Neutral Citation Number: [2020] EWHC 3590 (QB)

Case No: QA-2019-000367

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/12/2020

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

NORFOLK COUNTY COUNCIL	**Appellant/ Defendant**
- and -	
SHARON DURRANT	**Respondent /Claimant**

- -

Ms Lisa Dobie (instructed by Browne Jacobson LLP) for the Appellant
Mr Henry Mainwaring (instructed by Pabla & Pabla Solicitors) for the Respondent

Hearing dates: 24 June 2020

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APPROVED JUDGMENT

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 Wednesday 30th December 2020 at 2pm.

Mrs Justice Foster :

INTRODUCTION

1. This is an appeal by Norfolk County Council ("Norfolk") against a decision of Mrs Recorder Rodgers sitting in the Norwich County Court which found Norfolk liable in negligence for personal injuries suffered by the Respondent, Ms Durrant. They were sustained during an incident in September 2015 when Ms Durrant was a teaching assistant ("TA") at the Clover Hill VA Infant School and Nursery, Bowthorpe, Norwich ("Clover Hill") and a 6 year old child in her care at the school became upset when segregated from the classroom by Ms Durrant and another member of the staff.

2. The Claimant made a small claim for soft tissue injury to her left shoulder, chest, and limbs which healed within 8 weeks. There was a much larger damages claim in respect of Post-Traumatic Stress Disorder.

3. The case for the Claimant was put on the basis of common law negligence. She also pleaded provisions of the Management of Health and Safety at Work Regulations 1999, alleging by reference to them a failure to make any suitable and sufficient risk assessment of the risks to health and safety of those working at Clover Hill, failure to provide information on risks, to take into account her capabilities when entrusting her with tasks, and failure to provide training.

4. The Recorder noted that following section 47 of the Enterprise and Regulatory Reform Act 2013, breach of a Regulation causing damage did not of itself give rise to liability, but might be relevant for establishing common law negligence, and held that the Regulations provided context in which to assess an employer's performance of its common law duty of care. There is, rightly in my judgement, no challenge to that analysis.

5. The Claimant's case was based on breaches of the employer's duties to her, including to provide a safe system work. It was alleged that the area in which the injury happened, the so-called Sunshine Room, a calming-down area for disruptive children, was an unsafe place of work in light of what was known at the time.

6. Ms Durrant also alleged a failure by the school to operate their systems for monitoring and management of difficult pupils effectively. If the systems and policies had been consistently applied, she said, what was described as a "dramatic deterioration" in the child's behaviour before the incident would have been managed properly, and the incident would not have taken place. He would have been removed to a special area, alternatively, the "psychological

atmosphere" would have been different and the incident would not have taken place. She pointed to the absence of a completed Pupil Specific Risk Assessment form as a reason for - or evidence of - alleged non-identification of the relevant risks.

7. The central allegation became at trial (it was not pleaded) that the child, known in the case as "J", "undoubtedly should have been escalated", that is, subjected to a graduated "Red Card system" operated at Clover Hill, of escalating concerns about behaviour and removed to "the Base"- a special mobile classroom that was a discipline facility at the neighbouring, more senior, school, at some point before the incident. It was also said he should have been referred to the Leadership Team at Clover Hill, and that the incident on 28 September 2015 was quite foreseeable.

8. It was therefore Ms Durrant's case that Norfolk had failed to take reasonable steps to provide her with a safe system of work, reasonableness being judged in the light of what was known at the time. Necessarily, she had to show on the balance of probabilities that the alleged failings would have prevented the incident or avoided the injury.

THIS APPEAL

9. The argument by Norfolk on appeal is that the Recorder failed to ask herself what difference any breaches she found had made, in the light of what was known at the time and the safety measures and strategies there were already in place. Norfolk say, correctly, that there is no actual finding on the question of causation in the judgment and argue no consideration or conclusion upon it may be inferred from the terms of the judgment. The Appellants argue that, properly applying the law, the evidence did not support a finding of negligence against them. No act or omission of Norfolk could be said to be causative of the injury to Ms Durrant, whether directly or indirectly.

10. In addition to the failure to make findings on causation the Appellant says the Recorder also made two unsustainable factual findings namely:

    a. That there were other relevant incidents or concerns at the time that were not recorded or reported, and this resulted in
    b. A failure to provide an overall risk assessment

11. The Respondent accepts that no actual finding of causation was made by the Judge but invites this court to infer from the Judge's reasoning read as a whole that that is what the Judge must have found.

12. Norfolk say the Judge's reasoning cannot stand and invite this Court to analyse the materials set out by the Judge for itself and reach what they argue is the inevitable conclusion that the Claimant's case must fail. The Respondent Claimant is also content for this Court to reach its own conclusions on causation, and, if it were to accede to the Appellant's submissions, Ms Durrant does not ask for a retrial.

13. The issue of liability was tried over 3 days from 23 to 25 January 2019. Sequential and comprehensive written closing submissions were provided in February 2019. Judgment was handed down 18 December 2019, holding the Defendant liable but finding contributory negligence of 40% on the part of the Claimant.

14. Following the judgment, and expressing concern regarding some apparent inconsistencies and uncertainties as to findings, and particularly, the absence of reasoning as to causation, Norfolk requested the Judge to reconsider her reasoning consistently with *English v Emery Rheinhold and Strick Ltd* [2002] EW CA Civ 605, and *re B(Appeal: Lack of Reasons)* [2003] EW CA save 881, as applied in *re-A and L (Children)* [2011] EWCA Civ 1205. Norfolk posed a series of questions for the judge, she adjourned to consider her notebooks but declined to answer them.

THE LEGAL FRAMEWORK

APPEALS

15. Norfolk's case involves primarily a challenge to the legal question whether negligence was made out. They say the Judge made findings of breaches of duty which cannot stand, but even if there were errors by Norfolk that could be characterised as breaches of duties owed to the Claimant, there is no finding by the Judge that they were causative of the damage suffered by the Claimant, so negligence could not properly be found. As a secondary position, they argue certain primary findings of fact were not open to the Judge on the evidence.

16. The following non-contentious principles (which are not exhaustive of the statements of authority) are of relevance here:

    a. In a case in which credibility is in issue, an appellate court can hardly ever overturn primary fact findings where the trial Judge has seen the witnesses give evidence *Cook v Thomas* [2010] EWCA Civ 227 at [48].

    b. As to evaluations and deductions from fact, in *Re-Sprintroom* [2019] EWCA Civ 932 (where the Judge's evaluation, rather

than his findings of primary fact, was under appeal) the following was said:

> "76. So, on a challenge to an evaluative decision of a first instance Judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the Judge was wrong by reason of some identifiable flaw in the Judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion".
> 77. All this said, when assessing an evaluative decision of the facts found by a trial Judge, there can be no doubt that one must also bear in mind the well-known passage in the speech of Lord Hoffmann in *Biogen Inc. v Medeva plc* [1997] RPC 1, 45 where he said:
>
> > "…The need for appellate caution in reversing the Judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous Judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification, and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the Judge's overall evaluation. It would in my view be wrong to treat Benmax as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the Judge's evaluation."

17. See also Lewison LJ with respect to facts, inferences and evaluations in *Fage UK Ltd. & anor. v Chobani UK Ltd. & anor.* [2014] EWCA Civ 5, at paragraph 114 (also cited by Leggatt LJ, *supra*)

> "[114] Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial Judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. … They include:

> "(i) The expertise of a trial Judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
> (iii) Duplication of the trial Judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
> (iv) In making his decisions the trial Judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
> (vi) Thus even if it were possible to duplicate the role of the trial Judge, it cannot in practice be done."

18. See also *London Borough of Haringey v Ahmed and Ahmed* [2017] EWCA Civ 1861.

NEGLIGENCE

19. It was not disputed that the claim fell to be considered within the framework of common law negligence, informed by the content of various regulations, nor that it had to be shown that any proven breaches of duty were causative of the Claimant's loss. The nature of the requirement as to a causative link between breach and injury is set out in *Charlesworth & Percy on Negligence* (14th edition First Supplement. Chapter 5: Causation and Remoteness of Damage expresses the essentials succinctly thus:

The inquiry into cause

> 5-01
> A defendant who is in breach of a duty in tort cannot be held responsible for loss suffered by a claimant unless the defendant's conduct was a cause of that loss. As shortly stated, it might appear that there is a single inquiry into the cause of harm. However, the inquiry can conveniently be divided into three questions. First, it must be determined whether the defendant's conduct was a cause in fact of the plaintiff's loss. Normally this is a minimum requirement, although in certain special cases the proposition requires some qualification. Second, if a causal link in a strictly objective sense is shown, it is necessary to consider whether the conduct can be seen as a

> cause in law. It is not enough that the conduct provided the opportunity for the harm to happen: it must also be, in some sense, an effective cause of the harm. Formulating a test which captures this necessary link has proven to be difficult. Third, there is the question of the proximity between the cause and the damage or, in other words, of the remoteness of the damage. Assuming that the conduct was a cause, it must be sufficiently closely connected with the damage so as to justify the imposition of liability. While the test to apply in determining remoteness issues is clear, its application can often be a source of uncertainty.
>
> 5-02
>
> The three stages are analytically distinct, although the courts in their decisions do not always draw clear lines between them. The analysis is orthodox, and convenient, and assists in an understanding of the different aspects of the inquiry into cause.

The "but for" test

> 5-04
>
> The "but for" rule is generally the starting point in proving a causal connection between negligent conduct and the damage suffered. The claimant seeks to show that but for the defendant's negligence the injury complained of would not have arisen. If he succeeds, there is no additional requirement to show that the defendant's negligence was the only, or the single, or even chronologically the last cause of injury. This threshold "but for" test is based on the presence or absence of one particular type of causal connection: whether the wrongful conduct was a necessary condition of the occurrence of the harm or loss. The test does not distinguish between legally relevant and other causes, yet it is not its function to do this. It identifies whether the conduct in question was a cause. At this stage we do not need to concern ourselves with all the other factors which combined to produce the total environment in which the damage could happen."

20. Among the allegations of causative breach was a failure to conduct a proper risk assessment. Norfolk denied that there had been any such failure but also emphasised in submissions that a mere failure to conduct a particular assessment, or to conduct one in a particular format, could not without more be negligent.

21. In *Uren v Corporate Leisure (UK) Limited and Ministry of Defence* [2011] EWCA Civ. 66 the court considered a case in which a serviceman was injured diving into a shallow pool during an entertainment games event. It was argued in that case that, had a proper risk assessment been carried out, it would have revealed the significant risk of catastrophic injury and the event would not have been permitted to take place in a form which allowed the claimant to

enter headfirst and suffer catastrophic injuries. Smith LJ stated at paragraph 39:

> "It is obvious that the failure to carry out a proper assessment can never be the direct cause of an injury. There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. A decision of that kind would necessitate hypothetical consideration of what would have happened if there had been a proper assessment."

22. A statement of the standard of care required of an employer and approved as "classic" (in *Baker v Quantum Clothing Group*, [2011] UKSC 17, [2011] 4 All ER 223 per Lord Mance [9], [21] and [101] per Lord Dyson) is found *in Stokes v Guest, Keen & Nettlefold (Bolts and Nuts) Ltd* per Swanwick J. It says as follows:

> '' … the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge, it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.

23. I turn first to the background to the case.

THE CASE BELOW

24. The material uncontested facts were as follows. Clover Hill, a mainstream infant school providing education for 3 to 7-year olds, had in its cohort at the time, a number of children with behavioural and other issues of whom one was Child J. After Clover Hill the children moved to the nearby site of St Michael's for education between the ages of 7 and 11. Forty per cent of Clover Hill intake were in receipt of free school meals and 45% were registered as having special educational needs with "statements" from the local authority at the relevant time, although J was not among them. The school had received very positive reports from Ofsted the most recent Report of early December 2014, had scored the school "Outstanding" in relation to its "leadership and management", and outstanding for "behaviour and safety of pupils".

25. Child J, who was born in 2009, joined Chapel Hill aged 5 in March 2014. Although not statemented nor diagnosed with any disability it was recognised that J had certain behavioural difficulties agreed by all to likely relate to problems at home and consequent attachment issues.

26. The trial Judge heard evidence from the Claimant and a witness on her behalf called Sue Painter, the Pastoral Team worker who had worked with Child J until 6 June 2015. The Headmistress and Deputy Head, both members of the Senior Leadership Team gave evidence as did Victoria Chaplin J's class teacher, and Sandy Griffiths, Pastoral Team leader. Zoe Hanwell a TA who was in the Sunshine Room at the relevant time also gave evidence.

27. Ms Durrant had joined Chapel Hill on 8 December 2014 as a full time TA from a school that dealt with children with up to late teens with special educational needs and had been trained in various management techniques used with more difficult children. Initially she worked at Chapel Hill with another child, (Child A), described as having greater needs than J, and from March 2015 worked with both Child A and Child J on a one to one basis. Before being in the charge of the Claimant, one of her colleagues, a Ms Painter, had had the care of J. Up until about March 2015 J was one of about 5 boys in class who were difficult to manage and received pastoral support.

28. Ms Painter's evidence, which was accepted by the Recorder, was that J was an engaging boy, really liked by members of staff and that the Claimant's good work had meant the school had de-escalated J's behaviour. The Claimant's own evidence was that J was no more difficult than a number of others in the school.

29. It was not in dispute that the Claimant was injured on 28 September 2015 when Child J who was then 6½, became disruptive and violent while being segregated by the Claimant and Ms Hanwell a senior TA in a room next to the classroom known as the Sunshine

Room. This was an empty room alongside his class teacher Ms Chaplin's classroom set aside for calming down disruptive children who would spend time there accompanied by a teacher or helper. Once J was there, he was initially calm, but Ms Hanwell had to return to assist. Her evidence was that there was no problem for the first 5 minutes, but J appeared angry with the Claimant and had hit her in the stomach during a period when he lost control.

30. The Recorder rejected a large part of the Claimant's evidence, finding she had been deliberately untruthful about her health, about complaints and concerning comments she claimed at trial to have made in the run up to the attack, and also about details of the actual incident. The Judge held in terms that Ms Durrant had exaggerated the seriousness of the attack by Child J that injured her.

31. The only independent witness to the attack was Ms Hanwell. At the time of the assault child J was in the Sunshine Room for reflection, went out to the lavatory and had to be restrained on return to the Sunshine room. It was the evidence of Ms Hanwell that he became aggressive there after about 5 minutes.

32. The relevant part of the judgment dealing with the attack is as follows:

"

74. [Ms Hanwell] described J's behaviour in the Sunshine room as: "*…aggressive, not continuous, he was not doing it maliciously. He could not control himself…I was not aware that he drew any blood on me or on the Claimant… I asked her (the Claimant) to leave… I did ask her on numerous times to leave … I felt I had a good relationship with him, and I could de- escalate things when we left the room, he was calm with his legs crossed*". … the aggression did not start until they had been in the room for some 5-10 minutes before physical violence began.

…

'The handle was behind her. There was no impediment to her leaving. She was not showing any physical signs of being unable to leave… I believe she had been trained in STEPS at her earlier school. She was not fainting nor appearing dizzy. I was concentrating on J … He hit her in the stomach. I asked her if she was all right. "No." She would not get out. 'I would not leave you on you on you[r] own". In re-examination she said the aggression was not constant. "*J was running back and forward quickly. He would run forward to us and wait for a reaction. He was at the other end of the room when we had our stomach conversation and I told her to leave again twice. I*

> *knew the holding techniques. I felt I could manage him, and I did …*
>
> After 5-10 minutes we finally persuaded J to calm down. …*the incident was unforeseeable and unprovoked*"."

33. The Claimant said she had been trapped in the room and was unable to escape and had signed a statement saying she had fallen to the floor, and that Ms Chaplin had seen the attack on her and done nothing. She withdrew the last two allegations in court but had also claimed she had broken her ribs; she told her doctor she had been pushed against a pole and hit with shoes (which she had not).

34. Importantly, the Recorder continued

> "75. I make it clear that where there was any conflict on the evidence as to what happened that day in the Sunshine room, I have no hesitation in preferring the evidence of Ms Hanwell to that of the Claimant, the lat[t]er having added to her own descriptions during the trial itself. The Claimant said she suffered "a frenzied attack", but I reject this. I find that the attack, which started after J and the two adults had been in the Sunshine room for about 5-10 minutes, was not continuous, and that the Claimant was invited to leave, that she could have done so, but cho[o]se] not to."

35. The evidence given by the Claimant was strikingly unsatisfactory. The Judge found her to be significantly dishonest and characterised her general evidence as muddled and unreliable.

36. The Claimant accepted in oral evidence she was in fact fully trained and had significant experience. Her essential case (which was not pleaded) became that there had been such serious behaviour from J that there should have been Red Cards issued and he would then have gone straight to Base before the accident in question. She alleged (again for the first time in evidence) that she had made numerous complaints about the position to relevant individuals. She was shown the forms for recording difficulties. She had completed only 2 between March 2015 and the incident on Monday 28th September one of which had been on the Friday before, September 25th. The Rules indicated she should talk to the Senior Leadership Team if she had concerns, – but she accepted she did not.

37. She claimed she had not looked at Child J's file even though she had the particular care of him. The same for Child A. She never really thought of where the information was going, she said. She asserted that an incident when he smashed lights was not recorded by anyone

– (in fact, as was shown in cross-examination, it was). Her case was that there were a number of incidents she was aware of that meant she felt unsafe working with J up to the date of the incident and it was the school's failure to take steps that caused the injuries.

38. The Defendant asked in terms during the hearing for the Claimant to state more clearly what her case on causation was. The Claimant argued that although there were systems in place within the school to manage and monitor challenging pupils, they did not provide safeguards or operate effectively and there were inconsistencies. The Claimant asserted a "dramatic deterioration in J's behaviour from 21 September 2019" which was not managed. Eventually, the highest her case was put was that J would have been "escalated", and if he had been, that would have "created a different psychological atmosphere" alternatively, he would have been removed to " the Base" and would not have been in class at all, so the incident would not have happened.

39. The Claimant's submission was that the Clover Hill "Red Card" system of progressive discouragement from bad behaviour, was not properly applied and that incidents which took place in the week before the index occurrence ought to have been treated differently. She said the notes showed 6 or 7 other occasions of bad behaviour and they should have been treated as "Red Card" incidents. History showed only 2 had ever been issued, in the early months of 2015. The Claimant alleged there were incidents with J that were not properly recorded or discussed.

40. Ms Durrant accepted that incidents were "recorded", but she said this was not done on the correct documents which was evidence of the system being improperly applied. Had it been properly applied Red Cards would have been given, the information would have been centrally available, an increased risk of violence and injury would have been noted and this would have led to "meaningful intervention" before the attack on 28 September 2015.

41. The Claimant argued in final written submissions that Clover Hill had departed from their written policy and it was "*prima facie negligent*" to do so without good reason, so the Court was compelled to conclude this Policy departure reflected a failure to enforce, and not a considered approach. In particular, a failure to follow up a proposed meeting for an assessment of J with the Inclusion Manager in January 2015 was relied on as a negligent failure: had the various steps been taken, the school would have had a better understanding of Child J and the attack would have been obviated. A properly operated Red Card system would have led to consideration of excluding Child J at "the Base" in July 2015. Even if not excluded, there would have been "renewed efforts … and "far greater likelihood of meaningful intervention" in the week of 21 September 2015.

42. Norfolk invited the Judge to consider the following matters in particular:
    c. What was the history of J's behaviour?
    d. What were the precise facts of the incident on 28 Sept 2015?
    e. Had the Claimant shown that the Defendant had failed to take reasonable steps to provide a safe system of work – including
        i) Training
        ii) Management of the Claimant and of J
        iii) Risk assessments and reporting
        iv) Steps taken after events
        v) Whether use of the Sunshine room (J plus 2 staff members) was in light of what was known, an unsafe system of work
    f. If there were failings, did it/they cause or contribute to the injury
43. Contributory negligence was also an issue.

44. Norfolk argued that Ms Durrant accepted she was trained and experienced, and that they had appropriate safeguards and processes in place which were to be - and were in fact - properly, yet flexibly applied. They pointed to daily staff dialogue and leadership meetings about J in which the Claimant participated, one to one support for child J, and particularly J's improvement through the Summer of 2015 following his transfer to the class of Ms Chaplin, and the very good on-going relationship between J and the Claimant which was recognised by the other staff.

45. Importantly, they argued, even if it were the case (which was not accepted) that their processes were imperfect, or imperfectly understood by staff, they were all well informed about J and crucially, would have done nothing differently in any event, in respect of his care. He was unsuitable for the further processes that were suggested during the case on behalf of Ms Durrant. They particularly denied that any system breaches had caused the damage of which complaint was made.

46. Norfolk emphasised that Ms Durrant had had a very good working relationship with J. She accepted she came to know him well and it is clear the Judge accepted she was very well thought of by her colleagues. It was accepted by all sides that it worked well to take child J to the Sunshine Room for reflection time if there was a problem and it would calm him down. There was no previous evidence of him ever assaulting a teacher or causing harm to a teacher or "trapping" a teacher while in the Sunshine Room. J would usually have what was called restorative conversation there to talk about his behaviour and triggers once he had calmed down.

47. Norfolk highlighted to the Judge that the Claimant was a very unreliable witness. Her assertion that she had felt unsafe or that J should have been sent to Base had never been said until trial when she argued for the first time that J should have been at Base by the Friday before or the Monday lunchtime before the index incident on Monday afternoon 28 September 2015. Furthermore, none of the school's witnesses bore out what she said on this issue: they denied (rather than failed to remember) the issue ever being raised with them. Anna Gooch, Victoria Chaplin, and Zoe Hanwell said there had been no such conversations at any time.

48. Sue Painter, called on behalf of Ms Durrant, accepted in evidence she did not think there was any point in time when going to Base, or exclusion should have been (even) considered in respect of J whilst she was working with him until June 2015. She did not believe there had been any need to re-refer to the Inclusion Manager, he was progressing in the right direction even if a few incidents did take place. There were 2 episodes in June and one in July when he was supervised by assistants that he did not know as well as other staff. Norfolk emphasised that steps were taken, and a new permanent mentor provided for the September 2015 term.

49. There were no reported incidents until 21 September 2015 and at this time J was attending mentoring sessions. He hit a child in the playground on Tuesday, 22 September. On the Friday 25 September two incidents were reported of J swinging cushions and throwing chairs. He went to the Sunshine Room with the Claimant and also later tried to run away from school, possibly more than once.

50. Ms Chaplain gave evidence that was accepted in glowing terms by the Recorder. The Court heard from her about the policies for control and the disciplinary system operating at Clover Hill, including the five-stepped process of formal control designated by letters A- E.

51. Ms Chaplin explained how J was dealt with, and how it was judged entirely wrong to use Red Cards with him given his character and his needs. She said in evidence (Day 2 /58)

> "Every incident of – of violence is considered by the senior leadership team. Every incident with J, I considered, as well as the senior leadership team. And that is why – when he got increasingly difficult within that, sort of, week period, why we made extra efforts to contact mum, why Sharon [Ms Durrant] then supported me more with him. From these incidents, we put actions into place straight away because that's what we do."

And

> "When J moved into my class, we did adapt how we were working with him to best support him. We stopped flashing a Red Card

> in front of that child and putting it on a chart in the classroom because we believe that would've exacerbated his emotions and he would – and that would've increased his anxiety. Every time he had a violent incident, I recorded it, and I record on the "Significant concerns and conversations" document, or I recorded it on an incident report."

52. The evidence given by Ms Chaplin (expressly accepted by the Recorder) included that the school had endeavoured to adapt its system of discipline to Child J's needs. The orthodox Red Card system (involving an ultimate sanction of sending a disruptive Child to "Base" at the sister junior school,) might not work at all with someone like J. Her evidence was that a "3 strikes, and you are out" Red Card system could be counter-productive for this child -who might have Attention Disorder. She is recorded by the Judge as being "adamant that for a child like J who had attachments difficulties one would just not send such a child to "Base"". Rather, "we used other strategies like giving him support". The Judge expressed it in this way:

> 75. Ms Chaplin also explained in evidence that she discussed the altered policy that was adopted for J with the Claimant "virtually every day and J improved with the Claimant's excellent work". She reflected that there were meetings to discuss J, which were noted down in their work diaries.

53. Her evidence, as recorded by the Recorder, was that J was being managed effectively, even when he did deteriorate. She was very clear that there had never been any injury to staff before the Claimant's incident. She did not agree with the suggestion put that, after difficult incidents in the week before the Claimant's injury, there should have been an incident report and intervention. She described J as "not showing intentional violence … he was a child in crisis … a Red Card to J would not have helped him".

THE JUDGMENT

54. The Recorder wrote a long judgment in which she sought to set out quite a volume of the evidence that she had heard, interspersing the evidence with commentary and reflecting her observations as she went along. Norfolk have argued that it is difficult to discern which comments constitute findings on the evidence. It is helpful to consider the structure of what was said to understand how the Judge dealt with the issues.

55. The judgment presents the material generally as follows
    a. Paragraphs 1 to 7 are introduction

b. Paragraphs 8 to 9 give some history of employment including Ms Durrant's alleged complaints about J to the headteacher, and some history of J at school
c. Paragraphs 10 to 15 contain (some of) the Judge's comments with examples, on Ms Durrant's dishonesty in her application for the job contrasting her incapacity as reported to the DWP. These latter suggesting serious incapacity from regular unpredictable and frequent faints and requiring constant supervision with cooking, dressing, and mobility and the presence of Addison's disease. Her application to the school mentioned none of it.
d. At 15 to 16 the Judge states Ms Durrant's dishonesty prevented the school from doing a risk assessment as to her suitability; she finds "the school was grievously misled by the Claimant".
e. In paragraphs 17 to 23 the Judge comments on the system in operation at the school, and use of "the Base" and exclusion policy. The Judge observes that the circumstances triggering each of the steps were argued to be inconsistent - and that was partly justified:

> "but those inconsistencies were altered by the teachers deciding how best an individual child could/should be dealt with".

In terms the Judge finds that the staff were extremely impressive, that their first concern was the child, and it was

> "obvious they discussed and worried about getting the right strategies to work with a child rather than rigidly applying the framework",

Indeed, as she finds, J was the only child ever finally excluded from the school. The Judge finds as a fact that form filling was not followed to the letter and the system was convoluted and cumbersome and a

> "shorthand practice had developed of a few words over coffee which resulted in the development of working strategies for the child which may or may not have been formally recorded".

She then expressly finds that if the records were not fully filled in and the apparent chain of command not followed, it was not because of idleness but because time was taken up with careful teaching and nurturing of pupils, and:

> "they had professional trust in their own abilities… And were quite rightly proud of their own judgement and ability to provide working strategies for a particular child with needs".

f. The Judge returns in paragraphs 24 to 31 to the chronology of J at the school and his incidents with other children referring to

evidence given on behalf of the Claimant that there had been a physical attack on a child on 28 January 2015, and there was a discussion as to what system could be offered to him. In February 2015 he was taken to the Sunshine Room. He moved to Ms Chaplin's class in March 2015 which appeared to work well, and he was integrated by April. On 30 June 2015 she notes one, possibly two incidents. In one he threw scissors. The Judge records that the emphasis in the notes is on what work would be suitable for J rather than any concern as to staff safety "which really does not seem to be an issue".

g. After the summer holidays, the Judge found, J appeared to work well with the new teacher. There was then a fight with another child on 22 September, throwing a chair and throwing a shoe at a light, on the Friday, 25 September 2015 throwing a chair and hiding under a table, he went to the Sunshine Room upset and then took his clothes off; eventually, following restorative conversation, J calmed down and returned to the class, although at break he ran to the school gate in an attempt to leave. Thereafter on Monday 28 September 2015 he ran into class and was violent and the index incident in the Sunshine Room took place in which he hit and injured the Claimant.
h. Importantly in paragraph 31 the Judge finds that after the events of 28 September 2015
"at a pastoral meeting the next day no one suggested anything different should have been done".

The Judge emphasises that the chronology does not reflect the views of those teaching him who were at pains to stress how they could deal with him and how their thought-out strategies were working. The Judge makes no express findings on this evidence.

i. In paragraphs 32 to 33 the Judge recounts some of the evidence of C, her arrest for shoplifting, the death of her grandmother (recording that her evidence was unreliable as to the date of this). She describes how the Claimant "tried to exonerate herself" from apparently not understanding how the Red Card system worked although she did admit that she was aware of the 3 cards meaning a child would go to Base. The Judge makes no overall finding here.
j. Through paragraphs 34-80 the Judge describes the content of the evidence of each of the witnesses and recounts some of it, with some chronology again. Generally, as elsewhere the facts are set out only; occasionally the phrase "I find" is used and the recitation of the evidence is interspersed with the Judge's observations. Perhaps understandably, it is not always chronological. Of note are the following:
    i) The Claimant complains that the policy of "3 Red Cards and then straight to Base" was not carried out

in respect of J when it should have been. The Judge observed:

> "This was right, but for pastoral reasons as explained by Ms Chaplin and others later."

ii) The Claimant had thought that J was a danger to himself on 22 September 2014

> "she had been concerned that his breaking glass had made it unsafe for himself, but not for her".

and

"I was left with the distinct impression that the school was bending over backwards to help and assist at the disturbed child without actually fulfilling to the letter responses to every infraction of the school behaviour rules… He was being managed by competent and caring staff"

iii) the Claimant's evidence "at times was muddled and unclear"

iv) when the Claimant took J to the Sunshine room on the Friday before the index incident at the Judge observes

> "I note she did not think it necessary to have assistance with this"

v) the Claimant's assertion of a "frenzied attack" is dismissed by the Judge who reiterates the disparity between what she told to the agencies and what to her doctors.

vi) the day after the index incident the school log was noted by Ms Durrant in respect of J as follows:

> "the violence was on a scale she'd not seen before it was new and unexpected"

vii) the Judge also reminds herself particularly of the Claimant's evidence of the perceived improvements in J down to June 2015.

viii) She records that any member of staff could have asked for a risk assessment;

ix) Sue Painter was drafted in in January until she was removed in May at the request of J's mother (following her referral to social services) the Judge

finds that the Claimant was "brilliant with J" she finds as a fact that she sees:

> "a picture of a child who was beginning to settle down"

and the action plan that had been put in place was resulting in many improvements.

x) She notes Ms Sue Painter, giving evidence for the Claimant, had said she would have recorded it if J was an exceptional extensive risk. If he was not safe among staff and pupils, she would have recorded it, and she did not recall the Claimant mentioning that J made her feel unsafe. She also did not remember her saying she personally felt unsafe in September.

xi) The Judge thereafter says it was

> "difficult for an overall analysis to be concluded when teachers use their own judgements as to what it was necessary to record".

She finds

> "there was a more than regulated (sic) reporting system within the school to deal with disruptive children"

and

> "…I find that the system no doubt devised with the best of intention to cover these problems had become overcomplicated and the varying groups were not clearly in liaison with each other this was made worse in that many including the Claimant did not record their concerns and report books available to them they just mentioned it verbally to others in the chain of command".

and

"they were without exception committed to doing their best in that each thought that how they were managing a child was for that child benefit …

"… nevertheless, the form filling in a busy school day was not as completely organised as it might have been."

xii) The Judge expressly found the school had endeavoured to adapt its usual system of discipline to the needs of J. She accepts that sometimes showing a red card to a child with attention disorder might actually disrupt that child and be counter-

productive. She then states she considers the undressing incident is an example of the ordinary disciplinary machinery not being suitable or effective for "a grossly disturbed child".

> "The difficulty appears to have arisen that not every teacher/assistant was applying the same analysis, and things (for may be perfectly good and understandable reasons) were not recorded in the various ways they could have been".

xiii) She says that there
"were options which could have been but were not taken such as sending the child to Base".

She does not here make observations on causation or other relevance.

xiv) The Judge then deals with the evidence of Ms Chaplin, a witness whom she commended as convincing and impressive and whose "professionalism and care shone out". At a different point [paragraph 66] she records:

> "Ms Chaplin was adamant that for a child like J who had attachment difficulties one would just not send such a child to 'Base'. She said "we used other strategies like giving him support. She said the Claimant did not complain about these alterations from the school policy for J, which was adopted from that used with A … I discussed it virtually every day with the Claimant, and J improved with the Claimant's excellent work…""

xv) Ms Chaplin's evidence is recorded as being adamant there were meetings to discuss what to do with J and the outcome was entered into personal work diaries of those involved. There were no injuries by J to any staff before the instance complained of. Ms Chaplin was of the opinion the school was managing J even when it got worse and did not agree that J had reached a crisis point on Friday, 25 September such that they should have been intervention or a central incident report. In Ms Chaplin's view J was being managed effectively. Nowhere does the Judge say other than that she found Ms Chaplin to be convincing and impressive, impliedly accepting her evidence.

xvi) The Judge then says, quoting Ms Chaplin

> "he was a child in crisis… A red card to J would not have helped him… the policy would not have been right for him. We did not follow the policy.… At no point did the Claimant ever complain to me that she was not safe, at no point did she say she was in danger.…

The Judge then says:

> "I accept without hesitation the evidence of this witness".

She records that Ms Chaplin decided to put strategies in place to deal with J after his flareups and those strategies were going well, then J had a wobble and Ms Chaplin had to "up her strategies". By the week of 21st September, she agreed the strategies were not working but

> "we thought we had the skills to cope. No one expected his outburst…". [68]

xvii) the Judge comments on Ms Chaplin's evidence:

> "she agreed that pupils risk assessment was not completed for J: "because we were managing the risks… If we had completed that risk assessment, we would have been covering ourselves. However, we were doing everything that was on that form""….the Judge then held "the reality from her evidence appears to be at they would apply the red card policy to children who would benefit from it being applied to them" [68]

56. Thereafter the Judge lists references to a series of documents with a short description of the triggering incidents, and goes on to record more of Miss Chaplin's evidence:

> "[the Claimant] was always very positive about J she never said that his behaviour was too extreme to be dealt with. No other staff raised it."

She records that Ms Chaplin never felt every part of the school policy had been exhausted or that J's behaviour was so extreme he would have to be moved to Base. It was not a "dramatic escalation" rather "we are used to this kind of behaviour and worse". It is at this point the Judge comments again on how convincing and impressive Ms Chaplin was.

57. Dealing with other witness evidence, the Judge indicates with respect to the incident, and the version of events given by the Claimant:

> "I make it clear that where there was any conflict on the evidence as to what happened that day in the Sunshine Room, I have no hesitation in preferring the evidence of Ms Hanwell to that of the Claimant, the latter having added to her own descriptions during the trial itself.…"

58. Further passages of the judgment include relevantly:

a. The Deputy Headmistress Ms Gooch had said J's behaviour was challenging and aggressive but not extreme.

b. There was uncertainty as to the frequency and formality of the Leadership Team meetings but any teachers who were present recorded their own notes/minutes in their own words and their diaries were shredded after 3 years.

c. The Judge said

> "I am concerned that these overlapping layers of reporting had become cumbersome and bureaucratic [for] the busy staff to use".

d. The Judge then deals with evidence from the Deputy Head Ms Gooch who

> "was adamant that stage E exclusion had not been reached for J… "We found alternative ways of dealing with him".

The Judge records how Ms Gooch was firm that the package of strategies was working, and that J was more of a risk to himself and to other children and anyone else; they had not foreseen what had happened on the Monday.

> "The witness was certain that although J might need more physical intervention, it was not foreseeable that he would injure himself or others."

e. The Judge then states

> "Details of what might have happened if protocol had been followed can be seen from this witness's evidence "–

she refers to February 2015 and says [with emphasis added]

"they **might have** come to a decision that other forms of referral would have been better";

And

"Tiffany Howard **could have** done an observation which **could** then have gone on to advise the Pastoral Team…

and

"following the June incidents Ms Gooch **could** have triggered this if necessary (but she was adamant that even the slap face incident would not have triggered this) although the after-school incident was reported to the Pastoral Team."

59. What follows is the only part of the judgment that contains reasoning about the cause of action. In total it is as follows:

> "83. But what really happened was that the teachers on the spot did not think it would have helped this child. They could manage him with inter-teacher discussions: "he was safe within the school and the staff were safe within the school", said this witness.
> 84. The tragedy here is that by not invoking the somewhat cumbersome machinery of checks and balances, a wider overview about J and his problems did not take place. It was, bluntly, negligent. I remind myself that the Claimant herself could have invoked this system in writing, and not just with a word to another teacher over coffee.
> 85. By September 2015, Ms Gooch considered that the events of 22 September 2015 which involved J fighting with another child, was a common occurrence between children, which did not merit any upward reporting as J had accepted the consequence of his actions, and his mother came into school the next day. The 23rd and 24 September 2015 had both been good days. "He was doing really well, and our restorative actions were working". She did not know of the two events on 25th September. Even if these had merited exclusion, the Deputy's range of actions on that Friday were limited. She explained "to stop him being in the school was not a clear option. There had been no opportunity to speak to his mother. Tiffany was not on the site she was at Base with another child". This witness thought that to have put J in Base at that point would increase the risk for a child with an attachment disorder. The witness thought that the Claimant was dealing very well with J's initial outburst. The other children were on their break and were not with J. She was rocking him, and he was in a calm place, and appearing to enjoy the physical contact. I note nowhere that, even with her experience of J, the Claimant was willing to treat him thus, and did not appear to object to her own physical contact with this disturbed child. When asked about the later events in the Sunshine room this witness said "I could not have foreseen that assault. We did not wait until something happened. I do care about our duty of care…" When asked about the Claimant's evidence that she said that she had had complained to Ms Painter [sic) and to Ms Gooch, her reply was: "she never said that to me. I had taken it on board. I have a duty of care." She was pressed on this but was adamant that the Claimant had never complained to her, I have to say that I

> by far prefer the evidence of this witness to that of the Claimant."

60. The Judge then continues in rehearsing evidence that was given by other witnesses.

61. She continues thus…

> "88. I am constrained to find that the rather convoluted system for recording children's' behaviour was not fully, nor carefully, implemented. Forms were ignored and reporting up the chain of command to the Headmistress was not rigorously carried through. However, I make it clear that the teachers who were dealing with J were by far more concerned was trying to help him, calm him and settle him. I was very impressed by their professionalism, involvement, and concern to keep J within the mainstream school system. They had little or no support from his mother. I acknowledge that Ms Durrant was regarded as someone who could deal with J, but she too failed to take advantage of the in-house reporting system. With regret I must find that the gaps on reporting results (and the summer holidays may also have disrupted J) meant that an overall view of any risk J might be posing to himself, other children and to staff was not as carefully considered within the apparently rigorous reporting system, which was supposed to provide a platform for just this kind of developing situation, as it should have been. This was negligent.
> 89. Because of the failure to record and report, there was no proper overall assessment of how to treat J, or as to what risks/measures were advisable to have due regard to staff safety. No risk assessment to staff and to the Claimant was carried out, as all the information was not recorded, or any overall assessment made, let alone any blueprint for action. This amounted to a negligent failure to have due regard for the safety of staff, which has caused injury to the Claimant."

62. The Judge then states the defendant as employer had a duty of care to its staff as well to the child J.

63. It is worth reiterating that earlier in her judgment [paragraph 68] the Judge had stated she accepted the evidence of Ms Chaplin in its entirety. The judge in so doing makes no distinction between historical matters of fact and the assessment of the situation on the ground to which the witness spoke. That evidence included that after J's flareups Ms Chaplin had put some strategies in place to deal with J. After he had had a wobble, she had increased her strategies. And with regard to why the risk assessment form was not completed, Ms Chaplin had stated importantly:

> "… because we were managing the risks… If we had completed that risk assessment, we would have been covering ourselves. However, we were doing everything that was on that form".

In other words, there was no material reason for the completion of the form, except protecting themselves with "process" by filling it in. Further, what would have been written down was just what happened in any event: it would have changed nothing about what in fact they did. Furthermore, other evidence apparently accepted by the Judge was all to the effect that no staff- including the Claimant- perceived J to be a risk to staff whether in the past or just before the incident.

DISCUSSION AND CONCLUSIONS

64. The essential challenge from Norfolk is that the Recorder has not clearly identified material failures by Clover Hill, and nowhere said that any of the inadequacies she did find were causative, whether directly or indirectly, of the injury sustained by Claimant.

65. The Appellant argues in the Grounds of Appeal that it is difficult to discern the learned Judge's reasoning, her analysis of the chronology of events, and her conclusions as to whether failures were culpable and caused the loss complained of. I regret that I am constrained to agree.

66. I am mindful that she had the benefit of several days of evidence and saw the witnesses, according, and bearing in mind the admonitions of Leggatt and Lewison LJJ, I have read carefully the 400 or so pages of the Transcript of the hearing to determine whether it can assist me in supplementing the Judge's reasoning and sustaining her conclusions. It does not do so.

67. Applying the principles set out above, it is clear that unless I am able to spell out of the Judge's judgment, a conclusion on causation, the finding that Norfolk were negligent, cannot stand. Regrettably, I cannot find cogent reasoning or a conclusion as to causation.

68. It is trite that breach and causation are essential elements of the tort of negligence. This requires findings of fact, an assessment of their relevance, and findings as to whether any breaches were causative of the loss in question, whether directly or indirectly and thus in law amount to negligence. Where it is alleged that a risk assessment was not completed, or, as in this case, not reduced into writing, following *Uren*, the court must be aware that an assessment failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken

which would probably have avoided the injury. As Smith LJ pointed out a decision of that kind would necessitate hypothetical consideration of what would have happened if there had been a proper assessment.

69. In this case it is, with respect, firstly, sometimes difficult to discern whether criticisms of the school amount to findings of breaches of duties owed to Ms Durrant, and secondly, very difficult to find any developed consideration of the counterfactual- what would have happened if the alternative courses of action had been adopted.

70. The highest that the findings on a counterfactual is expressed is as set out above in paragraph 64, citing the judgment at paragraph [82]. It is there held that had, in January 2015, "protocol been followed" [not explained] … "they **might** have come to a decision that "other forms of referral would have been better". There is nowhere a finding of what would have happened on the balance of probabilities, nor a finding that on the balance of probabilities, whatever would have been done would probably have obviated the injury.

71. Immediately after these findings the Judge records the evidence of Ms Gooch to the effect it would actually have increased the risk were J to have been put in Base, as the Claimant says Clover Hill negligently failed to do. The Judge recites Ms Gooch's views on what was considered to be the appropriate treatment of J, and, as with the evidence other witnesses to like effect, makes only complimentary comments. Clear reasoned views on the steps taken -and not taken- in respect of J were explained by all of Clover Hill's witnesses, and even the Claimant's own witness agreed (see above). These were recited by the Judge who takes no issue at all with the unanimous (save for the Claimant) views.

72. I have come to the clear conclusion it is impossible logically to spell out a finding that any of the failures found were breaches of Norfolk's obligations to Ms Durrant or that such caused the damage whether directly or indirectly suffered by the Claimant Ms Durrant.

73. Furthermore, assessing the facts as they emerge from the judgment, I have formed the clear view that even were a coherent finding of negligence discoverable, it would be a conclusion that was not supportable on the evidence.

74. The submissions on behalf of Ms Durrant resolved themselves before the Judge into essentially the following points:

a. There had been an unjustified, unreasonable, and undocumented departure from policy and departures are prima facie negligent

b. The departures were not, as stated in evidence, positive, but rather a simple failure of enforcement
c. The school consistently failed to recognise the seriousness of J's behaviour and at least 4 Red Cards ought to have been issued in the September week before the incident
d. Although accepted that a record was made of incidents [the evidence was, it was put in individual diaries which are destroyed after 3 years], this was not sufficient
e. The evidence from Ms Chaplin was "most unsatisfactory"; it was not accepted that there was any actual discussion of J in Senior Leadership meetings nor with the Inclusion Manager as Ms Chaplin had said in evidence
f. By early July J should have reached level E – exclusion from Clover Hill
g. Alternatively, referral to an external agency should have taken place
h. Nothing turns on the differences in accounts between the Claimant and Ms Hanwell of the incident – it is not in dispute she suffered injury

75. In my judgement, despite the strong submissions on her behalf both below and before me by Mr Mainwaring, the evidence just did not support the case made by the Claimant. Her evidence was deeply tainted by what the judge characterised, simply, as her dishonesty and, even in respect of the incident in the Sunshine Room, she rejected her evidence. There is no suggestion that what Ms Durrant (alone) said were the appropriate steps to have been taken regarding J, were accepted as such by the Judge.

76. It should be noted:
a. the Judge did not find Ms Durrant was inadequately trained or prepared by the school;
b. the Judge did not find the Claimant was inadequately managed;
c. The Judge did not find that steps taken following any of the J incidents, or the reflections after those events were wrongly or poorly made;
d. the Judge did not find that the use of the Sunshine Room, in particular, in the circumstances of what was known at the time, constituted an unsafe system of work;
e. the Judge did not say that the system of reporting behaviour was negligent in itself although she describes it as convoluted and cumbersome;
f. the Judge nowhere sets out the counterfactual as to what would have happened differently on the balance of probabilities, had a risk assessment form being completed, or a different system been in place; and
g. the evidence reported and accepted by the Judge does not support a finding that, but for the flawed system of reporting,

> the incident that injured Ms Durrant would not have happened. Indeed, to the contrary, there is no witness who was able to say anything would have been done differently. That was so whether the processes and protocols had been followed to the letter or not.

77. In my judgement, the Judge did not address her mind to the requirement for such faults and problems as she found in the school's systems as operated to be **causative** of the loss, even if indirectly.

78. In my judgement it is impossible to read the Judge's condemnation of aspects of the school's systems as an implicit finding that the failures caused the injury, as was urged on me by Mr Mainwaring on Ms Durrant's behalf. It is quite inconsistent with the evidence which the Judge must have accepted to the effect that everything encapsulated in a formal written Risk Assessment was in fact being carried out.

79. That the attack was unforeseeable and unprovoked must necessarily carry considerable weight: the evidence was that no one expected or foresaw the flareup of the index event. The Judge makes no finding to the contrary but recites with approval the evidence to that effect. Crucially, nobody suggested anyone would have acted differently, or done anything differently with the benefit of hindsight.

80. In such circumstances it is impossible to spell out a causative link between any problems with strict adherence to the school's written systems and the Claimant's injuries. Likewise, no negligence can be spelt out from the choices made as to how to deal with J up until the index incident.

81. It is clear the Judge considered the facts in issue carefully and had a close understanding of the pressures and difficulties inherent in coping with child J. She reflected her sympathy with the school staff on numerous occasions and was clear in her dismissal of the Claimant as a witness of truth. She was clear also in her acceptance of the evidence of the other witnesses, all bar one of whom gave evidence on behalf of Norfolk and were senior to Ms Durrant. Nonetheless, I regret that I am compelled to agree with Ms Dobie, counsel for Norfolk here and below, that it is not always easy to see what the process of reasoning of the Judge was. It is certainly not clear, in my judgement, as I have set out, how she could conclude that a case of negligence had been made out. Accordingly, her judgment is appealably wrong.

82. Analysing the position afresh and drawing such inferences as I may (pursuant to CPR 52.21) the evidence shows in my judgement that Clover Hill did indeed carefully consider the position during J's period at the school. There was a significant body of evidence from

reliable witnesses that they considered the position of J, his behaviour, and the best way to tackle it, frequently and in detail.

83. Norfolk submitted, and I accept, the written Policy was not a contract, it necessarily had to be adapted to circumstances (its wording suggested as much). Even if, which in this context I doubt, a departure from the letter of the Policy required "a good reason", then good reasons existed here. To fail to use a system of discipline and control that was actively considered to be inappropriate for this troubled child could not possibly be characterised negligent, indeed, to follow a rigid policy path might attract criticism.

84. As to failure to keep records, the burden of the evidence from witnesses who had impressed the Judge was that personal notes of meetings were kept, frequent meetings were held, even if informal and seldom centrally recorded.

85. In the context of a busy and demanding school environment it was important to analyse carefully what difference scrupulous formal records in accordance with the Policy might have made in J's case. The evidence was again clear; the Judge certainly did not dismiss it, and appears to have accepted it: nothing, on reflection, would have been done differently, or if done differently, would probably have prevented, or avoided the incident.

86. Considerable reliance was placed on the failure of the referral to Tiffany Howard the Inclusion Manager at the beginning of 2015. It is clear however, that the environment for a reference to her changed. Alternative steps were taken for J between January and June 2015 and it is also clear from the chronology and evidence that in any event from March 2015 there was measurable improvement in J. In my judgement there is no connection between any culpable failure to refer and the incident that caused injury to Ms Durrant.

87. The Judge herself said in the course of the second day of the trial that it was not the reams of policy documents that mattered, but whether Clover Hill took professional decisions about actions. I agree with that approach, and the evidence in my judgement shows clearly that they did. That approach was not sustained in the judgment however, as explained above, and the finding of liability against Norfolk cannot stand.

88. In the circumstances I do not need formally to decide whether the Judge's two findings of fact are unsustainable, as challenged in paragraph 10 above. However, in my judgement there is real force in the criticism made by the Appellant that it is wholly unclear which incidents the Judge refers to in her deciding paragraphs as not being

recorded, and which thus prevented an "overall risk assessment" being made.

89. The Claimant's evidence did not support the contention that such unrecorded incidents of significance existed. The evidence had shown there were Pastoral Meeting minutes, an electronic log, Incident Forms, and other pastoral notes made. There was in my judgement, no scope for a finding that significant matters remained unrecorded. In any event, it was clear on evidence apparently accepted, that the team at Clover Hill were at the relevant times fully informed of the issues concerning J. The process of Risk Assessment was continuous and there was no evidence that any failures to record adversely affected any aspect of assessing J's risks.

90. Accordingly, were it necessary to do so, I would quash those findings.

SUMMARY

91. The Appellants are in my judgement clearly correct that there is no finding of causation in the learned Recorder's judgement and, on the evidence as I have assessed it, there could be none.

92. Reassessing the materials and the facts as found by the Judge, there was also, and in any event, no breach of any duty owed to Ms Durrant by Norfolk.

93. For these reasons there can be no sustainable conclusion that Norfolk were negligent and liable for Ms Durrant's injuries.

Case No: QA-2019-000367

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

THE HONOURABLE MRS JUSTICE FOSTER
Between :

NORFOLK COUNTY COUNCIL	**Appellant/ Defendant**
- and -	
SHARON DURRANT	**Respondent / Claimant**

ORDER

UPON the APPELLANT'S APPEAL

1. The Appellant's appeal is allowed for the reasons given in the judgment previously circulated to the parties and handed down on 30 December 2020.

2. The question of costs and any consequential matters arising be adjourned for representations in writing (if so advised) by 4pm 6 January 2021.

3. The time for appealing this judgment does not begin to run until 6 January 2021.

4. Liberty to either party to set aside or vary this Order on 48 hours' notice in writing by email to the other side and to the Court.

Dated this 30 Day of December 2020