, a man whom she well knew, she was falsely pinning this event onto the Claimant.

160. In my judgment, if the solicitors had raised this issue with KL, it would likely have gone nowhere. In the unlikely event that KL supported the Claimant to the extent that she could confirm that AB had told her about a fireman, any cross-examination of AB about it (and permission would have been required under s.41 of the 1999 Act) would have been laden with risk. AB might have denied in convincing terms that there ever was a fireman, and that denial would have been damaging to the cases of both ML and the Claimant. AB might have said that there was a fireman and then added that she is certainly not confusing the Claimant with him. That evidence would also have been very damaging. The chance that AB would have accepted both that she was raped by a fireman and that this was all some terrible mistake in blaming the Claimant was remote. It is not surprising that the fireman did not feature in the third trial. The fact that he was ever mentioned smacks of desperation.

161. I must also point out that what comes through the transcripts and the attendance notes is that the Claimant at his second trial was trying to distance himself from ML (the

latter was doing the same *mutatis mutandis*), underplay the significance of his previous encounters with AB, and place the event AB was describing as late in time as possible. None of this had anything to do with the Defendant.

162. In my judgment, it is necessary to examine the contemporaneous documentation in a case such as this with particular care. Some of the documentation may not be particularly reliable, and I would need no persuading that the solicitors may not have accurately recorded everything that was said. However, there are a number of respects in which the overwhelming weight of the documentary evidence militates against the Claimant being right. I will provide some examples at this stage but revert to this issue when examining the individual heads of claim.

163. First, the Claimant told me that he was dissatisfied with the Defendant during the course of the trial and made his views known. She was not taking points she ought to have done; she was not accessible; she did not follow her instructions.

164. Save in one minor respect, the Claimant's oral evidence hereabouts was not contained in his witness statement. The attendance notes indicate that the Claimant was, at turns, disappointed, anxious and frustrated, but there is no inkling of any dissatisfaction. Nor is there any convincing evidence to the effect that the Defendant was remote and not prepared to listen to his instructions and assuage his concerns as they arose. After the Claimant was convicted, the only concern he expressed to Mr Webb was about the fireman. Perhaps the most telling evidence on this issue is Mr Wilcox's email (see §92 above), "he was gracious and expressed gratitude for his representation during trial". I accept Mr Smiley's submission that Mr Wilcox would not have written it if he knew it to be untrue. It is unnecessary to go further, save to add that my assessment of the Claimant is that he is a polite and well-mannered individual who would freely express gratitude if he felt it appropriate to do so.

165. The absence of a complaint by the Claimant about the Defendant's performance does little harm to his case on breach of duty. But it is clearly relevant to the issue of his reliability as a witness.

166. Secondly, the Claimant was convinced that he told the Defendant at the August 2012 conference about his meeting with AB at the Pickwick pub. There is absolutely no evidence of that in Ms Taylor's attendance note or the Defendant's own notes. It had not featured in the Claimant's police interview. There was nothing about it in the Claimant's proof of evidence in the criminal trial. Furthermore, in answer to the Defendant's open and non-leading question during his evidence in chief in July 2013, the Claimant did not mention the Pickwick pub in this particular context. This establishment was of course mentioned in the different context of when the Claimant first met ML. It was not as if the pub was not in the Claimant's mind. In my judgment, the encounter in the Pickwick pub and AB's apparently beautiful singing voice only came out in the third trial and in the context of a defence that had abandoned mistaken identity.

167. Thirdly, I cannot accept the Claimant's evidence that he mentioned Lisa Wilment's surname to the Defendant at any stage. There is no reference to this in any of the contemporaneous notes. I am far from convinced that this finding of fact makes any difference either way: if she were such a valuable witness, the police could have been asked to make inquiries even if a last name was missing. However, the Claimant has

convinced himself that he told the Defendant about Ms Wilment, and I cannot accept that he did.

168. Finally, I must return to the issue of the fireman because it is important to the reliability if not the credibility of both the Claimant and the Defendant. That the Claimant's instructions were that he had been told by KL that AB had confided in her that she had been raped by a fireman features in Ms Taylor's notes dated 18th October 2012. On the second day of the first trial, assuming that Mr Owen's note is correct, the Defendant was told "for the first time" that AB had a relationship with a fireman but there was no mention of any rape. Subsequently, and after the conviction, there were slightly different versions of this story.

169. Mr Edwards submitted that I should find that the Claimant did give the Defendant instructions about the fireman at the August conference. The fact that at the PCHM a section 41 application was under consideration is entirely consistent with that. Furthermore, given that we know that the Claimant used the word "rape" when discussing this topic with Ms Taylor on 18th October 2012, it seems implausible that he did not use the same language on 29th January 2013; and Mr Owen's note is defective. It was also suggested that Ms Taylor's friendship with the Defendant would have caused her to share that detail at some stage, but I see no merit in that particular submission.

170. Mr Edwards's submissions have some force, but ultimately I cannot accept them. Had the Defendant been told about a fireman on 13th August 2012, I am sure that someone would have noted that. The reference to "*any* s.41 application" does not betoken that there must have been a discussion about a fireman; indeed, the point goes the other way. Had the fireman been mentioned and had the Defendant been giving active consideration to making a s.41 application in 2012, she would have remembered that both in January and July 2013, and probably now, and would have responded differently at all times. Instead, Mr Owen's note records that the fireman was being mentioned for the first time (unthinkable, if the Defendant had been giving active consideration to the making of a s.41 application), and in July 2013 Mr Webb's vague question rang no bells (as it would have done if Mr Edwards' counterfactual were true).

171. The real point is that there is no real room for judicial manoeuvre. Although not advanced quite in these terms, Mr Edwards' case can only be that the Defendant must be lying. Had she been told that there was hearsay evidence that AB had been raped by a fireman, she would have remembered that on 31st July 2013 when she answered Mr Webb's email. It was not put to the Defendant that she was lying, and I am satisfied that she was not.

172. Ms Welsh gave her evidence well. She is more able academically than her partner and has a responsible job. Even so, although I find that she was telling the truth as she sees it, I cannot conclude that she was an objective and reliable witness.

173. First, she told me that Lisa's surname was mentioned in the Defendant's presence during the second trial. There is no attendance note that indicates this, and I prefer the Defendant's evidence on this issue. Secondly, she told me that the Defendant's advice was that KL could not be used as a witness for the Claimant. Depending on precisely what the Defendant said, there is certainly room for misunderstanding here. KL could

not be called by the Claimant if she was already being called by ML. However, her evidence could be "used" in the sense that she could be cross-examined by the Defendant. I cannot accept that the Defendant told anyone that it was not possible to cross-examine a witness called by the co-accused. Thirdly, Ms Welsh told me that the revelation about the fireman via KL was *before* 13th August 2012. We know that the fireman was mentioned on 18th October 2012, and it is possible that this was not fresh information. It is unnecessary for me to decide when the revelation was made but I find that the Defendant was not told about a fireman on 13th August 2012.

The Defendant

174. I was expecting the Defendant's understandable nerves and anxiety to show when she started to give her evidence, but there was no sign of these. The Defendant came extremely well-prepared. She had an encyclopaedic knowledge of the voluminous documentation in this case, and every detail had been considered in advance. If a professional woman's judgment is under attack, that is no more than elementary prudence. It meant that the Defendant was well-equipped to deal with Mr Edwards' cross-examination, which was at times robust, although always courteous.

175. The Defendant gave her evidence in a direct and confident manner, and very soon relaxed into the cross-examination. She answered "yes" and "no" where appropriate, and only occasionally took up the cudgels of advocacy on her own behalf. The Defendant was a good and credible witness whose evidence I can largely accept.

176. The extent to which the Defendant was an entirely reliable historian merits consideration. That must come as no surprise to anyone. These events occurred more than seven years ago and as a thought experiment it is a useful exercise to try and remember the details of difficult cases years after the event. The risk of subconscious reconstruction, rather than accurate recollection, is obvious. Mr Edwards cross-examined the Defendant on the basis that her notetaking and/or note retention was substandard, but in virtually all respects his point had no merit. The Defendant has retained notes of high quality. The Defendant accepted that she did not take notes of her conferences and exchanges with the Claimant outside court, or at least there is no evidence that she did. The BSB Code of Conduct mandates that notes are taken and retained, but when it comes to spontaneous conferences in and outside court I have to say that this rule is more honoured in the breach than the observance. I cannot criticise the Defendant for that. However, when asked by Mr Edwards how she could remember what took place at these meetings if she retained no notes, the Defendant countered that it was all "in her head". In one sense that was correct, because if it were anywhere it was "in her head" and not in a notebook; but I think that on reflection the Defendant would have to agree that her answer was ill-considered. Without a perfect memory, and without a note, the Defendant must be struggling to remember exactly what was said over seven years ago now.

177. There is also an issue over the Defendant's trial strategy in one particular respect. In her Defence filed on 31st December 2018, it is pleaded that the defence was solely one of misidentification. The Defendant must have approved this pleading before it was filed, although Mr Edwards asked her no questions about it. In her witness statement the Defendant said that the defence was primarily one of identification, but there were other strands to it. My interpretation of her oral evidence was that the Defendant would jettison the adverb "primarily". This is all in the context of the Claimant's

argument that the Defendant placed two much emphasis on mistaken identity at the expense of other matters.

178. I will be examining in due course whether the Claimant's contention is right, but at this stage I am addressing the Defendant's reliability. The better view on all the evidence is that the Claimant's defence was *primarily* misidentification. That did not exclude other lines of defence, and it is clear from the transcripts that the Defendant pursued them. Whether she pursued them hard enough raises a different issue. Overall, I think that the Defendant has been over-analysing this case and in so doing, at least at times, has distanced herself from the analysis and thinking she carried out many years ago. In some respects, therefore, her witness statement is more reliable than her oral evidence, but the issue of *ex post facto* reconstruction still applies.

179. What I have just said should not be interpreted as much of a criticism; it is human nature.

180. The Defendant also said that she had previous experience of HHJ Jarvis and knew him to be a difficult, irritable judge. When asked about these experiences, she was somewhat vague. That in itself may not be surprising but I suspect that what has happened is that the Defendant was told this by her co-counsel, and that is what she is remembering. Whether HHJ Jarvis has been fairly characterised is another matter entirely. I was told that it was very hot in July 2013, and that HHJ Jarvis was suffering in the ambient conditions, but the transcripts give out real no clue that he was either difficult or irritable.

181. Another general point I would wish to make about the Defendant's evidence generally is the extent to which she researched the law. She told me that she read the passages in *Archbold* dealing with severance and that she had underlined relevant sentences. She came to the conclusion that severance would not be ordered in these circumstances. I consider it more likely that she did check *Archbold* but it was her legal instincts that were telling her that severance was not a viable argument. Nothing turns on this point because, as will be seen, those instincts were right.

182. The final general point that must be made about the Defendant is whether I think that she is a barrister of good judgment. We all know that there are barristers who are good at pleasing clients, those who appeal more to judges, and those who are adept at both. We also all know that there are very able barristers with little or no judgment, barristers who may not be so strong intellectually but with judgment in spades, and barristers who take every point indiscriminately. And I could go on.

183. My overall assessment is that the Defendant is a barrister of good judgment. That is how she came across when she gave her evidence, and snippets of this are apparent in the attendance notes. The Defendant's closing speech was also well-judged. No pyrotechnics maybe, but balanced and persuasive, and clearly attuned to what she felt would go down well with this jury. I asked a number of questions at the end of the Defendant's evidence in order to deepen my apprehension of the level and quality of her judgment. She answered those questions well. In particular, I asked her whether she felt, given the way the trial had gone, the Claimant should have been acquitted. The Defendant said that she did, and her answer was clearly honest and balanced. She said that the Claimant had given his evidence well and that AB, despite all her sobbing, at times came across as awkward and snappish.

G. BREACH OF DUTY

Opening Observations

184. The issue of strategy cannot be ignored although it has not been properly pleaded. Let me attempt the following analysis of what the criminal trial was about.

185. The criminal trial depended largely on the credibility and reliability of AB. She was known to be a vulnerable witness, but was her vulnerability caused in whole or in part by the sexual abuse she claimed to have suffered at the hands of ML? Her allegations against her step-brother ML were rather different from her single allegation against the Claimant, but there was a clear interconnection that was uncomfortable for both co-accused. This nexus inhered in the obvious fact that ML apparently invited the Claimant to have sex with his step-sister. As I have already said, the closer was the degree of their friendship at the time, the more plausible it would be that the invitee was the Claimant even if AB had not seen him before. It also inhered in the equally obvious fact that a dent in AB's credibility and/or reliability *vis-à-vis* one accused might have consequences for his co-accused, and *vice-versa*.

186. AB was saying that she had never seen the Claimant before and that she only recognised him from the Facebook photograph many years later. She could deduce that her assailant was ML's friend. It could be argued that the fact that AB's description at police interview did not obviously match that of the Claimant was not as strong a point as might appear because (1) descriptions of this sort are rarely 100% accurate, and (2) AB had in fact seen a photograph of the Claimant on Facebook just a few days beforehand, or at least had claimed to, and therefore was not remembering him from years ago. On the other hand, I see the force of the Defendant's evidence that the frailty of AB's identification was an issue which could work well before a jury. It could readily be understood. Juries may not analyse cases in the same way as trained lawyers.

187. The fact that AB was saying that she had never seen the Claimant before cut both ways. In order to improve her contention that she was recognising and describing the Claimant, it would have been easier for AB to say all along that she had in fact seen him before. AB may not have been thinking though this logically, but on this issue she had no obvious reason for not telling the truth. It is correct that once AB committed herself to the account she gave at police interview she might have perceived there to be difficulties in departing from it, but it is also correct that AB could be wrong about not meeting the Claimant before and still telling the truth. She might simply have forgotten that detail after so many years. As the Defendant explained in her oral evidence, her client's case was that their meetings were "fleeting". It follows that I cannot accept the Claimant's viewpoint that this was a black and white issue: in other words, if his evidence was right, it meant that AB was lying.

188. Unless the defence of the Claimant was to be advanced on the lines that AB knew him, was describing him and was lying, the inherent tension I have already mentioned was always likely to arise. If the Claimant was continuing to run the defence of misidentification, drawing attention to inconsistencies and possible fallacies in AB's evidence was all well and good to the extent that her credibility was undermined. But some of these inconsistencies related to the number of occasions on which AB had

seen or might have seen the Claimant before. Potentially damaging AB's credibility was one thing but drawing attention to the possibility that she did know the Claimant and was therefore better able to identify him because she recognised him was another.

189. I am not convinced that the Defendant articulated all facets of this inherent tension even to herself, but it matters not. I am satisfied that her instincts were informing her that there was a tightrope to be walked, although maybe not quite the same fine line she was describing to the Claimant in the attendance note for 29th January. Aside from her intuition, the Defendant also told me, and I accept, that advancing the defence of misidentification left open the possibility that the jury might convict ML but acquit her client. In other words, the jury might be sure that AB's account was both credible and reliable, but not be sure that she was not badly mistaken as regard her identification of the Claimant.

190. In the final analysis, the Defendant could not run the defence of misidentification if the Claimant gave instructions to the contrary. It is not his case that he did, nor could it have been. What is clear from the attendance note of the August conference is that the Claimant was instructing his barrister that AB's description was not of him. It was for this reason that the defence case statement was drafted as it was.

The Claimant's Overarching Case

191. I have set this out at §124 above although it is not a pleaded allegation. I have explained why I am addressing it, and on any view it does feed into a number of the Claimant's pleaded allegations, in particular the first two.

192. The Defendant baulked at the term "low profile", but it is clear that she decided that the principal focus of this trial should, if possible, be ML and not her client. She told the Claimant words to the effect that she had done this to good effect before, and she also told the jury at the start of her closing speech that "I've had fairly little to say over the last seven days". It is not open to the Claimant to argue that "low profile" or its equivalent fell woefully short of being the correct strategy, and in any case I would reject such a contention. "Low profile" as opposed to being "front and centre" or "out there" was fine, or at least reasonable, provided that the Claimant's case was properly put to the witnesses and the jury. I do not interpret "low profile" to suggest that the Defendant made some sort of policy decision not to do her best.

193. Had the Defendant's strategy been solely misidentification and nothing else, I would have been surprised. I have explained the potential difficulty. However, the Defendant was entitled to consider that misidentification as part of a broader armamentarium, even the primary component of it, was a reasonable approach. The jury would understand it and would not necessarily analyse the issues in the case quite in the way I have ventured to. And the fact remains that the defence was *not* solely one of misidentification to the exclusion of all else. At least some of the inconsistencies in AB's account were explored, as was the fact that she made no complaint to anyone until 2010. These were sound jury points which would not be entirely neutralised by the judge's standard direction about stereotyping. It was put to AB that what she described did not happen, and the Defendant told me that she was looking for the right moment to do that. I will be examining the Claimant's more granular complaints in due course, but in my judgment the wide-ranging, unpleaded case lacks force.

194. Of course, it might be said that a different advocate may have tackled AB in a different way, and that a more aggressive approach might have yielded more. My assessment of Mr Newton-Price's cross-examination of AB shows that he did get further on a number of issues and was particularly effective on the "we was downstairs" point. However, I have listed all the matters that the Defendant drew out of AB's cross-examination (see §70 above), and on a different day before a different jury and a different judge, and in particular different evidence from ML, things could well have turned out better. The real point is that the Defendant got a lot out of AB that was helpful.

195. An additional factor is that ML's counsel, who obviously went first, was inevitably going to bear the lion's share of the cross-examination of AB and of the Crown's other witnesses. The fact that he seems to have had mixed success is not a point that may be taken against the Defendant.

196. There is no evidence that the Defendant failed to represent the interests of her client robustly and in accordance with her duty, or that she elevated the interests of her co-defendant to those of her client.

197. I have absolutely no doubt that Mr Edwards, and his junior Ms Ayesha Smart, are convinced in their own minds that the Defendant's overall performance fell woefully short of what was required. It follows that I have absolutely no doubt that each of them would have defended the Claimant differently. Nonetheless, their views cannot determine the answer to the question I am required to pose: was the Defendant's overarching conduct of her client's defence blatantly deficient? The answer to that question is in the negative.

198. I have not dealt expressly with the Claimant's additional unpleaded allegation that the Defendant failed to take proper instructions or to advise. These allegations are not supported by the evidence.

Para §122 above: Items (1) and (2)

199. I take these two items together because they are combined. This is undoubtedly the strongest part of the Claimant's case and it has caused me the greatest degree of concern.

200. The contention that the Defendant ought to have objected to the discharge of the jury in January 2013 because the opportunity was lost "to reinforce the unfairness to the Claimant of the introduction of any bad character evidence relating to ML" is not sufficiently focused. The Claimant's better case is that the adjournment should have been opposed on several grounds but first and foremost that it would be unfair for the trial to go off for reasons that had nothing to do with him. The prejudice and unfairness enuring to the Claimant was not co-extensive with ML's. Yet again, however, this formulation does not receive any precise echo in the Claimant's pleadings. The extent to which the Claimant is travelling beyond the envelope of his pleaded case is a factor that I will have to bear in mind.

201. The bad character evidence relating to ML's previous conviction for USI was clearly relevant against him as evidence of propensity. Had he opposed its admission, there was no real prospect of the court ruling in his favour. In any case, ML wanted the

evidence to be admitted because it was two-edged. AB had supported him in 2002/3 during those proceedings (she did not accept that when giving her evidence), and that was inconsistent with the proposition that she herself had been the victim of similar criminal conduct.

202. ML's previous conviction for USI was inadmissible against the Claimant for clear, axiomatic reasons. The Claimant's instructions to the Defendant were that he found out about ML's USI conviction only much later. These instructions were extremely surprising, because – even though the dates were somewhat confused – the Claimant was friendly with ML in April 2003 which was when the latter went to prison. The Defendant might have tested her client's instructions more thoroughly, but any omission to do so was not negligent. Thus, even if the Defendant did foresee the risk that the Claimant might be questioned about his knowledge, if any, of ML's USI conviction, she was entitled to believe that he had a ready answer.

203. The Defendant's only basis for objecting to the USI conviction was that her client was prejudiced because he might be cross-examined about his state of knowledge. All other aspects of prejudice could be covered by an appropriate legal direction. The Defendant's instructions made it difficult to raise this objection, and an astute barrister may not have wanted to signal the possibility of cross-examination about the Claimant's state of knowledge to the Crown. As it happens, it appears that the Crown was not going to ask a question about this until someone in the jury latched onto the point. In any case, and *pace* Mr Newton-Price, I do not consider that cross-examination along these lines would count as relevant prejudice for the purposes of s.78 of PACE or otherwise. It follows that there was no sound basis for objecting to the admission of the USI evidence, and no basis for overcoming ML's agreement to it going in. Had the judge been forced to rule in these circumstances, the evidence would have gone in under gateway (d).

204. The bad character evidence relating to the Watson document leads, at least in part, to a similar analysis. It could only be admissible evidence against ML; it had no relevance to the Claimant. Indeed, it is possible to go further to the extent that the bad character evidence was relevant against ML only insofar as it went to correct a false impression he had given: see s.105(6) of the Criminal Justice Act 2003. That was very specific, and certainly narrower than the issue of propensity. However, there are further issues relating to the Watson document which I address below.

205. The Defendant was aware that the Claimant ran the risk of guilt by association. This risk was inherent in the sense that the Claimant was friendly with someone charged with serious offences against a child. The Claimant was so friendly with ML that each was covering up for the other's affairs. I can see the force of the Defendant's point that there was a serious risk of guilt by association which was incapable of being addressed.

206. The extent to which the Defendant appreciated that the bad character evidence, if admitted, might have a contingent *additional* impact on her client is not altogether clear. I believe that she accepted this in cross-examination, although maintained that her client's interests could be safeguarded by a proper direction. According to her witness statement:

> "I discussed it with the Claimant and we agreed that the evidence at this stage was of very poor quality, was vague and contained hearsay. I was of the view that it would not be admitted on the grounds of propensity because the allegations were of a very different nature, but it might be used to correct a false impression. On that limited basis, impacting upon ML alone, I did not consider that it would impact the case against the Claimant, with appropriate directions. Prior to the start of T1 it was not clear whether it would be admitted by the judge, but I thought that it was it adduced, it might be another factor to help to distance the Claimant from ML …"

207. There are obvious difficulties with the second of the Defendant's stated reasons – helping to distance her client from ML. Even if the bad character evidence went in with a proper direction, the Claimant ran the risk of being tarnished by ML. I have difficulty with the idea that the evidence could have assisted in creating space between the two of them.

208. Aside from the protective cloak of a proper direction, the other possibility was severance, which the Defendant says that she considered. Her evidence was that she did not consider that there was a real prospect of severance being ordered, and so no application was made. In July 2013 she did not want to irritate an already irascible and uncomfortable (because of the heat) judge by making unmeritorious submissions.

209. I am not impressed by part of this second reason. It would be sufficient to say that there is no point making submissions which could not succeed. In any case, the appropriate time for making a severance application would have been at the start of the first trial, in the cool of January, even if not much progress could be made until the weaknesses in the Watson evidence had been addressed. The Crown had just served their bad character application, and no one could have said that the application should have been made at the PCMH. Furthermore, the issue is whether severance was arguable, not whether it had a good prospect of success. There is some force in Mr Edwards' submission that arguable points should be fearlessly maintained before difficult tribunals.

210. The issue here is whether a severance application had any real prospect of success. This is an objective question for me, and I can ignore the quality of any research conducted by the Defendant in *Archbold*.

211. Mr Edwards makes the points that this was not a case of joint enterprise, that the court retains a broad discretion, and that the Watson document was particularly prejudicial. These points have force, as far as they go, but there are other considerations. ML and the Claimant were not jointly charged on Count 6, but their cases were "inextricably bound". The Claimant cannot have it both ways. If he and his co-accused were bound for the purposes described by the CACD, they were also bound for the purposes of any potential severance argument. The only real objection to severance is that the potential prejudice to the Claimant could not be safeguarded by a legal direction. Although there might be circumstances in which that would be the case, there is a very strong public policy interest in having one trial in this sort of case rather than two. It would be undesirable for AB and other witnesses to have to give their evidence twice.

212. The potency of the public policy considerations I am describing has been underlined in two decisions of the CACD that have been drawn to my attention, although I do not doubt that there have been many more.

213. In *R v X and others* [2012] EWCA Crim 2276, the facts were not dissimilar from those arising here. The CACD was considering the impact of bad character evidence admissible against one accused ("X") on his co-accused ("Y") in circumstances where one of the allegations was that the victim was in the house at X's instigation and was then raped by Y. The CACD held:

> "[15] … If the admission of the evidence of the bad character of one Defendant would unfairly prejudice the fairness of the trial against the others then either that evidence ought not to be admitted or the judge (under s. 78 PACE 1984, if not under the 2003 Act) could rule the Defendants whose character is not impugned should be tried separately by ordering severance.
>
> [16] But, in our view, admitting the evidence of X's previous conviction would not cause unfairness, provided, of course, that the jury is properly directed about that evidence. It is true that it made the defence of L and particularly M more difficult. Once it is accepted that it was important evidence against X since it showed propensity to force others, more vulnerable than her, to engage in sexual activity in her presence, it made it much more difficult for M or L to persuade the jury that the Complainant may have been consenting. But there are many cases of joint criminal activity involving a number of Defendants where the evidence against one of them is far stronger than against the others. There are many such cases where once the jury are sure that one of the Defendants is guilty it becomes far more likely that they will be equally convinced of the guilt of the others. This case, in our view, is no different.
>
> [17] Once the jury was sure of the Appellant X's guilt then it was far more likely, although not inevitable, that they would be convinced of the guilt of the other two. But, even though the two Appellants were unaware of X's previous conviction, we see no unfairness in the effects of X's previous criminal activity. It is trite to observe that the trial must be fair to both the prosecution and the defence. It would have been unfair if the jury had not been told of X's previous behaviour, so similar was it to her behaviour in this case. It would have been unfair on the prosecution if all three Defendants had not been tried together …"

214. In *R v Marsh-Smith* [2015] EWCA Crim 1883, Rafferty LJ stated (at paras 46-50):

> "The interests of justice are best served by the ventilation before a jury of allegations which find a common thread, defendant to defendant, event to event, or by reference to other factors, during a trial whose process can protect a defendant

> from avoidable injustice … No body of learning is necessary to establish that robust directions are in general enough to preserve the integrity of the trial process. *Miah* [2011] EWCA Crim 945 underlined that very exceptional circumstances set the high bar for a successful severance application…"

215. In my judgment, a severance application stood very poor prospects of success at any stage. I am assuming for present purposes that such an application would be made on the contingent premise that the bad character evidence was admitted. Either the Claimant would have to demonstrate the presence of very exceptional circumstances, or that the risk of prejudice was unusually great (see *Blackstone, 2021 Edition*, para D11.88). In the alternative, he would have to hope that powerful, instinctive advocacy might somehow carry the day. But ignoring this human consideration, I have to say that it would be very difficult to show that the risk of prejudice was unusually great, provided that is that proper legal directions were given.

216. The question does arise of whether Mr Edwards' argument draws any support from the observations of Laws LJ in the instant case. I have touched on this at §106 above. Was Laws LJ saying that the Watson document prejudiced the Claimant even with a proper legal direction, or was he saying that it was the absence of such a direction that was key, or was the sub-text that, now that ML's appeal had succeeded, it was unconscionable that the appeal of the Claimant should not also succeed? I can assure the parties that the fact that I was a party to this decision (and Laws LJ was of course giving the judgment of the court) does not assist. It would not have been appropriate to divulge matters which were discussed in private when the CACD retired to consider its judgment, but the truth is that I cannot recall. As a matter of strict logic, it should make no difference to the position of defendant Y that bad character evidence against X has wrongly been admitted, provided that the judge gives a proper direction. Whether strict logic was applied on 27th February 2015 is of no consequence because the judge did not give a proper direction. I do not think that Laws LJ's reasons for the CACD allowing the Claimant's appeal may be regarded as impacting in any way on the settled state of the jurisprudence I have already ventured to summarise.

217. Mr Edwards' severance argument has a yet further iteration. He submits that, once it became apparent in January 2013 that the judge might adjourn the trial because of the Watson evidence, the Defendant should have submitted at that stage that the Indictment should be severed and the case proceed against the Claimant alone, albeit before another jury.

218. This is an ingenious submission which has also not been pleaded. I reject it on its merits. Severance was either appropriate or it was not. Severance did not become more appropriate simply because the case against the innocent party here, the Claimant, would otherwise have to be adjourned. I do see the point that for purely tactical reasons a barrister might introduce severance into the debate in order to strengthen her primary argument, but it would be putting this far too high to say that this was the only non-negligent option. Many judges would have interpreted the submission as being instrumental, running the risk that the primary argument might be weakened. Moreover, it would not have been appropriate to have tried the Claimant alone before a different jury in early February 2013, even if that had been feasible in Dorchester.

219. Against this backdrop, I bring myself back in time to the end of January 2013. On 28th January HHJ Jarvis was minded to exclude this evidence, but left open the possibility of the Crown making further inquiries; on 29th January he was disposed to give the Crown more time; on 30th January the Crown applied for an adjournment.

220. In this context, the Watson evidence raises a number of questions. I have found as a fact that the Defendant did not submit to HHJ Jarvis that this case should not be adjourned, although I accept that it is possible that she indicated her opposition without supporting submissions. The judge was clearly in two minds about this. He was concerned that ML might not be telling the truth about the reasons for his going into care, and it would have been obvious to him that an adjournment would inconvenience many people, including AB. The judge was showing the Crown considerable indulgence: not merely had it made a late application to adduce evidence of bad character, the evidence was of intrinsically poor quality.

221. The Defendant's reasons for not objecting to an adjournment were set out in para 14 of her witness statement:

> "When the Judge suggested, at the end of T1, that the trial should be adjourned and the Jury discharged, I did not believe that objecting would be in the best interests of the Claimant. At this point, the Judge was suggesting that he was going to admit the Watson evidence in order to correct a false impression, but was unhappy with the quality of the evidence. He was concerned as to whether there was more substantial evidence which the Prosecution had not been able to obtain or evidence which undermined what the Crown had discovered this far. Additionally, if the prosecution were unable to produce any better evidence then the Judge might not have been inclined to admit it … We thought that if we continued with the trial, the evidence might be admitted by the Judge in its current form; whereas if it was adjourned, there was a chance the application might fail …"

222. The Defendant provided further explanation in her oral evidence, and I have noted in particular her answers to my questions. She felt that there was a risk that if the matter was pressed the judge would allow in the Watson evidence. She considered that if the Crown were given a final opportunity to obtain additional evidence, and then failed to obtain any, there was a good chance that the Watson evidence would be excluded.

223. I certainly see the force of this second point. The fact that HHJ Jarvis admitted the Watson evidence in July 2013 when the position had not materially changed does not weaken the Defendant's contention. However, her first point is more problematic. This may have been the position earlier in the week, but on 30th January 2013 the Crown was asking for an adjournment, either to the following Monday or until a date to be fixed. The risk that HHJ Jarvis would take his own course and admit the Watson evidence was very low. I do not discern anything in the Defendant's blue books or in her note of the judge's ruling which suggests that the risk was material.

224. The Defendant could see that counsel for ML was making valiant submissions against an adjournment. The difficulty he had was that he was not getting through to the

judge, and one of the main reasons for this was that the judge felt that his client was withholding the truth.

225. In cross-examination, the Defendant told me in terms that the judge was in two minds and that he was sympathetic to the proposition that the defence (by whom she meant ML) had not had the opportunity properly to consider the Watson material. However, she also told me that the judge was "on his high horse" and that she felt that whatever she did would not change anything.

226. I have thought very carefully about this. It is quite true that the judge had taken against ML and that his counsel was doing his level best to persuade the judge not to adjourn this trial. The real point here is whether the Claimant did have something new and different to say. His position was different from ML's in that he was entirely blameless, and a mixture of the Crown's dilatoriness and ML's apparent obstructiveness was liable to cause him prejudice and unfairness that was not coterminous with ML's.

227. An additional consideration is that the judge was vacillating and appeared to the Defendant to be leading himself into error. In such a situation an advocate knows that a different voice speaking from a different perspective may make a difference. We all have had experience of that. Furthermore, there was little or no apparent downside risk because the Crown were not pressing the admission of the Watson document without an adjournment.

228. It is at this point that I must remind myself that this allegation has not been clearly pleaded. The pleaded case is that the Defendant should have opposed the Crown's adjournment application but for a different reason. The Claimant's (far better) case has arisen very late in the day. It started life when I asked a question of the Defendant; it was not taken in clear terms in Mr Edwards' closing written arguments; it came out more strongly in his oral argument. The submission that no reasonable barrister would have failed to apply for an adjournment is considerably weakened by this examination of how the matter has evolved.

229. I am far from convinced that the Defendant would have given different evidence had the matter been properly pleaded, but I do think that what would have happened in the face of a better pleading is that transcripts for 28th – 30th January 2013 would have been obtained. These would have permitted a better assessment of the ebb and flow of the argument, and the judge's reaction to it, over the course of these three days.

230. On the assumption that these pleading difficulties may be transcended, the furthest I am prepared to go on all the available evidence is that I think that most barristers would have been less passive than the Defendant. Most would have opposed the adjournment in some shape or form. Some would simply have reiterated the prejudice to the Claimant (the learned pleader appears to be in that camp); others would have emphasised the particular unfairness to the Claimant, and then sought to be explain in her own words why the Watson evidence should not be admitted.

231. These limited findings fall a long way short of establishing that the Defendant's failure to apply for an adjournment amounted to a breach of duty. The fact remains that the Claimant must show that the Defendant's decision-making made "in the fog of war" was blatantly wrong. I express the matter in these terms because the better

view on the evidence was that the Crown applied for an adjournment on that Wednesday morning once the judge was in court. Even if the Defendant received some prior warning on an informal basis, it makes no difference. The Defendant was having to think through the ramifications of the adjournment application in difficult, fluid and fast-changing circumstances. Although it was becoming clear that the judge probably would order an adjournment, this was not a dichotomous situation: the possibility of a short adjournment, until the following Monday, remained on the cards until the judge ruled it out. The ideal strategy was to attempt to force the judge's hand, as it were, and seek to persuade him to exclude the Watson document at this stage; but an adjournment and even a retrial would not mean that this evidence would inevitably be going in. Indeed, the Defendant was entitled to consider that, unless the Crown came up with something new, the judge would in fact be excluding the Watson evidence at any adjourned hearing; and that the chances of the Crown obtaining further evidence after 23 years were slim.

232. The Defendant was forced to consider the pros and cons of various courses of action in a difficult and unusual case. The judge appeared to be taking an unorthodox approach. The Claimant could be largely insulated from ML's bad character by proper directions, and to the extent that he could not that was part of the rough and tumble of a criminal trial in a two-handed case. The Claimant would be prejudiced by the delay, but so would others.

233. In my judgment, I must fall well short of concluding that the Defendant made a blatantly wrong decision. This point, even if properly pleaded, can lead nowhere.

234. I move forward in time to July 2013. By now the Crown had produced little or nothing new in relation to the Watson material, but the application to adduce it was not being abandoned. Even if in practice this was the moment at which any severance application was likely to have considered by the court, I have already said why I believe that it would have had no real prospect of success. But the question remains of whether the Defendant should have added her opposition to the Crown's bad character application because she had locus to do so and it might have played out well with this particular judge. I do not think that it matters for these purposes whether the opposition should have been made on a free-standing basis or, as Mr Edwards suggests, contingently, as part and parcel of an application to sever that was only being advanced for strategic reasons.

235. My assessment is that counsel for ML was objecting to the Watson document competently although perhaps he should have made more of its hearsay nature and the limitations of s.117 of the Criminal Justice Act 2003. The only conceivable advantages to the Claimant of the Defendant adding her metaphorical pennyworth were that (1) a different advocate might have been more persuasive with this judge, (2) objecting to the Watson evidence might have given the Claimant an appeal point that was not contingent on ML, and (3) the need for proper directions might have been reinforced.

236. The Defendant's repeated evidence in cross-examination was that she did not believe that she could usefully add to her co-accused's objections. Again, this was a judgment-call made in the "fog of war". Although the Defendant must have made a decision in advance of the application that she probably would not be contributing, I do not find that this was immutable. It would depend on the submissions advanced by

ML's counsel and the Judge's reaction to them. In this regard, there was no opportunity for mature reflection. The Defendant's assessment was that the judge was not expecting her to advance any submissions, although he was extending an invitation in case she wished to do so. The fact that the judge gave that indication – or, at least, that the Defendant interpreted him in this way – is inconsistent with the proposition that it was blatantly wrong not to advance a submission. The Defendant's assessment was that her co-accused had said everything that could reasonably be said on this issue, and she was in that court room and I am not. The fact that the Defendant was of the view that the Watson document should not go in cuts both ways for these purposes. Reading the transcript, it is far from obvious that there came a moment in time when the judge signalled that he was likely to admit this document. I appreciate that counsel for the Crown submitted to the CACD in February 2015 that the judge's reasons for acceding to the application emerge from the exchanges in oral argument, but I consider that puts it too high. One only knows that once the judge concluded his ruling.

237. The judge's remarks immediately after he had delivered his ruling (see §67 above) do not alter the position. ML was not cross-examined by the Crown on the basis that his statement at police interview about not introducing a friend to his sister generated a false impression owing to what he had said, or may have said, 23 years earlier. Although the judge was going beyond the terms of the Crown's actual application, ML's counsel had made a forceful objection to that, and the matter could be revisited when the judge's draft legal directions were being considered on 17th or 18th July.

238. Objecting to the Watson document in order to provide the Claimant with a potential appeal point is somewhat far-fetched. If the document were wrongly admitted, the Claimant could appeal on this issue if ML also appealed, which is what eventually happened. Further, I cannot accept that it was necessary to object in order to reinforce the need for proper directions. That went without saying, even if – in the event – proper directions were not given.

239. The Defendant's failure to seek to correct the judge's draft directions on the law leaves her in good company: no one drew the judge's error to his attention, and the Claimant's new counsel in the CACD did not take the point on the Watson document until Henriques J indicated that she should. It is not a free-standing allegation of breach. Even had it been, I would not have found that the Defendant made a blatant error.

240. For all these reasons it must follow that the first two limbs of the Claimant's case must fail.

A failure to obtain or utilise the counselling records from the Hughes Unit

241. AB had said at her ABE that she had not mentioned her rape by "Iain" to anyone before 2010. AB received a number of counselling sessions at the Hughes Unit between May and August 2003, which may have post-dated her alleged rape. It was contended by Mr Edwards that the Defendant should have taken AB systematically through these notes, or at the very least have cross-examined her on the dates, so as to reinforce the point that she had every opportunity to give disclosure within this "safe space".

242. The Defendant's reason for not conducting this exercise was that AB had already accepted that she had complained to nobody, and that to take her to the notes gave her the opportunity to explain either that she had been too traumatised or that she did complain and the notes are deficient. The Defendant added that she had experience of this happening in the past.

243. The Claimant said in evidence that the Defendant had told him that these notes had been destroyed, which was untrue. I reject the Claimant's evidence about this. At best, he has confused the Hughes records with a different set of notes. The Defendant had the Hughes records in January 2013 and decided not to use them.

244. The chance that AB was going to say that she did mention "Iain" and the notes were incomplete was low. A greater problem was that the timings were far from clear and it may have been better not to be too precise about the dates. Furthermore, I simply cannot accept the proposition that it was wrong, still less blatantly wrong, not to deploy the Hughes notes in this fashion. The Defendant had a range of options as to how best to present the Claimant's case on this issue, and I discern nothing wrong with what she did. The Defendant did get AB to confirm that she had not complained to anyone.

A failure to cross-examine AB about her previous inconsistent statement to PC Arak-Newman

245. The Defendant did cross-examine AB about her previous inconsistent statement to PC Arak-Newman: see §70(1) above.

246. The Claimant's revised case, which remains unpleaded, is that the Defendant failed to ensure that the previous inconsistent evidence was properly in evidence. It was contained in an email from PC Arak-Newman dated 8th November 2011 which the Defendant failed to ask him about in cross-examination. The officer in the case, PC Austin, had confirmed the existence of this email when cross-examined by the Defendant.

247. In cross-examination the Defendant accepted her error. Strictly speaking, the email was not formally in evidence before the jury, although they had heard questioning about it and the jury knew that the email existed.

248. This new case has not been pleaded, and even were an application made at this late stage to amend the pleadings I would refuse it. The Defendant made an error on her feet and her omission fell far short of being blatantly wrong.

A failure to cross-examine AB on the "we was downstairs" remark at police interview

249. Mr Newton-Price had a metaphorical field day when it came to his cross-examination of AB on her "we was downstairs" remark. This was in the context of the bold case that he was running that AB well knew who the Claimant was, and she was lying.

250. However, the Defendant was, on instructions, running a different case. The ABE interview is ambiguous as to whether AB had seen the Claimant downstairs. Had she done so, that would strengthen the proposition that, as para 17.5 of the Particulars of Claim pleads, she could have clearly identified him. In other words, it would have strengthened the proposition that her identification of the Claimant was correct.

251. The inherent tension in AB's evidence meant that this issue needed to be handled with care. In fact, the Defendant did deal with the location of those in the house quite deftly (see §70(1) and (2) above) even if the "we was downstairs" remark was not put. In her closing speech the Defendant was able to underscore the vagueness of AB's account.

252. This is a classic instance of seeking to impugn a barrister's judgment as to how to cross-examine a difficult, vulnerable witness in circumstances where there was a real risk that she might say something that could seriously damage her client's case.

A failure to advise that Lisa Wilment be interviewed by the solicitors, alternatively by the police

253. I am satisfied that the Defendant was alive to the potential significance of Lisa Wilment as a witness in this case. She featured in the Defendant's notes after reviewing the ABE. I also find that there a discussion at that conference about her although there is no note of one. The Defendant's recollection (see §255 below) was that there was such a discussion and to that extent the parties are in accord.

254. Before 22nd July 2013, I have not seen a document, attendance note or transcript in which Lisa's last name is mentioned. I cannot accept the Claimant's evidence that he provided her last name to his legal team during the course of the August conference, or Ms Welsh's evidence that "Wilment" was mentioned to the Defendant in her presence. I think that their evidence on this issue has been coloured, if not distorted, by an erroneous belief that Lisa was such a vital witness. The "Comments" document prepared by Ms Taylor, which the Claimant approved, referred to Lisa by her first name throughout and made clear that the only information that he could provide was that "she was living in a caravan with her partner".

255. The precise terms of the discussion about Lisa at the August conference are not clear. According to para 22b. of the Defendant's witness statement:

> "I had a discussion with the Claimant about whether we should call Lisa Welsh to give evidence. The Claimant inferred that he didn't know Lisa Welsh, and knowing the layout of the property he was of the view that she wouldn't have heard anything. Therefore there was no point in trying to locate and call her."

256. The Defendant was not cross-examined about this directly. The reference in the Defendant's statement to "Welsh" is an error which may have derived from Laws LJ's judgment. I certainly do not interpret the Defendant as accepting that her last name was mentioned. On the other hand, the second and third sentences are problematic. The (incorrect) use of the verb "inferred" suggests that the Claimant did not say any of this in terms. In fact, this was a small property and had AB cried out Lisa would have heard it. AB's evidence was that she did not cry out, thereby explaining, if it be true, that Lisa, who was upstairs, heard nothing. I conclude that the Claimant did not say that there was no point in trying to locate her.

257. In my judgment, the Defendant's witness statement mixes up a number of things and is – not for the first time - redolent of subconscious *ex post facto* reconstruction. In

oral evidence the Defendant agreed that she would not advise a criminal defendant to look for witnesses it being the solicitor's job to do so, and that there was no sign that she had been sought out by the police. The Defendant agreed that she did not ask the solicitors to initiate any inquiries and that she did not initiate any of her own with the Crown.

258. The question for me is whether it was a breach of duty for the Defendant to fail to advise the Claimant that inquiries be made to locate Lisa and interview her. In one sense, the absence of Lisa's surname is somewhat of a distraction because the police, if asked, would probably have found her, as they were to in 2015. Accordingly, I reject Mr Smiley's submission that there was no reason for the Defendant to believe that Lisa might be found, let alone interviewed.

259. I do not think that I need make a finding as to whether the Claimant believed at the time that Lisa was a critical witness and that he communicated that belief to the Defendant. The latter did say in cross-examination that she understood that Lisa was *potentially* a key witness.

260. Aside from that part of para 22b of her witness statement that I have rejected, the Defendant's reasons for not advising that steps be taken to find her were that she might have said that there was an occasion on which the Claimant and ML went to the property, and that the Crown had chosen not to obtain a statement from her.

261. In my judgment, Lisa was not a critical witness and the Claimant was probably better off without her. First of all, she was ML's ex-girlfriend and potentially very partisan, although which way she might flip was unclear. Secondly, she was likely to say that the Claimant and ML were close friends at the time, which was indeed what she did say later. Thirdly, AB's evidence was never that she cried out and Lisa must have heard her. Logically, Lisa could not disprove the Crown's case on an important aspect. Fourthly, Lisa might have said all sorts of things in cross-examination which could be anticipated but never precluded. For example, a good cross-examiner might well have induced her to agree that there might have been an occasion or occasions on which the Claimant and ML were at the property together, even if Lisa could not now remember that specifically. Finally, Lisa's absence from the trial as a potential prosecution witness who might have given valuable evidence was a good jury point for the Claimant.

262. It follows, in my opinion, that the Defendant's failure to advise the Claimant that inquiries be made to locate Lisa was not a breach of duty. This issue must be judged objectively because the issue for me is whether the Defendant's failure was "blatantly wrong". The fact that there is little evidence as to the Defendant's actual thought-processes does not matter.

263. In any event, albeit dealing with this issue out of turn, there is simply no basis for contending that any failure by the Defendant was causative. Lisa did not give a witness statement in 2013 and in 2015. She felt intimidated on both occasions. Mr Newton-Price decided not to risk calling her pursuant to compulsion and without a statement. The position would have been the same in January and July 2013.

A failure to advise that KL and/or ML be interviewed and/or that written questions be put to them and/or to cross-examine them about the occasions on which the Claimant and AB might have met

264. It is convenient to take KL and ML together. I can deal with this allegation quite shortly. It is without merit.

265. The Claimant did not instruct the Defendant that he might have met AB at the Pickwick pub and when he gave evidence in July 2013 he did not say that. The Claimant's evidence was extremely confused at to the dates. What is clear, as I have already pointed out, is that he was seeking by his evidence to minimise the possibility of AB being able to recognise him by, if anything, underplaying the number of opportunities for their having met. The Claimant did not believe it to be in his interests to add to these possible opportunities. Given that misidentification was an important plank of his defence, that was entirely logical.

266. As I have already said, the Claimant was also trying to distance himself from ML and KL. He was also concerned to ensure that his friendship with ML, whatever its closeness, started after AB's 16th birthday.

267. ML's evidence was hopelessly vague as to the dates, and there were obvious dangers in cross-examining him on the premise that he could give useful evidence as a reliable witness. In theory, a number of written questions could have been put to him, but – as the Defendant has clearly said – the possibility of collusion, or at least apparent collusion, was obvious. In addition, ML was also trying to distance himself from the Claimant.

268. KL's evidence was that she did not even believe that the Claimant really met AB, and that if they did meet it would have been down at the local pub. The Claimant must have read her statement but gave no instructions to the effect that they did meet at the local pub. In theory, a number of written questions could have been put to her, but these would have been in the nature of cross-examination. In my judgment, that would have been both an unwise course and an unnecessary one: it was not in the Claimant's interests to antagonise KL or, indeed, to get her to say that there were further opportunities for him and AB to meet.

269. The only sensible course in these circumstances was for the Defendant to test the water with ML and KL, which is what she did. In the result, ML's answers in cross-examination were quite helpful to the Claimant.

270. There is no value in examining what happened in the third trial. By now, the evidence from the two accused was operating more in counterpoint, and the emphasis had moved away from mistaken identity to outright mendacity. Whether consciously or otherwise, KL was alive to this change of course, and may also have been alive to the importance of proximity rather than distance. The attack on AB required a united front.

A failure to advise that live character witnesses be called and that more than one character witness be read

271. According to Mr Owen's attendance note and the judge's summing-up, the statements of three character witnesses were read, and they were named. The Claimant's attempt to persuade me that there was only one was entirely futile and damaged his credibility. It also showed very poor judgment.

272. Some barristers would say that it is always better to call live character evidence. The Defendant was of the view that that can sometimes be risky because the witness is then open to cross-examination. There may be two schools of thought about this, but the Defendant's reasoning cannot possibly be described as wrong, still less blatantly wrong.

273. In my view, this point should really have been abandoned.

A failure to attend the last day of the trial

274. It is obviously extremely regrettable that the Defendant was unable to attend the last day of the trial. However, she was unable to push back her Taunton trial, and I reject the suggestion that she was in breach of duty by failing to ask HHJ Jarvis to telephone his colleague in Taunton to see what might be done. I find as a fact that the Claimant did agree to the release of the Defendant, and that the latter did not say words to the effect that he had no choice.

275. For evident reasons this allegation of breach could never have led anywhere. The jury was deliberating on 22nd July 2013 and the Defendant could not contribute further. Had there been a jury question, it is fanciful to suggest that the Defendant's non-attendance might have prejudiced the Claimant.

276. We do not know what, if anything, HHJ Jarvis said to the jury about the Defendant's absence. It is standard practice in these situations for judges to explain the position.

A failure to advise the Claimant that he had reasonable prospects of appealing the conviction on the grounds subsequently affirmed by the CACD

277. This allegation is slightly more troubling.

278. Mr Smiley took a number of pleading points which I simply cannot accept. It is contended that this is described as a "service failure" rather than an allegation of breach of duty. The pleading may be defective, if not inept in its use of language, but the Defendant has always known that a justiciable complaint is being made in this regard. The pleading may not state in terms that the "service failure" is causative, but there is no prejudice to the Defendant in examining the hypothesis that it was.

279. The Defendant was asked to provide a written advice by 29th July 2013, and she did so on the Sunday. Her advice was entirely accurate insofar as it went. The Defendant was aware that her co-accused's counsel was considering an appeal on the basis of the wrongful admission of the Watson document. It was the Defendant's belief that this document should not have been admitted. In her email dated 31st July 2013 the Defendant informed Mr Webb that she needed to see ML's grounds of appeal in order to assess whether they impinged on her client's prospects.

280. I think that the Defendant's advice on appeal should perhaps have stated in terms that a final decision had to await sight of ML's advice. Further, the Defendant did not state that the judge's bad character direction was in any event deficient irrespective of the merits of his anterior decision to admit it. However, this deficiency in the direction missed the notice of a number of barristers, and it took Henriques J to point the Claimant in a better direction.

281. On reflection, I do not consider that the Defendant's omission to deal with the Watson document in her formal advice was a breach of duty. The reality of this case was that if ML did not appeal, any appeal by the Claimant would severely struggle. It was reasonable not to give a positive advice at that stage, but to wait and see. The Defendant made it clear that an appeal point might become available should ML decide to advance it. Furthermore, I find that the Defendant would have given positive advice on sight of ML's grounds had she not been disinstructed in the interim.

282. In any case, there is no evidence that any breach by the Defendant was causative. There was delay in the CACD hearing this case as late as February 2015, but the delay remains unexplained. ML appears to have appealed in time. It is not clear whether Henriques J granted him permission to appeal on the same occasion as he referred the Claimant's application to the Full Court, but I am prepared to assume that he did. Had the Claimant's new legal team taken the right point earlier, rather than cause potential delay by seeking out fresh evidence that was never going to satisfy the conditions of s.23 of the Criminal Appeals Act 1968, it is possible that the Claimant would have been released on bail before March 2015; but that is an exercise in speculation. Further, it is an exercise that cannot avail the Claimant because the Defendant had no responsibility for what the new legal team either did or failed to do.

Conclusion on Breach of Duty

283. I have rejected all the Claimant's allegations of breach of duty. This claim must be dismissed for this reason alone.

284. However, and out of deference to the detailed submissions I have received, I will consider the remaining issues in this case with appropriate economy.

H. CAUSATION/LOSS OF A CHANCE

285. It is unnecessary for me to consider all the possible permutations and combinations on the counterfactual that the Defendant was in breach of duty in one or more respects. Neuberger J's multiplicative approach would require a series of calculations.

286. In my judgment, the only breaches of duty that are arguably causative are the first two: the failure to object to an adjournment, for severance and/or for ML's bad character evidence to be excluded.

287. To the extent that any conclusion on this issue depends on what the Claimant would have done, I find as a fact that he would have followed whatever advice he was given.

288. There was no real prospect in persuading HHJ Jarvis to sever this Indictment at any stage. Given that no application to sever was made, this issue can only be addressed on a hypothetical basis. I do not believe that severance was the right course in this

case, and I have no doubt that this particular judge would have refused any application to sever.

289. In addition, there was no real prospect in the Defendant persuading HHJ Jarvis to exclude the bad character evidence against ML because it prejudiced the Claimant. HHJ Jarvis was concerned about the fairness of admitting the Watson document in these circumstances, but (examining this issue in July rather than January 2013) his answer to any submission to the effect that the evidence should be excluded for a different reason (sc. prejudice to the Claimant) would have been (1) that would be unfair to the Crown, and (2) the Claimant's position may be safeguarded by giving an appropriately worded direction. The chance that he might have come to a different conclusion was minimal.

290. On this topic the Defendant could only have repeated the submissions the judge had already received from ML's counsel. However the Defendant chose to advance the submission, the contention that the Claimant was separately prejudiced because he would be tarnished by the Crown's brush against ML would always have been met by the riposte that this issue often arises in criminal trials and the co-accused is safeguarded by the appropriate legal direction. Furthermore, it does appear that by July 2013 HHJ Jarvis was determined to admit the Watson document under gateway (f) because he formed the view that ML was being obstructive. He would not have acceded to a submission that, regardless of this, it should not be admitted at all because it unfairly impacted on a co-defendant.

291. The fact that HHJ Jarvis had doubts about the relevance of part of the gateway (f) evidence as soon as he had delivered his ruling on it does not affect this conclusion. What should have happened is that he should have been asked to give an unequivocal direction to the jury that that part of ML's police interview which related to the invitation to his friend should not be regarded as giving any false impression, and that in addition the Watson document was relevant evidence in the case only against ML. The difficulty here is that the Claimant has not pleaded that the Defendant was in breach of duty in failing to correct the judge's legal directions when she saw them in draft. The damage flows, if it flows at all, not from the admission of the evidence but the failure to compartmentalise it appropriately.

292. It might be argued that had the Defendant objected to the admission of the Watson document and emphasised the need for a proper legal direction as soon as it was becoming clear that the objection would fail, there would have been a better chance of the judge's legal direction being correct. The answer to this exercise in speculation is that the judge's understanding that he had to give a proper legal direction went without saying.

293. In oral argument I raised the possibility that, if the Defendant were in breach of duty in failing to object to the admission of the bad character evidence *and* that failure was causative (because the judge might have acceded to the Defendant's objection), the judge's deficient legal directions do not break the chain of causation. The parties' submissions on this uncovenanted judicial question were, perhaps unsurprisingly, somewhat limited.

294. My question was posed at a stage when I had not reached a final decision on this aspect of the case, which was always the most troubling. Now that I have concluded

that any submissions by the Defendant would not have made a difference, my further causation point does not arise. I prefer not to express an opinion about it.

295. This leaves the Defendant's failure to object to the adjournment in January 2013. On the premise that it was negligent, it gives rise to a number of questions.

296. In my judgment, (1) the chances of the Claimant being acquitted before this judge and jury were in the region of 50% at the moment this trial started in January 2013, (2) the chances of the Defendant persuading the judge to refuse the adjournment because of the separate prejudice to her client were in the region of 15-20%, and (3) had the adjournment application been refused and had the trial continued in January 2013 without the Watson document but with the USI bad character evidence against ML (as to which there was no prospect of its exclusion), the chances of the Claimant being acquitted were in the region of 70%.

297. Each of these percentages is somewhat conjectural but can be justified on the following basis. Mr Edwards submitted on a number of occasions that this was always a weak case, that AB's account was obviously a tissue of lies (see his opening argument), and that the bad character evidence should be excluded because it was being used to bolster a weak case. I cannot accept those submissions. Indeed, towards the end of his closing oral argument Mr Edwards came much closer to submitting that this case was finely balanced, and that on narrow margins hard cases often turn. That was a more accurate assessment, and (doing the best I can) leads to my 50% figure.

298. The chances of persuading HHJ Jarvis to change course on the adjournment issue were more than minimal: they were realistic, albeit quite low. These chances must be evaluated not on the basis that a judge should have refused the adjournment because the application was late and the evidence far too weak to be admitted. The assessment of the chances must be carried out on a close and case-specific basis: namely, asking the question what would or might HHJ Jarvis have done in these circumstances. I accept the Defendant's evidence that he was "on his high horse" and was far from impressed by ML's apparent obstructiveness. Although the Claimant had sound reasons for objecting to the adjournment, some of them coincided with ML's reasons and by 29th and 30th January 2013 it appears that the judge was very reluctant to give up on the Watson document. My 15-20% figure reflects all of the above.

299. This approach contrasts with that applicable in a clinical negligence case where a claimant has two metaphorical bites of the cherry (see *Bolitho v City and Hackney HA* [1998] AC 232): what *would* the clinician have done and what *should* she have done? This is because a normative judgment falls to be made about the acts and omissions of a putatively negligent party. Here, there is no room for a similar evaluation, and the question is only: what are the chances that HHJ Jarvis would have done X or Y?

300. Finally, the reasons for both ML and the Claimant being convicted at the second trial are multifarious and many of them are unknowable. The Watson document was highly damaging evidence against ML, and it is reasonable to conclude that the Claimant was or may have been swept up in its tailwind. However, it would be wrong to conclude that the Watson document turned the whole case.

301. Applying a multiplicative approach, which yields a figure in the region of 3-4%, the Claimant fails to satisfy me that he has lost a real and substantial chance of an acquittal in consequence of the Defendant's failure to apply for an adjournment.

Conclusion on Loss of a Chance

302. The claim fails on the issue of causation.

I. QUANTUM

303. In the circumstances, the Claimant having lost on breach of duty and on causation, I will be brief. I will set out my conclusions and some succinct supporting analysis.

304. Having regard in particular to *AXD v Home Office* [2016] EWHC 1617 (QB), *Popat* and *Rees v Commissioner of Police of the Metropolis* [2019] EWHC 2339 (QB), I would have awarded £65,000 in respect of loss of liberty on the basis of 100% recovery. I accept the Claimant's evidence that he was subjected to very unpleasant experiences which he did not report at the time. He lost a lot of weight in prison owing to anxiety and depression. However, there is no medical evidence to support the contention that the Claimant has had full-blown PTSD (as opposed to some symptoms of PTSD), and Mrs Rutherford confirmed that her son has been much better since 2017. I also pay some regard to the fact that this is a professional negligence case rather than an action brought against an emanation of the State.

305. The Claimant's earnings before January 2013 were relatively modest. I cannot accept the argument that regard should be had to self-employed receipts which have not been declared. The Claimant's counselling and managerial roles had not been recent. At the time of his arrest and conviction, the Claimant could be fairly described as long-term unemployed, not having worked since December 2009. In the second trial the jury were told about the Claimant's cleaning business. It was not making any money.

306. For the period of his incarceration, I would have awarded the Claimant damages calculated on the basis of £15,000 net per annum.

307. After his release, the Claimant was employed in what appears to have been a health and safety role in the building trade and/or a labourer, earning at the rate of £32,000 gross per annum. He has never received more lucrative employment. The Claimant had filed a witness statement from Mr Adrian Davies which claimed that he was offered employment at the level of £40-45,000 p.a. which his conviction prevented him from taking up. Mr Davies did not attend trial to give evidence. He had made no reference to this alleged job offer when he gave character evidence for the Claimant at his third trial, nor is it clear why this offer was not available upon his release. There is nothing to support this offer beyond the Claimant's assertion. No relevant documents have been disclosed. There are issues concerning the existence of Mr Davies' company. I find as a fact that no job offer was made by Mr Davies.

308. I received a mass of evidence and submission about CRB checks and DBS enhanced certificates. It was argued that the absence of a "clean" enhanced certificate was the reason the Claimant failed to obtain employment in the field of counselling. However, the Claimant's evidence was in a state of some disarray. It transpired that he did not in fact apply for any employment which required such a certificate. When it was

discovered this year that the information on the certificate was incorrect, the Claimant did nothing to rectify the matter. The certificate could probably contain some limited information about the Claimant having been arrested and charged for a sexual offence, but the Defendant was not responsible for either of those things. Nor was she responsible for the errors in the certificate or the failures to correct them, on whosever door that lay.

309. The claim for retraining costs is inadequately evidenced and cannot be supported in the light of the Claimant's acceptance that some of these costs have not been incurred by him.

310. The unfortunate reality for the Claimant is that his claims for financial losses are in disarray. That being said, I am not altogether comfortable with the notion that the Claimant should recover absolutely nothing for loss of earnings after his release from prison, either past or future. This discomfort is not altogether allayed by the twin considerations that the Claimant had not been working since December 2009 and did manage to secure remunerative work after his release from prison. It is arguable that he qualifies for an award for loss of earning capacity under the principle first enunciated in *Smith v Manchester Corporation* [1974] EWCA Civ 6. But this point was not argued and cannot therefore be taken any further.

311. On the basis of full recovery and before any discount for the loss of a chance, my award would have been based on the following figures: £65,000 (loss of liberty) and approximately £26,000 (for lost earnings whilst in prison). Should the need arise, the parties can perform the necessary arithmetic.

J. CONCLUSION

312. If it is any consolation to him, I endorse the Defendant's view that the Claimant should not have been convicted of the offence of rape on 22nd July 2013. The jury ought not to have been sure of this guilt. But there were many reasons for the Claimant's conviction and I cannot know all of them. What I do know is that it has not been proved that this was the Defendant's fault.

313. There must be judgment for the Defendant.