Neutral Citation Number: [2025] EWHC 65 (KB)

Case No: KB-2022-000959

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2025

Before :

HIS HONOUR JUDGE SIMON
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

ZZZ **Claimant**

- and –

MINISTRY OF DEFENCE **Defendant**

- -
- -

Mr C Barnes KC & Mr S McCracken (instructed by **Austen Jones Solicitors**) for the **Claimant**
Mr A McLaughlin (instructed by **Keoghs LLP**) for the **Defendant**

Hearing dates: 21 – 24 May 2024
Draft circulated – 19 December 2024

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JUDGMENT

HIS HONOUR JUDGE SIMON:

Preliminary application.

1. At the outset of the trial, the Claimant applied for an anonymity order, due to the circumstances of the case and other factors raised by Mr Barnes KC, which included unwelcome attention from third parties. The Defendant did not object to the order being made. Having considered the submissions, I was satisfied that an anonymity order should be made.

Introduction

2. This is a claim for damages brought by the Claimant, ZZZ, against the Defendant, his former employer. By order dated 19 May 2023, Master Sullivan directed that there be a trial of liability only in the first instance.

3. In the early hours of Sunday 24 March 2019, the Claimant, who was a Rifleman with A Company 5 Rifles, based at Bulford Army Base in Wiltshire, fell from a second floor landing (the landing) to the ground floor (the incident). The landing was situated at the third floor of the building, as some evidence describes it. The Claimant suffered serious injury. The circumstances surrounding the fall, both before and after, constitute the central area of focus for the Court and require findings of fact in order to settle the factual matrix, which is not inconsiderably in dispute. In seeking to reach such conclusions of fact to which the various legal factors potentially in play can then be applied, the Court has been required to consider not only evidence provided within these proceedings, and in some cases tested by cross-examination, but also a number of statements made by colleagues of the Claimant provided to the Royal Military Police, who investigated the incident to consider any criminal proceedings that might flow from it.

4. In the particulars of claim, dated 3 April 24 and amended pursuant to an order of Master Sullivan dated 28 March 24, the Claimant sued for damages under a number of separately particularised heads, which can be summarised as follows:

   (i) Vicarious liability for the unlawful actions of Rfn Graham in pushing the Claimant towards and/or over the balustrade;

(ii) Liability in negligence and/or breach of statutory duty and/or breach of common law duty in failing to ensure that the balustrade area was safe and/or that the dangers were made known to those using the area;

(iii) Vicarious liability for the actions and/or inactions of Riflemen after the Claimant had fallen and sustained injury.

5. The amended defence, dated 9 April 24, accepted the principle of vicarious liability but denied that the Defendant was liable on this or any other of the bases advanced by the Claimant, again summarised as follows:

(i) The Defendant's servants and/or agents were not acting in the course of their duties and/or functions at the relevant time;

(ii) The actions of the Claimant and Rfn Graham on the landing put them beyond their licence for use of the premises, and therefore outside the scope of any duty owed under the Occupiers' Liability Act 1957;

(iii) There was no other actionable statutory duty;

(iv) Civil liability for breaches of regulations cited by the claim were removed by section 69 of the Enterprise & Regulatory Reform Act 2013, such regulations being stricter than the duty owed at common law;

(v) Building Regulations only applied to new work or alterations that materially affect an existing building, which did not apply to the building in which the fall occurred.

6. I will return to the specific causes of action in a little more detail later in this judgment, although as a result of my overall conclusions, it will not be necessary to discuss each of them at length.

Nomenclature and related matters

7. The experts in this case have referred to the part of the staircase over which the Clamant fell as a balustrade. Others have referred to it as a banister. For clarity, I have adopted the word 'balustrade' throughout, save when quoting directly from other evidence. Either word when used is referring to the same straight

stretch of railing, running from the top of the stairs to the wall along the side of the landing, being the area where the incident occurred.

8. For consistency, I have used metric measurements throughout. Where quoting imperial measurements from others, I have included the metric equivalent.

9. In respect of the broad heading of breach of duty, the Claimant, in opening, invited the Court to make the following factual findings:

(i) The Claimant is tall at 6 feet 4 inches (193cm) in height.

(ii) The top of the balustrade was 890 to 900 millimetres above the floor of the landing.

(iii) His height would have made the risks posed by a low balustrade obvious at all material times.

(iv) The premises were originally constructed in 1939, though not as soldiers' accommodation. At some unknown point they became barracks for soldiers.

(v) Insofar as there were any standards applicable at the time of their conversion to barracks, the balustrade did not meet them.

(vi) The first Building Regulations, published in 1965, required balustrades on common stair landings to have a minimum height of 1067 millimetres, rising to 1100 millimetres in the 1970s.

(vii) The barracks were the subject of very substantial refurbishment works from 2010 to 2011. Such works included "*Stair finishes … new vinyl finish to all treads/risers and landing areas generally … Stair balustrades and handrails – Minor repairs and redecorate"*.

(viii) On the basis of the evidence of Mr Hill, the refurbishment works appeared to have further reduced the effective height of the balustrade (by increasing the depth of the flooring adjacent to it).

(ix) Following the Claimant's accident an assessment was made of the safety of balustrades across the Single Living Accommodation of the Defendant's retained estate. Numerous balustrades or handrails were categorised as red (meaning "*fall from height hazard present"*). As a result, works were carried out to remedy those identified as unsafe.

Those works have successfully ameliorated the risks of falling over the balustrade in question.

(x) The actual cost of remedying the particular balustrade is likely to have been modest. The cost of remedying all other balustrades within the retained estate was £281,725.

(xi) This cost is to be contrasted with the costs of the earlier refurbishment works of £1.45billion.

(xii) Boisterous behaviour was expected of soldiers, would have been a feature of military life and known to all relevant parties for many years.

(xiii) Excessive alcohol consumption is a feature of military life and alcohol consumption is encouraged. The risks arising from it have been acknowledged by the Defendant for many years.

(xiv) Reliance was placed on the incident involving another soldier, Rfn Moon in April 2018. The Claimant relied on similarity of features between that incident and the one involving the Claimant. Adequate risk assessment would have led to the identification of that risk without the need for either of the two accidents.

(xv) There is evidence that concern had previously been expressed regarding the height of the balustrade. The Authority Notice of Change, dated 12 May 2020, noted that the balustrades were too low in places and posed a severe risk to occupants falling over them.

(xvi) The risk assessment of the barracks prior to the Claimant's accident was, at best, cursory. It failed to identify the risk posed by alcohol, frolic and/or the height of the balustrades. By contrast, the risk assessment conducted by WO2 Pepper [dated 23 September 2019] is what should have been carried out earlier. An adequate risk assessment would have detected the risks posed by the low balustrades.

(xvii) The thrust of the Claimant's case was that the Defendant had failed to take such care as was reasonably necessary to ensure that the Claimant was reasonably safe. The balustrade was dangerously low, the accident was reasonably foreseeable, the potential consequences were very serious indeed and the costs of remedying or avoiding the risks were relatively modest.

Causes of action

Assault and battery

10. The Claimant argues that, if the Court makes findings of fact supportive of an assault on the Claimant by Rfn Graham, the Defendant ought to be held vicariously liable for the same. The nature and circumstances of such an incident would not necessarily absolve the Defendant of responsibility. This is based on the context demonstrating the necessary "close connection", when account is taken of the authority exercised over Rfn even when off duty, the cohesion argument in terms of alcohol and junior rank socialisation and the "workplace defect" causing the assault to have the consequences that it did. The reliance on colleagues for post-incident care is also cited.

11. The Defendant contends that the Claimant and/or Rfn Graham were willing to fight each other after a drunken night out and that any dispute was a private affair. They were therefore not acting in the course of their duties or otherwise as soldiers at the time of the incident. The actions are said to have been illegal and even if the Claimant is able to prove that he was assaulted, the Defendant would not be liable in the circumstances for the actions of Rfn Graham.

Occupier's Liability

12. The Claimant argues that the Occupiers' Liability Act 1957 obligations apply giving rise to an actionable duty, because the premises were not, in short, reasonably safe.

13. The Defendant's position is that the Claimant and/or Rfn Graham exceeded the scope of their licence to be in the barracks, meaning that they had become trespassers. The Occupier's Liability obligations ceased to apply before the fall itself occurred.

Breach of duty and/or negligence

14. The Claimant asserts that the Defendant, as employer, owed a clear duty of care to the Claimant to ensure that the working and living conditions were sufficiently safe and did not expose employees, in this case, soldiers, to risks of injury beyond those inherent in certain expected activities.

15. The Defendant denies that, in the circumstances of soldiers fighting and/or behaving in a disorderly manner when intoxicated, it owes a duty of care to the Claimant. The actions of the Claimant and/or Rfn Graham were not permitted under army regulations, in law more generally and were not permitted nor condoned by the Defendant. Such actions put the Claimant beyond the scope of duties owed by the Defendant.

Building regulations

16. The Claimant argues that the regulations are indicative of the height considered to be acceptable in modern buildings, thus representing a measure that the Court can use when assessing negligence/breach of liability and reasonableness. The Claimant challenged the Defendant's assertion of principle that the adequacy or otherwise of the balustrade did not fall to be judged by reference to the Building Regulations 2010 and/or any accompanying guidance.

17. The Defendant denies that the building regulations are of any relevance and the adequacy of the balustrade is not to be judged by reference to them. They do not have retrospective effect save if triggered by qualifying works within, for example, a refurbishment programme. Such circumstances had not arisen in respect of the barracks.

Workplace regulations & Work at Height Regulations

18. The Claimant argues that these regulations are also relevant to the care reasonably to be expected of the Defendant, whether or not the Claimant was at work at the time. Reliance was placed on Regulation 6(3) of the Working at Height Regulations and the requirement to take suitable and sufficient measures to prevent, so far as is reasonably practicable, the Claimant falling a distance likely to cause personal injury. Assessing whether a measure was reasonably practicable can include assessing whether an employer has shown that the cost and difficulty of such measure so substantially outweighed the quantum of the risk involved.

19. The Defendant's position is that the regulations are either not applicable or are not actionable. The primary argument is that neither the Claimant nor Rfn Graham was at work or using the premises as a place of work at the relevant time. Just because the accommodation was provided by the Defendant does not alter this. The reference to Regulation 12(5) of the 1992 regulations is misconceived because it related to the provision of handrails to staircases. The incident is not alleged to have occurred on a staircase. In any event, the balustrade was of sufficient dimensions, strength and rigidity and the premises were therefore reasonably safe. None of the regulations impose a stricter duty than that owed at common law or otherwise.

Defences

20. In addition to the Defendant's responses to the various causes of action, the Defendant relied on a number of pleaded defences, namely contributory negligence, *volenti* and *ex turpi causa*.

21. In relation to the defences, the Defendant argued that the Claimant had become involved voluntarily in a fight with Rfn Graham, they both having drunk to excess. The Claimant chose to go back to the landing instead of going to bed. He had already had a physical altercation with Rfn Graham and he therefore willingly put himself in a position of continuing the argument, knowing that this could be physical. Once on the landing the Claimant engaged in a further drunken altercation with Rfn Graham, as a direct result of which the Claimant ended up falling over the balustrade and suffering injury. The Defendant contended that the actions of Rfn Graham and the Claimant were therefore criminal and/or in flagrant breach of Army discipline.

22. In response, the Claimant rejected any suggestion that it was negligent of him to drink alcohol, whether in the barracks or in the town or that he could be blamed for the scuffle with Rfn Graham, who was said to be the aggressor on any account. If it was not negligent, and if the Claimant were merely responding to Rfn Graham's aggression, then none of the defences claimed would be applicable so as to reduce or expunge the claim.

The premises

23. The location of the incident which is the subject of these proceedings is formally known as the Sandhurst Barrack block, WD0011 (the barracks). The block was built around 1939 and, whilst its previous use was otherwise, at some unspecified time it became and remained in use as Junior Ranks Accommodation. It is a three-storey detached building with adjoining wing buildings with interlocking stairwells. The building was refurbished during 2010-2011 as part of Project Allenby/Connaught to provide modern single room

Junior Ranks en-suite living accommodation in the four wings and on two levels above the central dining area.

24. The Building (Amendment) Regulations 2008 came into force on 6 April 2008 and applied to the design of the 2011 refurbishment. However, the regulations applied only to new construction work or to new work carried out on existing buildings. In the case of WD0011 there was no change of use of the building and therefore the regulations did not apply to existing building elements that were unaltered, where they had in turn been constructed at a date prior to the coming into force of the regulations. Although changes subject to the regulations were identified in terms of fire and acoustic issues, the internal staircases and balustrades were not identified as requiring change. The Scheme Design Report referred only to "*Stair Balustrade and handrails – minor repairs and redecorate*".

25. Following the incident involving the Claimant, the Defence Infrastructure Organisation requested an estimate from Aspire Defence, which delivered the Project Allenby/Connaught, for a multi-site survey to bring all retained estate single living accommodation stairwell balustrades up to the standard required by the Building Regulations.

Risk assessments

26. In July 2018, CSgt Easterbrook undertook a Risk Assessment of the accommodation occupied by A Company 5 Rifles. This did not identify any specific concerns about the stairs or balustrades. The same risk assessment document completed in April 2019 made reference to the recent major incident and that a review of the risk assessment would be undertaken following receipt

of a specific report. A presentation was to be arranged for the Battalion about falls from height.

27. An Accident/Incident Report, dated 25 March 2019, was compiled by Major Lee Roberts. This referred to the circumstances as being the Rfn playfighting with each other while ascending the stairs. This continued at the top and it was then that the Claimant accidentally "fell backward over the railings onto the floor below". Had the Rfn not loitered at the top of the stairs, the report indicated, the incident would not have happened.

28. A document, dated 27 March 2019, and entitled "Learning Account" was compiled by Major M Clayden and brought together strands of information about the incident. It noted that the Claimant joined the army in 2016 and arrived at 5 Rifles in Bulford in September 2018. It described the Claimant as "*not a heavy drinker*", but "*a keen and enthusiastic young Rfn*". It recorded that the Claimant had had a couple of drinks before going into Salisbury and to the nightclub. Interviews of others involved suggested that the Claimant had fallen over the banister rail at the top of the internal staircase. Whilst in Salisbury Hospital, before being transferred to Southampton University Neurological Regional Transfer Unit, the Claimant stated that he had been pushed. This triggered an investigation by the Royal Military Police. Under a heading "*Immediate Issues for Learning that have been identified*", Issue 1 was noted as "*The bannister was not at a sufficient height to prevent the fall*".

29. By letter dated 25 July 2019, the Service Prosecuting Authority, notified the Commanding Officer that they were not charging Rfn Graham with an offence. The key passage reads, "… *there is insufficient evidence to rebut a suggestion*

by [Rfn Graham] that the [Claimant's] fall and injuries – whilst very tragic and serious – were not caused by anything more than either the [Claimant] losing his balance whilst drunk and falling or as an accident resulting from light-hearted consensual play-fighting with [Rfn Graham] whilst drunk".

30. WO2 Pepper compiled an Accident/Near Miss Investigation Report dated 7 February 2020, which provided a number of details about the incident. The height of the fall was 21 feet eight inches with the Claimant landing head first onto concrete. The report noted that due "*to the bannister being low (building built in 1939) [the Claimant's] height gave a counterweight effectively assisting him over the bannister*". The Claimant was described as "an unconscious none *[sic]* breathing casualty". WO2 Pepper measured the height of the balustrade to be 894 millimetres. The report recorded the following at paragraph g (of the 'Details of Incident' section) on internal page 6 (replicated as it appears in the document):

> "*g. The height of the bannister has been checked and is slightly lower then British Building Regulations allow for. In addition to this the building was designed as a place to treat the sick, and not for Soldiers Accommodation, in addition those soldiers approximately three hundred, are all junior ranks and therefore young in age. Added to this soldiers drink, normally at weekends, both fall from height incidence 2018 and 2019 have involved young men and drink, with either frolic or malice being a contributary cause. The combination are contributing factors means that there is a remaining risk to young soldiers living in the accommodation block.*"

31. Further on in the 'Details' section of the report, it states this at paragraphs k. and m.:

> "*k. The response from Aspire, was to send three members of their safety team via Mr John Fogarty, to visit the scene of the accident including a structural engineer in April 2019. Measurements and photos were taken, and it was agreed that improvements were needed*.
>
> …
>
> *m. There is yet to be further control measures to Ward 11, that means a physical change to the building, to safeguard the lives of the Riflemen in Ward 11. The evidence is clear from the risk assessment which requires reasonably practicable further control measures that must be put into place as a priority*."

32. The section on "Conclusions and Recommendations" stated "*A demographic of young people, including thrill seekers that the Army attracts, with the combination of alcohol does mean that this incident can happen again*".

Expert evidence

33. The Claimant relied on the opinion of Mr Stephen Watts, Consulting Forensic Engineer, which was in essence that if a person who is six feet four inches tall falls against a balustrade that is 900 millimetres high, the possibility that he might topple over it is relatively strong. The outcome becomes unlikely if the balustrade is 1100 millimetres high, which is the reason for that height appearing in the regulations. Although not expert evidence, the Claimant also

relied on the Defendant's Learning Account which concluded that "*the balustrade was not at a sufficient height to prevent the fall*".

34. The Defendant relied on the opinion of Mr Robert Hill, Chartered Building Surveyor, who was not instructed to consider or comment on any duty of care, but to deal with the relevance of the Building Regulations 2010 and the design of the stairs and their guarding. Mr Hill was instructed not to consider the fall mechanics, as another expert was intended by the Defendant to cover this topic. The Defendant did obtain evidence from a Dr Paul Lemon, a falls specialist, however, the report was not served. The Claimant invited the Court to draw an inference from such non-service.

35. Both experts conducted an inspection of the flight of stairs and balustrade in question. Following exchange of reports, the two experts held a telephone conference and prepared a Joint Statement.

36. The Joint Statement recorded differences in the observations and measurements achieved by the two experts during their inspections, though they could not account for them. The key measurement, being the height of the balustrade, seemed to vary slightly along its length, which may not be surprising in a building of this age. In any event, the highest measurement was 905 millimetres. It was agreed that the Building Regulations were not retrospective and compliance would not become a requirement unless the building were to be materially altered. Altering the decoration and floor covering and introducing step tread nosings was not qualifying work to trigger application of the Regulations. There has therefore been no mandatory requirement to alter the stairs or the balustrade.

37. In a section of the Joint Statement entitled Areas of Disagreement, Mr Watts' opinion was set out in summary. There was no mandatory requirement to alter the balustrade/guarding height to the edge of the landing, the Building Regulations not being retrospective. However, there was still a duty to ensure that the building was reasonably safe for the purpose for which it was provided, so far as reasonably practicable. Mr Watts considered that a cursory assessment of the balustrade would have revealed how low it was when measured against a person of 6 feet in height (not even the height of the Claimant). He also formed the view that a suitable and sufficient assessment would have indicated that occupants were at a foreseeable risk of falling over the balustrade as a consequence of its low height. Extending the height of the balustrade did not involve any structural or significant alterations and could have been achieved at a minimal cost as the Defendant subsequently demonstrated.

38. Mr Hill was not technically in disagreement with Mr Watts, but rather the headings under which Mr Watts had reached the above conclusions were outside Mr Hill's instructions in terms of matters on which he was asked to report.

39. In oral evidence, Mr Watts explained that he had done quite a bit of research as to the percentage of a person's height that might represent the centre of gravity when considering falls. Although there is no real consensus and weight distribution also comes into play, he had referred to The Staircase by John Templar, which is a study in hazards and is quite a well-known and well researched publication. That study suggests 55-57% of height as the 'tipping point'. The Claimant is 194 centimetres tall; 57% of this would be 110 centimetres. Mr Watts was asked questions about force needed to push someone

over the balustrade. He replied that this was a difficult area because there would be numerous "reaction forces", such as the coefficient of friction between feet and floor. He did say that with enough force, a person would pivot over the balustrade even if it was slightly higher than the centre of mass. If it was at 1100 millimetres in height with a centre of mass or gravity higher than the balustrade, significantly less force would be needed to push someone over. Utilising the actual figures in this case, Mr Watts opined that if the balustrade was at 1100 millimetres in height, he could not say with certainty that the Claimant would not have gone over, but he could say that it was significantly less likely. He said all the information in his report suggested that a balustrade height of 1100 millimetres would provide a good level of protection for most people in cases where they slipped or stumbled or someone pushed them.

40. In his oral evidence, Mr Hill confirmed that the works in 2011 to the barracks involving relaying of the floor was not a structural amendment but merely a finish. He accepted that none of the texts he referred to in his report would support construction of a balustrade at the height of that on the landing, but he made the point that this was if one took the texts as guidance. They are not standards as such. The balustrade in question was not untypical of what might have been built at the time.

Relevant law

41. In the context of my overall findings set out below, it is unnecessary to record or consider much in the way of legislation or case law. For completeness, the relevant section of the Occupiers' Liability Act 1957 provides:

2 Extent of occupier's ordinary duty

(1)An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2)The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3)The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

> *(a)an occupier must be prepared for children to be less careful than adults; and*
>
> *(b)an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*

(4)In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

> *(a)where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and*
>
> *(b)where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.*

(5)The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same

principles as in other cases in which one person owes a duty of care to another).

(6)For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

42. In addition, the other potentially relevant duty arose in the context of an employer/employee relationship. Such a context gives rise to a non-delegable duty of care, summarised in *Chadwick v (1) R H Ovendon Limited (2) Hamilton* [2022] EWHC 1701 (QB) as a duty on an employer to take reasonable steps to provide a reasonably safe place of work for their employees, so as to protect them, so far as reasonably practicable from reasonably foreseeable harm.

Factual findings

43. The trial evidence contained statements from a number of witnesses, some of whom provided oral evidence as well. By addressing the factual findings in respect of the incident itself first, this will clarify the extent to which, if at all, the evidence of those who were not eye-witnesses requires summarising or quoting. In reaching my judgment in this case, I have of course borne in mind all of the evidence, but a sequenced approach to the findings of fact may mean that the pertinence of some evidence to the issues as they crystallise is reduced.

44. As part of the context within which the Court must seek to make some factual findings, the Claimant relies on the absence of Rfn Peden, Green and Graham from the trial. Their witness statements from the Service Police investigation were served by the Defendant with a hearsay notice. The Claimant notified the Defendant that he wished to serve witness summonses on those individuals to secure their attendance at trial. Two had left the Armed Forces and their

whereabouts were unknown. As to the third, namely Peden, he was said to have been promoted but his location was uncertain at the time that the Defendant sent a letter in May 2024. By the time of trial, the Defendant's skeleton indicated that contact had been made with Peden "early on but [he] declined to get involved". It was submitted on behalf of the Claimant that this background should afford greater benevolence towards the Claimant's own evidence, which has been tested in court and to whom questions could be put in cross-examination. The inherent difficulty with this submission is that the Claimant has quite properly acknowledged at various stages, both before and during these proceedings, that the injuries he suffered mean that he is not able to recall some details of the incident. At times he has indicated that his last memory of the evening was putting his food, bought in McDonalds on the way back from the nightclub, into his room.

45. In reaching factual findings about the events surrounding the incident, I have reminded myself of the general limitations that attach to the hearsay statements. The evidence has not been given under oath or affirmation, has not been tested by any questioning and no assessment can be made of the witnesses themselves as to credibility or reliability. However, the Court is entitled to take account of general consistency across the statements, particularly from those who were part of the group that was drinking in the barracks, then went into Salisbury and were present at the time of the incident.

46. The Service Police statements that I have drawn upon are from:

The Claimant – dated 16 April 2019 (but only to a limited extent given his detailed written and oral evidence at trial.)
Rfn Down – dated 24 May 2019

Rfn Green – dated 17 June 2019
Rfn Holter – dated 22 May 2019
Rfn Hutchinson – dated 23 May 2019
Rfn Peden – dated 17 June 2019
Rfn Reeves – dated 24 May 2019
LCpl Smith – dated 26 April 2019

47. It is convenient to divide the relevant events of the 23/24 March 2019 into five tranches: drinking in the barracks; at the nightclub; the return journey; on the landing; and, the aftermath. It is then necessary to analyse the available evidence about each in turn for the purposes of forming a picture of the likely events and in particular the nature of the interaction with Rfn Graham that gave rise to the Claimant's fall from the landing.

48. In Appendix A, I have included a summary of the Claimant's evidence at trial. In Appendix B, I have included relevant extracts from the written evidence of the other contemporaneous witnesses of fact.

49. Naturally, there is no challenge to the description of the Claimant's height (paragraph 9(i) above). Not much is said of his build in the Service Police statements, which at trial appeared to be at least average. There is consistency across those statements, however, that Rfn Graham was much shorter, approximately five feet six inches tall (168 centimetres) and was of "skinny" build at the relevant time. The Claimant describes him as reaching to his upper arm in height.

50. The factual details of the incident engage an inevitable degree of speculation. Even affording the Claimant the generous approach to his evidence advocated in *Mackenzie*, I find that, whilst a credible witness – that is one doing his best

to give truthful evidence – he is not a reliable witness in his recollection of significant events. I would emphasise that, by this finding, I am not concerned about his genuine belief in the accuracy of that which he can remember. However, the Claimant quite properly acknowledged that there were gaps in his memory and the nature of the injuries sustained clearly provoked a negative impact on it. In cross-examination, varying accounts given by the Claimant at different points after the incident that were inconsistent with each other were put to him and he responded by reference to the serious injuries sustained in the fall and both the immediate and longer term consequences.

51. The Claimant's memory is also adversely affected, I find, by the amount of alcohol he had undoubtedly consumed. Even if he is right in his evidence that at the age of 18 he was already a seasoned drinker, well capable of imbibing the quantities described in the evidence, with limited impact on his faculties, this latter assertion is at some odds with the evidence of Rfn Reeves, who was the only one in the car who had not been drinking at all. Coupled with his limited, and one might say detached, role in the events, Rfn Reeves' evidence about the state of intoxication of the Claimant is to be preferred.

52. As to the other contemporaneous evidence, I have acknowledged the limitations inherent in the hearsay evidence. Having considered it carefully, I am not persuaded that it is to be treated with such caution that the Claimant's evidence should be preferred where it conflicts. The Service Police statements were not made in contemplation of these civil proceedings but rather for the much more immediate, criminal investigation. In respect of the events leading to the incident and the incident itself, there is no reason to doubt the accounts of Rfn

Green and Peden, which are in keeping with the evidence of Rfn Down as to the in-barracks drinking, Rfn Down playing no further part in the events. As to the journeys to and from Salisbury, their accounts are not inconsistent with the evidence of Rfn Reeves, whose credibility and reliability I have already set out above. Neither of them is directly involved in the incident itself and there is again no principled basis upon which to doubt their general description of it. This applies to the nature of the interaction between the Claimant and Rfn Graham and the mechanism giving rise to the fall. The Claimant's father's evidence is insufficient to detract from my assessment above.

53. On the balance of probabilities, the incident occurred as described by Rfn Peden and Green, namely in the course of what was referred to at trial as 'frolic'. In using that term, I intend it to mean something akin to a playfight, but exacerbated by alcohol. I do not find proved that there was any serious intent on the part of Rfn Graham to fight the Claimant, who towered over him and was clearly more powerful in terms of strength and physique. The layout of the landing, the intoxication of the two protagonists and the descriptive evidence that I prefer as more reliable, all coalesce to lead to the conclusion, that the fall was caused accidentally and not maliciously.

54. In respect of the intoxication, the Defendant was concerned to put before the Court, quite understandably, the efforts made in recent years to educate servicemen about the dangers of alcohol abuse, both generally and in the particular context of service in the Forces. There has been a concerted campaign to seek to curb excessive alcohol intake. However, in the circumstances of this case, that has to be balanced with a number of relevant findings:

(i) Despite the preliminary approach of the Defendant at trial, it is clear that the Claimant fell into a category of persons required to live-in at the barracks;

(ii) When not on duty, the Claimant and other residents of the barracks were afforded significant freedom as to how they spent their free time;

(iii) That freedom included drinking alcohol, both in the barracks and off-site, as well as being free to leave and return to the barracks, it seems without restriction of time. In this case, LCpl Smith visited Rfn Green's room and saw the group drinking beer, about which nothing unfavourable was said. The group arrived back at the barracks at approximately 4am and encountered no challenge in gaining access;

(iv) The primary requirement was to be fit for the beginning of the next duty/parade, which in this case was Sunday morning as the soldiers were due to travel away from the barracks for intended live-fire practice in the following week;

(v) Rfn Green, Peden and Graham, however much they may have drunk over Saturday night and into Sunday morning, and despite the events following their return to the barracks, did it seem report for parade on Sunday morning in a state that sufficiently passed inspection. Had they not presented adequately, they would have faced disciplinary measures.

55. The Defendant's contention, therefore, that the Claimant and others had breached Army rules by drinking to excess and put themselves to some extent outside the responsibility of the Defendant, as employer and as occupier, is not one that I can accept. It is impossible to be sure, if the incident had not occurred, whether the Claimant may have struggled somewhat to parade in a fit state on the Sunday morning, but on the balance of probabilities, drawing on the available and reliable evidence, he might well have been.

56. These two conclusions, in respect of fighting and intoxication, have a specific impact on some causes of actions and some defences. The cause of action in vicarious liability for what was said to be the assault by Rfn Graham falls away and with it, in my judgment, the defence of *ex turpi causa*. On the balance of probabilities, I find that there was no conduct on the part of Rfn Graham or the Claimant that would give rise to criminal liability, whether assault, affray or otherwise.

57. My conclusions also remove the Defendant's contentions that the Occupier's Liability Act does not apply. The Claimant and others were not, I find, acting outside their licence to occupy the premises so as to relieve the Defendant of this statutory responsibility. Their activities, as I have found them likely to have been, were not at all beyond the bounds of reasonable expectation for young servicemen – thrill-seekers as some witnesses described them – who, though required by their employer to reside onsite, are nonetheless permitted wide latitude when off duty to continue to enjoy alcohol and do many of the things they would do if living elsewhere, so long as it does not interfere with their compliance with the high expectations of them when they are on duty. When

off duty they were still subject to rules and regulations, but none of the evidence presented by the Defendant has established that the Claimant's drinking was in breach thereof, if he was able to parade in a fit state when next required on duty. I repeat that the clear evidence is that others did so, having engaged in at least similar drinking and partying in Salisbury.

58. WO2 Pepper's evidence that A Company was no more a concern for off duty activities than any other Company, fortifies my conclusions. Had the Defendant intended to go beyond an education programme to inculcate some self-discipline into servicemen about alcohol use/misuse, the latitude referred to above would have had stricter parameters attached to it, extending to periods off duty, particularly, if onsite.

59. As to the defence of *volenti*, this is also not made out on the same reasoning, augmented by the fact that the Defendant contended that the height of the balustrade was not and was not known to be dangerous. On that basis, it seems to me difficult to argue that the Claimant sufficiently knew the dangers involved in an act of intoxicated horseplay away from the open staircase at what ought to have been a "safer" part of the landing. Furthermore, on the evidence as I have found it to be, the Claimant is more likely to have been responding to non-malicious horseplay initiated by Rfn Graham, rather than being an instigator.

60. Having been satisfied that the Defendant continued to owe a duty to the Claimant as employer and as occupier, the next question is whether there was a breach of that duty.

61. Plainly, risk assessments are required for both employer's and occupiers' liability. As may be evident from the resume of the test to be employed in each

of these two causes of action set out above, there is limited material difference in the duty arising from each of them.

62. The documentary evidence in respect of risk assessments coupled with the very candid evidence of WO2 Pepper leads me to find that there was indeed a breach of duty owed by the Defendant to the Claimant. Risk assessment undertaken prior to the incident was, I find, inadequate. Had it been of sufficient rigour, it would likely have identified the balustrade as presenting a potential danger to those using the building in general, especially if reasonable account was taken of the range of heights and builds of such users. WO2 Pepper's more experienced and quasi-expert eye in respect of risk assessment plainly identified that the incident did not constitute some freak event that would never be replicated. Rather, his evidence, which I fully accept, was that the incident could be repeated and with even worse consequences.

63. One must bear in mind that the duties of care that I find the Defendant had to the Claimant were anticipatory and continuing. By this, I mean that one cannot wait for a near miss to trigger thorough assessment and action if required. I have not had much regard to an earlier incident involving another Rfn, who I understand to have climbed onto a more modern, regulation-compliant, external staircase, as I am not persuaded that it has any particular relevance to the Claim. However, I am satisfied on the balance of probabilities that the Defendant breached its duties of care, by failing unreasonably to undertake sufficiently robust risk assessment to identify an inherently unsafe aspect of the barracks that undermined the reasonable safety of those occupying and/or using it. That the landing was not used formally for 'work' is, in my judgment, irrelevant.

Some of the Defendant's pleaded case appeared to be based on optionality as to whether the Claimant lived in the barracks or at home/elsewhere and came in for duty. That particular point was, however it came about, inaccurate as was established at the hearing. Once the requirement on the Claimant to live in was settled, the extent of the Defendant's duties was crystallised as including when the Claimant was off duty but in the barracks.

64. On the question of causation, I am satisfied on the balance of probabilities that Mr Watts' calculations and evidence are a reliable guide, especially given my findings about how the incident occurred and the lack of any great force, as well as the absence of any lifting of the Claimant by Rfn Graham in a concerted attempt to push him over. In my judgment, had the balustrade been higher, the risk of the Claimant falling over and suffering injury would have been materially reduced. Not as the result of reference to the Building Regulations, but from the evidence of Mr Watts, I am satisfied that a balustrade at a height of around 1100 millimetres would have reduced the risk of the Claimant falling over it such that the fall and its consequences would likely have been avoided. This finding is made carefully in the factual context of how I find the incident is likely to have occurred.

65. The final issue to determine is that of the Defendant's assertion of contributory negligence. The Defendant's key submissions on this point were that the Claimant's conduct, in getting drunk and fighting, breached all of the applicable Army rules; that he knew what he was doing; his drinking was grossly excessive; he should have stayed in his room once he went there with his food; and that the rules were designed to promote the safety of the soldiers and other

users of the barracks. The Defendant sought a very substantial reduction on this basis.

66. In response, it was argued on the Claimant's behalf that his drinking had not been made out on the evidence to have been grossly excessive, and therefore was not negligent; his leaving his room was neither negligent nor causative of the incident; there was no evidence that he left his room to confront Rfn Graham; any fighting involved Rfn Graham as the aggressor, not the Claimant; and that overall the evidence did not support any finding of contributory negligence on the part of the Claimant.

67. The submissions on this point were, perfectly properly, directed to an interpretation of the circumstances surrounding the incident that I have found is not made out on the evidence. Within my findings of fact, the only pejorative conclusion, so to speak, that I have reached is that he was more intoxicated than he recalls, though I do not accept the Defendant's characterisation of it as grossly excessive. Had that been the case, it would have emerged from the other witnesses whose evidence underpins the factual findings. Nevertheless, I have considered with care whether the degree of the Claimant's intoxication is sufficient to found any measure of contributory negligence, but whether viewed on its own or in the context of the other findings I have made, I have concluded that the defence of contributory negligence is not made out.

Conclusion

68. For the reasons give above, the Claimant succeeds in full on the issue of liability.

ANNEX A

C attended the Army foundation course from 1 October 2017 and completed the course in August/September 2018. He was taught all of the basic skills needed for life in military and the important qualities demanded of a serviceman, such as respect and not bringing the army into disrepute, whether on or off duty. This included, very clearly, not getting involved in fighting whether with members of the public or other servicemen and whether in public or on army premises. Fighting with another soldier would not be tolerated by the army. The training also included specific advice about alcohol and its misuse though the Claimant could not remember the exact details of what was taught. He accepted that the course script in the evidence looked like something that would have been taught. He agreed that being unfit through drink, including being hungover, could result in disciplinary action. Following the course he joined 5 Rifles, joining Platoon 1 of A Company, based at Bulford. Rfn Graham was in a different platoon within A Company.

C had a room on the top floor of Building 11, known as Ward Barracks. He agreed the layout of the building and said his room was the third room on the left down the corridor. Each corridor had a utility room, small kitchen, a common room and a TV room. He was generally on duty in the weekday daytime until late afternoon, but then off duty until the following morning. Weekends were generally off duty unless otherwise instructed. Leaving the barracks was permitted when off duty, but C agreed that soldiers would still be expected to uphold the standards of the army.

On Saturday 23 March 2019, C was off duty and due back on duty on the Sunday morning in order to travel to do a live firing exercise. On Saturday afternoon, C was drinking from about 5pm until 9pm in Rfn Green's room. Present were also Rfn Peden, Rfn Graham and a fifth whose name C could not remember. They were all drinking Budweiser, Stella Artois and Kopperberg, which they had purchased collectively. This was not something he did every weekend. C thought he drank about six or seven beers, not more than this, because he knew he had to be up the next morning and also knew he was going out to town that night. He could not recall if he had drunk more after getting ready to go out. He identified Rfn Graham as the most drunk of the group, based on how he behaved at the end of the night and how he looked. Rfn Reeves dropped them off and the group went to the bar attached to the night club, which opens first. He drank either a beer or a vodka and coke in the bar. C said they were in the nightclub mainly for the atmosphere, but he did have four or five double vodka and cokes and two Jägermeisters. Asked to agree that this was not a small amount of alcohol, C said it depended on a person's tolerance. He was unsure if he was drunk or heavily under the influence, but he had consumed alcohol. He would not have called it "a major drinking session". He disagreed with Rfn Green's statement that everyone was quite drunk before leaving the nightclub. It had been arranged that Rfn Reeves would collect the group from town and drive them back to the barracks. C did not recall being reluctant to leave the nightclub because he wanted to talk to women. The tension between Rfn Graham and C related to an earlier argument between Rfn Graham and

Rfn Peden about money, in which C and Rfn Green had intervened to prevent an incident that would have them evicted from the club. C said Rfn Graham threw a punch at Rfn Peden. C moved Rfn Graham away, while Rfn Green spoke to Rfn Peden. There was no tension from C's part when it was time to leave the nightclub, but Rfn Graham was the most drunk and he just lost his head, directing it at C because he got in the way of the argument between Rfn Graham and Peden.

From what C remembered the group walked to Rfn Reeves' car, the others were winding up Rfn Graham, but C was just sat behind in the car. He did not do anything. C did not understand the reference in Rfn Reeves' account to his "stumbling with a kebab", only that the group went later to McDonalds, so he did not know why he would have a kebab. On the way back, C remembered Rfn Reeves stopping the car, though not specifically at a bus stop. He remembered Rfn Graham asking him to stop rather than as Rfn Reeves stated in his account. This was because Rfn Graham had said earlier he wanted to fight C after stopping the argument, but having not done so, one of the others mentioned shaving eyebrows, being a reference to Rfn Graham having not done what he said he would to C. Rfn Graham got out and so did C. The car drove off, C thought because Rfn Reeves had had enough of everyone, not just because C and Rfn Graham were misbehaving. C's intention in getting out of the car was not to fight Rfn Graham, but to defend himself. C accepted he could have stayed in the car and that when getting out he knew Rfn Graham wanted to get at him. C was not going to be able to talk sense to Rfn Graham who he said was very angry. C denied pushing Rfn Graham over or that any punches were exchanged. Rfn Reeves did come back in the car and said to stop fighting or he would not take C and Rfn Graham home. They returned to Bulford via McDonalds. C thought that everyone took that to be the end of it, though it obviously was not so between C and Rfn Graham. C did not recall an atmosphere nor a scuffle in the car park at the Barracks.

Everyone then went upstairs in the barracks, although Rfn Graham's room was on a different wing. C took his food and put it by his bed, returning to the landing. This would have been around 4am or later. C said he did not go to bed because the others were still on the landing and he wanted to say "see you all in the morning". He insisted this was the reason for returning to the landing and not to continue the fight with Rfn Graham. The others were eating their food there, but C did not want to eat his food with them but preferred to eat in his room. C did not remember thinking that Rfn Grahan was still angry, he did not remember what he was thinking about his feelings as it was a long time ago. He was not trying to make up with him, no one would try that in the moment but wait until the following day. C did not remember thinking at all that there was every chance that Rfn Graham would want to fight him. There are then 'black out points' in C's memory of events. C remembered having Rfn Graham in a headlock in front of the banister. The last thing C remembered before this was putting his food down in his room. From what C could remember it was not playfighting with Rfn Graham. C was on one knee with Rfn Graham in his right arm in a headlock; then he felt a tap and thought Rfn Graham had enough. C could not remember how long any fight was before the headlock. They were by the banister just before it curves off to go down the stairs. C said it was not really a fight but the landing was where it happened.

C accepted the possibility that what came before the headlock could have involved kicking or punching or the like. Having released Rfn Graham from the headlock, C stood up and in evidence he demonstrated that he was standing about a foot or so away from the banister. He gave evidence about the description of the mechanism of his fall. He was challenged about the description in his Service Police statement, which he explained was taken just after he was released from hospital with a brain injury. He felt he should not have been made to give a statement at that stage. He did not really know what was going on. He did not remember anything about his time in hospital in Southampton.

C acknowledged that in "plain black and white" engaging in a fight with Rfn Graham on the landing, his conduct fell far below the standards expected of a soldier. Though it may not be in any way allowed, tolerated or condoned, but this does not mean that it does not happen. He could see that the location was obviously very dangerous. He denied being drunk, rather when in a fight he was not thinking this or that might happen, but was just dealing with what was in front of him. C rejected the suggestion that he was engaging in the fight willingly, although "in black and white" it could be said that he could have walked away.

C said he had drawn on the account given to the RMP for his statement in these proceedings, although he would not say that events were necessarily fresher in his mind when giving his account. C confirmed that neither he nor Rfn Graham were subject of any disciplinary action as a result of the incident. He was not drunk and explained his history of drinking at house parties on weekends. If he had been at home or on a proper night out C said he would have drunk a lot more. He said he was not the aggressor, nor did he do anything to prompt Rfn Graham's actions.

ANNEX B

Drinking in the barracks

LCpl Smith was on duty as the Company Orderly Sjt. He was conducting a check of the barracks. In one room on E wing at about 9pm he found a number of Rfn, including the Claimant, socialising. They were drinking alcohol and seemed in good spirits. He joked with them about not getting too drunk and reminded them about deploying to Brecon the following morning.

Rfn Green was hosting the socialising and drinking in his room. He believed all present were quite tipsy. The atmosphere was good. He thought that he, the Claimant, and Rfn Peden and Graham got a lift with Rfn Reeves to Salisbury, but he could not remember. He said they got food at McDonalds before going to the nightclub.

Rfn Peden said the group were drinking Budweiser, Stella and Kopparberg, sharing a crate of the first two and a couple of cans of the latter. The mood was alright, without arguments or issues. He was sure they were all "under the influence of alcohol" when they left the barracks. He recalled an argument between Rfn Graham and the Claimant and their wanting to fight each other, though it started off in a jokey way and came to nothing.

Rfn Down was in the group drinking in Rfn Green's room, together with the Claimant, Rfn Peden and Graham. They had brought a crate of twelve Budweiser beers and started drinking them in the room about 6pm. As Rfn Down was not going out later, he drank more than the others – he thought he had five or six beers and the rest were "split equally among the three *[sic]* others". They stayed in the room drinking for about three hours. No one was drunk, Rfn Down himself only being "a bit tipsy". There did not seem to be any tension.

When **Rfn Reeves** drove the group into Salisbury, they had had a few drinks, but he would not have said that they were drunk. They sat in the car chatting. He dropped them off and did not see them again until 3am the next morning.

At the nightclub

Rfn Green explained that there was a bar attached to the nightclub that opened earlier than the club itself. The group carried on drinking at the nightclub. They had quite a few drinks and he thought everyone was quite drunk before they left the nightclub. Rfn Green did not recall there being any issues between anyone in the group during the night. He did recall that the Claimant had lent everyone else money to enable them to go out that night.

Rfn Peden recalled that he and the Claimant were drinking "Jaeger" (Jägermeister) and all the group had vodka and coke at some point. He said, "Whilst at the bar, nothing unusual happened. We were all just having a laugh and having a good time.

The return journey

Rfn Reeves had to wait ten or 15 minutes for the group to arrive. Rfn Green was first. He seemed almost sober and was trying to hurry the others up. He was talking normally and not slurring his words. The "other three guys" were stumbling with a kebab into the car. They did as Rfn Reeves asked them and wrapped up their food before getting in. When they got in they were just arguing and being drunk. They were pushing each other and their behaviour was putting Rfn Reeves off his driving. He stopped at a bus stop. He thought he told them to get out. The Claimant and Rfn Graham did get out and started arguing with each other. There was some pushing or such like between them and Rfn Reeves drove off as a result, but he went around a roundabout and came back. Thereafter, they sat quietly in the car, going via a local McDonalds. Rfn Green stayed in the car with Rfn Reeves, but the other three went inside and ate food, though some brought food back to the barracks as well. The journey back was quiet and he dropped them off outside the block.

Rfn Green said that when they left the club just before closing time they sat on a wall outside to await Rfn Reeves. Rfn Graham and Rfn Green tried to get the Claimant to leave to find their lift home, but he wanted to stay and talk to girls, which caused some tension between the Claimant and Rfn Graham. Rfn Graham then went to the car round the corner, while Rfn Green waited for the Claimant. During the drive back, Rfn Green sat in the front, with the Claimant in the middle backseat. He and Rfn Graham were arguing about something, which resulted in them getting out of the car and "having a play fight". They appeared to be laughing, so it did not seem serious. They got back in and Rfn Reeves drove via McDonalds, with the three other passengers getting out and going inside. From there to the barracks, there was little talking.

Rfn Peden did not recall the journey back, but he remembered stopping at McDonalds, because he had a McDonalds with him when he was walking into camp. He did not recall any issues or incidents on the journey. His recall was probably affected by drink.

On the landing (or the foyer as it is referred to by some witnesses)

In his interview with the Service Police on 16 April 2019, **Rfn Graham** gave a prepared statement denying that he had pushed the Claimant as alleged. He added that the Claimant was drunk and his hand missed the balustrade as he stumbled towards it, causing him to fall down the stairwell. Questions put by the interviewing officers were met with no comment.

Rfn Green said that when he, Rfn Peden, Rfn Graham and the Claimant reached the top floor of the barracks they all went out into the foyer. The latter two started having another play fight, but it appeared to be getting more serious. He did not recall anything being said, but they were still laughing and giggling. Rfn Green was leaning against the balustrade between the stairs, when he saw the Claimant get Rfn Graham in a

headlock, with Rfn Graham then breaking out of the headlock. Rfn Green thought that as he did so he caught the Claimant's arm, knocking him backwards. The Claimant then fell against the balustrade and as he hit it, he flipped over the top, falling into the gap between the stairs. As he fell, the Claimant hit the middle floor balustrade as he went past it, before landing on the ground floor. Rfn Green thought he landed face down.

Rfn Peden said that when they got to the landing, the Claimant and Rfn Graham started having a friendly drunk fight, just grappling and shoving each other. He did not try to stop them as he knew they were just playfighting. He recalled the Claimant having Rfn Graham in a headlock with his face smothered on the Claimant's chest, due to distinct height differences. As a result, Rfn Graham was trying to push the Claimant away from him, but he would not have known that they were moving towards the balustrade. The next thing that Rfn Green knew was the Claimant going over the balustrade. He had not been paying too much attention to the fight as he was on his phone.

The aftermath

Rfn Green said he and Rfn Peden immediately ran down the stairs to where the Claimant lay, face down and unconscious. They immediately put him in the recovery position and he started to breathe. Rfn Graham followed them down. Rfn Green and Peden stayed with the Claimant for about half an hour before helping him up and to his room, where they put him into bed. Rfn Peden left about 6am and Rfn Green left shortly afterwards, having woken the Claimant. When asked, Rfn Green said he did not think Rfn Graham meant to cause the Claimant to fall over the balustrade, describing it more in terms of an accident.

Rfn Peden ran down the stairs with Rfn Green to see if the Claimant was alright. When he got down, the Claimant was on his side, unconscious and not making a sound. He had blood on his nose and mouth. After 30 seconds, the Claimant started making some noise. Rfn Peden said the Claimant was trying to sit up and because he was drunk and had just fallen he would not listen to them. The Claimant stood up and tried to walk to his room. Rfn Peden and Green helped him. Rfn Peden could not remember where Rfn Graham was at this time. Rfn Peden and Green spent the night in the Claimant's room to make sure he was okay.

LCpl Smith was approached at about 9am by Sjt Isaacs asking about the Claimant's whereabouts. LCpl Smith asked Rfn Graham, who said "I think he fell over last night", which LCpl Smith took to indicate a minor incident. LCpl Smith made contact with the Claimant who said he was in his room and his neck hurt. On his way to fetch him, LCpl Smith saw the Claimant with blood on his face and he was bent almost double. He was unable to walk.

Rfn Holter, who drove the Claimant to the hospital, could see that LCpl Smith was having to help him walk. The Claimant looked to be in a lot of pain. During the drive to the hospital, the Claimant said he had fallen down the stairs and then remembered

waking up in his room. A later conversation with Sjt Isaacs about falling in between the stairs, rather than down them, seemed to Rfn Holter to jog the Claimant's memory. The Claimant went to describe a number of altercations with Rfn Graham during the evening, including a scuffle in Salisbury, the Claimant knocking Rfn Graham to the ground, another and a further scuffle in the car park outside the barracks on their return, with the Claimant again knocking Rfn Graham to the ground. Rfn Holter noted that he failed to understand some of what the Claimant was saying, at least in part due to his difficulties in speaking.

Rfn Hutchinson refers to a car journey in April 2019, in which he drove the Claimant from the barracks to his home. There was conversation about the incident. The Claimant said that Rfn Graham had been provoking him and there had been some physical contact. He said they had gone back to the barracks where they were still drinking. They were on the top landing, there was a "scrap" or an argument and the Claimant was pushed over the balustrade (something along these lines).