Judgment to be delivered on Preliminary Issues on Tuesday 30th November 2010

1. In these proceedings the Claimant Mr Kirk sues the police alleging that he has been the victim of a very large number of incidents where the police in South Wales have wrongly stopped him; and/or unlawfully arrested or prosecuted him; and/or have wrongly failed to deal with protection of him or his property. He does so in three actions, one issued in 1996 and pleaded by solicitors, one in June 2002 pleaded by counsel and the third also in June 2002 pleaded by himself. He alleges that these are not merely individual incidents of wrong doing but part of a conspiracy to damage him and his interests. This is merely a short resume of the extensive complaints made by him.

2. The Defendant applies to strike out Mr Kirk's claim as a matter of preliminary issue of law in respect of a number of incidents. Their application is made under three main classes: that Mr Kirk alleges a privately actionable duty of care in negligence where the Defendant contends that there is as a matter of public policy no cause of action to an individual; that he alleges liability for failure to use due care when dealing with his vehicles after they arrested him and took him away from them whereas the Defendant contends that there is likewise no privately actionable duty of care; and that in a number of cases his claim amounts to a collateral attack on criminal convictions and court findings which the Defendant contends he is not entitled to re-open.

3. I heard the conclusion of any argument for the Defendant on these preliminary issues of law on Monday 27th September 2010. The Defendant had served skeleton argument in respect of these issues on the court and on the Claimant Mr Kirk on 30th July 2010. It has been my concern to ensure that although he is a litigant in person there was proper opportunity for Mr Kirk to follow the argument in law and if he chooses to respond to it.

4. It was for this reason that

   (a) the order made on 9th June 2010 required the Defendant to serve a skeleton argument on these matters by 28th July 2010 (it appears there was difficulty in e-mail transmission to the court and it was received by hand on 30th July 2010)

   (b) when medical evidence indicated a risk that the Claimant Mr Kirk might have difficulty in dealing with a long trial sequentially day after day, I directed that in relation to argument on preliminary issues also (which took place in the week commencing Monday 20th September) the court would sit on Monday Wednesday and Friday only; out of abundant caution, in order to accommodate possible difficulty for Mr Kirk, the court sat with hours very severely curtailed on Friday 24th and Monday 27th September 2010)

   (c) I indicated on Monday 27th September, when the Defendant's arguments were concluded, that if Mr Kirk wished to submit further written argument I would within reason accommodate it but that it was necessary for it to be submitted soon and I canvassed the possibility of setting a deadline for him to do so during the course of that week.

5. I further indicated that in any event I would wish to consider the arguments and produce a written judgment and would not deliver that judgment before Monday 11th October 2010. I directed, out of abundant caution, since these matters have long been known and in preparation, that Mr Kirk should have permission to deliver any further submissions in writing provided that they were received by the court by 10.30am on Monday 4th October 2010, which would have been 9 days after conclusion on Friday 24th September 2010 of argument on preliminary issues other than MAPPA, the Claimant if necessary doing so via the e-mail facilities of solicitors for the Defendant.

6. I have received written argument on these and other points from the Claimant Mr Kirk, in (i) a document headed skeleton argument mostly dealing with the action more generally dated 6th September 2010 of 23 pages (ii) a document dealing with issues arising from the Defendant's argument and position statement dated 26th September 2010 of some 6 pages (iii) a position statement also dated 26th September 2010 (iv) a position statement dated 28th September 2010; (v) a "Further Submission to Argument on Preliminary Issues" dated 4th October 2010 of 15 pages; and in various communications thereafter including an e-mail and attachments of 3.11.2010. I also received from the Defendant a brief written submission dated 6th October 2010 (in response to Mr Kirk's submission dated 4th October 2010) and a brief written submission dated 29th October 2010 (in relation to Mr Kirk's contention that I should watch a video taken by street camera in relation to the incident of which he complains on 5th April 2000). It will be seen that some communications have been sent after the date set by the court but I have not excluded any of them

   The first class: whether there is privately actionable duty of care.

7. It is well established that the Defendant can be liable for acts of unlawful arrest, unlawful detention, or malicious prosecution on the part of individual officers. The police, and individual police officers, have duties to the public of investigation and suppression of crime. Mr Kirk asserts that there is in addition a privately actionable duty of care in negligence on the part of police officers, and the Defendant, towards him and a right of action for breach of that duty. The Defendant seeks to strike out those claims made in the proceedings by the Claimant which are founded on alleged breach of duty of care in negligence, denying a privately actionable duty of care.

8. There can be no doubt that in general for reasons of public policy the highest Courts have ruled that there is - in general - no privately actionable duty of care to members of the public.

9. In Hill v Chief Constable West Yorkshire Police (HL 1989 1 AC 53) the damage alleged was the most potent that could be imagined: the murder of the daughter of the Claimant, at the hands of Sutcliffe "the Yorkshire Ripper", allegedly by reason of negligence on the part of the police in the course of investigating the rape and murder of several women prior to the murder of Miss Hill. Notwithstanding this, and on the express assumption that there was a failure by the police to exercise a reasonable degree of skill and care such as would have been expected to be displayed in the circumstances by an

ordinarily competent police force (eg Lord Keith at 58H) the House of Lords ruled that on grounds of policy there was not an actionable duty of care.

> "59B The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty.
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> [The opinions identified a first ground for absence of duty, which was that eg at 62C "Sutcliffe was never in the custody of the police force. Miss Hill was one of a vast number of the female general public who might be at risk from his activities but was at no special distinctive risk in relation to them, unlike the owners of yachts moored off Brownsea Island in relation to the foreseeable conduct of the Borstal boys". But a far more reaching general principle was then identified:]
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> "63B That is sufficient for the disposal of the appeal. But in my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. …Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes.
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> While some such actions might involve allegations of a simple and straightforward type of failure - for example that a police officer negligently tripped and fell while pursuing a burglar - others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A

> great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell L.J., in his judgment in the Court of Appeal in the present case [1988] Q.B. 60, 76, was right to take the view that the police were immune from an action of this kind on grounds similar to those which in Rondel v. Worsley [1969] 1 A.C. 191 were held to render a barrister immune from actions for negligence in his conduct of proceedings in court".

10. In Brooks v Commissioner of Police for the Metropolis 2005 UKHL 24 this core principle in Hill was extensively reconsidered. Some of Lord Steyn's observations in Brooks, suggest that it may be appropriate to adopt a more critical and discerning approach to expectations of how those in public office may behave than was assumed a generation ago, a view which would respectfully be shared by many modern judges. Nonetheless the "core" principle in Hill was upheld.

Lord Steyn:

> "16. First, I accept that in these proceedings it must be assumed without equivocation that each and every one of the allegations of fact in the pleading under consideration could conceivably be established at trial. In particular the matter must be considered on the basis that Mr Brooks has suffered personal injury (in the form of an exacerbation of or aggravation of the PTSD that was induced by the racist attack itself) in consequence of the negligence of the officers and that injury of this type was reasonably foreseeable.
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> 30. But the core principle of *Hill* has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in *Hill*, arose for decision today I have no doubt that it would be decided in the same way. …The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence: …. **A retreat from the principle in *Hill* would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill*, be bound to lead to an unduly defensive approach in combating crime**. [emphasis supplied].

> 31. It is true, of course, that the application of the *Hill* principle will sometimes leave citizens, who are entitled to feel aggrieved by negligent conduct of the police, without a private law remedy for psychiatric harm. But domestic legal policy, and the Human Rights Act 1998, sometimes compel this result. In *Brown v Stott* [2003] 1 AC 681, Lord Bingham of Cornhill observed [at 703D]:
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> > "The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from 'The heart-ache and the thousand natural shocks That flesh is heir to.'"
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> I added [at 707E-708A]:
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> > "In the first real test of the Human Rights Act 1998 it is opportune to stand back and consider what the basic aims of the Convention are . . . The inspirers of the European Convention, among whom Winston Churchill played an important role, and the framers of the European Convention, ably assisted by English draftsmen, realised that from time to time the fundamental right of one individual may conflict with the human right of another … . They also realised only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights…."
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> Unfortunately, when other specific torts and the Race Relations Act 1976 (as amended) are inapplicable, an aggrieved citizen may in cases such as those under consideration have to be content with pursuing a complaint under the constantly improved police complaints procedure: see Police Reform Act 2002, the Police (Conduct) Regulations 2004 and Police (Complaints and Misconduct) Regulations 2004. For all these reasons, I am satisfied that the decision in *Hill* must stand.

11. The "core" principle was reaffirmed by the House of Lords in van Colle 2008 UKHL. In that case, in the words of Lord Hope, "There was in Mr Smith's case a highly regrettable failure to react to a prolonged campaign by Jeffrey threatening the use of extreme criminal violence. The question is whether, on the assumed facts which Lord Bingham has set out, it is at least arguable that the Sussex Police owed him a duty to take reasonable care to prevent these threats from being carried out".

12. Notwithstanding that background, whilst Lord Bingham alone was prepared to find arguable a "liability principle" in general, the core principle in Hill was reaffirmed decisively by the majority: see eg Lord Hope at 76; Lord Phillips at 97-98; Lord Carswell at 106; Lord Brown at 119-120.

13. There remains in law in principle the possibility of an exception to the core principle in Hill. In Brooks Lord Steyn stated,

> "34. It is unnecessary in this case to try to imagine cases of outrageous negligence by the police, unprotected by specific torts, which could fall beyond the reach of the *Hill* principle. It would be unwise to try to predict accurately what unusual cases could conceivably arise. I certainly do not say that they could not arise. But such exceptional cases on the margins of the *Hill* principle will have to be considered and determined if and when they occur".

In van Colle Lord Phillips stated (as cited above) that there was no duty of care "in the absence of special circumstances". This raises the question of what such special circumstances might be. In that case Lord Carswell stated,

> 109 It remains to be considered whether there are any exceptions to the generality of the rule. Lord Hope has referred in paragraph 79 to the existence of a duty of care in respect of operational matters. As he says, imposing liability in such cases does not compromise the public interest in the investigation and suppression of crime. I also agree with his view (paragraph 78) that the test propounded by Lord Bingham, dependent on the production of apparently credible evidence of a specific and imminent threat to the life or physical safety of the complainant, would be difficult to operate and would tend to lead to a defensive approach to the carrying out of police work. I would not dissent from the view expressed by Lord Nicholls of Birkenhead in Brooks at paragraph 6 that there might be exceptional cases where liability must be imposed. I would have reservations about agreeing with Lord Steyn's adumbration in paragraph 34 of Brooks of a category of cases of "outrageous negligence", for I entertain some doubt whether opprobrious epithets provide a satisfactory and workable definition of a legal concept. I should accordingly prefer to leave the ambit of such exceptions undefined at present."

14. In none of the authorities to which I have been referred is there an attempt to define what is "special" or "exceptional". What is clear is that negligence which gives rise to serious specific and imminent threat to life of an individual member of the public is not in itself sufficient to found a duty of care actionable at the suit of that individual. The question is therefore whether in the claims made by Mr Kirk in these proceedings a privately actionable duty of care may exist by way of exception to the core principle in Hill.

15. In written submissions and orally Mr Kirk argues that

(i) it is inappropriate to consider only the individual allegations as to a particular incident. Since he alleges an overarching conspiracy, or intention on the part of police officers to damage his interests, there must be a duty of care and breach, alternatively there should be no blanket ruling against existence of a duty of care in individual cases; and/or (my formulation of what he says) the Court should wait until it is able to make findings of fact which will illuminate whether a privately actionable duty of care in negligence exists towards him in the particular circumstances of which he claims;

and/or

(ii) the existence or absence of a duty of care is fact-sensitive and I have yet to make findings of fact.

16. As to the latter I must assume, for the purposes of ruling whether an actionable duty of care does or may exist in the circumstances pleaded by Mr Kirk, that the facts pleaded by him will be established as true. Leading counsel for the Defendant was careful to acknowledge that. It is thus not relevant that I have yet to make findings of fact. As to the former, it is necessary to consider the law as stated in a number of leading cases: I am here dealing with whether there is a privately actionable duty of care at common law.

17. For completeness, I note that in written submissions Mr Kirk argues "proximity", of each officer or officers of each incident of action or omission, from 'a close cluster of many incidents in one fairly small geographicalarea', and/or that 'the Claimant believes the Chief of Police had an obvious responsibility for these incidents, and so a close proximity relationship to the Claimant; as supporting a duty of care in law.

The word "proximity" is used in the classic statement of Lord Bridge in *Caparo Industries plc –v- Dickman (1992 AC605 at 617 – 618)* considering "a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the Court considers it fair, just and reasonable that the law should impose a duty of a given scope on one party for the benefit of the other"

It is thus a more complex consideration than simple geographical proximity, or the physical proximity of one person in relation to another on an occasion of which complaint is made, although these can be relevant. It is in the wider, and thus more complex, sense that the court will consider whether a privately actionable duty of care exists.

18. I remind myself of these principles. But the first question is whether a duty of care is excluded by the "core" principle which I have set out above, in the particular circumstances alleged by Mr Kirk.

<u>Duty of Care: The allegations subject to application to Strike Out.</u>

19. The application by the Defendant was to strike out the claims made in Action 1 paragraphs 8.18 to 8.21 (involving a Mr Stringer) and Action 3 paragraph 3 (in relation to investigation of theft of cheques). I take the latter claim first, for reasons which will become apparent.

20. The claim in Action 3 paragraph 3 is a complaint pleaded by Mr Kirk personally, in the action issued on 13th June 2002. (Action 2 had been issued by claim form on 1st June 2002, with Particulars of Claim pleaded by counsel). The background to the claim, in essence, is simple. In September 2001 Mr Kirk complained to the police that cheques belonging to his veterinary practice had been stolen and then cashed at Cash Generators, in Barry. The allegation

is that the police failed to investigate this complaint properly. CCTV footage in the shop was available, was obtained by the police and viewed. The manager of the Cash Generators shop identified the suspect on the CCTV footage. Mr Kirk's claim is as simple as this: the police failed properly to investigate, and refused to allow him or his staff to see video footage, with the result that the suspect was not apprehended and he suffered loss of £1500 for which the cheques had been stolen and made out. (The documents in the Bundle reveal that these were cheques issued on 7.3.2001 for £320, on 21.5.2001 for £370, on 28.6.2001 for £374, and 29.6.2001 for £340).

21. That which the police officers did (or did not do) was plainly in the course of and a part of their duties for the investigation and/or suppression of crime. I observe: (i) The mere presence of police officers at the scene of an incident where a criminal offence is said to be taking place does not of itself establish a sufficiently close relationship or special circumstance so as to create a duty of care (Cowan –v- Chief Constable of Avon and Somerset Constabulary 2001 EWCA Civ 1699, CA Keene, LJ at paragraphs 10-15 and 23-45). Mr Kirk's complaint is much less strong than this, in that police were not present at the commission of any offence. (ii) There is no question or suggestion that the person of Mr Kirk was under imminent threat of attack, or his property; here, as is evident from the dates of the cheques which I have listed, the criminal offences in question had already been committed. His property, in the shape of money, had already been stolen. This claim appears to me to fall foursquare within the core principle in Hill. I am unable to discern a special circumstance which properly excepts this claim from the general principle.

22. I have considered whether this claim might be preserved in favour of Mr Kirk, for example by any complaint that he was the subject of deliberate and malicious failure to pursue these matters on the part of the police officer or officers whom he criticises. No such complaint is made here. Elsewhere in this action, drafted by Mr Kirk himself, he does allege malice on the part of individual officers or on the part of the Defendant generally; here he does not. It is thus clearly a claim in negligence, pure and simple.

23. In general terms Mr Kirk has submitted in writing, (since the conclusion of the argument in law), that he should be at liberty to amend his claims.

24. First, this is in general terms, and he does not indicate any intention or wish to amend in respect of this particular claim. Second, there has been ample opportunity over the course of several years to identify each matter of which he complains, and malice on the part of the police officer in question has never been alleged. Third, out of abundant caution I have looked to see whether the police officer alleged to have failed properly to investigate on this occasion is one of those whom Mr Kirk might allege to be "recidivists" in their behaviour towards him or engagement in his affairs; she ("PC Dilworth") is not.

25. As a matter of law I therefore see no reasonable prospect of Mr Kirk establishing a privately actionable duty of care in the circumstances which he alleges, and the claim in Action 3 paragraph 3 must therefore be struck out.

26. I turn to the application to strike out Action 1 paragraphs 8.18, 8.19, 8.20 and 8.21. The essence of Mr Kirk's complaint is that on 21.7.1995 a Mr Stringer attacked him Mr Kirk and damaged his property at Tynewydd Road, Barry but the police failed to respond (Action 2, 8.18); on 23.07.1995 the police witnessed an assault by the same Mr Stringer on Mr Kirk and failed properly to deal with matters or protect him, (paragraph 8.19), on 24.7.1995 the same Mr Stringer attempted to enter Mr Kirk's veterinary hospital by using a lump of wood, but there was no response from police (paragraph 8.20), and on 6.7.1995 Mr Stringer attacked one person and on the following day broke windows, again without proper police action or response (paragraph 8.21).

27. As the law stands, there is formidable argument for the Defendant that there is no privately actionable duty of care in respect of these matters. The case of Cowan appears to stand foursquare in the way of liability, even in the most pungently alleged of these incidents, where I assume for the purpose of this application that it will be proved that Mr Stringer attempted to enter the veterinary hospital by using a lump of wood, and did actually attack a person.

28. However it became apparent in the course of preliminary argument, on objection by Mr Kirk, that these complaints had been the subject of application to strike out long ago whilst the action was still in the Bristol County Court. They had been struck out, but were reinstated on appeal. (Strictly speaking, reinstatement I was told was subject to condition that Mr Kirk comply with certain requirements; the Defendant did not accept that he had done so, but no application having been made to strike out on that basis over the years, thought it proper not to rely upon this). In these circumstances I understood the Defendant to recognise that it was not now appropriate prior to trial itself to strike out that which had already been reinstated on appeal. In any event, in my view procedurally it is unjust for the Court to embark for a second time upon consideration whether these claims should be struck out prior to evidence being given, (i) on the basis of proper use of Court time and resources (ii) in that where there has been a reinstatement of the claims in question, it is akin to the principle *nemo debet bis vexari* (no-one should be troubled with the same litigated decision twice) and (iii) as a matter of discretion in case management that a litigant should not here be revisited with identical application to strike out before evidence is heard..

29. Accordingly it is inappropriate to comment further on whether liability will or will not be established in Action 2 claims 8.18 to 8.21; but Mr Kirk will be at liberty to adduce evidence in respect of those claims.

<u>The second class: Liability of the police as bailee of property and/or in negligence.</u>

30. Here the Defendant again relies upon the general rule of law which as a matter of policy prevents the existence of a private law duty of care in negligence on the part of the police to a Claimant in the absence of special circumstances as discussed in Hill, Brooks, Cowan, and van Colle.

31. For the Defendant it is pointed out that the power to remove and arrange the storage of Mr Kirk's property, (here a vehicle), is conferred upon the police by regulations made pursuant to the Road Traffic Regulation Act 1984. These are powers conferred upon the police in consequence of and/or in order to assist them in their public duties for the investigation and suppression of crime.

32. The Defendant accepts in written submissions that *prima facie*, and subject to considerations of public policy,

> "[the Defendant] could be capable of acting as a bailee in respect of any property seized from Mr Kirk and retained by the Defendant. In those circumstances there is no higher duty upon the Defendant other than to take reasonable care in the circumstances in respect of such property, see Sutcliffe –v- the Chief Constable of Yorkshire 1996 RTI86CA, where a vehicle was seized and retained by the police pursuant to the powers conferred on them by Sections 19 and 22 of the Police and Criminal Evidence Act 1984. In that case the Chief Constable conceded the duty of care as bailee without it being argued. The Court of Appeal held that the duty upon the police as bailee was no higher than to take reasonable care of the chattel, regardless of the provisions in the Police and Criminal Evidence Act 1984."

33. The Defendant concedes that there is an absence of authority on point as to whether public policy reasons would operate to prevent a duty of care being placed on the Defendant as a bailee of Mr Kirk's goods, but submits

> "it is at least arguable that it is not just, fair or reasonable to impose such a duty upon the Defendant in merely carrying out the requirements placed upon the police by either the Road Traffic Regulation Act (in relation to removing a vehicle preventing an obstruction to traffic) or indeed the Police and Criminal Evidence Act 1984 (in respect of the general powers to seize and retain property), and as such, the Defendant arguably should not be regarded as a voluntary or true bailee of the property, particularly where the subject property, in this case, Mr Kirk's vehicle was immediately recovered by a reputable garage for safe storage".

34. This is tentatively put. I hope I am not unduly influenced by the tentative manner in which the argument is advanced. However (i) in general terms, it appears to me preferable in these circumstances that rulings in law upon the existence or absence of a duty of care should follow a full exploration of the facts at trial and (ii) the argument that Mr Kirk's vehicle was immediately recovered by a reputable garage for safe storage, appears to me to risk trespassing into the evidence which the Defendant would seek to prove at trial, not that which Mr Kirk asserts and is to be assumed to be true for the purposes of preliminary argument; alternatively not to meet the thrust of his claim that his vehicle was taken and its location deliberately concealed from him.

35. In addition the individual circumstances appear to me to underline this.

    In Action 1 paragraph 8.13 the essence of the background, on the facts alleged, is this, that Mr Kirk reported his motorcycle as stolen on 16th October 1993; the police at some unidentified time recovered the motorcycle and thereafter failed to notify him of that fact; it was only by chance that he was eventually able to trace the vehicle to a recovery garage.

    In Action 2 paragraph 9 the essence of the background, on the facts alleged, is this, that on 1st December 1999 Mr Kirk was driving his car when he was required to stop by police officers; he was ultimately arrested and convicted for failing to provide a specimen of breath; he was wrongfully deprived of his car for a period of about six weeks.

36. It would be naïve on my part if I did not note that here (i) the Defendant's case is that a PC Kihlberg made arrangements for the vehicle to be safely recovered and stored by a reputable recovery firm (Action 2 paragraph 9); (ii) Mr Kirk makes particular complaint against PC Kihlberg as having been maliciously disposed and maliciously motivated in his actions towards him. (PC Kihlberg features also in the complaints made by Mr Kirk in Action 2 paragraph 13 Action 3 paragraph 13). This is quite apart from Mr Kirk's overarching theme that there was conspiracy on the part of police officers in the Defendant generally, or those who had regular contact with him. If the Court of Appeal contemplate the possibility that the police may as bailee be answerable for want of care in dealing with a chattel, then even allowing that there is no complaint of damage to the vehicle in question on either occasion, in my judgment any ruling of law by myself in this case where the complaint is of deliberate concealment of whereabouts of the vehicle ought to await findings of fact in respect of the matters complained of.

37. It follows that on the basis of Mr Kirk's claim as pleaded, and assuming that the facts which he alleges as true will be proved, I cannot properly say that there is no reasonable prospect of success or as a matter of law no arguable basis of claim in respect of Action 1 paragraph 8.13 and Action 2 paragraph 9. They must therefore proceed to trial.

<u>The third class. Claims alleged to be an abuse of process. Legal Principle itself.</u>

38. The Defendant applies to strike out a number of claims on the basis that they amount to a collateral attack on criminal convictions which subsist against Mr Kirk, or against conclusive findings which have been made against Mr Kirk in previous proceedings. These are the claims made by him in Action 1 Paragraph 8.12, Action 2 paragraph 3.1, Action 2 paragraph 9, and Action 2 paragraph 11.

39. For the purposes of this judgment it seems to me that I can seek to state the principles of law as follows, whilst reminding myself of the fuller citations from the Authorities which for clarity and brevity I relegate to an Appendix to this Judgment.

(i) Proceedings, or a part of proceedings, may be an abuse of the process of the Court. If so the Court has a duty, not merely a discretion, to exercise the power to prevent misuse of its procedure in that way.

(ii) There may be abuse of process if the initiation of proceedings in a Court of Justice is for the purpose of mounting a collateral attack upon a final decision against the intending Claimant which has been made by another Court of competent jurisdiction in previous proceedings in which the intending Claimant had a full opportunity of contesting the decision in the Court by which it was made. The highest Courts have consistently approved the following statement of principle,

> "The Court ought to be slow to strike out a Statement of Claim or Defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here it has been shown that the identical question sought to be raised has been already decided by a competent Court".
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> and
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> "I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again".
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> (Hunter –v- Chief Constable of the West Midlands Police and Others 1982 AC529 Lord Diplock at 541B and 542B-F)

(iii) The application of this principle to proceedings does not require that those proceedings be for the purpose of mounting a collateral attack, but the existence of such a purpose may reinforce the case for application of the principle.

(iv) The rule is based upon considerations of public policy, and should be applied to an individual case informed by reference to considerations of public policy which are threefold:

1. "The affront to any coherent system of justice which must necessarily arise if there subsists to final but inconsistent decisions of Courts of competent jurisdiction….. we cannot of course shut our eyes to the possibility that a criminal defendant may be wrongly convicted, perhaps because his Defence was ineptly prepared or conducted. When that occurs, it represents an obvious and serious injustice. There are two possible solutions. One is to relax the present restraint on seeking to establish that injustice by civil action. The other is to ensure that in appropriate cases, the conviction itself can be reviewed. It seems to us clear that it is this second solution which has, over the past century, been favoured: By giving a criminal defendant a right of appeal; by providing a relatively low standard for the admission of fresh evidence on appeal; by empowering the Appellate Court to order a new trial; by giving the Home Secretary power to refer a case back to the Court of Appeal; and by proposals to establish a new review body.

2. The virtual impossibility of fairly re-trying at a later date the issue which was before the Court on an earlier occasion. The present case exemplifies the problems. It is over 12 years since the crime was committed. Recollections of the participants and the lawyers involved must have faded. Witnesses have disappeared. Transcripts have been lost or destroyed. Hayes may, or may not, be available to testify. Evidence of events since the trial will be bound to intrude, as it already has. It is futile to suppose that the course of the Crown Court trial can be authentically recreated.

3. The importance of finality in litigation…… The maxim *interest reipublicae ut finis sit litium* was not invented by English judges, and nothing (on one view) could better serve the personal interests of the legal profession than endless litigation of the same issues. If, as suggested in *Bleak House*, "the one great principle of English Law is, to make business for itself….." there could be no better way of doing so. But the view has long been taken that a final decision should, save in special circumstances, be final.

   These broad considerations of public policy remain compelling".

   (Sir Thomas Bingham, MR in Smith –v- Linskills CA 1996 1 WLR 763 at 773B-H, approved by the House of Lords in Arthur JS Hall –v – Simons 2002 1 AC 615.)

(v) The principle applies as much to a conviction on a plea of guilty as it does to a conviction upon trial of the evidence.

(vi) The principle applies not only to a verdict of guilt but to any final judgment in a criminal trial. (Illustratively, the leading case of Hunter –v- Chief Constable of the West Midlands Police concerned the ruling of the trial judge on *voir dire,* not upon the conviction itself).

(vii) Notwithstanding the more critical approach to expectations of those in public office above, it has been re-emphasised that the principle underlying Hunter must be maintained "as a matter of high public policy" such that

> "it is however prima facie an abuse to initiate a collateral civil challenge to a criminal conviction. Ordinarily therefore a collateral civil challenge to a criminal conviction will be struck out as an abuse of process"
>
> (Arthur JS Hall –v- Simons 2002 1 AC 615 Lord Steyn at 679E).

A key question is

> "whether the subsequent action is necessarily going to involve the risk that different conclusions on issues decided in the first case will be reached in the later case".
>
> (Arthur JS Hall –v- Simons Lord Browne-Wilkinson at 684GH).

(viii) There is a possible exception to the principle, where the Claimant in the current proceedings is able to adduce "fresh evidence". In order to do the evidence must be (i) such as was not available at the original trial or could by reasonable diligence have been obtained then (ii) such as "entirely changes the aspect of the case". (Hunter –v- Chief Constable West Midlands Police 1982 AC529 at 545A-B Lord Diplock, emphasis supplied).

40. I have reminded myself of the opinion of Lord Hoffmann in Arthur JS Hall – v- Simons (2002 1AC615 at 702F to 703D).

> "Hunter –v- Chief Constable of the West Midlands Police 1982 AC529 shows that superimposed upon the rules of issue estoppel and the Civil Evidence Act 1968, the Courts have a power to strike out attempts to litigate issues between different parties as an abuse of the process of the Court. But the power is used only in the cases in which justice and public policy demand it……
>
> I, too, would not wish to be taken as saying anything to confine the power within categories. But I agree with the principles upon which Lord Diplock said that the power should be exercised: In cases in which re-litigation of an issue previously decided would be "manifestly unfair" to a party or to bring the administration of justice into disrepute. It is true that Lord Diplock said later in his speech at page 541 that the abuse of process is exemplified by facts of the case was:
>
> > "The initiation of proceedings in a Court of Justice for the purpose of mounting a collateral attack upon a final decision against the intending Plaintiff which has been made by another Court of competent jurisdiction in previous proceedings in which the intended Plaintiff had a full opportunity of contesting the decision in the Court by which it was made"
>
> But I do not think that he meant that every case falling within this description was an abuse of process or even that there was presumption to this effect which required the Plaintiff to bring himself within some exception. That would be to adopt a scheme of categorisation in which Lord Diplock deplored. As I shall explain, I think it is possible to make some generalisations about criminal proceedings. But each case depends upon an application of the fundamental principles. I think that Ralph Gibson LJ was right when after quoting this passage, he said in Walpole –v- Partridge and Wilson 1994 QB106 116A that Hunter's case ….. decides "not that the initiation of such proceedings is necessarily an abuse of process, but that it may be".

In Walpole, where the Court did allow the fresh proceedings to go ahead, the complaint was against the representatives of the Defendant for inadequate preparation and not against the quality or content of deliberations of the Court itself. A central element in the principle is whether the fresh proceedings if successful require a finding inconsistent with the integrity of the deliberations of the Court or Tribunal itself which decided the issue on the prior occasion.

41. It has been said that the principle does not lay down an inflexible rule to be applied willy nilly to all cases which might arguably be said to be within it (Smith –v- Linskills 1996 1WLR763 at 769). Nonetheless, it is expressed (i) to apply even where the judicial input has been small, as in the case of a plea of guilty and (ii) to demand that the remedy in a criminal case is to appeal in the criminal proceedings and, if appeal has been exhausted by reference to the Criminal Cases Review Commission.

42. Lord Hoffman stated in Arthur J S Hall v Simons[2002 1 AC 615 at 705,

> "In my view, there will be cases (such as conviction on a plea of guilty) in which the *Hunter* principle may be engaged although there has been virtually no judicial input at all. The Court of Appeal accepted this. On the other hand, I can see no objection on grounds of public interest to a claim that a civil case was lost because of the negligence of the advocate, merely because the case went to full trial. In such a case the plaintiff accepts that the decision is res judicata and binding upon him. He claims however that if the right arguments had been used or evidence called, it would have been decided differently. This may be extremely hard to prove in terms of both negligence and causation, but I see no reason why, if the plaintiff has a real prospect of success, he should not be allowed the attempt.
>
> There is, I think, a relevant difference between criminal proceedings and civil proceedings. In civil proceedings, the maxim nemo debet bis vexari pro una et eadem causa applies very strongly. Fresh evidence is admissible on appeal only subject to strict conditions. Even if a decision is based upon a view of the law which is subsequently expressly overruled by a higher court, the judgment itself remains res judicata and cannot be set aside: see *In re Waring (No. 2)* [1948] Ch. 221. An issue estoppel created by earlier litigation is binding subject to narrow exceptions: see *Arnold v. National Westminster Bank Plc.* [1991] 2 A.C. 93. But the scope for re-examination in criminal proceedings is much wider. Fresh evidence is more readily admitted. A conviction may be set aside as unsafe and unsatisfactory when the accused appears to have been prejudiced by "flagrantly incompetent advocacy:" see *Reg. v. Clinton* [1993] 1 W.L.R. 1181. After appeal, the case may be referred to the Court of Appeal (if the conviction was on indictment) or to the Crown Court (if the trial was summary) by the Criminal Cases Review Commission: see Part II of the Criminal Appeal Act 1995.
>
> It follows that in my opinion it would ordinarily be an abuse of process for a civil court to be asked to decide that a subsisting conviction was wrong. This applies to a conviction on a plea of guilty as well as after a trial. The resulting conflict of judgments is likely to bring the administration of justice into disrepute. The arguments of Lord Diplock in the long passage which I have quoted from *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, 222-223 are compelling. The proper procedure is to appeal, or if the right of appeal has been exhausted, to apply to the Criminal Cases Review Commission under section 14 of the Act of 1995. I say it will ordinarily be an abuse because there are bound to be exceptional cases in which the issue can be tried without a risk that the conflict of judgments would bring the administration of justice into disrepute. *Walpole v. Partridge & Wilson* [1994] Q.B. 106 was such a case.

43. Walpole was a case where the complaint was not that the court had erred but against the Claimant's own representatives in the original proceedings.

Claims alleged to be an abuse of process. Application of legal principle to the facts alleged by Mr Kirk.

44. The Defendant argues that in a number of the individual claims made in these proceedings by Mr Kirk, the findings which he seeks, and which would be necessary to found a judgment in his favour, would be inconsistent with prior convictions which still stand, or with findings of fact and/or rulings made in earlier proceedings in the criminal Courts. In oral presentation of the argument I was referred to those and deal with them in detail below.

45. In addition, in the Skeleton Argument on behalf of the Defendant it was contended as follows,

> "21. As the Court will be aware from the papers, Mr Kirk was struck off by the Royal College of Veterinary Surgeons [RCVS], a decision for which he blames the Defendant. It appears that at least part of the justification for striking him off were a number of the extant convictions which fall to be considered as part of these preliminary legal issues. The papers reveal that Mr Kirk has on a number of occasions attempted to overturn/challenge the decision of the RCVS. As our main Skeleton Argument demonstrates, Mr Kirk has attempted to challenge these extant convictions in any way open to him, whether in the Magistrates' Court, Crown Court or Administrative Court. It may be surmised that his main motivation as to why he now seeks to erase these convictions once again is because he wishes to use it as a means of overturning or challenging the decision of the RCVS".

46. There was some reference to this in oral submissions. I am unsure what the real thrust is. If it is that insofar as Mr Kirk is motivated in these proceedings by a desire to achieve a reversal of the decision of the Royal College of Veterinary Surgeons, such is an improper purpose, I am wholly unconvinced.

47. First, I was not referred to any decision or purported finding of fact, in a decision of the RCVS.

48. Second, it is unknown to me in any detail to what extent the RCVS may have relied upon the fact of convictions, and to what extent it may itself have heard evidence from witnesses, as to the incidents in question.

49. Third, without much more in the way of information or reference to statute or Charter, I could not possibly conclude that the decision of the RCVS was equivalent to the decision of a Court or Tribunal.

50. Fourth, "although the principal aim of an award of compensatory damages is to compensate the Claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose" (Ashley and Another –v- Chief Constable of Sussex Police 2008 UKHL 25 HL 2008 3 AER 573, Lord Scott paragraph 22 at 586d).

51. This is an authority to which I was not referred by either party during the course of argument, but which I myself identified during research after argument, given that Mr Kirk is a litigant in person. Since it seems to me not a central point, I have not invited further submissions from the Defendant upon it. If an individual claim in these proceedings is otherwise an abuse of process, then so be it; otherwise I bear in mind the observation of Lord Bingham that it is not the business of the Court to monitor the motives of the parties in bringing and resisting a claim (Ashley at page 579a paragraph 4).

51. There are two over-arching themes in Mr Kirk's various written submissions in relation to the matters of preliminary argument. The first is that he has rights under Article 6 of the European Convention on Human Rights, which demand that each of the claims which he makes in these three actions should be tried by the Court before which that claim is brought. The second is that the scale and number of the allegations which he makes, and/or the number of occasions on which he has been stopped by the police and charged but ultimately been successful in achieving withdrawal or dismissal of the charges, requires as a matter of common sense an inference that each of his claims is worthy of investigation by this Court and should be the subject of both evidence and judgment in it.

52. In relation to the first of these themes, Article 6, there seems to me a short answer. He has had the opportunity to resist the application to strike out some of these claims. It is inherent in any system of justice, that if a claim is unsustainable according to the law of that jurisdiction, it is proper for a Court to rule upon that issue. Where a proper opportunity has been given to a litigant in prior proceedings, criminal or civil, to have a matter or issue definitively decided, in proceedings which themselves satisfy the requirements of Article 6, there can be no complaint if the Court declines to permit or embark upon re-litigation of that issue. As appears below, it seems to me that Mr Kirk, as is his right, has already energetically pursued his various rights of appeal and/or application for judicial review of the decisions upon which the Defendant relies to assert that there is abuse of process in re-litigating the decisions in question.

53. As to the second of these themes, the scale and number of allegations, Mr Kirk is at liberty to pursue this at the trial itself generally but this general reliance or assertion does not appear to me to resolve the task of deciding, where an individual incident has <u>already</u> been the subject of finding by a court, whether it would be improper to allow it to be re-litigated in this trial. The scale and number of allegations may be part of the background, but only a part. If in these claims an allegation by Mr Kirk as to a particular incident has already been the subject of intense and repeated scrutiny, and his allegation has been rejected, the fact that he makes wider allegations is of modest if any weight in relation to that particular allegation. Even more so, where those wider allegations have been made and considered by the earlier court, then the fact of those wider allegations is nothing new put into the scales when deciding whether it is proper or improper to allow re-litigation of the self-same allegation in the present proceedings.

54. For completeness I ought to record one of the more recent written submissions by Mr Kirk. He invites the court to note the number of incidents vented upon him, "comparable with the experience of others of his class, (being white, highly qualified, professional man, public school educated, veterinary surgeon, moderately wealthy, well spoken in more than one language and at the time of incidents a respectable married middle aged man"). He submits that the number of incidents is inconsistent with a defence of honest belief. Where an incident is not struck out, and is to be the subject of evidence at trial, it is an argument which he may deploy. In relation to whether there is a private duty of care actionable at law, and/or whether it would be an abuse of process to re-litigate matters which have been conclusively decided by the Courts on previous occasions in which he has participated, it seems to me to add little to the arguments.

52. I turn to the individual claims which the Defendant asserts are an impermissible attempt to re-litigate convictions against Mr Kirk which stand and/or findings of a court or tribunal.

Claim in Action 1 – Paragraph 8.12 4th October 1993.

53. The essence of the background is this. On 4th October 1993 Mr Kirk was arrested for driving whilst disqualified. He was prosecuted for driving whilst disqualified, and driving without due care and attention. In fact, at the material time, he was not disqualified. He was convicted in the Magistrates Court for driving without due care and attention (and also failing to stop). He appealed the conviction for those offences. Ultimately that came before the Crown Court on appeal where the appeal was unsuccessful. This might be described as the "roundabout incident" in that it is common ground that Mr Kirk drove more than once around a roundabout. The number of times that he did so, and the circumstances of whether he did or did not inhibit other traffic from entering the roundabout, was heavily in dispute between himself and police officers in the original hearing and in the long history of litigation leading to appeal. He was, and is, able to point to real variation or discrepancy between the account of different police officers as to his driving at that roundabout and the circumstances in which he was eventually stopped.

54. In the pleadings, there is no allegation of unlawful arrest. His claim is that he was "maliciously charged" with driving while disqualified, and driving without due care and attention. Translated into conventional pleading as to cause of action, this is an allegation that there was malicious prosecution of him, in other words that there was malice on the part of those who prosecuted him, and an absence of reasonable cause to do so.

55. The curious detail is that on the very day before the incident, he had been disqualified for driving for 6 months from 24th May 1993, but in fact the disqualification had initially been suspended and thereafter it was overturned. Ultimately therefore the charge of driving whilst disqualified was not pursued.

56. The charges of driving without due care and attention, and/or failing to stop, were however pursued to the Magistrates Court. The memorandum of conviction records the fact that Mr Kirk was convicted of those two offences, and was subsequently disqualified from driving for 6 months, albeit the disqualification was suspended pending appeal. Following applications for judicial review on his part, the appeal to the Crown Court eventually came on for hearing before His Honour Judge M Evans Q.C. and Justices on 24th May 1995. The appeal was unsuccessful as to conviction or sentence, in respect of the offences of driving without due care and attention and failing to stop.

57. There is much which Mr Kirk would wish to raise, even now, as to the circumstances of his driving when being followed by the police, and his asserted innocent reasons for not stopping until he realised that he was being followed.

58. In relation to the offence of driving without due care and attention, and the offence of failing to stop, it remains the case that he stands convicted of that offence. His appeal against such conviction failed. In accordance with the principles which I have outlined above, it seems to me that the only proper conclusion is that in these civil proceedings Mr Kirk, is not, and should not be, at liberty to re-litigate the facts and circumstances of the manner of his driving, or the conclusion that he failed to stop.

59. He complains that he was prosecuted for driving whilst disqualified, and that this was a malicious prosecution. Although these words do not appear in his pleading, the essential grievance of this claim, in that which he would required to prove in order to succeed, are that there was malice on the part of the police and an absence of reasonable and probable cause for his prosecution.

60. On appeal the court made findings of fact. As I have summarised above, as a matter of legal principle it is not only the fact of conviction of an offence, but also individual findings of fact made as an essential part of the decision of a previous Court, which may bar a subsequent civil action as an abuse equivalent to a collateral attack on the original finding .

61. The findings of the court were set out very fully by HHJ M Evans Q.C. and the Justices, but amongst them are the following:

> "In this case, Mr Kirk had not produced his driving licence when required to do so. It is the duty of the police to enquire of him whether he was licensed to drive or not and, certainly, since the police officers tell us in their evidence that they were concerned that he was a disqualified driver, Mr Kirk should have stopped long enough to enable the police officers, and in particular Police Constable Hill, to make that enquiry (trial bundle A1/3.325 at 329A).
>
> It is also at the very foundation of this case that Mr Kirk has a burning sense of injustice about past wrongs. Whether that burning sense of injustice is based upon real or imaginary fact is of no consequence to us. ….. Mr Kirk told us in evidence, and I suspect will always believe, that there is always some form of conspiracy against his interests. It

was a constant theme in his questions to the police constables. He put to them that each constable knew all about him and that they were involved in some kind of vendetta or, perhaps cover up of police wrong doing or, maybe inefficiency. (A1/3 at 329E).

……

"…..when Police Constable Reid was on duty at the front desk, he had before him Mr Kirk who had arrived at that time…… Mr Reid said that the MOT certificate was produced….. he tells us that Mr Kirk said, "I don't have a licence or insurance" and also said "hurry up, you watch me drive that van out of here". Mr Kirk did not challenge Mr Reid about his statement, "you don't have a licence or insurance", but in the witness box Mr Kirk gave a somewhat different version. However he did agree in the end that he did not produce a driving licence and did not produce an insurance certificate. He conceded that he did say, "watch me drive that van out of here" or words to that effect. (A1/3 at 330E)

……

"That is quite apart from the fact that not to produce a licence or insurance and to drive without a licence and no insurance are offences in themselves. If Mr Kirk had no licence because he was disqualified – and his records shows that at that time he was not a disqualified driver; but, he if he had no licence because he was disqualified, again, there would be no effective insurance, and therefore the public would again be in danger if there was an accident. In either case in our judgment it was right for the police and we would go so far as to say it was the duty of the police to ensure that he was followed and appropriate questions asked. (A1/3 at331E).

…….

The main issues are: Are the police officers to be believed? Or, to put it another way: Are we satisfied so that we are sure that Mr Kirk drove a number of times around the roundabout (336A)

We accept the prosecution witnesses as witnesses of truth. We find that Mr Kirk was guilty of driving without due care and attention and that he failed to keep a lookout because he failed to see Mr Hill get out of his police car; he failed to see the flashing headlights; he failed to react to the flashing blue light and, in particular, he failed to take into account the traffic which was trying to get on to the roundabout, or waiting to get on to the roundabout, we accept the argument that the traffic was inconvenienced because of the way in which Mr Kirk drove around the roundabout on a number of occasions …… (at 340E).

…….

Testing that driving against a reasonable competent careful driver, in our judgment this shows wanton lack of care and attention and, accordingly, we convict him of the first charge. We are satisfied so that we are sure that he was given the signal to stop by means of the flashing blue light and the flashing headlights…… for those reasons this appeal against conviction is obviously dismissed, for we, having considered the evidence from the start, now find Mr Kirk guilty" (at A1/3 341B and following).

62. In respect of all matters of driving without due care and attention and failing to stop, it is clear that Mr Kirk, unless he can establish that he comes within an exception to the general principle, is not at liberty in these civil proceedings to renew his factual allegations.

63. It is clear that Mr Kirk mounts an attack on the veracity of the police officers (see his statement trial bundle A1/3.4B). It is, therefore, says Leading Counsel for the Defendant, an attack on the veracity of the police officers which has already been determined to be ill founded by the Crown Court. In so far as he mounts an attack on the veracity of the police officers in their stated belief that he was disqualified from driving at the time of stopping him, I am satisfied that in accordance with general principle it would not be permissible for him to do so in these civil proceedings in that it is an attack on the findings of the previous Court.

64. Charges were preferred, and ultimately dropped, in respect of driving whilst disqualified. It is unclear on the face of the pleadings when those charges were preferred, and when they were dropped. Analysis of the documents before me does not reveal reliably the precise dates. On the face of it, it will be an impossible task for Mr Kirk, if he is hobbled with and bound by a finding that the relevant police officers were acting in good faith at the time of stopping him in a belief that he was disqualified from driving, to persuade the Court that a charge of driving whilst disqualified was made and pursued maliciously, or indeed without reasonable and probable cause. It is not the case, (for instance), that his allegation is, or is in the alternative, that they may have acted in good faith at the time of stopping him, but prior to the dropping of charges knew or must have known that he was not disqualified.

65. I remind myself that his general theme is of malice and/or conspiracy against him. By factual findings of the Court which stand, the police officers were not guilty of want of faith and did believe him to be disqualified at the time of arresting him. It might be argued that there remains a possibility that they might, or might be found to have, discovered that the belief was unfounded and preferred or allowed charges to proceed, notwithstanding.

66. It seems to me that I must approach my task with some sense of reality. If I am confined by those findings of fact by the Crown Court, it seems to me unrealistic to suppose that there is any real prospect of Mr Kirk as Claimant establishing that <u>subsequent</u> knowledge (of which there is no suggestion in the pleaded case), shows malice and/or lack of reasonable and probable cause in the charges of driving while disqualified. .

<u>Claim in Action 2 paragraph 3.1- 12th May 1996.</u>

67. The essence of the background is that Mr Kirk was driving his car, when there was a rally of cyclists. He overtook cyclists, and was stopped by the police so as to be charged with driving without due care and attention and no insurance. The claim is that his prosecutions ‘continued maliciously’, and ‘without reasonable and proper cause’, in respect of both driving without due care and driving without insurance.

68. The car he was driving was an Austin Maestro van D821 LNY. Such was recorded on an HURT2 (trial bundle A2/1.159) and an insurance certificate was produced on the 25th May 1996 (i.e. strictly out of time, trial bundle A2/1/160) but for a different vehicle F118 NTP which, on viewing the certificate itself (trial bundle A2/1.200) includes a provision that he "may also drive a motor car not belonging to him and not hired to him under a hire purchase agreement".

69. To the charge of crossing a white line, Mr Kirk pleaded guilty; his attempted appeal was in due course dismissed. In respect of the charges of due care and driving without insurance, he was convicted, but his appeal was allowed. The Appeal Court declined to award him his costs. It gave a full judgment of its reasons for not doing so. Those findings are at trial bundle A2/1.220.

70. In his witness statement Mr Kirk reports the fact of pleading guilty to crossing the white line, but pursues allegation of malicious intent on the part of the police officers (to be translated into legal terms doubtless as malice, and absence of reasonable and proper cause for their prosecution of him) in respect of driving without due care, and driving without insurance.

71. It suffices here to set out the following from the written reasons given by HHJ Gaskell for refusing to award costs in favour of Mr Kirk.

> "I decline to state a case on our refusal to make a costs order in favour of the appellant, Mr Kirk. No other order could sensibly be made for the reasons which appear hereafter and the request that we state a case is frivolous and wholly lacking in merit. I set out the background to the making of our order that there be no order in respect of the Appellants' costs with details of the appeal, our findings of fact, our reasons for allowing the appeal and our reasons for refusing to make a costs order in favour of the Appellant.
>
> Our findings of fact: We found
>
> 1. The Appellant finding his progress delayed by the presence of the cyclists lost patience and attempted to overtake by moving to the centre of the road, crossing the hatched area and remaining there so that he straddled the continuous white line.
>
> 2. As the road straightened out the Appellant undertook an overtaking manoeuvre.
>
> 3. There was a car coming from the opposite direction but on the basis of the plans and measurements put before us by the Appellant we considered that it was arguable that there was room for that manoeuvre to be completed without risk to oncoming vehicles.
>
> **4.** When the Appellant returned to the nearside we were not satisfied that the Appellant inconvenienced any bicyclists. Not one cyclist was called as a witness nor did one complain. **We concluded that the police officer honestly believed that cyclists had been inconvenienced but was unsighted and could not see around the vehicle which had been overtaken".** (emphasis supplied).

72. In these circumstances, if Mr Kirk is bound both (i) by the conviction of driving without due care (and crossing the white line) and (ii) by the finding of fact made by the court which heard the evidence in the matter. In the light of that, I can see no reasonable prospect of him establishing absence of reasonable and proper cause for his prosecution for driving without due care (or crossing the white line).

73. As to his prosecution for driving without insurance, the certificate which he produced (late) in May 1996 was for a car in a different registration. He was convicted by the Magistrates Court on 02.12.1996. He made appeal which came before His Honour Judge Jacobs, on 4th and 5th November 1997. It was in November 1997 that insurance brokers wrote to the judge to clarify the terms of Mr Kirks insurance, (letter date 05.11.1997, Trial bundle A2/1/199 and 330). It was on 20.11.1997 that the appeal was allowed in respect of driving without insurance, no evidence there being offered. There is much on which the Defendant can here seek to rely, to suggest that it was justified to prefer against Mr Kirk a charge of driving without insurance, and/or that the circumstances are inconsistent with malice or want of reasonable and proper cause for prosecution.

74. Mr Kirk will thus at trial face difficulty in showing that, in contrast to reasonable belief and want of malice in relation to the charge of driving without due care and attention, there was malice or want of reasonable and probable cause for his prosecution for driving without insurance. His case for malice in prosecution for want of insurance, if I might say so, appears to date factually frail in the light of the matters evident in paragraph 75 above.

75. That is however a different matter from concluding that his factual case for such malice is in itself inconsistent with the prior findings of the court, or amounts to a collateral attack on the findings of that Court.

76. The general thrust of his case remains that he was targeted by the police officers without true belief. He contends that on one occasion facing a charge of driving without insurance, he declined to give evidence before the magistrates, and was acquitted on pointing to his many acquittals on prior occasions when charged with driving without insurance. In my judgment, whilst his claim as to prosecution for driving without insurance may face very real difficulties of fact, its pursuit does not amount to a collateral attack on the findings of His Honour Judge Gaskell and the Justices on the occasion of his successful appeal against driving without due care and attention.

77. Accordingly, insofar as his claim is based on arrest for, or prosecution for, driving without undue care and attention (or for crossing the white line), I rule that it is to be struck out. Insofar as his claim is based on prosecution for driving without insurance, it is not to be struck out.

Claim in Action 2 paragraph 9 – 1.12.1999 – driving at Llantwit Major.

78. The essence of the background is that Mr Kirk was driving his BMW car in Llantwit Major. He was stopped by PC Kihlberg and PC Humphries. His claim is that there was no good reason for his arrest, or translated into legal terms that there was an unlawful arrest, in respect of his alleged failure to provide a specimen of breath. Here there is no claim for malicious prosecution. The pleading is drafted by Counsel. He was convicted of the charge of failing to provide a specimen of breath on 4.12.2000 by the Vale of Glamorgan Magistrates who set out reasons for his conviction.

79. Putting it shortly, various appeals against conviction and/or applications for judicial review failed. I see from transcripts that on 24th September 2001 I myself dismissed his first appeal, albeit I raised questions as to the lawfulness of the disqualification which had been imposed on him, and gave further time to Mr Kirk to apply to reinstate his appeal on provision of better medical evidence than he had hitherto provided. It appears that on 24th October 2001 Mr Kirk in fact had a medical certificate which would arguably have shown reasonable excuse for non-attendance but he "consciously decided not to reveal it" (ruling by HHJ Hckinbottom Bundle A2/4.81 at p88).

80. I recite the provisions of the Road Traffic Act 1988 Section 6 as they were which were in force and under which he was convicted.

> "(1) where a constable in uniform has reasonable cause to suspect –
>
> (a) that a person driving or attempting to drive or in charge of a motor vehicle on a road or other public place has alcohol in his body or has committed a traffic offence whilst the vehicle was in motion, …
>
> he may, [subject to Section 9 of this Act, not here relevant], require him to provide a specimen of breath or a breath test.
>
> (4) A person who without reasonable excuse fails to provide a specimen of breath when required to do so in pursuance of this Section is guilty of an offence.
>
> (5) A constable may arrest a person without warrant if
>
> ……
>
> (b) that person has failed to provide a specimen of breath for a breath test when required to do so in pursuance of this Section and the constable has reasonable cause to suspect that he has alcohol in his body".

81. In short, a constable may arrest without warrant an individual if that individual has failed to supply a specimen of breath when required to do so in pursuance of the section and the constable has reasonable cause to suspect that he has alcohol in his body. If there is a conviction, it is a finding in itself that the individual has failed to provide a specimen of breath when required to do so in pursuance of the section, and that the constable had reasonable cause to suspect that he had alcohol in his body. An attack on the lawfulness of the arrest is an attack on the lawfulness of the conviction.

82. The difficulty which Mr Kirk faces is twofold.

83. First, there is still a conviction extant against him for failure to give a specimen of breath. Conviction of that offence that a police constable is found by the court to have had reasonable cause to suspect that the driver "has alcohol in his body or has committed a traffic offence whilst the vehicle was in motion". The police officer may then require the driver to provide a specimen of breath or a breath test, and then a person who without reasonable excuse fails to provide a specimen of breath is guilty of an offence. Such a conviction is simply inconsistent with a complaint that there was "no good reason for an arrest" (Mr Kirk's action pleaded by Counsel at pleadings bundle page 86 paragraph 9.1, 9.3) or that there was unlawful arrest.

84. Second, and in addition, there are findings of fact made by the Magistrates, which have at no time been set aside on any Judicial Review, or on any appeal. These include the following

> " We find you guilty of failing to provide a road side breath test.
> Reasons. Findings of Fact. You were stopped by the police as they considered you were exceeding the speed limit. .. The police requested you open your car door. Following your refusal and lack of response to police requests, and your unusual behaviour in eating a sandwich, making a phone call and closing your eyes and reclining your seat the police concluded that you were under the influence of alcohol.
>
> The police then requested the assistance of the traffic supervisor. Following consultation with Sergeant Bowen and after giving warning a forced entry into the car was made. The rear near side quarter light was broken and entry obtained. In gaining access to the car there was a strong smell of alcohol. PC Kilberg (sic) formally requested you to give a specimen of breath and you failed to respond. This was witnessed by Sergeant Bowen and PC Humphries. He again repeated the request and your response was to shine a torch in the police officer's face. On the third request PC Kilberg said 'Shall I get the apparatus out?' But you did not respond. You were then arrested and cautioned and taking to Fairwater Police Station.
> Once at the police station you co-operated in supplying a specimen of breath and the reading was zero. ……. We therefore find you guilty of failing to give a road side breath test without reasonable excuse on 1st December 1999
>
> 4th December 2000 (signatures of Justices)" (Bundle A2/3.295).

85. It therefore seems inescapable to me that pursuit of this claim on the part of Mr Kirk amounts to a collateral attack on the findings of a prior court, which findings have never been subject of successful appeal.

86. No new independent or the unavailable evidence is identified. It follows that this claim must be struck out.

Action 2 paragraph 11 – 5.4.2000 – driving in Albany Road.

87. The essence of the background is this. On 5th April 2000 Mr Kirk was stopped whilst driving his car. He was arrested for failing allegedly to provide a specimen of breath. Charges were laid against him of (1) failing to provide a specimen of breath (2) failure to wear a seat belt …(4) driving without insurance and (5) driving without an MOT certificate (see Bundle A2/5.140).

88. He pleaded guilty. On 11th April 2000 the Magistrates Court passed sentence. He then attempted to re-open the matter. On 18th September 2000 the Cardiff Magistrates Court refused to allow him to re-open his pleas; he made application for Judicial Review; this was dismissed by Scott Baker J. A renewed application before the Divisional Court was dismissed on 13.03.2001. In a convoluted procedural history, the matter came before HHJ Jacob, who made strong comment on the way in which Mr Kirk insured his vehicles, and, HHJ Jacobs having allowed re-instatement of the appeal against sentences only. In October 2001, appeal against sentence was heard and decision given by HHJ Hickinbottom. In short, the Court declined to allow Mr Kirk to re-open his plea. On 11th April 2002 HHJ Hickinbottom gave reasons for the decision on appeal, which are available in transcript.

89. In his Particulars of Claim Mr Kirk pleads that at about 11 o'clock on the 5th April 2000 whilst his car was stationary at the intersection of Newport Road and Albany Road in Cardiff, a police officer smashed the rear passenger window for no good reasons. He was thereupon removed from the car and arrested for failing to give a breath sample.

90. The complaint by Mr Kirk in respect of this incident, pleaded by counsel on his behalf, is threefold (see pleadings paragraph 11.3 at Pleadings Bundle page 87) :

    a. There were no reasonable grounds to suspect that the Claimant was probably guilty of an arrestable offence.
    b. The decisions to arrest and detain the Claimant were such as no reasonable police officer would have reached.
    c. The detention of the Claimant beyond 12.05 was longer than was reasonably necessary and was in breach of the provision of the Police and Criminal [Evidence] Act 1984.

"11.4 The Claimant was charged with the offences of driving without valid insurance and MOT certificate, failing to wear a seat belt and failing to provide a breath sample.
11.5 In May 2002 the prosecution on the first three offences was determined in the Claimant's favour in the Magistrates Court.
11.6 The prosecution of the Claimant on these three offences was instituted and continued by police officers maliciously and without reasonable probable cause".

Particulars. There was no evidence that the Claimant had committed the offences with which he was charged and the police officers had no reasonable and probable cause for believing the Claimant's guilt."

91. This was then a claim for unlawful arrest, malicious prosecution and unlawful detention.

92. The claim that detention was longer than was reasonably necessary is freestanding from, and independent of, the claim that there were no reasonable grounds to suspect the Claimant of guilt of an arrestable offence and/or that there was malicious prosecution. That claim of unlawful length of detention must be allowed to proceed.

93. In respect of offences other than the failure to provide a specimen of breath, the Defendant accepts in its written skeleton argument that Mr Kirk is entitled to invite the Court to consider a claim for malicious prosecution from it, albeit that the Defendant denies that such claim is once tried on the evidence well founded. Insofar as he advances a claim for wrongful arrest in respect of his arrest for failing to provide a specimen of breath the Defendant contends that this amounts to a collateral attack upon the conviction.

94. As to failure to provide a specimen of breath, Mr Kirk faces the same difficulty as I have identified above. A finding of guilt under Section 6 Road Traffic Act 1988, namely that a driver has been stopped on reasonable suspicion that he has alcohol or has committed a moving traffic offence, has failed to provide a specimen of breath, and has done so without reasonable excuse, is incompatible with the contention that he has been prosecuted without reasonable and probable cause. This is no less so if conviction was upon plea of guilty by Mr Kirk himself (see paragraphs 29, 10, 45above).

95. Is the principle displaced, where Mr Kirk is the author himself of the plea of guilty but now seeks to advance material inconsistent with that? Subject to the video point below, it seems to me clear that the principle is not so displaced.

96. First, he has already mounted unsuccessful challenges to conviction upon his own plea. The plea was on the 11th April 2000. On the 18th September 2000 he mounted a challenge in the Magistrates Court to re-open his plea, which was rejected by the Court. He sought to displace this by judicial review, but this was refused by Scott Baker, J, (making reference to the video to which I shall refer below). He renewed application to the full Court, which was refused. He renewed his challenge on appeal, without success: on 15th March 2002, HHJ Hickinbottom refused it. On 11th April 2002 he again returned to the challenge, unsuccessfully. On 19th June 2002 he returned to the Magistrates Court and renewed his challenge there, without success.
97. In other words, Mr Kirk has already sought to displace his own conviction by appearance before the Magistrates Court, in the Crown Court (in fact twice) and in the Divisional Court (in fact twice), all without success.

98. Second, and for completeness, this is not a case where a Defendant alleges that he made a plea of guilty when he had no memory of the facts, or was under some debility or incapacity.

99. Third, Mr Kirk indicated to me that he wished me to look at a video of the events of 5th April 2000. He told me that the video would show his car merely

stationary in traffic, and him being pulled from his car and assaulted by a police officer. This requires some detail.

The video issue.

100. The video which Mr Kirk invited me to view was eventually supplied to the Court in a viewable form on disc on about 13th October 2010. At that time, the Defendant had not as I understand it received a copy of it. The Defendant argues that this appears to be a video that was disclosed to Mr Kirk by the CPS within a relatively short time following his guilty plea; that therefore he had it available to him, and indeed it appears to form the basis of his applications for Judicial Review in 2001; the final one of which was heard in early 2002. It is true that it appears that the existence of the video was brought also to the attention of the Crown Court when HHJ Hickinbottom was considering the appeals of Mr Kirk in March and April 2002. Finally, says the Defendant, Mr Kirk had the video available to him when he sought to take the matter back to the Magistrates' Court when he sought that they reconsider his plea in mid 2002.

In short the Defendant therefore argues that the video cannot, whatever its contents, be regarded as "fresh evidence" particularly having regard to the stringent test that has to be applied to such evidence as set out in the opinion of Lord Diplock in Hunter (at page 545A-F), (in other words that the new evidence must be such as "entirely changes the aspect of the case").

Further, argues the Defendant, even if the video were to be regarded as fresh evidence as so defined, the appropriate mode of challenge is in the criminal courts (Arthur J S Hall, Lord Hoffmann at page 706E, cited at paragraph 44 above).

> "If Mr Kirk has exhausted his attempts at appeal in the criminal courts, then that is his own fault, for having entered an unequivocal plea of guilty. It would be an affront to justice if, some ten years after the events with which we are concerned, Mr Kirk were enabled to use these civil proceedings to, in effect, both overturn his unequivocal plea of guilty and the considered view of two Magistrates' Courts, three sittings of the Crown Court and four Divisional Courts".

101. I regard these as formidable arguments given the elaborate process of appeal and application for Judicial Review to which these convictions have been subject at Mr Kirk's instance.

102. It seems to me however that two, or possibly three, arguments can be deployed to the contrary. (Mr Kirk is a litigant in person. His own submissions do not identify either of the first two).

103. First, it is open to a Court, in proper circumstances, to consider evidence "*de bene esse*", namely without prejudice as to whether that evidence will or will not finally be adduced before the Court.

104. Second, it may be that the Court should be more wary of considering prospective witness evidence, which can only be assessed and tested by demeanour and prospective examination and cross examination, than it should of considering a document such as a video which is self evident or self stating, alternatively much more self evident or self stating.

105. Third, and perhaps less centrally, it is unclear to me whether the respective courts looked at the video, as opposed to noting its existence.

106. It seemed to me that the video which Mr Kirk asks the Court should view, might reveal itself to be self evidently unimportant or self evidently important. I therefore concluded that it would be proper for me to view the video in question, *de bene esse*. Assuming that the video is, as it appears to be, of the police in question and Mr Kirk's car, the video shows an immediacy and rapidity with which police officers in question progress from presence at the door of Mr Kirk's car, to what appears to be the breaking of a rear window and the forcible extraction of Mr Kirk from his car.

107. In accordance with the authorities in Hunter and following, in what circumstances am I entitled to regard the video evidence, once I have viewed it, as admissible? Either as showing "animus" on the part of the police officers in the great tapestry of events on which Mr Kirk seeks to rely, or to throw doubt upon the convictions? It seems to me that on authority which is binding on me, if new evidence such as this is to be admitted it must be, whatever else, "such as entirely changes the aspect of the case" (see above).

108. If the video were showing what was agreed to be the first involvement of the police with Mr Kirk on 5th April 2004, the video might be arresting, in both senses of the word. Having looked at the video, I have a duty to see whether what it shows is inconsistent with the account which was given by the police of the same occasion. The police account of this incident was, and still apparently is, that at an earlier junction police had spoken to Mr Kirk in his car but he had nonetheless driven off to escape their attentions, so that a police car was deployed to block traffic at the junction which the video shows. The video is clearly at the junction where he came to a stop and they intervened to remove him from his car by breaking the window, (see statements at trial bundle A/5.20 81,86). The video shows what may be a robust intervention. However if what it shows is consistent with the police statements at the time and thereafter, I cannot conscientiously rule that the video is evidence which entirely changes the aspect of the case. In that event, principle and practicality both command a ruling that the evidence so submitted does not justify the court yet again hearing evidence on this claim where other courts have declined to set side Mr Kirk's own plea of guilty.

109. Mr Kirk also contends that the police should be ordered to disclose a video of what went on within the police station and/or custody suite. In the course of his attempts to overturn his conviction, he has made the

argument repeatedly that there is a video which the police have and should be ordered to disclose; and that the absence of such a video prejudices/prejudiced his position such that it was an abuse of process not to set aside the convictions and/or it ought to be taken into account in his arguments that the convictions be set aside. Put shortly, these arguments and requests have been put exhaustively in prior proceedings and so should not be re-opened.

110. Mr Kirk argues orally that his present proceedings serve a purpose in righting wrongs in themselves, but are more important still in the context of his seeking to set aside his debarral from practice as a veterinary surgeon, which in turn was as a result of reliance upon convictions and incidents placed before the disciplinary committee of the RCVS, in the proceedings of 2002 and following. In his written submissions of 4th October 2010 he informs the Court that leading counsel withdrew reliance upon the incident of 5th April 2000 in the disciplinary proceedings, once he disclosed the video. Insofar as that is true, it means that reinvestigation of 5th April 2000 in the present proceedings would not in any event correct any matter on which the RCVS relied. That however seems to me immaterial to my decision. I have made my ruling independently of those considerations.

111. Accordingly in respect of the conviction for failing to provide a specimen of breath, I rule that Mr Kirk is not to be permitted to adduce evidence in order to seek to undermine that conviction or in order to achieve a ruling in these proceedings inconsistent with that conviction.

112. In the course of oral submissions, Leading Counsel for the Defendant urged the Court to take a decisive view not only in relation to the claim of malicious prosecution in respect of failure to provide a breath sample, but also those in respect of seat belt, MOT, and no insurance. My attention was drawn to correspondence of the Crown Prosecution Service. It appears from a letter of 22nd May 2002 that Mr Kirk attended the CPS on 21st May 2002 to produce a valid MOT certificate, resulting in the CPS not wishing to pursue that matter further; and evidence of medical excuse for not wearing a seat belt. As to the MOT certificate, it was urged that this, in May 2002, was the first indication that any MOT certificate had been produced; and that the production of evidence as to medical reason not to wear a seat belt was a tacit acknowledgment that he was not wearing a seat belt on the occasion of the incident on 5th April 2000.

113. The Defendant argued that thus there could not be absence of reasonable or proper cause to prosecute in respect of either of these matters: the certificate of insurance that was produced appeared to be for a different vehicle; and I note the strong criticism by HHJ Jacobs of the evasive way in which Mr Kirk dealt with insurance for his various vehicles.

114. These seem to me powerful points, which might very well decide the claim at the end of these proceedings after the hearing of all the evidence. But (i) it is not inconsistent with the ultimate finding of the

Court as a matter of record to pursue the claims; and (ii) it is conceptually possible that Mr Kirk might deploy evidence, and/or make progress in questions of the police officers concerned, in a way which gave more strength than now appears to his claims. In other words, in my judgment the original written skeleton argument was well judged in accepting that in respect of the other road traffic offences, Mr Kirk is entitled to invite the court to consider a claim for malicious prosecution. I am dealing with whether it would be an abuse of process to pursue them, not with whether they appear to me to be strong or merely "arguable" claims.

Action 3 paragraph 2 – 19.8.1998 – Vale of Glamorgan Show.

115. The essence of the background is that on 19th August 1998 Mr Kirk attended the Vale of Glamorgan Agricultural Show as honorary veterinary surgeon. His claim is that he was ordered to leave the showground by PC Walters; that the Defendant maliciously and without reasonable or probable cause arrested Mr Kirk for breach of the peace and detained him overnight at Barry Police Station. In his own pleaded words, "[He] appeared before Barry Magistrates on 20th August 1998 and was then released without reason for the custody or for the appearance in Court. The Claimant next appeared before Magistrates at Bridgend on 7th January 1999 when the allegation of breach of the peace was withdrawn with neither explanation or compensation". Whilst malice is pleaded, it therefore appears that in legal terms the claim by Mr Kirk is one for wrongful arrest.

116. The Defence originally pleaded that this was a matter which stood struck out by HHJ Jack when the claim was proceeding in the Bristol County Court. It was struck out 'if the Claimant failed to fulfil an undertaking'. However Leading Counsel in argument conscientiously drew the attention of the court, in favour of Mr Kirk, to the fact that this was not an order on the merits. Irrespective of whether Mr Kirk had failed to fulfil his undertaking, (albeit the Defendant asserted he had), leading counsel therefore did not rely upon the matter as being in fact struck out.

117. The pleading is unequivocal that the arrest was malicious and without reasonable or probable cause; it may not therefore be necessary to cite from the extensive material in which the Claimant complains of the actions of the police and its motivation. Perhaps it suffices to say that in an affidavit for the purposes of application to the Administrative Court Mr Kirk stated (trial bundle A3/2.1)

> "On the 19th August at Fonmon Castle I received an unprovoked attack by way of a slap across my face followed by pushing by an ex-police inspector Howard John Davies.
> I was then assaulted by Mr Simon Turner by him repeatedly pushing me at least six times violently, my eventually falling to the ground. I called for witnesses to call the police.
> I at no time assaulted Howard John Davies or Simon Turner.
> I left with my 10 year old son to go to my car, having been on duty at the Agricultural Fair as the duty veterinary surgeon. I saw the police arriving and so returned to the scene.

> The police stated that no-one had made a complaint but if I did not leave I would be arrested.
> I refused, saying that I had been seriously assaulted and wished to make a statement of complaint.
> I was arrested and received CS gas in my face on route to the police ɜ station.
> I remained in the cells all night, my not receiving a reason for my detention nor any paperwork to indicate any offence.
>
> In Court next day I asked why. Neither the prosecution nor the clerk would say why other than they had received a complaint and did I accept it. I stated I did not accept a complaint and the Court still did not tell me what the complaint was".

118. This is in fact a partial account of the history.

119. Initially charges of breach of the peace were placed before the Magistrates. They were withdrawn (Bundle A3/1.170-173). In their place charges were laid of threatening abusive or insulting words or behaviour, common assault on Simon Peter Turner, and resisting a police officer in the execution of his duty (trial bundle A3/2.31-33). Mr Kirk was convicted of all three of these charges (trial bundle A3/2/345). He appealed to the Crown Court.

120. First, he appealed on the basis that there was abuse of process, his argument being that there had been an unjustified withdrawal of simple charges of breach of the peace, and the institution of new charges. This application that the proceedings of which he had been convicted were an abuse of process were heard before HHJ Gaskell, in a hearing which apparently lasted, surprisingly, 4 to 5 days. It is clear from the judgment, and from the transcript of evidence of Ms Seal who had been the CPS prosecutor in the magistrates' court and was questioned by Mr Kirk before HHJ Gaskell, that Mr Kirk was alleging that the police, the CPS, and others were motivated by a general conspiracy against him. HHJ Gaskell dismissed the appeal, ruling that there was no abuse of process.

121. Second, the decision was the subject of application for review by Mr Kirk, but the decision of HHJ Gaskell was considered and approved by the Divisional Court (Bundle A3/3.78).

122. Third, the matter came then on appeal simpliciter, against conviction, before the Recorder of Cardiff. On this occasion it was a seven day hearing. The same allegations of conspiracy were made by Mr Kirk. Specific findings of fact were made on 3.7.2000 in the judgment on appeal.

123. The judgment was in the following terms,

> "We make the following findings of fact:

"Mr Turner rightly feared a breach of the peace and was justified to intervene; his conduct throughout was reasonable and the force he used was in no way excessive.

(i) The Appellant resisted all attempts by Mr Turner to calm things down because he was determined to follow after Mr Davies to continue his altercation with that witness
(ii) The Appellant was violent waving his arms around as he tried to push past Mr Turner.
(iii) Mr Turner used no more force than was reasonable in an attempt to restrain the Appellant taking hold of his arms.
(iv) The Appellant used force to break free of that restraint.
(v) The Appellant punched out at Mr Turner but we are not satisfied that he landed a punch. We are satisfied however that he pushed Mr Turner.
(vi) The fall to the ground was the result of the struggle put up by the Appellant as he resisted the efforts of Mr Turner to restrain him so that the shoulder injury sustained by Mr Turner in that fall was the direct consequence of that struggle.
(vii) All force used by the Appellant was intentional, deliberate and unlawful.

A common assault is committed both when a person intentionally causes another to apprehend immediate and unlawful violence and when a person intentionally inflicts unlawful force. On the evidence and on our findings of fact there can be no doubt that the Appellant intentionally caused Mr Turner to apprehend immediate and unlawful violence but the charge is drafted to include an allegation of beating - this is done, presumably so as to follow the advice of the Divisional Court in Director of Public Prosecutions –v- Taylor 1992 2WLR460. A beating is another way of describing the common law term 'battery, the actus reus of which involves the use of force, although a touching without consent is a battery and no injury has to be proved. We are satisfied that the Appellant used force when he broke free of Mr Turner's grasp, when he pushed him away and when he struggled so that they fell to the ground.

3. Section 89 sub section 2 of the Police Act 1996

The evidence in respect of this charge can be summarised shortly because the Appellant does not dispute large parts of it. ……

The Appellant during his closing submissions confused the powers of arrest under Section 5 of the Public Order Act and a police officer's powers of arrest under part 3 of the Police and Criminal Evidence Act but his main point was that PC Walters had no reasonable grounds for arresting him in the first place because he had seen no breach of the peace and had made no enquiries at the scene to ascertain the truth of what Mr Turner had said. In support of these submissions he relied upon the fact of his return from the car park and the absence of any mention in the summary prepared by PC Walters – to which reference has already been made – about the assault. We reject these submissions. PC Walters had ample grounds to suspect both that there had been a breach of the peace and that there was a risk of a further breach. He had the complaint of Mr Turner, the intervention of Mr Dwek and the behaviour and demeanour of the Appellant; he was not obliged to make any further enquiry. For the sake of completeness we

> reject the Appellant's contention that he was arrested and then kept in custody overnight to prevent him getting evidence. The reasons for his detention overnight were not explored in any great detail; it suffices to say that such evidence as we heard on the point indicated the decision was taken to detain him overnight to prevent him returning to the showground where there may have been a further disturbance. This conclusion is not contradicted by the evidence of the Appellant's wife in her agreed statement or by any other evidence we have heard.
>
> Conclusions
> For all the above reasons we find each of the charges proved and the Appeal is dismissed.

124. Thus the court ruled against Mr Kirk. As a matter of law, when considering the charge of resisting PC Walters in the execution of his duty, the Court must necessarily have considered whether PC Walters was acting in the execution of his lawful duty at the material time. The Court did consider that issue. It made specific findings of fact both in relation to Mr Kirk's general conduct and specifically in relation to the charge of resisting the officer. The findings of fact by the Court were that PC Walters

> "had ample grounds to suspect both that there had been a breach of the peace and that there was a risk of a further breach" (trial bundle A3/3.307).

125. This is a claim which has been pleaded by Mr Kirk himself. It may be that his words are intended to pursue a claim not merely for wrongful arrest but for malicious prosecution. To establish a claim for malicious prosecution Mr Kirk would have to establish on the balance of probabilities (a) malice and (b) that the prosecution was without reasonable probable cause. A finding to that effect in civil proceedings would be inconsistent with and incompatible with, finding of the Criminal Court.

126. I have looked with care to see whether there is some fresh evidence which was unavailable to Mr Kirk and which now entirely changes the aspect of the case. I cannot discern any such evidence.

127. Lastly, Mr Kirk invites me to read a number of documents, (such as the transcript of Ms Seal before HHJ Gaskell, and the original breach of the peace documents in their three original versions), and I have read them. These, and the comments and arguments which Mr Kirk raises in them, are in substance identical to the arguments which he was deploying over a decade ago to courts which rejected them.

128. Quite apart from the injunction of Lord Hoffmann in Arthur JS Hall v Simons that application in respect of these matters would properly be by appeal in the Criminal proceedings, or reference to the Criminal Cases Review Commission, I cannot identify material which justifies yet further investigation of these matters, and certainly not in these proceedings.

129. Mr Kirk refers to ECHR Article 8, the right to respect for private and family life and/or Article 3 torture by cruel and degrading treatment. Leaving aside the fact that at the date of many of these incidents the Human Rights Act 1998 was not in force, and that it is not pleaded or relied upon either in the two professionally pleaded actions, or that pleaded by Mr Kirk himself in 2002 (Action 3), I adopt what I have stated at paragraph 52 above, and in my judgment Convention rights do not lead to the existence of a duty of care.

130. Mr Kirk also asserts that his case is unusual and extreme, and so should be excepted from application of the principles which I have set out above. If the facts in Hunter the facts were not unusual and extreme so as to defeat the general principle, then I cannot see that the facts or circumstances alleged by Mr Kirk are, in respect of this incident.

131. If ever there were a case where the principle ought to be applied that conviction of a criminal offence and/or the prior ruling of a court should not be the subject of collateral attack, it is this case, where there have been repeated applications to the higher courts to set aside the conviction in the Magistrates Court, which have not only failed, but have failed despite lengthy and it would seem exhaustive hearing with witness evidence having been given and considered by the Appeal Courts.

MAPPA documents.

132. At the same time as preliminary issues of law were being argued, issue arose as to "MAPPA" documents. (MAPPA stands for Multi Agency Public Protection Arrangements).

133. It has been a theme of Mr Kirk in his oral representations that he has been under police surveillance for many years, that this is evidence that he has been targeted improperly by them, that this goes beyond the ordinary steps of the police as required to investigate and/or suppress crime, and that it will show malice on the part of those in the police force interested in him. On the 22nd June 2009, he was arrested and was charged with unlawful possession of a firearm, this being a machine gun. He was remanded in custody. He remained in custody until the conclusion of his trial in February 2010 during a substantial part of the period in custody he was in Caswell Clinic, for psychiatric report and observation. He became aware that he was subject to monitoring as a "Category 3 MAPPA case". He had solicitors write for him to question and/or challenge the appropriateness of this.

134. By letter dated 15th December 2009 Mr Rees, co-ordinator for MAPPA replied, "Category 3 MAPPA cases are defined within the MAPPA Guidance 2009 Version 3.0. "Offender" does not refer only to the current offence charged but to any relevant previous convictions. The responsible authority has determined that Mr Kirk meets the criteria as a Category 3 case. Mr Kirk will continue to be informed when MAPPA meetings have been held and what his current status may be. Any further disclosures will be decided by a MAPPA meeting and communicated, if applicable, directly to Mr Kirk".

135. It is Mr Kirk's strongly expressed belief that subjecting him to MAPPA involvement is yet another illustration of the conspiracy on the part of the police to disadvantage him.

136. Prior to the commencement of the intended trial, I directed that the Defendant's solicitor should cause enquiries to be made with South Wales Police and that he should provide a statement by 31st August 2010 which identified: (i) the dates upon which the Claimant was categorised as "MAPPA Category 3". (ii) the date upon which the Claimant was no longer categorised as "MAPPA Category 3"; (iii) the dates of all MAPPA meetings at which the Claimant was discussed; and (iv) the extent to which any documents might exist as a result of such meetings and whether it was understood by the Defendant that the South Wales Police or any other agency present at the meetings would object to disclosure of such documents in the context of these civil proceedings to the Claimant and in the event of any intended refusal the statement should seek to set out supporting reasons for any intended refusal.

137. By witness statement Mr Adrian Oliver solicitor for the Defendant identified as a result of enquiries made by South Wales Police that (i) the Claimant became subject to MAPPA and was categorised as a "MAPPA Category 3 subject" on 8th June 2009; (ii) he was discharged from being categorised as a "MAPPA Category 3 subject" on 17th December 2009; (iii) the Claimant was discussed during MAPPA meetings on 8.06.2009, 9.07.2009, 20.08.2009, 22.10.2009, 23.11.2009 and 17.12.2009.

138. MAPPA arrangements were introduced in 2003. The statutory framework is the Criminal Justice Act 2003 Sections 325 to 327. Under Section 325 sub section 2 the responsible authority for each area must establish arrangements "for the purpose of assessing and managing the risks posed in that area by – (a) relevant sexual and violent offenders, and (b) other persons who by reason of offences committed by them (wherever committed), are considered by their responsible authority to be persons who may cause serious harm to the public". The "responsible authority" in relation to any area, means the Chief Officer of Police, the local Probation Board for that area and the Minister of the Crown exercising functions in relation to prisons, acting jointly (section 325 sub section 1). By Section 325 sub section 8 the Secretary of State may issue guidance to responsible authorities on discharge of the functions conferred by Sections 325 and 326.

139. In general it is clear that this is a sensitive area. Information may be given or received on a confidential basis and/or in assessing and managing risks which are posed by the classes of person identified in Section 325 sub section 2 in general terms it may be considered necessary on occasions to share, and on occasions not to share with those persons the relevant information.

140. Mr Oliver stated that MAPPA is not an official body in itself but a set of arrangements which exist to assess and manage risk, and that "therefore, no individual MAPPA agency has the authority to release confidential information shared at the MAPPA meetings". He continued

> "furthermore the statutory guidance [namely that issued by the Secretary of State pursuant to section 325 (8) Criminal Justice Act 2003] records that the MAPPA meeting minutes are likely to include personal confidential third party (including victim) and operationally sensitive information and are, therefore, not suitable for full disclosure under one or more of these exemptions under the Freedom of Information Act (2000): Investigations and Proceedings by Public Authorities (Section 30 (1)(b)); Law Enforcement (Section 31); Health and Safety (Section 38); Personal Information (Section 40); and (e) Information Provided in Confidence (Section 41).
>
> It is therefore been confirmed to me by Nigel Rees, MAPPA Manager and Co-ordinator of South Wales Police, that in accordance with the above statutory guidance, no individual agency in attendance at the meetings would have the authority to disclose the confidential information shared at MAPPA meetings. I am also advised by the South Wales and Gwent Police Joint Legal Services, that the Defendant would assert public interest immunity as to the minutes that are prepared and that disclosure of the same would require to be refused. From my discussions with the above named, it is my current understanding that all other agencies present would object to disclosure of the minutes on the same basis as that on which the Defendant intends to refuse disclosure. All MAPPA meeting minutes – irrespective of the person concerned – are subject to a claim for public interest immunity, on the grounds of law enforcement and public protection i.e. the same nature of public interest immunity which is embodied within the category exemptions set out in the Freedom of Information Act, above."

141. However Mr Oliver in his witness statement also reported that in response to the Order made by me, an Executive Summary of the minutes of the MAPPA meetings held in respect of this Claimant has been brought into being, which "both the Chair of MAPPA and the MAPPA Co-ordinator have confirmed would be capable of being produced to the Court and would not require the assertion for a claim for public interest immunity".

142. He states that this Executive Summary was not in existence prior to 17th August 2010, and its creation has in effect, been "triggered" by the Court's Order of 17th August in these civil proceedings. I was invited, once relevance had been determined to give consideration as to whether disclosure and inspection of this documentation should take place within the context of the current allegations".

143. The Defendant submits that the Executive Summary itself should not be disclosed to Mr Kirk, on the basis that (i) it is not material to his proceedings and (ii) that it should not be disclosed for reasons of public interest immunity.

144. As to relevance, the Defendant argues that since Mr Kirk is reported to have been subject to MAPPA categorisation only between June 2009 and December 2009, such cannot be material to his complaint of incidents from 1993 to but ending (so far as these three actions are concerned) in 2001; and as to public interest immunity, that once this issue is properly raised, the court must itself consider the issue and decide whether it is contrary to the public interest for disclosure to be made.

145. I turn to legal principle. As I have stated above, in general it is clear that this a sensitive area. Certain principles as to the impact of public interest immunity as to disclosure or discovery of documents are helpfully set out in the case of Evans–v-Chief Constable of Surrey Constabulary (Attorney General intervening) 1989 2 AER 594 (Wood, J).

> "First, these issues are interlocutory, and my decision is one made within the discretion or substantially within the discretion of a judge at first instance: see the *Burmah Oil* case (1979) 3AER700 at 704 (1980) AC1090 at 1108 per Lord Wilberforce.
>
> Second, public interest immunity is not a 'privilege' (within the meaning normally given to that word when considering discovery) which can be waived. It is an issue which, if facts are disclosed on which it could arise, must be considered, if necessary by the Court itself: see the *Air Canada* case (1983) 1AER910 at 917 (1983) 2AC394 at 436 per Lord Fraser.
>
> Third, once public interest immunity is properly raised, the burden is on the party seeking disclosure to show why the documents should be produced for inspection by the Court privately: see the *Air Canada* case (1983) 1AER910 at 914 (1983) 2AC394 at 433 per Lord Fraser, …….
>
> Fourth, discovery involves two stages, disclosure of the existence of a document and production of that document for inspection. ……. See the *Burmah Oil* case (1979) 3AER700 at 706 to 707 (1980) AC1090 at 1111 per Lord Wilberforce, where he says: "A claim remains a class even though something may be known about the contents; it remains a class even if parts of documents are revealed and parts disclosed. Burmah did not I think dispute this. And, the claim being a class claim, I must state with emphasis that there is not the slightest ground for doubting that the documents in question fall within the class described; indeed the descriptions themselves and references in disclosed documents make it clear they do. So this is not one of those cases, which any way are exceptional, where the Court feels it necessary to look at the documents in order to verify that fact. We start with a strong and well fortified basis for an immunity claim"
>
> Fifth, before any question of public interest immunity can be raised the document must be disclosable within the rules of discovery normally applicable in litigation: see the *Burmah Oil* case (1979) 3AER700 at 731 (1980) AC1090 at 1141 ….

> I would also refer to the passage from the speech of Lord Edmund-Davies in the Air Canada case 1983(1) AER910 at 921 to 922 (1983) 2AC394 at 441 when he says:……..”that at every stage of interlocutory proceedings for discovery, the test to be applied is: will the material sought be such as is likely to advance the seeker’s case, either affirmatively or indirectly by weakening the case of his opponent?..... it is accordingly insufficient for a litigant to urge that the documents he seeks to inspect are *relevant* to the proceedings. For although relevant, they may be of merely vestigial importance, or they may be of importance (great or small) only to his opponent’s case. And to urge that, on principle, justice is most likely to be done if pre access is had to all relevant documents is pointless, for it carries no weight in our adversarial system of law……”
>
> Sixth, if a public interest immunity claim is raised, and it is usually only raised on sound or solid ground, it is necessary for those who seek to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of the particular documents involved. It is then, and only then, that the Court may proceed to the balancing process”

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146. The intrinsic nature of MAPPA arrangements under the relevant legislation raises the issue whether the court should refrain from ordering disclosure of documents, if otherwise relevant, by reason of the sensitive and confidential area in which they are brought into being. Such would naturally include minutes of meetings and/or any executive summary of those minutes.

147. In addition, by Section 325(8) “the Secretary of State may issue guidance to responsible authorities on the discharge of the functions conferred by this Section and Section 326” and that guidance, as in force at the material times, states at Section 6 “disclosure to any third party will be the exception to a general rule of confidentiality. Any disclosure must be part of an overall plan for managing the risk posed by an offender”.

148. It follows that in my judgment public interest immunity is an issue which must be considered in this case. To state the obvious there is also a public interest in a litigant having access to material, if that material is likely to advance his case. It is the task of the Court to balance those competing interests. I direct myself first, that I have a discretion in this matter and second, that on authority “the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he might be “deprived of the means of …… proper presentation” of his case: see Glasgow Corporation –v- Central Land Board 1956 SCHL1 at 18….. it would be plain that that formulation has been mainly derived from the speech of Lord Edmund-Davies in the Burmah Oil case 1979 3AER700 at 721 and from the opinion of McNeill, J. in Williams –v- Home Office 1981 1AER1151 at 1154. It assumes of course that the party seeking disclosure has already shown in his pleadings that he has a cause of action, and that he has some material to support it. Otherwise he would merely be “fishing” “(*Air Canada* case HL1983 1AER910 at 917 1983 2AC394 at 435 Lord Fraser).

149. If Mr Kirk has been subject to MAPPA consideration, and categorisation as a MAPPA subject, only between dates in 2009, it is a formidable if not irresistible argument, that any MAPPA involvement at all, and any documents or records arising during that involvement, are not relevant to the allegations which he pursues in these three actions, running only until 2002. This is no less so, if Mr Kirk asserts, as he does, that the Defendant "obtained the ultimate objective and had the Claimant struck off the Veterinary Register on 29th May 2002" (Mr Kirk's document entitled Claimant's Preliminary Skeleton Argument dated 6th September paragraph 150). I state, for the record, that in the Executive Summary itself I have not discerned any material which suggests that Mr Kirk was subject to MAPPA consideration or categorisation before June 2009.

150. By e-mail following conclusion of oral argument, Mr Kirk asserts that MAPPA minutes reveal a plan, or willingness of the Defendant to shoot him as an unarmed man. The "leaked" minutes he attaches as an extract, supposing them to be a true copy of such minutes, do not in fact state that. One would have to see the full copy of the minutes and what threat was perceived by the police or others and in what context.

151. In short, I consider that the argument of the Defendant is formidable as to likely relevance. However I am left ill at ease with the notion that a litigant, who wishes to argue that there should be further disclosure of MAPPA material, should be denied the opportunity to see an Executive Summary in respect of which the MAPPA Co-ordinator himself expressly makes no claim that it should not be disclosed to the Claimant. I note, for the record, that one date stated in the Executive Summary is plainly inaccurate, namely the date of Mr Kirk's arrest in June 2009. It is the case that Mr Kirk has during my conduct of these actions, continually asserted that he has been the subject of police surveillance over the years. If such were proved to be the case, whether such surveillance was or was not motivated by, or accompanied by, malice on the part of one or more police officers would be a matter for review only having heard all the evidence at trial. I have not seen the Minutes themselves or whether the minutes themselves would support any inference of prior surveillance of Mr Kirk. Albeit by a narrow margin, in these circumstances it would seem odd to me that Mr Kirk should not be permitted to see a document which the MAPPA Co-ordinator does not argue should be withheld from him. This is plainly, and I make it clear, not a ruling that Mr Kirk is now entitled to see the Minutes themselves. If I should be asked to view those, it is in my judgment plain that they should be viewed by me to consider first materiality to the present proceedings, and if I were satisfied of materiality it would still be necessary for me to consider public immunity interest as to disclosure.

152. This has been a long judgment. I wished both parties to have it in writing. It is formally delivered on 30th November 2010 only because of the difficulties as to listing. I will invite leading counsel for the Defendant to draw an appropriate order reflecting the judgment.

Delivered 30th November 2010 His Honour Judge Seys Llewellyn, QC.