

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 06/10/2014

**Before :**

**THE HONOURABLE MR JUSTICE DINGEMANS**

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**Between :**

<b>Jose Antonio Serrano Garcia</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>Associated Newspapers Limited</b>	<b><u>Defendant</u></b>

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**Ronald Thwaites QC and Harvey Starte** (instructed by **Taylor Hampton solicitors**) for the  
**Claimant**

**Desmond Browne QC and Alexandra Marzec** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 21, 22, 23, 24, 25, 28, 29 and 31 July 2014  
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**Judgment**

**Mr Justice Dingemans :**

**Introduction**

1. On Saturday 21 April 2012 Associated Newspapers Limited (“Associated Newspapers”), who are the publishers of the Daily Mail and Mail Online, published an article in the Daily Mail by Kelvin Mackenzie (“Mr Mackenzie”) under the heading “A whole year of hell, thanks to a foreign doctor”. The article was also published on Mail Online.
2. The article stated that Kevin Jones (“Mr Jones”) had been reported by Dr Jose Antonio Serrano Garcia (“Dr Serrano”) to the DVLA, an executive agency of the Department of Transport, in respect of alcohol problems when there was no evidence to that effect. This was after a consultation between Dr Serrano and Mr Jones at the Little Ridge Surgery, St Leonards-on-Sea, Sussex (“the Little Ridge surgery”) on 24 January 2011. The DVLA had withdrawn Mr Jones’ bus driving and personal licences, as a result of which Mr Jones had lost his job.
3. It is common ground that the article, set out more fully below, contained meanings defamatory of Dr Serrano. The article was based on Mr Jones’ version of events about the consultation and afterwards.

4. Dr Serrano claims that Mr Jones' version of events is false, and that he has been defamed in the article, and he brings a claim for damages, including aggravated damages, against Associated Newspapers. Dr Serrano said that Mr Jones had confessed to abusing alcohol, that his medical notes showed that he had admitted drinking alcohol up to 70 units per week, and that he was suffering the physical effects of alcohol abuse, namely gout and elevated Gamma GT readings. Associated Newspapers rely on Mr Jones' version of events to justify the article, and also rely on the defence of honest comment in relation to comments made in the article. Mr Jones contends that he did not admit drinking excessive amounts of alcohol to Dr Serrano, that previous entries showing excessive alcohol intake in his notes were mistaken, and that he was a social drinker who did not have any problems with alcohol.

### **The Article**

5. I have set out, below, the whole text of the article. Although it was published without paragraph numbers the parties inserted these, and I have adopted them below, for ease of referencing parts of the article.

*“A whole year of hell, thanks to a foreign doctor”*

*(1) Last week, I raised the uncomfortable issue of foreign doctors working in this country, and targeted the offensive behaviour of a Spanish consultant. I have since received, and investigated to my satisfaction, an even more shocking case.*

*(2) Bus driver Kevin Jones, ages 53, turned up with his wife Samantha, to see Dr Antonio Serrano, a Spaniard, at his surgery in St Leonards-on-sea, East Sussex.*

*(3) Mr Jones was suffering pain from swollen legs. Almost immediately the doctor diagnosed gout and asked how much he drank. He said he might have a pint or two after work and if he went out with his wife and friends at the weekend, a couple of spirits.*

*(4) When he discovered Mr Jones drove a bus for a living – and had done for 30 years – his attitude changed and, without any research into any kind of alcohol dependency – such as liver or blood tests – he said he would write to the DVLA to have his licence revoked.*

*(5) Mr Jones told me: “This is where the language barrier hit home. He took it that I drank every night, and when I tried to explain, he wouldn't listen and just spoke over me”*

*(6) Several days later, Dr Serrano wrote to the DVLA. Mr Jones asked to see another doctor at the surgery, who agreed to send Mr Jones for blood, liver and kidney test over a six week period, all of which showed that Mr Jones was not alcohol dependent.*

*(7) By now, though, Mr Jones had been signed off sick by his employers Countryliner.*

*(8) Astonishingly without asking for any evidence, the DVLA took the doctor's word and revoked not only his bus driver's licence but also his car and motorbike licence.*

(9) *Mr Jones, who earned £17,000 a year, says: “It was a living hell. I could not persuade the DVLA that I was not alcohol dependent, and the only person who could get it revoked was Dr Serrano, who refused to do so.”*

(10) *By July last year, Mr Jones resigned from the bus company while he battled to clear his name. He had seen other doctors who, although they could not rule out gout, said it was most likely he had arthritis.*

(11) *Desperate, Mr Jones returned to his local MP, Tory Amber Rudd, who represents Hastings and Rye. She was appalled at his treatment and contacted the DVLA on his behalf.*

(12) *A few months ago the DVLA brought in an independent doctor to carry out tests on Mr Jones, which showed no trace of alcohol dependency.*

(13) *As a result, the DVLA returned all his licences to him and at the beginning of the week – having got his job back – Mr Jones restarted work, happily driving his passengers around the St Leonards area.*

(14) *He says: “Doctors talk about patient confidentiality but how is it right that this man could write to the DVLA and, without any evidence whatsoever, suggest I was alcohol dependant, which robbed me of my livelihood?”*

(15) *A DVLA spokesman confirmed that Mr Jones’s licence to drive a bus and his private licence were revoked purely on the strength of the letter from Dr Serrano. He said: “In some cases we can do further investigation, but as we had a doctor’s letter we felt this was enough justification.”*

(16) *I made several attempts to contact Dr Serrano, who said at first he could not discuss the case on the grounds of patient confidentiality, but then said if Mr Jones gave his written permission he would discuss it.*

(17) *A copy of this permission was faxed through to his surgery but then Dr Serrano said he could only talk about it in the ‘framework of a legal medical framework’. When asked what that meant, he claimed he could not hear because of background noise on his phone.*

(18) *Its not clear if Dr Serrano’s accent was a problem, but Mr Jones has suffered a nightmare, when all he wanted was treatment for swollen legs. I will be grateful if Dr Serrano would discuss the case with me. I won’t be holding my breath.”*

### **Issues**

6. I am very grateful to Mr Thwaites QC and Mr Starte for the Claimant, and Mr Browne QC and Ms Marzec for the Defendant, for their assistance during the trial and submissions. The following matters are in issue:
  - (1) What are the defamatory meanings of the article;
  - (2) Whether the defamatory meanings of fact can be justified, or sufficiently justified;
  - (3) Whether any defamatory comments can be defended as honest comment;

- (4) If not, whether damages, including aggravated damages, should be awarded and if so in what sum. The issue about aggravated damages raises a legal point of some importance.

### **Procedural matters**

7. The trial was extremely hard fought on both sides, and there were a number of procedural rulings required to be made. I gave reasons for those rulings at the time, but I have expanded the reasons for some of those rulings in this judgment.
8. The first relevant ruling related to the Defendant's application to examine in chief its witnesses. Written witness statements had been exchanged in the normal way. The proposed examination in chief was not to be restricted to matters which had arisen since the exchange of witness statements, or a few short questions to enable the witness to become used to the witness box before cross examination began, but an examination of all the critical evidence. The request was objected to by the Claimant. I refused permission for this extensive examination in chief for a number of reasons. First the request was made only when the Defendant was calling its first witness. This was important in circumstances where the Claimant's witnesses had already given evidence, and had not requested an opportunity to give their evidence in this manner, and would not now have that opportunity. Secondly the request was likely to have time implications. The case had been case managed on a number of occasions by Bean J. (as he then was) who had directed the parties to produce a timetable. This had been done, and showed that the case would run up to the last day of term. The timetable did not make allowance for extensive examination in chief. (I should record that the parties did complete the hearing on the last day of term, having had a day to prepare closing submissions, and I am very grateful for their efforts in keeping to the timetable).
9. The second relevant ruling related to the Defendant's request to adduce a supplementary statement from Professor Paul Wallace MBBS, MSc, FRCGP, FFPHM ("Professor Wallace") in which he qualified some of the statements that he had made in the joint statement of the experts. The Claimant objected to this evidence being adduced because there was a joint statement. I permitted this supplementary statement to be served because if Professor Wallace had changed his opinion on relevant matters it was necessary to know that as soon as possible, and providing a supplementary statement would provide the Claimant with a fair opportunity to consider that change of evidence before cross examination, where the change of mind would have been revealed in any event.
10. The third relevant ruling related to the Claimant's request to ask Dr Clare Gerada MBE FRCGP FRCPsych FRCP ("Dr Gerada"), who gave expert evidence on behalf of the Claimant, questions about where and how the joint meeting of experts had taken place, and how long the meeting had lasted. This was in circumstances where Professor Wallace had withdrawn his agreement to certain matters set out in the joint statement. The Defendant objected to that, referring to the Protocol on the Instruction of Experts, which made it plain that the contents of discussions couldn't be referred to at trial. The Claimant also pointed to the protocol which made it clear that the court could direct how the meetings could take place, for example by face to face meeting, or by telephone to reflect issues of proportionality. Some time was taken to look at Phipson on Evidence, Eighteenth Edition which referred to the protocol. I permitted

the question to be asked and said I would rule on whether I considered the evidence given to be admissible, and whether it was relevant. In my judgment the evidence given was admissible evidence, if it was relevant. This is because the evidence didn't disclose the contents of the discussion which was protected by the without prejudice privilege. However I did not consider the evidence to be relevant. The evidence showed that the meetings between experts took place by way of Skype discussions, sometimes with and sometimes without video link, but it did not assist me in determining the relevant contested issues.

### **Claimant's meanings**

11. It was contended on behalf of Dr Serrano that the article had the following meanings:
- (a) The Claimant was a particularly shocking example of foreign doctors working in the NHS who, for reasons deriving from their being foreign, are seriously incompetent, inadequate or otherwise unacceptable.
  - (b) The Claimant's inadequate grasp of the English language and incompetent failure properly either to listen to or to examine or to carry out any tests on or research the medical history of a bus driver patient had resulted in his wrongly diagnosing the patient as suffering from gout, as drinking too much alcohol and as being alcohol dependant.
  - (c) The Claimant had unnecessarily and uncaringly asked the DVLA to revoke the patient's driving licence because he was alcohol dependant, when there was no evidence whatsoever that the patient was, with the result that the patient had unnecessarily lost his driving licence and his livelihood as a bus driver.
  - (d) The Claimant had thereafter uncaringly refused to help the patient recover the driving licence of which he had wrongly robbed him, despite being the only person who could have achieved this.
  - (e) By this appalling treatment the Claimant had unnecessarily caused the patient and that patient's family to suffer a year-long living hell.
  - (f) When challenged by Mr Mackenzie, the Claimant had unjustifiably tried to hide behind his obligation of confidentiality to the patient and other specious excuses to avoid and put off Mr Mackenzie's investigation and exposure of his appalling conduct.

### **The Defendant's meanings**

12. It was contended on behalf of Associated Newspapers that the article had the following meanings:
- (a) Wrongly and inappropriately, without due regard for his patient's, Kevin Jones's, welfare, rights or feelings, and without doing proper or adequate testing and/or investigations, diagnosed Mr Jones, as being an alcoholic and unfit to drive;
  - (b) following such diagnosis, wrongly, inappropriately, unnecessarily and uncaringly, without Mr Jones's consent, and despite knowing that Mr Jones was a professional driver, notified the DVLA that Mr Jones was unfit to drive because of alcohol misuse

and thus caused Mr Jones's driving licence to be revoked by the DVLA, as the Claimant knew or must have known it would be;

(c) had thereafter failed to help Mr Jones to get back his licence, even though he was the only person who could have helped by correcting his report to the DVLA;

(d) had thereby not only wrongly and unlawfully breached patient confidentiality but also caused Mr Jones to lose his licence for a year, and had unnecessarily caused Mr Jones and his family to endure a year of "living hell" and a year's lost income; and

(e) That the Claimant's behaviour towards Mr Jones was shocking.

(f) The Claimant's misdiagnosis was caused or contributed to by the "language barrier", that is, the fact that he was not a native English speaker, or there are reasonable grounds to suspect that is was.

(g) In his conduct as set out above, the Claimant had fallen below the standard of care expected from a reasonable medical practitioner.

(h) Further, when challenged by the Defendant before publication of the article, the Claimant had been evasive and unjustifiably tried to hide behind his obligation of patient confidentiality in order to avoid answering questions about his conduct and to put off the investigation and the exposure of his misconduct.

### **Relevant legal principles and statutory provisions**

13. When deciding the meaning of words, a judge is providing written reasons for his conclusion as to the meaning to be attributed to the words sued upon. A Judge should not fall into the trap of conducting an over elaborate analysis of the various passages relied on by the respective protagonists. The meaning is to be determined from the viewpoint of the layman, not by the techniques of a lawyer, see *Waterson v Lloyd* [2013] EWCA Civ 136; [2013] EMLR 17 at paragraph 53. The exercise has been described as one of ascertaining the broad impression made on the hypothetical reader by the words taken as a whole. The natural and ordinary meaning of words includes what the reasonable man will infer from the words, see *Gatley on Libel and Slander*, 12<sup>th</sup> Edition, at 3.18. It was common ground that the Court is entitled to reach its own conclusions on meaning, and is not required to adopt meanings advanced by either party.
14. The applicable principles were summarised by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at paragraph 14:

*"The legal principles relevant to meaning ... may be summarised in this way:*

*(1) The governing principle is reasonableness.*

*(2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.*

*(3) Over elaborate analysis is best avoided.*

*(4) The intention of the publisher is irrelevant.*

- (5) *The article must be read as a whole, and any 'bane and antidote' taken together.*
- (6) *The hypothetical reader is taken to be representative of those who would read the publication in question.*
- (7) *... the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation ...' ....*
- (8) *It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense.'*

15. There are a number of well-known definitions of the legal meaning of the word "defamatory". Sir Thomas Bingham MR in *Skuse v Granada Television Limited* [1996] EMLR 278 at 286 said: "A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally." To be counted as defamatory an allegation must pass a certain threshold of seriousness: *Thornton v Telegraph Media Group Limited* [2010] EWHC 1414 (QB); [2011] 1 WLR 1985 at paragraph 90.
16. Section 5 of the Defamation Act 1952 provides "a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges"
17. Guidance on the defence of honest comment is set out in *Joseph v Spiller* [2010] UKSC 53; [2011] 1 AC 852 at paragraphs 3-5, which adopted, with important modification, the dicta of Lord Nicholls in *Tse Wai Chun v Cheng* [2001] EMLR 31. Comment must be recognisable as a comment, as distinct from an imputation of fact. The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is made, otherwise the comment will be treated as a statement of fact. It has been said that the sense of comment "*is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc*", see *Branson v Bower* [2001] EWCA Civ 791; [2001] EMLR 32 at paragraph 12 and the authorities there considered. A statement may be fact or comment, depending on context.
18. It might be noted that in order to establish the defence of honest comment, the comment must, subject to section 6 of the Defamation Act 1952, be based on facts which are either true or protected by privilege. In some cases, where there are facts on which the comment is based which need to be proved, the distinction between fact and comment may not be as important as in other cases, and compare Lord Phillips' comment at paragraph 109 in *Joseph v Spiller*. However the defence of honest comment remains an important safeguard for freedom of expression. In this case the Defendant made it clear that the primary defence was one of justification.

### **My determination of the relevant defamatory meanings of the article**

19. It was common ground that the article did have defamatory meanings. It is also common ground from the respective contentions of the Claimant and Defendant that the article criticised Dr Serrano's diagnosis and report to the DVLA, a failure to help

Mr Jones after the DVLA had removed his licence, a breach of patient confidentiality, and using patient confidentiality as an excuse not to comment to the Daily Mail. The meanings that I have determined the article to have are set out in italics below, and they are broadly somewhere between the meanings advanced by the Claimant and Defendant.

20. It was common ground that the article meant that Dr Serrano had acted “wrongly” or “incompetently”. The Claimant’s meanings included the meanings that Dr Serrano had been “seriously incompetent, inadequate or otherwise unacceptable” and that there had been an “incompetent failure” to listen. The Defendant’s meanings included the meanings “wrongly, inappropriately, unnecessarily”. These meanings engage issues of applicable relevant standards for doctors.
21. In the article the phrase “alcohol dependency” is used. When addressing the issue of meaning, I have used the phrase “persistent abuse of alcohol” instead of either “alcohol dependency” or “misuse of alcohol” because it appears from DVLA Guidance and the expert evidence that the phrases “alcohol dependency” and “misuse of alcohol” have technical medical meanings. I do not consider that any hypothetical reasonable reader would be aware of these technical meanings, but would understand a person who has “alcohol dependency” to be a person who persistently abuses alcohol. The use of the phrase “persistent abuse of alcohol” avoids the potential overlay of technical meanings. It might be noted that the use of this phrase avoids a potential difficulty which might have been created for Associated Newspapers if the meaning had been to the effect that Dr Serrano had diagnosed alcohol dependency, because it is clear from the medical records that Dr Serrano had not diagnosed alcohol dependency, and any such technical meaning would have raised issues about whether a meaning that Dr Serrano had made a diagnosis of alcohol dependency could be justified (or sufficiently justified having regard to the provisions of section 5 of the Defamation Act 1952). It might also be noted that the use of this phrase avoids difficulties, which might have been raised for both sides, with the meaning of paragraphs 6 and 9 of the article, which relates to whether tests had showed that Mr Jones was alcohol dependent.
22. In my judgment the article has the following 5 relevant defamatory meanings which I have set out below in italics:
  - (1) *“Mr Jones suffered an nightmare when he wanted treatment for swollen legs because Dr Serrano had written to the DVLA to have Mr Jones’ licence revoked for persistent abuse of alcohol when it was wrong and inappropriate to do so: (1) because Dr Serrano had been told that Mr Jones might have a pint or two after work, and a couple of spirits if he went out with his wife and friends at the weekend; (2) because of the language barrier Dr Serrano had wrongly understood that Mr Jones drank that amount every night and then refused to listen; and (3) without any research into whether Mr Jones persistently abused alcohol such as liver or blood tests, and without any other evidence whatsoever. The DVLA had relied on Dr Serrano’s report and revoked Mr Jones bus and personal driving licences.”*
23. This picks up the words used in paragraphs 2 to 7, the references to absence of evidence in paragraphs 8 and 14, and the references to the other tests carried out by the other doctor and independent doctor in paragraphs 6 and 12.



(2) “*Dr Serrano reported Mr Jones to the DVLA and it was wrong and inappropriate to do so because it was a breach of patient confidentiality.*”

24. This is mainly based on paragraphs 8 and 14. The meaning that Dr Serrano was “wrong” to “report” arises from the article as a whole. The meaning of the article does seem to me to be that Dr Serrano’s report was in breach of patient confidentiality, and this part reflects the Defendant’s pleaded meanings about breach of patient confidentiality.

(3) “*Dr Serrano unreasonably refused to persuade the DVLA to revoke its decision in circumstances where blood, liver and kidney tests, when carried out by another doctor, showed that Mr Jones did not persistently abuse alcohol, and where tests subsequently carried out by an independent doctor brought in by the DVLA showed no trace of persistent abuse of alcohol.*”

25. This picks up the literal wording of paragraph 9, but also ties it in with paragraphs 6 and 12 which reported that later tests showed no trace of alcohol dependency, which inevitably affects the reasonableness of the refusal to persuade the DVLA to revoke its decision.

(4) “*Dr Serrano pretended not to be able to talk about Mr Jones’ complaints on the basis of patient confidentiality, when an appropriate consent form had been sent through.*”

26. This is based on paragraphs 16 and 17 of the article.

(5) “*Dr Serrano’s conduct was shocking.*”

27. This is a near literal use of the words set out in paragraph 1 of the article. It is a comment, because it is making a judgment about the behaviour of the Claimant and the consultant.

28. In my judgment the main sting of the article is that Dr Serrano reported Mr Jones to the DVLA and it was wrong and inappropriate to do so because: there was no evidence to show persistent abuse of alcohol by Mr Jones; Dr Serrano had, because of the language barrier, misunderstood Mr Jones’ reports about his drinking; and because such a report was in breach of patient confidentiality.

### **Persistent misuse of alcohol and driving**

29. Drivers are required to disclose any relevant disability pursuant to the provisions of section 94 the Road Traffic Act 1988 (“the 1988 Act”). Section 92(2) of the 1988 Act provides that relevant disability includes “*the persistent misuse of ... alcohol, whether or not such misuse amounts to dependency.*”

30. The DVLA have published a document headed “At a glance Guide to the current medical standards of fitness to drive” (“The At a glance Guide”). The document is designed to assist medical practitioners to assist in discharging their duties when dealing with drivers with relevant medical conditions. Relevant medical conditions include “*drug and alcohol misuse and dependence.*”

31. At page 37 of the At a Glance Guide a suggested definition of “*alcohol misuse*” was “*a state which, because of consumption of alcohol, causes disturbance of behaviour, related disease or other consequences, likely to cause the patient, his/her family or society harm now, or in the future, and which may or may not be associated with dependence*”. The table provided that for drivers of public service vehicles (such as buses) “*persistent alcohol misuse, confirmed by medical enquiry and/or by evidence of otherwise unexplained abnormal blood markers, requires revocation ... until at least one year period of abstinence or controlled drinking has been attained, with normalisation of blood parameters*”.
32. Alcohol dependence was defined as “*a cluster of behavioural, cognitive & psychological phenomena that develop after repeated alcohol use and which include a strong desire to take alcohol, difficulties in controlling its use, persistence in its use despite harmful consequences, with evidence of increased tolerance and sometimes a physical withdrawal state*”. A 3 year period for loss of licence for alcohol dependence was directed.
33. The document provides (at page 6) “*It is the duty of the licence holder ... to notify the DVLA of any medical conditions, which may affect safe driving. On occasions however, there are circumstances in which the licence holder cannot, or will not do so.*”

#### **Medical confidentiality and disclosures to the DVLA**

34. The At a glance Guide then set out an extract from the relevant General Medical Council (“GMC”) Supplementary Guidance headed “Confidentiality: reporting concerns about patients to the DVLA or the DVA” (“the Supplementary Guidance”).
35. The Supplementary Guidance was produced to supplement the guidance given in the GMC Confidentiality Guidance (“the Confidentiality Guidance”). In paragraphs 36 and 37 of the Confidentiality Guidance, reproduced in the Supplementary Guidance, the GMC noted that there was a clear public good in having a confidential medical service, but that there could be a public interest in disclosing information to protect individuals or society from risks of serious harm. The Guidelines set out the extracts from the Confidentiality Guidance which noted that personal information might be disclosed in the public interest without patients’ consent and in exceptional cases where patients have withheld consent. The Confidentiality Guidance continued, noting that the doctor was required to “*weigh the harms that are likely to arise from non-disclosure of information about the possible harm, both to the patient and to the overall trust between doctors and patients, arising from the release of that information.*” Paragraph 53 of the Confidentiality Guidance, also set out in the Supplementary Guidance, noted that doctors should still seek the patient’s consent to disclosure and consider any reasons for refusal.
36. The Supplementary Guidance went on to note that drivers were legally responsible for informing the DVLA if they were medically unfit to drive, and that medical disorders which impaired a patient’s fitness to drive were set out in the DVLA’s “At a glance guide”. As noted above, these medical disorders included “*alcohol misuse*”. The Supplementary Guidance continued “*if a patient refuses to accept the diagnosis, or the effect of the condition on their ability to drive, you can suggest that they seek a second opinion, and help arrange for them to do so. You should advise the patient not*

*to drive in the meantime. If a patient continues to drive when they may not be fit to do so, you should make every reasonable effort to persuade them to stop ... If you do not manage to persuade the patient to stop driving, or you discover that they are continuing to drive against your advice, you should contact the DVLA immediately and disclose any relevant medical information, in confidence, to the medical adviser ... Before contacting the DVLA you should try and inform the patient of your decision to disclose personal information. You should then also inform the patient in writing once you have done so".* The Supplementary Guidance was produced in the At a Glance guide, although paragraph numbers had changed.

### **Dr Serrano**

37. Dr Serrano was born on 12 October 1969. He learned English at both primary and secondary school. He qualified as a doctor in Spain in 1994 after attending Saragossa University. He came to England in February 1995 and registered with the General Medical Council. He obtained full registration and began work on 25 February 1995 at a hospital in Crewe, and then moved to Weston-Super-Mare, before he moved to Hastings in February 1996 and started working at the Conquest Hospital. Dr Serrano qualified as a General Practitioner in February 2002, and during training completed the practical module for a diploma on treatment of drug and alcohol related conditions.
38. On 1 February 2002 Dr Serrano joined the Roebuck House Surgery. There were 5 independent practitioners working under the same roof and sharing the same management structure. In 2004 Dr Serrano passed the membership of the Royal College of General Practitioners Examinations with distinction. Dr Serrano moved to Bexhill in 2002. In 2006 the Claimant became a partner at Roebuck House and in 2008 he became a GP trainer.
39. In 2008 Dr Serrano married his wife, Dr Fynes, and they have 2 young children. Dr Serrano said he built up an excellent relationship with the local community and he began to attract patients from outside the old town area of the practice. His list grew from 1650 patients in 2006 to nearly 2000 by the time that he resigned on 1 February 2013. Dr Serrano said he'd spoken to the DVLA on a number of occasions to discuss patients who had had their licences revoked because of medical conditions and he had supported them in the process of regaining licences. He said that in 2011 he was familiar with DVLA medical guidance and that he had in his medical career only referred one patient, Mr Jones, to the DVLA.
40. On 14 October 2010 Dr Serrano completed the course MRCGP for Trainers. This qualified Dr Serrano to train GP registrars to prepare for exams and practice as a general practitioner. Dr Serrano gave evidence that one of the scenarios that he had to teach trainee GP's related to the chronic drinker who refused to stop drinking and who refused to report himself to the DVLA.
41. I accept this background evidence.

### **Mr Jones**

42. Mr Jones is a 54 year old man, and he had worked in the office furniture trade, working for an international office furniture company and he had then run his own

office furniture company before working on a freelance basis. He had met his wife in 1989 when they were both working for the same company. They had married in 1999 and have a son now aged 10.

43. Mr Jones and his family had moved from London to St Leonards-on-Sea, where Mr Jones' parents lived in 2005, and for a while he commuted to London. He gave up office furniture work in 2006 and in 2007 he set up a company installing decking for caravans. That had been affected by the recession and he closed it down in 2008.
44. Mr Jones had then obtained a job as a bus driver on 24 November 2008, having had a relevant licence for 30 years, and was driving at the time of the consultation with Dr Serrano in 2011. He was very happy to have got a job as a bus driver. He had continued to work as a professional bus driver except for a period between March 2011 and March 2012 when he couldn't work because his driving licence had been revoked. He used to work for Countryliner but that ceased operating in 2012 and he got a job as a driver almost immediately afterwards with Stagecoach, when they took over Countryliner's former routes. Before his licence had been revoked he had held a driving licence for 30 years without a single traffic violation or motoring conviction.
45. Mr Jones said he had a genetic condition which caused him to produce too much stomach acid which caused chronic indigestion and heart burn. He had been prescribed medication to help him deal with this for about 30 years. Mr Jones said he'd suffered from foot and ankle issues for some time. The first time was in the summer of 2008 when he was on holiday in Spain. That had been diagnosed as tendonitis. He'd then experienced similar pain in feet and ankles. Mr Jones said that since that date he had continued to experience occasional foot and ankle pain.
46. Mrs Jones said that since 2006 she had worked in accounts for a company which specialised in brain injury assessment rehabilitation and case management.
47. I accept this background evidence.

**The evidence about Mr Jones' drinking before 24 January 2011 and my findings on that evidence**

48. There is a dispute on the evidence before me about exactly what Mr Jones was drinking at the time of the consultation on 24 January 2011, and what he had said about his drinking beforehand. I will therefore address the past medical notes and the evidence relating to this.
49. Mr Jones said he would describe himself as a social drinker, meaning someone who enjoyed a drink when meeting with friends. He said that he had a take it or leave it attitude to alcohol, and that he had not misused alcohol and his drinking had always been under control. The amount of alcohol he consumed varied over the years. In the past when working abroad he would often be with colleagues staying in a hotel and would have a pint or two before dinner and perhaps a further pint with his evening meal. When he was working in garden decking work he would finish by 3pm after a very early start and he would have a pint or two most afternoons. Since becoming a bus driver in November 2008 he had drunk less frequently than he did in previous jobs. His shift pattern meant that he worked 4 days a week starting at either 6am or 10.30am. He averaged and still averages about 2 early shifts per week. At

Countryliner he would get a 6 day break every 4 weeks due to his shift pattern but at Stagecoach it is a 4 day break every 6 weeks. Mr Jones stated that if his shift started at 6am, which meant he got up at 5am he made sure he didn't drink any alcohol the day before. On other occasions if he had a later start he might go to meet friends and drink 2 or 3 pints of beers at most, but he would usually be home by 6:30pm for his evening meal and did not usually drink any more alcohol at the time. The only time he might is if a neighbour or adult son came round to catch up in which case he might have 1 or 2 more glasses of spirits mixed with cola.

50. Mr Jones gave evidence that his wife bought a small bottle of vodka, a 35cl bottle, each week as part of the weekly shopping trip and that was usually finished over the course of the week. Stagecoach and Countryliner had operated a zero tolerance policy with regard to alcohol. Drivers were not permitted to drink alcohol in the 12 hours before the start of a shift and Stagecoach conducted spot breath and blood tests. Mr Jones said that he would make sure he never drank alcohol within 12 hours of his shift starting and there was no point in taking the risk. No driver is allowed to go in to a place that serves alcohol while wearing a uniform otherwise they are suspended and this had apparently applied to a driver who had had a cup of coffee in a Wetherspoons pub.
51. Mr Jones said that in 2006 he would come home and he'd have a couple of glasses of spirits after work or a couple or 3 over the evening. He said he would have had some 4 to 5 glasses of Bacardi and that they didn't have an optic to measure the shots and he said he would drink more in 2006 when he was under stress. Mr Jones also gave evidence that he used a shot glass to measure his drinks. Mrs Jones also gave evidence about the shot glass, but said it was not used on every occasion as they knew what a shot measured.
52. Mrs Jones said that in all the time she'd known Mr Jones she had never been concerned about how much he drank and she would classify him as a social drinker. The amount of alcohol that Mr Jones drank varied over time, for example, at about the time of the move from Biggin Hill to St Leonards-on-Sea Mr Jones probably drank a bit more than he had at other times and that was because of financial difficulties and pressures, and similarly in 2005 Mr Jones had had trouble finding work and may have drunk a bit more due to the amount of spare time that he had. Mrs Jones said that since becoming a bus driver Mr Jones had made sure that he didn't drink much when he was working the next day and that if he was on the early shift he didn't drink at all. The days where he might drink were those where he had finished his shift early and was either not on the early shift or not working at all. He might meet up then with a friend from the caravan club and have a couple of pints and if there were visitors might have a glass of spirits mixed with cola after dinner. Mrs Jones said that as part of the weekly shop she bought a 35cl bottle of Tesco own brand vodka which cost about £6 and that Mr Jones would generally drink this at home over the week with help from a neighbour and her step son.
53. Mrs Jones said that her budget was £100 per week and that she only bought half a bottle of vodka because the extra money went on food. Mr Jones gave evidence that his spending money was limited.
54. Mrs Jones was asked about Mr Jones's drinking habits after they'd married and whether it was 42 units, and she said she couldn't recall and that she had difficulties

in working out and understanding units. In 2003 their son had been born but in 2004 there was a downturn in the economy and she'd lost her job and suffered from postnatal depression. They had then moved from Biggin Hill to St Leonards. At that stage Mr Jones was drinking more. There was a lot of debt and there were finance issues. Mrs Jones believed Mr Jones drank more as a coping mechanism at that time, and he was drinking to relieve stress that he was under. At that time they were earning a bit more than they earn now. Although it was a tough financial situation she wasn't saying they couldn't afford it. She said it wouldn't be fair to say that if he had time on his hands he would drink more. In paragraph 6 of her witness statement she had said that he may have drunk a bit more due to spare time but didn't consider that to mean the same thing.

55. Mrs Jones said it would have been more expensive to be a member of a gym than to drink the amount they did. Mrs Jones said he didn't drink every night to relieve stress and that it was not right to say that he drank as a hobby.
56. Before I turn to the medical notes about drinking, I should deal with two matters. The first is the fact that although Mr and Mrs Jones in evidence suggested that there was only a half bottle of vodka purchased each week by Mrs Jones as part of the weekly shop at the material time in January 2011, it became apparent that the purchase of vodka post-dated the relevant events, and that at the material time Mr Jones was drinking Bacardi and not vodka. It appears that Mr and Mrs Jones had mixed up their current purchase of alcohol with the historic purchase of alcohol. I do not consider that either Mr or Mrs Jones was trying to mislead me about the purchase of vodka. It is simply an illustration of the difficulty of trying to recollect accurately what was being drunk, and in what amounts, after time has passed, but it does obviously affect the weight that can fairly be put on their evidence about past drinking.
57. The second matter is that the Defendant suggested that Mr and Mrs Jones did not have sufficient income to permit Mr Jones to drink to the levels suggested by Dr Serrano and the medical notes. I do not accept that suggestion. Mrs Jones' own evidence showed that Mr Jones had drunk in the past to excess when there were money problems, and Dr Hancock and Dr Serrano both gave clear evidence about alcohol abuse among persons with low incomes, and I accept that evidence.
58. On 19 July 2002 the medical notes, which were served under the relevant Civil Evidence Act provisions, showed that Mr Jones was drinking "*42 units/week*". In 2002 on 19 July Mr Jones recorded that he was having 3 pints per day each evening. He was drinking Fosters lager and he didn't challenge that record. That would work out at 42 units per week. I find that this is an accurate record of Mr Jones' drinking at that time.
59. On 9 January 2006 Mr Jones was registering as a patient at the Little Ridge Surgery, and he had an induction interview with Alison Carter ("Ms Carter") in which she noted "*alcohol 70 units/week*". Ms Carter had joined the Little Ridge surgery in 1994. After becoming a receptionist she also became a health care assistant. Ms Carter said that she had a template on her computer which she followed and that she wouldn't have relied on Mr Jones knowing or being able to calculate how many units of alcohol he drank per week because she would have calculated the amount of units based on what Mr Jones said he was drinking. Ms Carter said she didn't ever recall having

recorded a level of alcohol consumption as high as 70 units and she said she would have been sure to double check with the patient that that was accurate.

60. Mr Jones said that in January 2006 he had registered at Little Ridge Surgery and he had told Ms Carter the truth. He didn't recall seeing any chart. He recalled her typing in to a computer as he spoke. He may have said 7 to 10 pints per week. He might have said 8 to 9 pints. He said he didn't carefully consider any answers, but he remembered vaguely being in the room. He said he was weighed and blood pressure taken so he was examined in that context but there was no careful examination of his drinking. He didn't say that he drank 70 units a week.
61. Mrs Jones said that in 2006 Mr Jones's work had dried up and it was about that time that they signed up at the Little Ridge surgery. She didn't remember registering with Ms Carter and she was unable to comment on the 70 units figure provided by Ms Carter for her husband's drinking.
62. Having heard Mr Jones and Ms Carter both give evidence I am satisfied that the entry made by Ms Carter is an accurate entry. I accept that Mr Jones did not say that he drank "70 units per week", but I am satisfied that he did give reliable answers about his drinking when asked by Ms Carter, which were then converted into 70 units per week by Ms Carter. The medical entries leading up to the consultation on 24 January 2011 show that Mr Jones had, until after the consultation on 24 January 2011, been very open and frank about his drinking. This was partly because Mr Jones considered that the amount that he was drinking was only social, and it was before he realised the trouble it could cause him. Mr Jones had no insight in to the fact that 70 units might be considered excessively high in 2006. I also note that if Mr Jones had said 7 to 10 pints a week that wouldn't have been a complete record of his drinking even at that stage because Mr Jones had always admitted drinking spirits, and he did not tend to be a 1-2 pints in the evening drinker, but a 2-3 pints in the evening drinker.
63. On 17 December 2008 Mr Jones was seen by a consultant cardiologist working at the chest pain clinic. It is recorded that Mr Jones drank "*alcohol 2 pints and a few Bacardi's each evening*". Mr Jones said he remembered going to see the cardiologist after he had a bad cold and a bad chest. He thought the chest pain was due to coughing. He'd gone to the doctor's but then been referred on to the cardiologist. Mr Jones accepted that it was the cardiologist's job to get the document right and the medical records were important and he wasn't saying that the doctor had got it wrong but that at the time he was drinking a couple of pints and a couple of Bacardis a week. He said his weeks weren't like normal weeks and that his work varied so much he must have got mixed up and he was not in denial about his drinking. He would have had to remember back. Mr Jones said that he was asked various questions about his health and lifestyle in an informal manner, and Mr Jones did not believe that his answers were particularly detailed or carefully considered, nor did he think that the consultant cardiologist would have been carefully recording everything that was said.
64. In 2008 Mrs Jones said that her husband had had a cough and cold and then associated chest pains. He'd gone to a cardiologist but she had never read the letter that the cardiologist had sent. I do not consider that Mrs Jones' evidence about the report to the consultant assists, as she has little recollection about the relevant matters, and it is plain from her evidence about vodka that Mrs Jones has understandable difficulties in recalling exactly what her husband was drinking and when.

65. I did not hear evidence from the consultant cardiologist who made this note, although it would be surprising if the cardiologist had any independent memory of the consultation now, but this meant that I did not have the opportunity to see the cardiologist being cross-examined. However, even making allowances for this fact, I do not accept Mr Jones' explanations about the note made by the cardiologist about his drinking, and I accept that the record made by the cardiologist of Mr Jones' drinking is accurate. A cardiologist is more likely than not to have been interested in what Mr Jones was drinking and to have recorded accurately what Mr Jones was saying, but it is plain that everyone, including cardiologists, can make mistakes. However, as recorded above, Mr Jones was open and frank about his drinking until after the consultation on 24 January 2011.
66. However after the consultation on 24 January 2011 Mr Jones became reluctant to disclose the amount that he drank. This was not because he considered that he had a problem with alcohol, or was anything more than a social drinker, but because he had become aware that medical practitioners took a different view. The best illustration of this change of approach by Mr Jones is that Mr Jones gave answers in October 2011 about his drinking in official documents which were wrong and unreliable. On 26 October 2011 Mr Jones saw Dr Busk, an independent medical adviser contracted by the DVLA, as part of the process for getting back his licence. In the course of that examination a number of questions had to be completed by Mr Jones in the presence of Dr Busk. Question 1 asked about current drinking. This was declared at 1-2 days a week on which he drank, with 2-4 units on a typical drinking day. This made a total of 2-8 units per week. Question 2 asked "*was there was a time when you were drinking more heavily and regularly than now*" and Mr Jones answered "*no*". This was simply inconsistent with the heavier earlier drinking that Mr Jones accepted he had undertaken. Mr Jones said that he had never been a massively heavy drinker and his understanding was that the question was directed to that type of drinking. However the question was a simple one and Mr Jones was an intelligent man and well able to understand the question. In my judgment the answer showed that Mr Jones' evidence about reports about his drinking cannot be relied upon. Mr Browne made the point that this is not a case about whether Mr Jones made false representations to get back his licence. I agree. However it is necessary, given the clear conflict of evidence between Dr Serrano and Mr and Mrs Jones to make findings about Mr Jones' drinking and, in my judgment, the answer to Dr Busk undermined the reliance that can properly be placed on Mr Jones' evidence about his drinking and his reports of his drinking.
67. Other relevant medical entries show that Mr Jones was seen in Accident and Emergency ("A&E") with foot problems on 15 August 2009. In December 2009 Mr Jones was seen in the chest pain clinic, and it was noted that he had had high blood pressure in the past, since he was aged 13. On 8 January 2010 Mr Jones attended A&E with left foot swelling and ankle pain, he was treated with analgesics and anti-inflammatories, and possible diagnoses of gout or reactive arthritis were made.
68. On 4 March 2010 blood tests showed that Mr Jones had a raised Gamma GT level of 130. On 12 March 2010 Mr Jones had a consultation with Dr Magrabi, then principal of Ridge View Surgery. Dr Magrabi noted that the readings for Gamma GT levels was raised and wrote "*consumes more than req [recommended] alcohol*", which issue was then discussed. I accept the accuracy of the note. It does not appear, from the



later evidence, that Mr Jones took heed of Dr Magrabi's concerns about Mr Jones' alcohol consumption being more than recommended.

### **Roebuck House surgery take over Little Ridge Surgery**

69. In December 2010 the Roebuck House practice received an urgent email stating the management team and doctors of the Little Ridge surgery had resigned. The Primary Care Trust ("PCT") wanted volunteers to take over the running of the surgery with immediate effect. The Roebuck House practice applied to take over the surgery and was successful in the bidding process. Dr Rowan, the senior partner of the Roebuck House surgery, was in charge of the administrative aspects, and Dr Serrano became the clinical lead for the project. It was for this reason that Dr Serrano was working at Little Ridge surgery on 24 January 2011.
70. Dr Rowan said that the decision to take Little Ridge surgery had been part of a strategy. It meant that they had at one stage 14,000 patients and could provide a triangle of care in the Hastings and Rother area. For the first year it wasn't a money spinner. There were difficulties with the practice but the PCT had trusted Dr Rowan's team and very substantial improvements had taken place. Little Ridge surgery had gone from being one of the worst prescribers to being one of the best. Little Ridge surgery had some 3300 patients. There was a very poor IT system in place at Little Ridge surgery which was very inefficient. Dr Rowan had gone in the first week and assessed needs and after that Dr Serrano had become the lead doctor. Dr Hancock was there as a junior locum doctor and Dr Rowan described him as a superb doctor. Dr Serrano provided support and a tutorial each week.

### **The contemporaneous documents relating to the consultation on 24 January 2011**

71. In January 2011 Mr Jones was suffering from severe pain in his foot ankle area. It was a foot that he used for driving and he had to be off work. Mr Jones was concerned that he was missing time off work, and that no one seemed to have worked out what was causing his problems. Gout, reactive arthritis and tendonitis had been suggested as possibilities by other medical practitioners.
72. The medical records before me show that Dr Serrano saw Mr Jones at 1554 hours on 24 January 2011, and that Dr Serrano did not see another patient for another 29 minutes. The length of the time that Dr Serrano saw Mr Jones in consultation was an issue before me.
73. The medical notes made by Dr Serrano record "*very long chat, pt [patient] had gout which has not been diagnosed, also drives a bus and drinks heavily, ½ bottle of spirit a night, some nights, needs to reduce drinking, I will inform DVLA and has been offered monitoring*".
74. Draft letters were also prepared, one to the patient and the other to the DVLA. The draft letter to Mr Jones dictated by Dr Serrano stated: "*I am sorry we had a very difficult consultation today. I have written to the DVLA informing them of your alcohol consumption ... in Jan 2006 you were noted to drink over 70 units of alcohol a week and when you attended the cardiology department in Dec 2008 you acknowledged to drinking 2 pints and a few Bacardi's each evening which is*

*consistent with your alcohol intake in 2006. I understand that you are upset and I understand your financial difficulties but it is of paramount importance that you start reducing your alcohol consumption immediately.”*

75. Dr Serrano gave evidence that he had instructed the letter to be sent, and I accept that evidence, as it is consistent with the fact that he dictated the letter, and there was no reason not to send the letter. Mr and Mrs Jones gave evidence that they did not receive that letter, and I also accept that evidence. There was evidence that instructions that Dr Serrano had given about not sending letters, for example Ms Carter’s letter dated 31 January 2011, were not always followed by the relevant administrative staff. It is also clear that Dr Serrano dictated another letter that day, to the DVLA, which was not sent until later, and I think it likely and find that an instruction not to send out the DVLA letter led to the failure to send out the letter dated 24 January 2011 to Mr Jones. However the letter dated 24 January 2011 to Mr Jones, although not sent, does provide, together with the notes, contemporaneous evidence of Dr Serrano’s recollection immediately after the consultation.
76. On 24 January 2011 Mrs Jones also typed a letter, which had the typed names of Mr and Mrs Jones at the bottom, complaining about Dr Serrano. The letter reads as if it is written by Mrs Jones alone, because it refers to the fact that *“my husband had an appointment ...”*. The letter complained that *“Dr Serrano didn’t really examine my husband, he had a quick look at his foot and just looked at blood result from almost a year ago and straight away said it was gout (which no other doctor could confirm)”*.
77. The letter continued *“He asked if my husband drank alcohol to which my husband replied probably too much. Dr Serrano then said he shouldn’t go to work the next day. He doesn’t drink every night and probably has up to 4-5 glasses maximum when he doesn’t work the following day. If he’s on an early shift he doesn’t drink at all.”*
78. Mrs Jones then went on to complain that Dr Serrano *“practically called him an alcoholic and told him that he should contact the DVLA tonight (basically make himself unemployed) as he would be phoning them on Thursday to inform them himself as it was his duty ... He is not our family doctor, has never met any of us before we were in there for 10 mins he looked at blood tests that another doctor organised a year ago he didn’t take any blood, blood pressure or anything he’s acting from my husband mentioning that he probably drinks too much and by too much he means a little bit above the units that are acceptable.”*
79. Mrs Jones continued *“How can a doctor accuse a patient without any evidence or tests and threaten to wreck someone’s career without any back up. We are absolutely furious that we were treated in this way, he was aggressive to both of us and this was all in front of my 7 year old so who ended up in tears and told me he was scared”*.
80. It is apparent from the terms of Mrs Jones’ letter that Mr and Mrs Jones were now aware of the serious difficulties likely to be caused by Mr Jones’ drinking.

#### **Dr Serrano’s evidence about the consultation**

81. Dr Serrano said that Mr Jones came to the Little Ridge surgery with his wife and their 7 year old son. He was an existing patient and had made an appointment. His records were on the computer system. Dr Serrano had not had any previous involvement with

either him or members of his family. Dr Serrano said he went to the waiting room to call and take the patient in to his consulting room. Mr Jones came in with his wife and son. He looked tense. Dr Serrano shook his hand and asked him to take a seat. Dr Serrano said that he asked him what he would like to discuss today and Mr Jones said he wanted to find out what was wrong with his legs, that he'd seen a number of doctors and that no one seemed to be sure what was wrong with them. He'd been given several diagnoses and treatments but nothing had worked. The last doctor had thought it was tendonitis and gave him some pills. It was affecting his work and he was fed of with taking time off work and his employers were concerned. Dr Serrano said that Mr Jones looked upset as he spoke about taking time off work. He said he drove for a living and it hurt to put his foot down. He said that the last doctor he'd seen had taken some blood tests to find out what the problem was but he didn't know what they showed.

82. Dr Serrano said he asked Mr Jones to tell him more about the problems. Mr Jones said it had been going on for a few years and it would come on all of a sudden with no warning. He said that his foot or ankle would become red, very hot and swollen, and so painful that he couldn't put his foot on the ground and walk. He said it would go away after a few days but that it could last up to a week and that it was happening more frequently. Dr Serrano asked him whether he was otherwise healthy and Mr Jones said he was. He was asked about other symptoms and replied "nothing at all". He was asked whether he was on medication to which he replied that he was not, and Dr Serrano asked if he might look at his records to which Mr Jones said "go ahead". Dr Serrano looked at the computer records and saw a liver function test report dated 4 March 2010 showing his C Reactive protein of 7mg/l and his Gamma GT reading of 130. Dr Serrano didn't look at scanned medical records which were stored in the "docman" storage file system.
83. Dr Serrano said that he asked to examine Mr Jones and he agreed. Mr Jones was a tall man and didn't look unwell. There was no swelling to hands or feet. His gait and posture had been normal. Dr Serrano examined his painful foot and ankle, having put on a pair of gloves from the desk, but found nothing abnormal. He asked him where he felt the pain and he pointed at the base of the big toe. He examined that and found it was normal. He also examined the tendons at the front of the ankle joint. These were normal and not swollen and Dr Serrano was specifically looking for a swelling of the tendons as there had been a past diagnosis of tendonitis.
84. Dr Serrano put the gloves in the bin and washed his hands and went over some of the history with Mr Jones. When he sat down Dr Serrano said "I think you've got gout" and Mr Jones replied "gout? How can I get gout?" Dr Serrano said that he had the typical signs and symptoms of it and he didn't know what it was causing it. Dr Serrano asked again about Mr Jones being otherwise healthy and whether he was taking regular medication and water tablets or over the counter medicines. Mr Jones said his diet was good and that he ate a lot of fresh food and vegetables. He didn't eat a lot of red meat or shellfish, and then Dr Serrano asked "and how much do you drink these days?"
85. Dr Serrano said that Dr Jones hesitated and looked away looking serious before replying "er, too much". He'd then mumbled something about being an alcoholic or a bit of an alcoholic and there was a pause before he said "I drink half a bottle of Bacardi a night". There was a short silence in the room broken by his son saying

“Dad you’re an alkie”. Dr Serrano remembered thinking at that point that it all fitted: symptoms of gout for a few years; treatment for arthritis and tendonitis which had not worked; raised cholesterol; raised triglycerides; raised gamma GT, but with his Transaminase and other blood tests normal; and a confession of high alcohol intake.

86. Dr Serrano tried to explain that alcohol was a cause for Mr Jones’ symptoms and that Mr Jones needed to stop drinking, and that the drinking was probably causing gout in the foot. Dr Serrano then said that he remembered that Mr Jones had told him that he drove for a living. Dr Serrano said he needed to know what this meant and what the impact on work would be, and asked him “what do you do for a living again?” to which Mr Jones replied that he was a bus driver. Dr Serrano said that he was shocked when Mr Jones said he was a bus driver. It was obvious to him that declaring he drank half a bottle of spirits and suffering from gout and abnormal blood tests must have implications for his fitness to drive and his driving licence.
87. Dr Serrano then tried to explore Mr Jones understanding of this asking whether he should be driving a bus if he drank half a bottle of Bacardi a night. Mr Jones responded saying that he had a clean driving licence and had never been convicted for speeding or other offences. Dr Serrano noted that neither Mr Jones nor his wife had responded to say that Mr Jones didn’t usually drink half a bottle of Bacardi at night. Dr Serrano then said you can’t drive the next day after you drink that much and that you should really stop drinking alcohol immediately and Mr Jones’s response was to say that he didn’t need to do that and that he’d been drinking this much for years and had never had a problem. Dr Serrano explained to Mr Jones that his raised gamma GT level and his blood tests were abnormal, showing him this from the computer record and Mr Jones replied that that was caused by indigestion pills. Dr Serrano recalled that Mr Jones said that he wasn’t taking any pills but in any event was aware that indigestion pills would not be an explanation for the pattern of abnormal blood tests. Dr Serrano said that he was concerned that Mr Jones’s reactions at the wheel might be effected if he drank half a bottle of Bacardi the night before.
88. Mr Jones didn’t respond that he wasn’t drinking that but his response was dismissive saying it wouldn’t, that he was not drunk and no longer got drunk after a drinking session, and he didn’t drink and drive. Dr Serrano responded saying that if Mr Jones had drunk half a bottle of Bacardi the night before the next morning he would have alcohol in his blood and reflexes would be impaired which might effect his ability to drive. Dr Serrano remembered that as he said this to Mr Jones, Mr Jones’s body language was antagonistic and he looked at his wife with an expression of disbelief on his face and it was clear that he simply did not agree with the advice that Dr Serrano was giving. This made Dr Serrano very concerned and he felt that this was a dangerous situation. Dr Serrano said to him that he needed to stop driving for the time being until things settled down, stating that maybe he could get a desk job. Dr Serrano said he would be able to support him by giving him a sick note for his foot problem which would allow him some time to recover. Dr Serrano said he was trying to persuade Mr Jones to stop driving for a while until he’d stopped drinking alcohol so that he might have sessions with a counsellor about safe drinking. Dr Serrano said that would have taken a few months and as far as he was concerned could have avoided the notification to the DVLA. However Mr Jones cut him off saying that there were no desk jobs available in his company.

89. Dr Serrano then said that he had to raise the issue of the DVLA being notified about his alcohol consumption. Dr Serrano said something to the effect that he was concerned about Mr Jones's ability to drive and felt it might be a good idea if Mr Jones told the DVLA how much he drank. Mr Jones cut off Dr Serrano saying if the DVLA found out how much that he had drunk they would take his licence away and he would lose his job and if he lost his job he would lose his mortgage and house. Dr Serrano responded saying that if Mr Jones didn't stop drinking and driving Mr Jones would have to tell the DVLA how much he drank as part of his duty as a licence holder and that if Mr Jones did not inform the DVLA that he was drinking half a bottle of Bacardi per night Dr Serrano would have to do it and tell them what Mr Jones had just told him. Mr Jones responded saying that Dr Serrano had no right to do that and that he couldn't tell the DVLA without permission, that would be against Mr Jones's rights. Dr Serrano said that he explained that in some cases doctors could disclose medical information about a patient without the patient's consent. Mr Jones asked how that could be and Dr Serrano said he could do so in this case or for example in the case of serious infections or diseases. Dr Serrano also said that if Mr Jones had told Dr Serrano that he was about to commit a serious crime, for example setting off a bomb, he would have to tell the police about that. Dr Serrano said that Mr Jones had then replied saying that if Dr Serrano told the DVLA about what Mr Jones drank he would lose his job and house. Mr Jones grabbed his son and held on to him saying to Dr Serrano "do you want my family to be homeless, is that what you want?" Dr Serrano said the conversation had become very tense and was getting heated. Mr and Mrs Jones were obviously upset and angry. The child was scared and started crying.
90. Dr Serrano suggested that Mrs Jones should take the child in to the waiting room, while Dr Serrano continued the consultation with Mr Jones, but Mrs Jones said she wouldn't do so saying she wanted to stay with her husband and the child stopped crying and went to Mrs Jones who comforted him.
91. Mr Jones then suggested that Dr Serrano did not really have to tell the DVLA about what he'd said about his drinking. Dr Serrano said it was quite clear that he was not saying what he had said was incorrect or that Dr Serrano had misunderstood what Mr Jones had said about drinking half a bottle of Bacardi at night. Dr Serrano responded saying that Dr Serrano did have to tell DVLA if Mr Jones wouldn't do it himself. Mr Jones's response was to say "ok ok fair cop fair cop, I've given myself in. We all do it at work. We are all drinkers. We all go to the pub and have a few pints after work and no one ever gets caught. Why me?" Dr Serrano said that it was because Mr Jones had told him that he drank half a bottle of Bacardi at night and Mr Jones responded asking why he was doing that and that he was using his words against him. Dr Serrano replied saying that he wasn't doing anything to Mr Jones, it was something that he had done to himself. Dr Serrano said that Mrs Jones interjected saying "my husband is not an alcoholic", and Mr Jones continued asking if he hadn't told Dr Serrano that he drunk half a bottle of Bacardi at night, whether Dr Serrano would have had to report Mr Jones to the DVLA. When Dr Serrano said that was correct Mr Jones stopped talking for a few seconds and then appeared calmer and his tone of voice changed and he said "ok can we just pretend that I never told you about that", but Dr Serrano said he couldn't go along with that. Mr Jones then changed tack according to Dr Serrano and tried to pretend that he had not told Dr Serrano that he drunk half a bottle of Bacardi at night. He turned towards his wife and said "no I didn't say that". Dr

Serrano said that it was obvious Mrs Jones was not prepared to agree to this, and she looked away and said nothing. Mr Jones then changed tack again according to Dr Serrano acknowledging that he said he drank half a bottle of Bacardi at night but was now saying that he didn't drink that much if he was driving the early morning shift the next day, by which Dr Serrano understood him to mean at 7 o'clock or earlier in the morning. Dr Serrano told Mr Jones that he should stop driving and he needed to reduce his alcohol consumption immediately. Dr Serrano said that he told Mr Jones to come and see him at the end of the week for a further assessment, that he needed some blood tests to check his liver again. Dr Serrano referred to Action for Change which would help reduce Mr Jones's alcohol intake and advise him about safe limits for drinking and driving. He also said that if Mr Jones hadn't referred himself to the DVLA and told them about his drinking by the end of the week Dr Serrano would do it himself. Dr Serrano said that if Mr Jones had a problem with the DVLA, Action for Change was very good at writing support letters. Mr Jones's response was that he wasn't going to refer himself to the DVLA and the consultation ended with him saying that he wouldn't want to see Dr Serrano again and would see a proper doctor.

92. Dr Serrano denied that Mr Jones's only reference to drinking half a bottle of Bacardi was to tell Dr Serrano that he had a right to drink half a bottle of Bacardi at night if he wanted to and if he wasn't going to be working for the next 6 days, and he had not told him about his drinking in a jocular light-hearted or self deprecating way. Dr Serrano denied being rude and aggressive during the interview. Dr Serrano said that after Mr Jones left with Mrs Jones and their son he looked at the DVLA website and read the At a glance Guide. He saw the definition of alcohol misuse and Dr Serrano said he made no formal attempt at a diagnosis of alcohol disorders but felt that Mr Jones was drinking alcohol to a level which was causing harmful affects to his body. Dr Serrano looked at Mr Jones's records and saw the record of the consultation with Dr Magrabi on 12 March 2010. Dr Serrano also found the cardiology record of Mr Jones's consultation in 2008 showing Mr Jones telling the cardiologist that he drank 2 pints and a few Bacardi's each evening and the report of alcohol excess.
93. Dr Serrano said he was very concerned that this patient was going to be driving a bus and taking children to school while under the influence and he wanted guidance from the DVLA, so he went out of his consultation room and asked Julie Holloway, who worked at the surgery, to call the DVLA and get them to ring him back. The DVLA called the surgery and Julie Holloway took the call and rang Dr Serrano in his room to tell him about it. Dr Serrano left his room and went to the office to speak to the DVLA. He obtained advice on an anonymous basis identifying Dr Serrano but not Mr Jones. Dr Serrano said he reported the conversations with Mr Jones to the DVLA and was asked whether there was anything on the patient's records and referred to the 2010 blood test and the report from the chest pain clinic. In further evidence Dr Serrano said that he had been asked by the DVLA to record the amount that Mr Jones had first declared to be drinking. The DVLA advisor told Dr Serrano that he should write to the DVLA that day with the evidence that he had and to the patient to tell the patient that the Doctor was writing to the DVLA. Dr Serrano went back to the medical records and edited the entry he'd made.
94. Dr Serrano also examined the entirety of Mr Jones' medical records and said that the history was of a patient who for several years had had a history of recurrent increasingly frequent attacks of self limiting and very painful lower limb pain with

high cholesterol and high Triglycerides, raised gamma GT and normal Transaminases, rising MCV and raised MCH against a background of high alcohol intake recorded on a number of occasions. Despite the advice that Dr Serrano had received from the DVLA he didn't immediately refer Mr Jones to the DVLA. He discussed the case with a number of medical colleagues and reviewed the latest guidance regarding the classification of alcohol disorders and the General Medical Council guidelines.

95. Dr Serrano said that Mr Jones had said that he drank "half a bottle of spirits at night" (emphasis added). He was asked about Mrs Carter's letter dated 11 February 2011 in which she reported that Mr Jones had told Dr Serrano that Mr Jones drank "half a bottle a night" (emphasis added). Dr Serrano said he was clear that Mr Jones had said that he drank half a bottle of Bacardi at night and it was only later on in the consultation that he had said that on occasions he didn't drink that when he was on early shift the next morning. He had made the notes on the 24 January 2011 before he'd left the surgery that evening and that had said "half a bottle a night, some nights" picking up the fact that the some nights referred to the later comment that he didn't drink every night. Looking at the medical notes Dr Serrano said there was an inaccuracy in the fact that he said a night rather than at night.
96. Dr Serrano said that the drop in the GGT readings from Mr Jones in March and June and August 2011 showed that it was clear that Mr Jones was getting his drinking under control. Dr Serrano rejected the suggestion that there had been any misunderstanding on his part about Mr Jones saying that if he had wanted to drink a couple of pints and half a bottle of Bacardi it wouldn't do him any good but it wouldn't be wrong. Dr Serrano said that the only reference to pints was that Mr Jones had referred to the fact that he did have a few pints after work. He hadn't recorded that in the notes because it wasn't clear what he was saying in that respect. Dr Serrano said it was only towards the end of the consultation that Mr Jones had attempted to back track on his drinking and he had attempted to ask Dr Serrano to overlook his reporting duties. He was asked whether he could recall whether Mr Jones might have said everyone drinks the same as a question and Dr Serrano said no and that Mr Jones had said "We're all drinkers. Why me? Why me?". Dr Serrano denied making up parts of the account.
97. Dr Serrano accepted that the statement about what the son said to his father, namely "you're an alkie dad" hadn't been mentioned in the letter of July 2012 from his solicitors or his current solicitor's letter in October 2012. It had first been mentioned in the reply in August 2013 together with the allegation that Mr Jones had said that it was a fair cop when Dr Serrano was refusing to change his view about reporting. Dr Serrano denied that he was embellishing the account of his evidence. He accepted that the words to the effect that Mr Jones had mumbled about being an alcoholic or a bit of an alcoholic were first mentioned in his witness statement. He said he'd not set that out before because he hadn't heard it as clearly as the other words as Mr Jones had said it as he was turning away.
98. There was a substantial debate about the length of time of the consultation. The computer records show that there were 29 minutes between Mr Jones's consultation and the consultation relating to the next patient. Dr Serrano said it would have taken at least 10 minutes to diagnose gout and that there was then a further discussion lasting the best part of 20 minutes. Dr Serrano said he didn't see Mr Jones's flip flops when he first attended because he'd gone in to the waiting room to call Mr Jones and

then seen that Mr Jones was accompanied by Mrs Jones and his son and had then gone back into his room to rearrange the furniture, and when he'd then seen Mr Jones again he'd been obscured by his son.

99. There was then a long discussion about the tasks that Dr Serrano might have undertaken after seeing Mr Jones and before seeing the next patient. This included logging on to the DVLA website looking at the At a glance Guide which appeared to have been in a different format at the time that Dr Serrano looked at it, being an HTML document rather than a PDF, making diary entries and calling the next patient. Dr Serrano's evidence about what he'd done in this respect was clarified by his first supplementary witness statement at paragraph 17, albeit in that supplementary witness statement he'd given an inaccurate reference to the paragraph number of the first witness statement. Dr Serrano was clear that this wouldn't have taken longer than 90 seconds to 2 minutes in total. It was suggested that this timing is inaccurate and under estimated the amount of time Dr Serrano must have spent at the end of the consultation.
100. There was a discussion about how closely Dr Serrano had looked at Mr Jones's feet. Dr Serrano said he'd certainly touched Mr Jones's feet to see whether or not there was tendonitis but that he had not forced movement of the joint because that would have been very painful for Mr Jones.
101. The next issue raised was the layout of the room and where Mr Jones had sat. Dr Serrano produced a plan showing that Mr Jones was immediately behind him as Dr Serrano looked at the computer screen but that Dr Serrano was on a chair which swivelled round and enabled him to see Mr Jones. Dr Serrano said that the layout of the surgery was not ideal but that his practice had just taken over from the previous practice and that changes were subsequently made to the layout of the rooms.
102. Dr Serrano said there was nothing that he felt that he should have apologised to Mr Jones for in relation to the conduct of this consultation or his dealings with him. He did think he might have been a bit more kind and compassionate in relation to finding some of the words to engage with him but he made it clear that he was trying to engage with him and Mr Jones wouldn't engage on his part.
103. Dr Serrano was criticised for asking about lobster and prawns and prawns and shrimps, but pointed out that Hastings was a fishing town and that a pint of prawns from Hastings market could be £2 and that there was a well known link between shell fish and gout. Dr Serrano had originally put alcohol problem/drinking on the notes but later found a more accurate heading of alcohol consumption counselling and adjusted the notes. That was on the evidence a permissible approach to take and the change to the notes was transparent.
104. He was asked about the letter that he'd sent to Mr Jones which was sent on 24 January as far as he was concerned, which said that he had written to the DVLA and had informed them. Dr Serrano rejected the suggestion that that was untrue because he had written it, it just hadn't been sent at the time and that Dr Serrano was trying to act in accordance with the GMC guidelines which were to give formal notice to the patient. It was suggested that the wording of his letter was wrong. Dr Serrano said that he did say he would tell the DVLA at the end of the week, and I note that Mrs Jones in her letter suggested that the report to the DVLA would be made on Thursday. Dr



Serrano confirmed that in the letter of 27 July 2011 he'd picked up the reference to 4 to 5 glasses which was referred to by Mr and Mrs Jones in their letter of complaint on 24 January because he took that to mean the same thing as half a bottle at night and he thought it would be easier to use their own wording. Dr Serrano said that Mr Jones was persistently misusing alcohol, if not suffering from dependency.

### **Mr Jones' evidence about the consultation**

105. Mr Jones said he attended his GP's surgery on 24 January 2011 which was a Monday because he was suffering from agonising pain in his right ankle. He was driven to the appointment by his wife because the pain meant that he was unable to drive. They also brought along their son who was 7 years old because he was too young to be left at home. The appointment had been booked for 5pm as he had to wait for his wife to return from work. His wife helped him down the corridor to the consultation room and they brought their young son along because he couldn't be left alone in the waiting room. Mr Jones was seen by Dr Serrano as his previous GP had just retired. Mr Jones said it was an unpleasant consultation which left him in a state of shock.
106. Mr Jones said his son had stepped on some scales out of curiosity and was told abruptly by Dr Serrano to get off. His son had then sheltered behind Mr Jones and Dr Serrano had then again told him harshly to move out of the way because he needed to speak to Mr Jones. This caused his son to have tears in his eyes and he took comfort from his mother. Dr Serrano had asked what the problem was and Mr Jones said that his ankle was swollen and painful. Mr Jones said that this had been a recurring issue and he had seen various doctors who had not been able to give a definite diagnosis.
107. Mr Jones was wearing flip flops as the pain meant that he couldn't put on normal shoes. Mr Jones's recollection was that Dr Serrano didn't put on medical gloves or anything or conduct any real examination of him, he simply looked down at his exposed foot briefly before telling him that he had gout. When Mr Jones queried how Dr Serrano could be so certain given that previous doctors had examined him more closely and not been so sure Dr Serrano was dismissive and said "anyone can see that it is gout".
108. Dr Serrano then looked at a computer screen in front of him and Mr Jones assumed that this was to look at medical records although he may have mentioned some previous blood test results recorded on the system. Dr Serrano asked Mr Jones what he did for a living and was told that he was a bus driver. Dr Serrano then asked Mr Jones how much he drank. Mr Jones said he didn't know as he didn't keep a record and so he replied that it varied and was hard to say precisely. Mr Jones then said that he can "then recall jokingly adding "probably too much!". Dr Serrano did not appear to appreciate this joke or did not understand that it was intended as a joke to lighten the mood, rather than any sort of considered response to his question. Dr Serrano's response was to say that because Mr Jones was a category 2 driver he shouldn't be drinking any alcohol whatsoever. Mr Jones said that response surprised him because there was nothing in the company rules to stop a bus driver enjoying a drink as long as he complied with rules and was not over the limit when he drove. Mr Jones said that he had told Dr Serrano he was wrong and said something along the lines of "there is no law against me drinking if I want to there is just a law against drink driving. If I want to drink a few pints in the pub and then drink half a bottle of spirits at home if I'm off work for the next 6 days, it might not be good for me, but

there is no law against it”. Mr Jones said that this was intended to be a hypothetical point to explain to Dr Serrano that bus drivers can legally have a drink now and then when they are off work contrary to what he seemed to be claiming. Mr Jones said it wasn’t intended to give insight into his drinking habits and that Dr Serrano had misunderstood what Mr Jones was saying and seemed to jump to the wrong conclusion that Mr Jones was drinking this amount every night.

109. Dr Serrano then said to Mr Jones given the amount that Mr Jones was drinking he couldn’t work and that Dr Serrano would have to report Mr Jones to the DVLA unless he, Mr Jones, went immediately home and reported himself. Mr Jones said he was obviously shocked at this and tried to explain to the doctor that he had misunderstood him. Mr Jones said that he tried to explain that he was just making a point to the effect that there was nothing wrong with a professional driver enjoying a social drink now and then, that millions of people in the UK are social drinkers who might enjoy a drink after work. Mr Jones said he was terrified by Dr Serrano’s threat to contact the DVLA because it would threaten Mr Jones’s livelihood which would in turn affect his ability to pay the mortgage and keep a roof over his family’s head. Mrs Jones was also shocked and tried to explain to Dr Serrano that Mr Jones was not a heavy drinker. Dr Serrano kept talking loudly over the explanation saying that it was his duty to refer to the DVLA given what had been said and that when Mr and Mrs Jones objected he interrupted saying “you’re wrong and you have done this to yourself”. Mrs Jones became upset that Dr Serrano was refusing to give them an opportunity to explain themselves and asked that he stop talking over them and listened to what was being said. When he ignored them she then asked for his full name so that she could complain about his conduct. Dr Serrano refused to give this information to her so she went out to get the information from reception talking their son. Mr Jones said that when she was out of the room Dr Serrano continued to repeat that because of the amount that Mr Jones had said he was drinking he had no option but to write to the DVLA.
110. Mr Jones asked why he had to do this immediately and why he couldn’t be given a chance to explain himself. Dr Serrano’s response was something along the lines that “if you were going to set off a bomb on the high street do you not agree that I would have to tell the police straight away?”. Mr Jones said he found this comparison implying that he was a terrorist very offensive and decided there was no point in continuing the consultation. By this stage his wife had returned with their child. The whole appointment Mr Jones said lasted between 5 and 10 minutes.
111. Mr Jones denied Dr Serrano’s account of the meeting. Mr Jones said his 7 year old son would never have said “Dad you’re an alkie”, because he was quite a shy child at that age, who spent most of the appointment sheltering by his mother for comfort after having been scared to tears by the doctor. Mr Jones said that when he got home his wife and he were in a state of shock about how the consultation had gone and were very concerned about Dr Serrano’s threat to contact the DVLA. Mrs Jones was so angry that she wrote to the surgery that evening explaining her concerns. She also set out in writing the pattern of Mr Jones’s drinking given that there had been no opportunity to explain this to Dr Serrano in the appointment.
112. That evening Mr Jones called the DVLA to ask for their advice about what would happen if he reported himself to them as Dr Serrano had requested. The lady said that if the GP thought that Mr Jones should report himself to the DVLA then that is what

they had to advise him to do as well. She also said that if Mr Jones disagreed with the GP it might help to get a second opinion in the same surgery as this might change the GP's mind. In further evidence Mr Jones said that he was told that he would lose his licence if he reported himself, and that was certainly his understanding.

113. Mr Jones spoke to his line manager, Mr Barry Smith, about what had happened. Mr Smith offered to give a reference to show to the doctor saying that Mr Jones had a good work record and no issues with alcohol. The reference was emailed over that evening.
114. Mr Jones said that he had said that he drank 2 to 3 pints a couple of times a week when Dr Serrano had first asked, being a couple of beers and a couple of spirits a few times a week. This was evidence different from that which had been contained in his statement where he said he'd never had a chance to say what he'd drunk because Dr Serrano had got the wrong end of the stick, although it is consistent with the email that he had sent to Mr Mackenzie when reporting what had been said at the consultation. Mr Jones accepted that he'd not put that he drank 2 to 3 beers and a couple of Bacardis per week in his statement but he had put in that his drinking varied which he said was saying the same thing.
115. Mr Jones said he'd made a joke at the meeting because his son was upset and it was an intense meeting and it was to lighten the mood. Mr Jones did not accept that he'd volunteered that he drank half a bottle of Bacardi at night. Dr Serrano did not ask him about his diet. Dr Serrano had taken what Mr Jones had said as meaning that he drank half a bottle of Bacardi at night and Mr Jones had only said that because Dr Serrano said that bus drivers couldn't drink. Mr Jones said that he believed that Dr Serrano had misunderstood him and that although Dr Serrano's English was good he had misunderstood and reported him to the DVLA. At that time Mr Jones didn't realise that Dr Serrano could report him to the DVLA. Mr Jones denied telling the truth and immediately regretting it. Mr Jones insisted there had been a misunderstanding even though he accepted that his evidence didn't leave any room for any misunderstanding. Mr Jones said he had composed the letter of 24 January with his wife. His wife had signed it on behalf of both of them. There was no mention of half a bottle of Bacardi or any mention that it had been said as a joke. Mr Jones denied that he was fabricating a complaint against Dr Serrano or that he was engaged in damage limitation.
116. Mr Jones said that his family would go up to the club house at the caravan club and he would sometimes drink Bacardi, perhaps 4 to 5 glasses but that wasn't half a bottle because each glass would be a shot and he used a shot glass to measure it out. He accepted that 4 to 5 might possibly be one more if the football was exciting but it was not 6 to 7.
117. Mr Jones thought there was a language barrier between him and Dr Serrano because there were different understandings of words when you had grown up speaking English. He said Dr Serrano's mannerisms and forceful way were perhaps a different culture. He had been very forceful and he had not let him speak. Dr Serrano hadn't been rude and hadn't sworn but he had been a little bit aggressive. He'd been abrupt with his son standing on the scales and Mr Jones hadn't had an opportunity to tell his son to get off the scales. That had happened before the conversation about alcohol. Mr Jones said his son was very disciplined and Dr Serrano had been telling him to move because he needed to speak to his father. He said the consultation had only lasted 5 to

10 minutes. He didn't believe it was half an hour. It hadn't seemed very long. It had got off on the wrong foot and he'd left.

**Mrs Jones' evidence about the consultation**

118. Mrs Jones gave evidence that before the appointment with Dr Serrano on 24 January 2011 Mr Jones had been suffering from ankle and leg pain for a while. The appointment on Monday 24 January had been at about 5pm. They'd gone at that time because Mr Jones's foot pain was so bad that he couldn't drive and he had to wait until Mrs Jones had finished work and their son was back from school before he could be taken to the doctor. Mrs Jones drove Mr Jones right up to the door of the surgery and walked him in.
119. When they got in to the consultation room Dr Serrano was sitting at his desk, there were 2 other chairs in the room. Mrs Jones said they'd never met Dr Serrano before and her recollection was that the appointment was short lasting less than 10 minutes. The first thing Mrs Jones remembered happening was Dr Serrano aggressively telling their son to get off some weighing scales that were in the corner. Her son was shy and was scared and upset by the tone of Dr Serrano's voice so he came and sat on the floor between Mr Jones and her. Mr Jones then proceeded to explain to Dr Serrano that he was suffering from pain in his ankle and that he'd been having problems with his legs and ankles for some time. Dr Serrano had then rudely asked their son to move out of the way so that he could see Mr Jones's foot. That had upset her son further and he'd moved to sit on the floor next to Mrs Jones with tears in his eyes. The doctor then didn't examine Mr Jones in any real way and her recollection is that he'd leaned down to look at Mr Jones's foot which was visible as he was wearing flip flops, perhaps touching it briefly before saying "anyone can see that it is gout".
120. Dr Serrano had then looked at the computer screen in front of him and mentioned previous blood tests, and he also asked Mr Jones what he did for a living, and Mr Jones said he was a bus driver. Dr Serrano then asked Mr Jones how much alcohol he drank and Mr Jones's response was to "jokingly say something along the lines of "I don't know. Probably too much!" he chuckled when he said this, and it was clear to Mrs Jones that it was meant as a light hearted comment". Mrs Jones said that Dr Serrano didn't appreciate the joke and had said that as a category 2 driver Mr Jones shouldn't be drinking at all. Mrs Jones said that Mr Jones had disagreed with what the doctor had said and said that there was no law which said he couldn't drink alcohol at all, but only that he couldn't drink and drive. Mrs Jones said that her recollection is "that he then tried to explain the point by saying that if he wanted to drink a few beers and half a bottle of Bacardi when he had the next few days off work, there is no law stopping him from doing so."
121. Dr Serrano immediately cut in and said that if Mr Jones drank that much every night he had to go home straight away and report himself to the DVLA and Dr Serrano said that if Mr Jones refused to do this he would report him. Mrs Jones said that they were both shocked by the doctor's reaction. Mr Jones had not said that he drank that much every night but was just trying to make a point that it was perfectly legal for category 2 drivers to enjoy a drink now and then. Mr Jones had tried to explain this to Dr Serrano, but the doctor kept talking over him and in the end Mrs Jones had to loudly interrupt Dr Serrano and ask him to let her husband speak. Dr Serrano's response to this was to give Mrs Jones a filthy look and she thought this was unacceptable and so

asked for his full name so that she could make a complaint. He refused to do so and said he would only give her his full name at the end of the appointment. Mrs Jones was frustrated by his refusal so went out to the reception taking her son with her.

122. Mrs Jones said that she told the receptionist that Dr Serrano was being very rude and acting unacceptably towards Mr Jones. She then went back to the room and shortly after she returned she recalled Mr Jones asking Dr Serrano why he had to inform the DVLA so quickly and whether he could give Mr Jones a chance to prove he didn't have a problem. Dr Serrano's response was to give an example of a doctor having to tell police if he found out that a patient might set off a bomb. At that point Mrs Jones said that they were so insulted by what Dr Serrano was saying that they left.
123. Mrs Jones contested the version of events given by Dr Serrano. Mrs Jones said that in the evening after the appointment she'd written a letter of complaint to the surgery, copied to the PCT. Mrs Jones had no recollection of seeing the unsigned letter from Dr Serrano to Mr Jones dated 24 January 2011.
124. Mrs Jones said that the loss of Mr Jones's licence and the resulting loss of earnings had placed the family under a lot of emotional stress and financial pressure and that it was a particularly difficult time for her because her mother was suffering from cancer and she was acting as her mother's carer. Mrs Jones said all in all it was a horrible time for Mr Jones and her and the entire family, that the most frustrating part of the whole thing was that it had all been caused by a misunderstanding by Dr Serrano, with Dr Serrano referring Mr Jones to the DVLA on a mistaken basis and then refusing to admit he had been wrong to do so.
125. Mrs Jones marked changes on Dr Serrano's plan of the consultation room showing that the scales were closer to her and that she was sat with her son and that Mr Jones was sat to the left of Dr Serrano as he was looking at the computer screen. Dr Serrano said it couldn't be that Mr Jones was in the location shown on Mrs Jones's plan because that was where the door opened in to. All of this was said to be relevant to the issue of whether Mr Jones had put his hands on his son's shoulders asking Dr Serrano whether Dr Serrano wanted Mr Jones to lose his job, be unable to pay his mortgage and lose his house.
126. Mrs Jones didn't suggest that Dr Serrano being Spanish had any relevance to events. When asked about a language barrier Mrs Jones said that Dr Serrano had not understood what they were trying to get over to him. He'd misheard what her husband was saying about half a bottle of Bacardi at night. Kevin had only used half a bottle as an example. Mrs Jones had had no difficulty understanding what Dr Serrano had said and her husband had no speech impediment or accent. He'd been brought up in London.
127. There had been no questions and no examination. Her husband had not mumbled anything about being an alcoholic and her son had not said that "you're an alkie Dad". Mrs Jones was very clear about this and indeed slightly upset at the suggestion. She said Dr Serrano had made her son cry and she said that hadn't been when Mr Jones had taken hold of her son in a desperate plea not to be made homeless. She said she didn't recall any quantities being provided to Dr Serrano and she said that Mr Jones had not got the chance to say what he drank. Dr Serrano had kept repeating about contacting the DVLA. She denied that there had been any back pedalling by Mr Jones

at the consultation. In relation to the letter of complaint Mrs Jones said that there had been no chance to say to the doctor that Mr Jones only drank 4 to 5 glasses maximum. When she was asked about what type of glasses they were she said they were either beer or Bacardi but not all the same night and she said the glasses would have been mainly Bacardi but could be beer.

128. Mrs Jones would have been surprised if alcohol consumption had caused her husband's gout. She knew that he drank Fosters beer and he drank spirits occasionally. He used to drink Bacardi and vodka. Fosters beers she described as not a high alcohol but not a low alcohol lager. She confirmed that she would drink WKD. Her husband smoked cigarettes but he used roll your own cigarettes. She hadn't thought about trying to get him to give up smoking. Mrs Jones would drink with her husband if she was socialising with him. They would occasionally go to the caravan club.
129. Mrs Jones had written the email which had been sent to Mr Mackenzie, and descriptions about what Mr Jones had said about drinking at the consultation were her best recollections because it was difficult to remember exactly what was said. Mrs Jones had no recollection about the discussions about his foot.

### **The expert evidence about the consultation**

130. Dr Gerada gave evidence about which respective version of events was most likely to be reliable. I have not taken that evidence into account, and Mr Browne was justified in stating that Dr Gerada's evidence on this point was not permissible expert evidence as it dealt with issues of fact, and not issues on which expert evidence was relevant. Dr Gerada gave evidence, which was agreed by Professor Wallace, to the effect that there was "triangulation" in this case, in that there had been previous reports in the medical notes of alcohol consumption in excess of recommended amounts, there were elevated Gamma GT readings which were suggestive of excessive alcohol consumption, and there was, if Dr Serrano's evidence was right, a report of consumption of too much alcohol.
131. Professor Wallace gave written evidence criticising the adequacy of the notes made by Dr Serrano but he withdrew that criticism before the trial. Professor Wallace did agree that Mr Jones was a heavy drinker and had problems with alcohol, but he also maintained criticisms about Dr Serrano's approach at the consultation, suggesting that Mr Jones should have been signed off sick while Dr Serrano attempted to get Mr Jones to engage in the process of recovery. Mr Thwaites was justified in pointing out to Professor Wallace that, on Dr Serrano's version of events, Mr Jones was refusing to engage in that process.

### **My findings about what occurred at the consultation**

132. The first, but important matter, to note about the consultation is that Dr Serrano did correctly diagnose Mr Jones as suffering from gout. It is now common ground following the later findings by a consultant rheumatologist that Mr Jones suffered from gout, and I find that Mr Jones was on 24 January 2011 suffering from gout. Dr Rowan remarked on Dr Serrano's clinical skills, and the fact that Dr Serrano successfully diagnosed gout when others had not been able to do so before, is an illustration of Dr Serrano's abilities in this respect. As appears above one of the

disputes of fact related to whether Dr Serrano had actually examined the foot and ankle. I accept Mr and Mrs Jones' evidence that Mr Jones was wearing flip flops, and Dr Serrano accepted this in a supplementary statement. However I accept Dr Serrano's evidence that he examined Mr Jones' foot. I do not consider that Dr Serrano could have diagnosed gout successfully, as he did, if he had not taken some time to examine Mr Jones' foot. This is particularly so where there was a competing possible diagnosis of tendonitis. I accept that it must have seemed a reasonably rapid diagnosis from Mr and Mrs Jones' perspective, but there was no basis for their suggestion that this was not a careful and justified diagnosis, and there was no basis for their suggestion that Dr Serrano barely looked at the foot.

133. The second matter to note is that the evidence before me shows that Mr Jones' gout was caused by persistent abuse of alcohol. There was no other explanation for his symptoms on the evidence before me. Other possible causes, such as a seafood diet or the side effects of medication, were not established. I accept that Mr Jones was taking medication which might have caused some elevated readings on Gamma GT tests, but the fact that his readings fell when he stopped drinking proved that the elevated Gamma GT levels had been caused by excessive alcohol intake. Mr Jones described the symptoms of his gout in graphic terms, likening it to having been poisoned and I accept his evidence as to the effects of gout. Dr Gerada said, and I accept, that a medical student would have been expected to work out that Mr Jones was a long term abuser of alcohol from the triangulation in this case.
134. I also find that Mr Jones, and Mrs Jones, refused to recognise the physical damage that Mr Jones had done to himself by his excessive consumption of alcohol. Mr Jones had caused his gout. Mr Jones had caused elevated Gamma GT readings. He had (as later investigations showed) suffered from a fatty liver caused by excessive alcohol intake. I accept that Mr Jones was able to take or leave alcohol as he chose, and was able to stop drinking without suffering withdrawal or other symptoms. Mr Jones part demonstrated that by giving up alcohol for a period of time after he lost his licence, and by reducing the amount he drank afterwards. However it was because Mr Jones was unaware of the physical damage that he was doing to himself that he had not decided to leave alcohol alone until after he had lost his licence. It was obvious from the letter written by Mrs Jones the evening of the consultation that the correct diagnosis of gout, and correct analysis of its cause, was very unwelcome news to Mr and Mrs Jones. They were, as Mrs Jones, recorded "absolutely furious".
135. Although this was for both Mr and Mrs Jones on the one hand, and Dr Serrano on the other, a difficult and memorable consultation, it is apparent that memories fade and that persons are able to convince themselves that things happened which did not. On the question of the timing of the interview the notes show that there was a 29 minute gap between patients. It is notorious that witnesses' estimates of time vary considerably in their reliability. I consider Mr and Mrs Jones' estimation of the time of the consultation to be considerable underestimate of time for the consultation, because Dr Serrano did have to diagnose gout, and he did then explore possible causes for the gout, including drinking, and it is common ground that there was then a substantial discussion about drink. I consider that Dr Serrano's estimate of time of 90 seconds to 2 minutes for the tasks that he had to do after the consultation ended and before the next consultation began was an underestimate. This was because he had to look at the relevant documents and refresh his mind about guidance. I do accept that

he was a GP trainer and therefore very familiar with the relevant layout of the guidance but he also had to make notes, albeit brief notes, recording the effect of the consultation and he then had to go out and call the other patient. I am quite satisfied in the light of the 29 minute period between patients that Dr Serrano's estimate of the length of time of this consultation is closer than that suggested by Mr and Mrs Jones.

136. As both sides were, in closing submissions, making suggestions that there were deliberate lies told about the timings of the consultation, I should record that I do not consider that anyone was lying about the timings, but the respective witnesses had convinced themselves of their respective timings and the accuracy of those timings.
137. I reject the suggestion that Dr Serrano should not have asked about shell fish consumption and accept his evidence that he did. As he noted Hastings is a seaside town, and shellfish is readily available and it appears that excessive consumption of shellfish would have been a possible cause of gout and needed to be excluded.
138. The main dispute is about what was said about Mr Jones' drinking. On this I accept Dr Serrano's evidence about what was said by Mr Jones about his drinking as set out in paragraphs 82 to 104 above. Dr Serrano's account that Mr Jones disclosed drinking half a bottle of Bacardi some nights has been consistent. There is no reason to think that Dr Serrano, who had never met Mr and Mrs Jones before, would invent this statement and state that the matter needed to be reported to the DVLA, unless it had been said.
139. I also reject Mr and Mrs Jones' account of what was said about Mr Jones' drinking at the consultation. Although it is now said that a half a bottle of Bacardi was mentioned as a joke, I note that it was not suggested in Mrs Jones' contemporaneous letter that Mr Jones had made a joke about his drinking. I also reject Mrs Jones' suggestion in the evidence that the reference to 4 to 5 glasses in that letter was a reference to beer. This was because Mr and Mrs Jones talked in the evidence in terms of pints of beer, and I consider that Mrs Jones was referring to spirits in the letter and was attempting to minimise the disclosure which Mr Jones had made about half a bottle of Bacardi. The evidence showed that if there are generous pourings into the glass, half of a full bottle of Bacardi can be drunk in 4-5 glasses. I also take account of the fact that Mr and Mrs Jones referred in the email to Mr Mackenzie to a disclosure of drinking a couple of beers and a couple of spirits a week, but this was not their evidence in the witness statements before me. I have already noted that Mr Jones gave a written answer on 26 October 2011 which was wrong when referring to his past drinking. In my judgment Mr and Mrs Jones were very upset to be confronted by an accurate diagnosis of gout, caused by drinking, and had convinced themselves, wrongly, that Dr Serrano was at fault.
140. I also find that there was no misunderstanding between Dr Serrano and Mr Jones. The evidence from Dr Serrano and Mr and Mrs Jones shows, and I find, that there was no language barrier between Dr Serrano and Mr and Mrs Jones.
141. I accept that Mr and Mrs Jones' son became upset during the interview, but do not consider that anyone has a very reliable recollection of how that occurred, whether it was because he had been told off for playing on scales and then asked to move, or because he realised that his parents were becoming increasingly worried about what was being said, or because Mr Jones had held him while making points about his



livelihood. I do not consider that anyone was lying about this point. I do not consider that the layout of the room assists in this respect. I do accept that Mrs Jones' drawing showing the layout of the room would have been a more logical layout, but it was also plain that the practice was not well organised and changes were being made to the rooms and computer systems.

142. I also accept that there was some discussion about Mr Jones being an alcoholic, and I note that in Mrs Jones' own letter there is reference to the word alcoholic, albeit in terms of being accused of being one. That said I do not consider it likely that Mr and Mrs Jones' son would have called Mr Jones "an alkie", and note that Dr Serrano had not referred to that when solicitors had written setting out relevant versions of events. It was apparent from his evidence that Dr Serrano had convinced himself that this was said, and I do not find that he was lying about this point, but I considered Mrs Jones' evidence on this point to be more reliable.
143. It is apparent that there was a discussion about informing the DVLA, and that Dr Serrano informed Mr and Mrs Jones of his duty to report them, and I accept Dr Serrano's evidence, as set out above, about that. I do not accept Professor Wallace's criticisms of Dr Serrano's conduct of the consultation. I find that Dr Serrano made every reasonable effort to get Mr and Mrs Jones to engage and confront Mr Jones' alcohol problems, but Mr Jones simply refused, and I accept Dr Serrano's evidence that Mr Jones tried to distance himself from what he had said. He considered himself a social drinker, had no idea of the damage that he was doing himself, and was not prepared to engage with his new doctor.

#### **The consultation on 27 January 2011**

144. On 27 January Dr Hancock saw Mr Jones. Dr Hancock noted a long discussion about alcohol consumption from Dr Serrano's entry on 24 January 2011. The note continued "*Bus driver. Consumes perhaps 2 beers and 2 bacardis 2-3 times per week in evenings. Total 30-40 units. Had good record with company. Boss has no concerns about his conduct or turning up for work under influence of alcohol in morning. Have also discussed with Dr Serrano and Dr Rowan. Pt has written complaint letter to surgery and PCT ... Alcohol 40 units/week. Patient advised about alcohol (Aim for max 3 units per night). Discussed healthy alcohol consumption. Apologised for previous misunderstanding about level of consumption (previous doctor had felt 20 units per night was being consumed). Review in 2-3 weeks. No action being taken with DVLA.*
145. There was also some discussion about whether Mr Jones had gout. Dr Hancock took bloods for review and wrote "*? Reactive arthritis ?? gout*".
146. Dr Hancock studied at Cambridge University and then the Royal Free University College Medical School in North London and obtained the bachelor of medicine, bachelor of surgery MBBS in 2005. He did GP vocational training scheme in Hastings and obtained membership of the Royal College of General Practitioners in August 2010. From August 2010 he had a variety of locum positions in the East Sussex area working for Rye medical centre, the Little Ridge surgery and a number of other practices. Dr Hancock said he had become a locum at the Ridge View surgery at some stage between August and December 2010. He'd started off working 1 to 2 days per week and ended up working 5 days and he'd stayed there for about 18 months. He

had been initially reluctant to provide a witness statement and had been extremely guarded when providing a witness statement and he said that the reason that he was uncomfortable was because of his duty of confidentiality owed to Mr Jones.

147. He was aware on 27 January 2011 that Mr Jones was wanting a second opinion because there had been a letter of complaint. He had spoken with Dr Serrano before the consultation although it was a brief discussion and he'd also spoken with Dr Rowan. Dr Serrano had told him that Mr Jones was drinking half a bottle of Bacardi and a few beers and he'd noted that on the patient's notes as up to 20 units per night.
148. On 27 January 2011 the consultation had been long and complicated. It wasn't confrontational. Mr Jones had been upset. Dr Hancock said he wanted to start off by believing Mr Jones and he had believed him. He had concluded that there had been a misunderstanding on 24 January 2011 but it was obviously necessary to discuss it further with Dr Serrano. He had apologised for the distress and also the misunderstanding. Even if he had not been inclined to believe Mr Jones he would still have apologised in an attempt to build up a good relationship with Mr Jones.
149. Dr Serrano was asked about Dr Hancock's note in the GP entries to the effect that he had been told that Mr Jones drank 20 units a day and Dr Serrano said that he had not said that Mr Jones drank 20 units a night every night. Dr Serrano said that Dr Hancock had provided a second opinion on 27 January 2011. Dr Hancock said that he'd arranged to have blood tests taken at the surgery the next day on 28 January 2011 and it was agreed that both should wait until the blood tests were back before writing to the DVLA.
150. Mr Jones said that on 27 January 2011 he went back to the surgery and had a consultation with Dr Hancock in order to get the second opinion. He also wanted a medical certificate as he hadn't been able to work since 22 January with ankle pain and the office required a certificate for their records. Mr Jones believed that he'd also brought along the email from Barry Smith. Mr Jones said that Dr Hancock had a much better manner than Dr Serrano, was supportive and willing to listen to what Mr Jones had to say. Mr Jones explained to Dr Hancock that there had been a misunderstanding about previous alcohol consumption and he explained that he drank roughly 2 beers and 1 or 2 small glasses of spirits mixed with cola 2 or 3 times a week but not when he was working the next day. Mr Jones said that he needed to prove to Dr Serrano that he had misunderstood how much he was drinking and Dr Hancock agreed to arrange blood tests and an appointment with an ankle specialist and a liver scan. From what Dr Hancock had said Dr Hancock had seemed confident that no report to the DVLA would be necessary.
151. I accept the evidence given by the parties, which was effectively common ground, about what occurred at the consultation on 27 January 2011. I also accept that Mr Jones was very much happier with Dr Hancock than he was with Dr Serrano, because Dr Hancock was attempting to support Mr Jones' attempts to avoid the report to the DVLA. I do not accept that Mr Jones' report of his drinking to Dr Hancock was accurate, because it was inconsistent with his earlier reports of his drinking in 2006, 2008 and to Dr Serrano, and even Mrs Jones' letter dated 24 January 2011, and because drinking at that level would not have explained his gout or elevated Gamma GT levels. I accept that Dr Hancock thought Dr Serrano had referred to Mr Jones

drinking 20 units of alcohol per night each night, but this was not what Dr Serrano had written in the notes where he had said “1/2 bottle of spirit a night, some nights”.

### **The blood tests**

152. Dr Hancock said that he expected blood tests to come back within 24-48 hours, and it appears that these blood tests were carried out promptly. The blood tests came back from the pathology laboratory and in relation to liver function test the recommendation was “*appt with doctor*”. They showed that the Gamma GT level of 151 with normal Transaminase and with a MCV of 96.7.

### **The letter dated 31 January 2011**

153. On 31 January 2011 Ms Carter responded to the letter of complaint. She wrote stating “*please accept my apologies for the misunderstanding regarding Mr Jones’ level of alcohol consumption. I understand that you have since been seen by Dr Hancock and the situation has now been resolved*”. Dr Hancock gave evidence to the effect that he had not been involved in the drafting of this letter, and I accept that evidence. I consider it likely, and find, that Ms Carter had looked at the relevant medical records, and noted Dr Hancock’s reference to a previous error, and then written up the letter on that basis. That explains why Ms Carter might have thought, wrongly, that she had spoken to Dr Hancock about it. She had relied on what Dr Hancock had written, but not on what he had said.
154. Dr Serrano was shown that letter and gave instructions that it shouldn’t be sent because Dr Serrano did not accept that there had been any misunderstanding at his consultation with Mr Jones, and the situation regarding Mr Jones and the reference to the DVLA had not been resolved. I accept Dr Serrano’s evidence that he gave instructions that this letter should not be sent. On the other hand it is clear from the evidence of Mr and Mrs Jones, and the letter that they received, that the letter was sent. This was an example of instructions in relation to the post not being followed by the administrative staff at Little Ridge Surgery, and it is easy to understand how that might happen in a busy practice, particularly where there was a new team leading the practice and changes were being made to attempt to improve the practice.
155. Receiving the letter was a huge relief for Mr Jones. I should record that although I have not accepted Mr and Mrs Jones’ evidence about the consultation with Dr Serrano I can well understand their unhappiness about what had happened in circumstances where they had received the letter dated 31 January 2011, but a report had then been made. Both Mr and Mrs Jones had considered Mr Jones to be only a social drinker, even though he had been consuming very serious amounts of alcohol on a regular basis from at least 2006 (when he reported drinking amounts which converted to 70 units per week), and it was having a physical effect on his body. He had developed gout, his Gamma GT levels were elevated, and he had (as later evidence showed) a fatty liver. The reports about “central obesity” and the differing weights shown on the medical notes also show other physical changes. Mr Jones was very well served by Dr Serrano, who diagnosed gout and forced Mr Jones to confront his drinking. On the other hand Mr Jones was unlucky that Dr Serrano was a GP trainer who knew about his own duties to report to the DVLA, and who had trained students not to give into the understandable temptations to avoid reporting to the DVLA so that a patient would not lose their licence and livelihood.

156. On 3 February 2011 Mr Jones attended Dr Hancock again, still with pain in his right ankle, which had moved to the mid foot area. On 4 February 2011 Dr Hancock referred Mr Jones to a rheumatologist. Mr Jones returned to work on about Monday 7 February 2011 as the pain in his foot had eased.

### **The report to the DVLA**

157. Dr Serrano saw the blood tests results in early February showing the Gamma GT level of 151 with normal Transaminase and with a MCV of 96.7. Ten months before Mr Jones's gamma GT level had been 130 with an MCV of 94.1. Dr Serrano decided to send the letter to the DVLA.
158. Dr Serrano sent a letter dated 11 February 2011 to the DVLA. It was based on the original draft prepared on 24 January 2011 but some changes had been made. In the letter Dr Serrano stated: *"I regret to inform you that Mr Kevin Jones ... attended the surgery today and reported a very high alcohol intake and I noted that his profession is a bus driver"* (emphasis added). It is common ground that the use of the word *"today"* was inaccurate, and it is criticised on the basis that it gave a false impression of urgency.
159. Reference was made to the routine blood investigations which showed high cholesterol and raised Gamma GT. Dr Serrano stated *"when I asked him about his alcohol intake he reported drinking half a bottle of spirits at night"*.
160. Dr Serrano went on to note that Mr Jones had reported drinking 70 units a week in January 2006, and 2 pints of beer and several spirits every night in December 2008 at the Conquest hospital. Dr Serrano noted that the consultation was difficult, and then stated that Mr Jones was *"some what reluctant to acknowledge that he cannot drive with the current alcohol intake. He feels that he's not intoxicated while he drives. I have explained to him that he would be well above the limit to drive the morning after"*.
161. Annexed to the letter were: a record of the introductory meeting dated 9 January 2006 showing *"alcohol 70 units/week"*; the chest pain clinic notes dated 17 December 2008 recording, under risk factors, *"alcohol 2 pints and a few bacardis each evening"*; a report dated 4 March 2010 showing a Gamma GT level of 130 on the blood test; and a report dated 28 January 2011 showing a Gamma GT reading of 151.
162. Dr Serrano said that he had changed the date on the letter to the DVLA, but it appears from the copy letter obtained from the DVLA files that the date was not changed. I find that the date was not changed, but it was apparent that Dr Serrano thought he had changed the date. I do not consider that Dr Serrano was lying about this, although he was obviously mistaken. It was an example of a witness giving evidence thinking he had done something, because he ought to have done something.
163. Dr Serrano said that the letter of 11 February 2011 was in the terms that it was, referring only to the half a bottle of Bacardi at night, because he had spoken to the adviser at the DVLA who had told him to tell the DVLA what Mr Jones had first answered about his drinking.

164. In response to this evidence the Defendant obtained a witness statement from Dr Wynn Parry and called him to give evidence. Dr Parry gave evidence that he was the chief medical advisor for the DVLA and had been in post for 4 months. He wasn't there at the relevant times but there were 21 medical advisors who were kept very busy with the DVLA with back logs, ranging sometimes from several hundred to two thousand cases and he had spoken with them about their approach to matters. Dr Parry noted that it was the duty of licence holders to report several medical conditions including epilepsy and alcohol misuse. He said that many people didn't realise that they had to self report unless they were advised to do so and that rules permitted doctors to report if a person refused to do so. Dr Parry said that there were no records of the telephone call made by Dr Serrano. It appears that records were not kept if the patient's name was not given.
165. Dr Parry also confirmed that as a matter of policy when contacted on the telephone by a doctor for advice the DVLA medical advisors would always request in writing as much information as possible before suggesting any course of action. This enabled any course of action to be placed in context and when the case related to alcohol consumption that helped the medical advisor to determine whether there was any pattern to alcohol use to suggest misuse or even dependency. Dr Parry said it wasn't the policy of the DVLA to ask a doctor to give anything less than a complete picture of relevant facts.
166. Dr Parry was subjected to a wide ranging cross examination which went far beyond the areas covered by his witness statement. This approach was perfectly permissible as any witness can be asked about relevant matters. Dr Parry was asked about a number of hypothetical examples and he said he would want as much detail as was possible to be given to the DLVA. Dr Parry said that it was the doctor's decision to make the DVLA aware and they would carry out any necessary investigation. It wasn't the doctor's job to carry out investigation but it was their job to report all relevant information.
167. However it was apparent that Dr Parry had had no notice of the areas on which he was to be questioned, and was keen to stress that the DVLA would take any relevant matters into account.
168. Dr Parry considered that if a person had been advised that a class 2 driver was drinking half a bottle of spirits a night that would be an appropriate notification. He noted that the GMC guidelines provided for the option of a second opinion and the DVLA had a range of options to deal with matters from instant revocation to an investigation.
169. Dr Parry said that the gout, high cholesterol, raised GGT and report of half bottle at night, drinking of 70 units in January 2006 were all relevant factors which corroborated Dr Serrano's report, and amounted to triangulation. Dr Parry said that it was for a doctor to make a judgment about whether they wished to follow GMC guidance.
170. Dr Parry suggested that it wasn't necessary to make a diagnosis before reporting. Dr Parry's answers on what further information would have an effect on him appeared to be confused in part because he appeared to be suggesting that if the reports were positive that might have an effect, but if they were negative then they might not,

however he went back and suggested that negative reports might have an effect. In the end his evidence seemed clear although it appeared to be inconsistent with how it had started out. I suspect, being fair to Dr Parry, that this was more a result of the fact that he was being confronted with various different scenarios which he hadn't had a chance to consider before.

171. On 11 February 2011 Ms Carter also wrote to Mr Jones "*further to your letter of 24<sup>th</sup> January 2011*" informing Mr Jones that she had spoken to Dr Serrano and could confirm that he had acted on information which Mr Jones had provided that "*I drink half a bottle of Bacardi a night*". Ms Carter recorded that Dr Serrano had examined Mr Jones' foot and that the blood tests from March 2011, together with details of disclosed drinking on registration and to the cardiology department all corroborated the information provided. The letter continued that "*Dr Serrano is informing the DVLA today*".
172. Mr Jones was upset and surprised to find this out. He described it as a nasty shock, which it obviously was given the terms of the letter dated 31 January 2011 which had been sent to him. Mr Jones said that Dr Serrano's report to the DVLA to the effect that Mr Jones had told Dr Serrano that Mr Jones drank "half a bottle of spirits at night" proved that Dr Serrano had completely misunderstood Mr Jones at the appointment. Mr Jones said that the records about previous drinking were also incorrect as Dr Serrano would have known if he had asked Mr Jones about them. Mr Jones said Dr Hancock's attitude changed after the letter to the DVLA had been sent and that Dr Hancock had said it was a matter for Mr Jones and the DVLA.

#### **Expert evidence about the letter to the DVLA**

173. Professor Wallace criticised Dr Serrano for failing to establish a pattern of drinking at the consultation, for example by using various tests such as Audit C or FAST, which provide a form of questions and flow chart for establishing drinking. Professor Wallace also considered that Dr Serrano had reported Mr Jones too quickly to the DVLA. Professor Wallace considered that there should have been a further opportunity given to Mr Jones to discuss matters with Dr Serrano, and that a warning should have been given about sending the letter.
174. At one stage in his evidence Professor Wallace gave evidence that his understanding was that a diagnosis of alcohol misuse needed to be established beyond reasonable doubt. It was not clear where that understanding had come from and although I accept it was genuinely held, it was wrong and a misunderstanding
175. Dr Gerada had originally considered the letter to the DVLA as appropriate, changed her mind in the joint report noting that in some respects it did not accord with "best practice", and then accepted in cross examination that there were important omissions from the letter. Dr Gerada accepted the letter should have said "some nights" for the drinking of the half bottle of Bacardi, and made it clear that it was not before an early shift. Dr Gerada thought that there should have been reference to: Mrs Jones' letter dated 24 January referring to 4-5 glasses; Dr Hancock's difference of view should have been disclosed; and that it would have been best practice to include Mrs Carter's letter.

#### **My findings about the report to the DVLA**

176. In my judgment Dr Serrano was justified in reporting Mr Jones to the DVLA. Mr Jones had effectively rejected Dr Serrano's efforts of assistance, and had started to distance himself from his frank admission about his drinking when he realised the potential consequences. Mr Jones had been seen by Dr Hancock, who had believed Mr Jones, but the Gamma GT levels in the blood test taken on 27 January 2011 were consistent with a higher than reported alcohol intake. Although Dr Hancock wanted to exclude other possible medical causes of the Gamma GT readings, later evidence showed that those unrelated medical matters could not have caused the readings, and the evidence shows that the high Gamma GT readings were caused by excessive alcohol consumption. Dr Serrano was acting in accordance with the At a Glance Guide, the Supplementary Guidance and the Confidentiality Guidance, because Mr Jones required to be reported to the DVLA, and he would not report himself.
177. I find that Dr Serrano was justified in waiting until 11 February 2011 to make the report. I accept that he had not seen the blood test when it arrived back at the Little Ridge Surgery, which is not surprising in circumstances where he was involved in two practices at the time.
178. However I also find that the reporting letter dated 11 February 2011 did not comply with reasonable standards of medical practice in a number of material respects. Although Mr Thwaites submitted that Dr Gerada had made inappropriate concessions, and that the criticisms of Dr Serrano's letter were to a standard of perfection and with the benefit of hindsight, I do not consider that submission to be justified. Both Professor Wallace and Dr Gerada gave clear and convincing evidence, which I accept as appears below, about some errors in the writing of the letter.
179. In my judgment there were the following relevant failings with the letter of report. First it stated that the consultation had occurred today, when it had occurred some 17 days before. Dr Serrano thought he had corrected that, but he had not. Secondly the letter did not state that the half bottle of Bacardi was consumed "some nights". Thirdly it did not disclose that Mr Jones did not drink before undertaking an early shift. Fourthly it did not disclose that the lead driver at Mr Jones' place of work considered that his performance was satisfactory. Although it appears from the medical notes that the email was handed in at a later date, the relevant information about the lead driver or employer had been recorded in Dr Hancock's note and should have been included in the letter. Fifthly it did not report the amounts disclosed in the letter dated 24 January 2011 or to Dr Hancock on 27 January 2011, although Dr Serrano would have been perfectly entitled to set out that he did not consider those to be accurate reports, and that Mr Jones had attempted to backtrack at the consultation on 24 January 2011. The reason for these omissions is that Dr Serrano made very few changes to the letter that he had drafted on 24 January 2011, and did not update the letter.
180. It should be recorded that Dr Serrano should, under the Supplementary Guidance, have written again to Mr Jones before he reported him to the DVLA, but this did not invalidate the decision to refer to the DVLA.
181. Dr Serrano gave evidence that he had spoken to the medical advisor at the DVLA who had said to report the initial amount of alcohol recorded. I accept Dr Serrano spoke to the DVLA and I accept Dr Serrano's evidence that Mr Jones had attempted to back track on the amount of alcohol that he said he drank in response to Dr

Serrano's statement that Mr Jones would have to report himself to the DVLA. I accept in these circumstances the DVLA medical advisor could properly have said that Dr Serrano should report the first report made of drinking made by Mr Jones, if Dr Serrano believed that to be true which is obviously what Dr Serrano did believe to be true, and I find that that was the gist of the exchange between Dr Serrano and the DVLA medical adviser.

182. In this respect I do not accept Dr Parry's evidence that Dr Serrano would not have been given such advice. This is for a number of reasons. First Dr Parry was not in post at the time, and was doing his best to give his understanding from subsequent conversations of what he understood would have been said. Much of his evidence was about what ought to happen, rather than what did happen. Secondly Dr Parry's evidence about what the DVLA would say was inconsistent with the DVLA's contemporaneous response by letter dated 24 March 2011 noting that the consumption of alcohol that Mr Jones was declaring and stating that "*the blood results could be consistent with this, however, the blood results did not actually form part of the licensing decision*" (emphasis added), which suggests that the DVLA did not always rely on all the information provided. Thirdly Mr Jones himself reported his conversation with the DVLA adviser on 24 January 2011 was to the effect that if he reported himself he would lose his licence. This was also inconsistent with Dr Parry's evidence to the effect that a denial of excessive drinking would have led to an investigation. Finally I accepted Dr Serrano's evidence on this point. It seems to me to be exactly the sort of thing that might properly be said where a patient has admitted drinking a certain amount of alcohol, and then attempted to backtrack. However although I accept that the conversation occurred, I do not consider that it justified a failure to inform the DVLA of the relevant matters set out above. The report should have included the first account, which the doctor believed to be true, but also subsequent reports. This is because both Professor Wallace and Dr Gerada said that it would have been appropriate to include all the later references about drinking, and this accords with the need to ensure that the relevant decision maker had available relevant information.
183. Dr Parry suggested that if the further information had been provided to the DVLA, the DVLA might have carried out an investigation, and that Mr Jones would not necessarily have lost his licence. In the light of the later developments and reports to the DVLA, set out more fully below, in my judgment the DVLA would still have removed Mr Jones' licence even if the letter had contained the further information, and even if the DVLA had carried out an investigation. I make this finding for two reasons. First because, as appears below, Mr Jones' solicitors were instructed to consider an appeal against the loss of licence and provided much of the relevant information to the DVLA, who did not change their decision or carry out an investigation. Secondly I make this finding because Mr Jones had, on the evidence, been misusing alcohol, within the definition of the DVLA terms, and it had caused him physical harm namely: gout; elevated Gamma GT levels; and a fatty liver. This meant that the DVLA, acting in accordance with their published guidance, would have removed Mr Jones' class 2 licence from him for a period of a year.

#### **My findings on the first and second defamatory meanings**

184. The first defamatory meaning of the article is set out above paragraph 22 ("*Mr Jones suffered a nightmare when he wanted treatment for swollen legs because Dr Serrano*



*had written to the DVLA to have Mr Jones' licence revoked for persistent abuse of alcohol when it was wrong and inappropriate to do so: (1) because Dr Serrano had been told that Mr Jones might have a pint or two after work, and a couple of spirits if he went out with his wife and friends at the weekend; (2) because of the language barrier Dr Serrano had wrongly understood that Mr Jones drank that amount every night and then refused to listen; and (3) without any research into whether Mr Jones persistently abused alcohol such as liver or blood tests, and without any other evidence whatsoever. The DVLA had relied on Dr Serrano's report and revoked Mr Jones bus and personal driving licences.*"). In my judgment Dr Serrano was not told at the consultation that Mr Jones might have a pint or two after work, and a couple of spirits if he went out with his wife at weekends. Dr Serrano was told that Mr Jones would drink half a bottle of Bacardi at night on some nights. Dr Serrano had not misunderstood that Mr Jones drank that amount every night, and his contemporaneous notes show that. There was no language barrier. Dr Serrano had not refused to listen to Mr Jones. Dr Serrano had carried out relevant research into Mr Jones persistent abuse of alcohol by looking at his previous reports of excessive drinking in 2006 and 2008, and by noting his elevated Gamma GT readings, and by diagnosing gout which had been caused by excessive alcohol intake. There was considerable evidence to justify Dr Serrano's actions. In these circumstances it was not wrong and inappropriate for Dr Serrano to write to the DVLA.

185. It is right to record my finding, set out above, that there were relevant omissions to include material in the letter dated 11 February 2011 sent to the DVLA, but these findings do not satisfy the provisions of section 5 of the Defamation Act, even in relation to the first meaning. This is because there are important differences between being wrongly accused of reporting someone without evidence to show persistent abuse of alcohol on the one hand, and it being said that the reporting letter, which was properly sent, should have contained more information.
186. As to the second defamatory meaning, (*"Dr Serrano reported Mr Jones to the DVLA and was it was wrong and inappropriate to do so because it was a breach of patient confidentiality"*) in my judgment Dr Serrano was entitled to report Mr Jones pursuant to the At a Glance Guide, Supplementary Guidance and Confidentiality Guidance which justified reporting to the DVLA even though Mr Jones had made the disclosures to Dr Serrano as his doctor. This is because Mr Jones refused to accept that he was drinking excessively and had no insight into its potential effect on his ability to drive. Mr Jones had obtained a second opinion from Dr Hancock, but blood tests had shown that the information provided to Dr Hancock about his drinking was not reliable. Mr Jones had returned to driving and was in a state of denial about his drinking, and the effects it was having on him. In these circumstances Dr Serrano was justified in writing to the DVLA, and it was not wrong and inappropriate to do so.

#### **The DVLA revoke the licences**

187. On 28 February 2011 there was a telephone discussion between Mr or Mrs Jones and Dr Hancock about Mr Jones' ankle pain, and his prescription. By letter dated 2 March 2011 DVLA wrote to Mr Jones recording that they had received information about his fitness to drive stating *"we recommend that you should not drive. This means that we will revoke your lorry/bus and car driving licence on 6 March 2011."* Information about how to appeal the decision to a Magistrates' Court within 6 months of the date of the letter was given in the letter. In a further letter dated 2 March 2011

Dr Wiles, a medical adviser at the DVLA, wrote to Mr Jones explaining that the DVLA had received a communication to indicate that Mr Jones was consuming alcohol at a level which would be deemed consistent with a persistent misuse of alcohol. Mrs Slee, head of the drivers medical group, also wrote a letter dated 2 March 2011 to Dr Serrano recording that *“I would be pleased to consider any additional information about your patients condition that demonstrates that they can now meet the licensing standards, should such information become available”*.

188. By letters dated 2 March 2011 Dr Serrano was informed of the DVLA’s actions. Mr Jones continued to be cared for by the Little Ridge surgery consulting with Dr Hancock. As the medical lead for the practice Dr Serrano had continuing discussions with Dr Hancock.
189. On 7 March 2011 Mr Jones saw Dr Hancock again. He recorded that he had had very little alcohol in the past 5 weeks with no ill effect. He had had one beer and one or two Bacardis at his son’s birthday the week before. Mr Jones mentioned the character reference from his boss which he said he would drop in. Dr Hancock agreed to discuss the matter with Dr Serrano as Dr Hancock did not think that Mr Jones fulfilled the guidelines for alcohol misuse.
190. Dr Hancock did then have a discussion with Dr Serrano. Dr Serrano supported his decision to write to the DVLA on the basis of (a) previously documented alcohol consumption; (b) quantity of alcohol consumption disclosed by Mr Jones on 24 January; (c) the Gamma GT readings which were described as biochemical markers; and (d) the impression that Mr Jones had physiological dependence issues and difficulty controlling consumption. The evidence showed that this was a reference to the fact that Mr Jones did not get drunk from drinking considerable amounts of Bacardi, and had ignored warnings in the past to reduce alcohol consumption. The note continued recording Dr Hancock’s view that he did not feel that Mr Jones had behaviour changes or dependence symptoms sufficient to fit DVLA guidance. Dr Hancock noted that he had to agree that the markers were most likely related to alcohol but, as recorded above, felt that other medical causes needed to be excluded, and Dr Hancock arranged for further tests. Later tests did exclude those other medical causes.
191. Dr Hancock also spoke with the legal advisor for the Medical Protection Society (“MPS”). The legal advisor stated that the generic guideline from the MPS was that *“if you feel a pt has a condition threatening safety of themselves or members of the public then you have a duty to act. (a) explain concerns to pt, (b) persuade pt to inform DVLA (c) if not satisfied that the pt will do this then inform them yourselves”*. It was noted that it was not possible to give individual guidance on DVLA guidelines.

#### **Dealings with Mr Jones after 7 March 2011**

192. On 8 March 2011 results had been received from a liver function test that showed a greatly improved Gamma GT level of 65. This was good news in terms of Mr Jones’ long term health, but it also part proved the fact that the elevated Gamma GT readings had been caused by alcohol, because the only realistic explanation for the significant reduction in GGT level was that Mr Jones had cut his alcohol intake level.

193. The updated Liver Function tests were added to the notes by Dr Fynes, who as noted above was Dr Serrano's wife. There was questioning about whether Dr Fynes must have realised that this was Mr Jones, who was the patient about whom Dr Serrano had spoken after the difficult consultation. Dr Fynes said that she did not know Mr Jones' name, and did not realise that Mr Jones was the person about whom her husband had spoken. She noted that when a batch of results came back from the laboratory there would be many results for many different patients to be entered, and she would not have looked back to Mr Jones' notes to put two and two together. I accept that evidence, because it accords with the overwhelming likelihood of what would be happening in a busy practice.
194. Dr Hancock realised that, given the fall in Gamma GT levels and the fact that it coincided with Mr Jones' stopping or very severely reducing his drinking, the only reasonable explanation for the earlier elevated Gamma GT levels was excessive alcohol intake.
195. On 10 March 2011 Dr Hancock had another telephone discussion with Mr Jones, who had just spoken to the DVLA. The DVLA informed Mr Jones that Dr Serrano had been sent further paperwork asking for information that would make Mr Jones eligible for driving, and Dr Hancock agreed to, and did, ring the DVLA. The DVLA told Dr Hancock that Mr Jones was not being sent for independent assessment "*as the situation seemed quite clear cut from Dr Serrano's letter. Mr Jones unlikely to get licence back until 1 yr passed*". Dr Hancock reported this to Mr Jones, who still thought that DVLA would give his licence back if they received a letter from the surgery declaring him fit to drive.
196. On 13 March 2011 Mr Jones wrote to the DVLA stating that he wished to appeal against the decision to revoke his driving licence. He referred to the consultation and said "*I visited my local doctors surgery to obtain a diagnosis regarding a painful swollen ankle, I was seen by Dr Antonio Serrano-Garcia who I had never met before, he took a quick look at it and diagnosed gout (subsequent tests suggest my condition is arthritis, I have an appointment to see a specialist)*". Mr Jones went on to relate that Dr Garcia had looked through Mr Jones's medical records, relied on a year old blood test, and said that on the grounds of alcohol dependence he would be writing to the DVLA with a view to getting the licence revoked. Mr Jones said that he had told Dr Garcia "*yes I enjoy a drink but so do millions of other UK residents, this does not make them all alcohol dependent*". Mr Jones suggested that his prescribed drugs might be responsible for the elevated Gamma GT readings in his blood samples. He noted that Dr Garcia was not helping him, and that although Dr Hancock had been sympathetic he had not been able to comment too much.
197. This account does not relate what Mr Jones had said to Dr Serrano about his drinking, disputes what it is now proved to be the accurate diagnosis of gout, and shows that Mr Jones was still in denial about the effects of his drinking, considering it to be social, denying the gout that it had caused, and attempting to find other causes for his elevated Gamma GT readings. Mr Jones said that the writer of this letter was his father and him. He accepted that parts were possibly misleading. He hadn't realised that was in the letter, he'd seen it for about 30 seconds before he was asked questions about it. When his father wrote the letter Mr Jones was still very angry and that is why he'd left in parts. It might be noted that Mr Jones was not saying that Dr Serrano didn't understand English.

198. The DVLA responded by letter dated 24 March 2011 noting that the consumption of alcohol that Mr Jones was declaring was consistent with the persistent misuse of alcohol, if not alcohol dependency. It was also noted that “*the blood results could be consistent with this, however, the blood results did not actually form part of the licensing decision*”.
199. As noted above this letter is inconsistent with Dr Parry’s evidence, who said that the DVLA would want to know everything and inconsistent with good medical practice of triangulating the relevant information. It is also inconsistent with Dr Wiles’ letter dated 6 July 2011 to the effect that DVLA should consider blood tests.
200. The letter continued stating that “*unless the DVLA could be supplied with the report from your doctors indicating what error had been made and how it had occurred there could be no reconsideration of the licensing decision*”.
201. On 29 March 2011 Dr Hancock had a review with Mr Jones. Mr Jones said he had not drunk alcohol since their last meeting, which seems to have been 10 March 2011. Dr Hancock noted the correspondence from the DVLA and agreed to discuss with Dr Serrano whether further progress could be made, and he also said that he would discuss with the DVLA whether guidelines needed to be strictly adhered to in this case. Dr Hancock rang Dr Rizzi of the DVLA, who noted that the requirement was legislative and in guidelines, and there was no scope for individual assessment. In the absence of error the decision must be upheld, but the Magistrates Court could consider the decision if it was appealed. Abstinence needed to be maintained for 12 months if a category 2 licence was to be returned, supported by normalised liver function tests.
202. On 1 April 2011 Mr Jones’ father wrote to Dr Serrano stating that Mr Jones had informed him that his licence had been revoked on the grounds of alcohol dependence (which was not the case) and that since losing the licence Mr Jones had not drunk any alcohol. Mr Jones’ father pointed out the effect on Mr Jones’s whole family of him losing work. The letter specifically noted that Mr Jones was not aware of his father’s letter. Dr Serrano replied noting that “*it is very difficult to write to you without your son’s knowledge. However if you would like me to give you full details I would need your son’s written consent to do so*”. Dr Serrano stated that the matter was now between the DVLA and Mr Jones, and that “*the doctors in the surgery are working hard to improve the chances of your son regaining his licence*”.
203. I note, because it is relevant to the issue of whether Dr Serrano was genuinely concerned about issues of patient confidentiality, that he did not give details about the medical evidence supporting his decision to Mr Jones’ father.
204. On 7 April 2011 Dr Hancock had a further review with Mr Jones. There was a long discussion and Dr Hancock informed Mr Jones of the outcome of his discussion with the DVLA and that Mr Jones would be looking at getting his licence back in February 2012 if he was abstaining. Dr Hancock encouraged Mr Jones to get legal advice and to take the matter to the Magistrates if he was contesting. Dr Hancock noted “*no further action possible from surgery’s perspective (apart from monitoring over next 12m)*”.

205. By 8 April 2011 Mr Jones had retained Barry & Co solicitors to act on his behalf in a proposed appeal. It appears that he spent about £900 on the solicitors, which had been lent to him by his father. The solicitors had spoken to the DVLA obtaining information about the procedure to be adopted, and wrote by letter dated 8 April 2011 to the DVLA saying that Dr Serrano's letter was "*inaccurate*". The ways in which the letter was said to be inaccurate were not specified. Mrs Jones gave some evidence to the effect that Mr Jones was unable to afford to appeal to the Magistrates' Court. I accept that Mr and Mrs Jones were suffering financially because Mr Jones was signed off work as sick at this stage. However it was apparent that Mr Jones' parents had been able to provide financial support, and I do not accept that the reason that an appeal was not pursued was only because of lack of funds. It is apparent from my findings above that such an appeal was not likely to have been successful because Mr Jones was shown to have misused alcohol, within the DVLA definition.
206. On 12 April 2011 an ultrasound scan of the upper abdomen was performed which noted fatty infiltration of the liver. The evidence shows that the likely cause of this was excessive alcohol intake.
207. On 14 April 2011 Dr Henderson, consultant Rheumatologist, saw Mr Jones at the Department of Rheumatology at the Conquest hospital. He noted that "*his liver function was normal apart from a raised gamma GT at 151 u/l.*" It does not appear that he had the 7 March 2011 tests. Dr Henderson noted that Mr Jones was drinking something of the order of 20 to 30 units of alcohol per week, that he had reduced his alcohol intake recently and had given up alcohol altogether for about two months. Dr Henderson also arranged for a full set of x-rays of Mr Jones feet and ankles which showed no evidence of osteoarthritis. Dr Henderson noted that "*he certainly gives a good story for gout*", noting that it could only be diagnosed for certain by identification of the offending crystals in the relevant synovial fluid. Dr Henderson hoped to manage Mr Jones' symptoms by conservative treatment.
208. As noted above I have found that Mr Jones had gout. I make that finding on the balance of probabilities (and it was effectively common ground at the trial), even though to be "*certain*" crystals would have had to be taken from synovial fluid. Mr Jones said that he had not volunteered for that, and given the likely discomfort from such a test I can understand that approach.
209. On 15 April 2011 further results from a blood test showed the liver function test to be normal. On 26 April 2011 Mr Jones spoke with Dr Hancock via telephone and they discussed the test results from 15 April 2011 and the ultrasound scan of Mr Jones's liver on 12 April 2011. Mr Jones asked if Dr Hancock or Dr Serrano would write to the DVLA to support his application to have his licence restored, but Dr Hancock told Mr Jones that this wasn't possible, and that revocation of his licence had to be for 12 months from when he stopped drinking. Dr Hancock said that based on his conversations with the DVLA he felt there was no scope for individual interpretation of the guidelines, and there would be a 12 month revocation of the licence.
210. On 13 May 2011 Mr Jones' solicitors contacted the DVLA again, and were told about a backlog of 2,000 cases, which meant that on 13 May 2011 the doctors at the DVLA were looking at papers sent to them on 1 March 2011. There was some discussion about timescales, and it was noted that it would be necessary to wait for the DVLA doctors to consider the papers. If those doctors considered the original decision to

have been wrong, there would be no need for an appeal. By letter dated 16 May 2011 the solicitors sent in Mr Jones' latest blood tests (taken on 15 April 2011) and liver scan (taken on 12 April 2011), and asked to hear from the DVLA without further delay.

211. On 16 May 2011 Mr Jones also came to see Dr Serrano. The notes record "*very long chat*" and noted that the Gamma GT level was still 151. Dr Serrano advised "Action for Change" an alcohol help agency and regular blood tests. It might be noted that Dr Serrano was not aware of the improved Gamma GT result of 65, recorded by Dr Fynes, his wife, on 8 March 2011. Dr Serrano accepted that he must have overlooked this, and noted that the computer system at the surgery was not user friendly. I accept that he could not have seen that test otherwise he would have referred to it. I do not accept that it had any bearing on the speed at which Mr Jones got his licence back. This is because the DVLA had the test, and although the test showed a reduced Gamma GT reading, it part proved the reason for the earlier elevated readings to have been alcohol abuse.
212. Mr Jones said that he had asked Dr Serrano for assistance in overturning the revocation of his licence. Dr Serrano had showed Mr Jones the computer file notes and the entries of earlier drinking recorded on those notes. Mr Jones' purpose was to see Dr Serrano to see where they went from there, and he asked why it was necessary to refer to the DVLA. In evidence Mr Jones said that Dr Serrano had told Mr Jones it was because Mr Jones had told Dr Serrano that he drank half a bottle of Bacardi at night. Mr Jones accepted that his comment about the Bacardi was not in the witness statement.
213. After the consultation Dr Serrano wrote to Mr Jones stating that he had found Mr Jones' latest Gamma GT results which were still raised, although to a much lower level. Dr Serrano also referred to the DVLA's letter to Mr Jones dated 7 March 2011, noting that the DVLA were looking for an error, but the Gamma GT results showing elevated Gamma GT levels were consistent with the levels of alcohol consumption reported in the past. Dr Serrano said that his advice was for Mr Jones to engage with a clinic which assisted with drink addiction, to wait for blood results to normalise.
214. On 7 June 2011 Dr Hancock had a further consultation with Mr Jones, noting ankle pain, which was bad at night and aggravated by bed covers. Dr Hancock noted that "*Still denies alcohol problem. Solicitor involved. Had a few beers for England game other weekend*". There was discussion about how long Mr Jones might be considered unfit for work. On 8 June 2011 Mr Jones' solicitors spoke again with the DVLA chasing a response. There was some discussion about whether the solicitors were asking for a review on the basis of fresh information or an appeal, and it was decided to wait for the DVLA doctors to review matters on the basis of the fresh information. Mr Jones had a further blood test at the surgery on 10 June 2011 which showed that his Gamma GT level had dropped to 64. On 16 June 2011 the solicitors sent in the latest blood test results, and noted the urgency of the situation as Mr Jones was in danger of losing his job.
215. Dr Wiles of the DVLA wrote a letter dated 6 July 2011 to Mr Jones' solicitors responding to the results. Dr Wiles noted that Dr Serrano's letter showed that Mr Jones was consuming alcohol at a level which would be consistent with a persistent misuse of alcohol. This was a prescribed disability. The Advisory Panel on Alcohol,

Drugs and Substance Misuse had advised the DVLA that a period of 1 year off driving was required for Group 2 users. The Advisory Panel had advised the DVLA to consider various blood tests when considering individuals with a history of alcohol misuse, and the Gamma GT from early June was raised. Dr Wiles noted that even if the blood results were now normal, Mr Jones would not be able to drive public service vehicles (under a Group 2 licence) until February next year. This appears to have been the approach taken by the DVLA to Mr Jones' case, because this is in fact what occurred.

216. On 21 July 2011 Mrs Jones attended to get a copy of the letter from Dr Henderson. On 27 July 2011 Dr Serrano wrote to Mr Jones noting that he had received a letter from Mr Jones' family asking Dr Serrano to review the case. Dr Serrano recorded in the letter that Mr Jones was "*a group 2 licence driver who has suffered the physical effects of alcohol consumption with abnormal blood parameters*". Dr Serrano enclosed the DVLA paper and chapter 5 of ICD 10 (which contains definitions of various medical conditions). In the ICD 10 it was noted that alcohol use might cause physical damage such as gout and abnormal blood marking and fatty liver, and increased tolerance. Dr Serrano recorded that "*you told me that you drink between 4 and 5 alcoholic drinks a night and you do not become drunk so that is consistent with the developing of tolerance to alcohol which is part of the dependence syndrome which is a definition for alcohol misuse*". Dr Serrano said that he used the figures of 4-5 glasses because that had been used in Mrs Jones' letter of 24 January 2011, and he considered it to be effectively the same and less likely to cause issues with Mr Jones if he used it, and I accept that evidence. Dr Serrano said he had sent the papers to Mr Jones so that he could understand the position, and get advice from a solicitor or driving advisor. Dr Serrano noted that the Gamma GT levels were 130 on 4 March 2010; 151 on 28 January 2011; 65 on 8 March 2011; and 64 on 10 June 2011. Dr Serrano recorded "*the current upper limit of normal for gamma GT is 58*". Dr Serrano recommended regular blood tests, and getting the licence back after 12 months of normal results. Dr Serrano recommended Mr Jones engage with Action for Change. Dr Serrano stated that he would prefer not to receive pressure from Mr Jones' family regarding the matter, and hoped that his letter was informative enough for Mr Jones to begin the process for regaining his licence. In the attachments to the letter reference is made to harmful use of substances which was defined as "*a pattern of psychoactive substance use that is causing damage to health. The damage may be physical ...*".
217. On 4 August 2011 Dr Hancock had a consultation with Mr Jones. They discussed recent letters, and it became apparent that Mr Jones had not seen Dr Serrano's recent letter. This is yet more evidence of the unreliable post system then operated at the Ridge View Surgery. Dr Hancock printed it off for Mr Jones to read. Mr Jones was adamant that he didn't have an alcohol problem and hadn't been drinking for months. Mr Jones wanted a letter of support for his category 1 licence. Dr Hancock agreed to discuss the matter with Dr Serrano and encouraged Mr Jones to engage with an alcohol support group. Mr Jones said he thought it would be admitting he was an alcoholic and did not want to do it. Dr Hancock considered that Mr Jones was still in denial about his drinking.
218. On 6 August 2011 Mr Jones attended Action for Change, and a number of further sessions. He was reported, in a later document, to have set himself a target of no

more than 6 units in a session. Mr Jones said that he had not wanted to attend before August because he considered that it might be misconstrued as an admission that he had a problem with alcohol when he did not. Mr Jones did not consider that he had gained anything from the short course, and he said that the course providers considered that he should not have been there.

219. On 9 August 2011 Dr Hancock wrote to Mr Jones informing him of the outcome of Dr Hancock's discussion with Dr Serrano. Dr Hancock referred to the DVLA's guidance, and said in relation to the 6 month period for getting back the normal driving licence that "*our position is that the 6 month period cannot be said to have yet started*". Dr Hancock recommended Action for Change. He also recorded that "*I understand that you dispute that you have had a problem with over consumption of alcohol*", noting that the DVLA were likely to interpret that as a lack of insight.
220. Dr Hancock accepted a rebuke in relation to this letter, in relation to the commencement period for getting the licence back, on the basis that a Gamma GT reading of 65 was sufficiently close to the upper limit of normal at 58 to be considered normal, especially because it would not be possible to get a lower reading because of the permanent effect of the fatty liver.
221. On 19 August 2011 Mr Jones had a further liver function test which showed a GGT level of 65 and Mr Jones left the Little Ridge practice shortly after that. Mr Jones said that he had changed doctors because Dr Serrano was back at Roebuck House and Dr Hancock and Dr Serrano had not recommended his return to driving and he understood that Dr Serrano's support would be required if he was still in the same practice.
222. On 30 August 2011 Mr Jones wrote to the DVLA, asking for his licence to be reinstated. He noted that he had never met Dr Serrano before, and that he had now left the practice. He stated that Dr Serrano's diagnosis was only his own opinion "*and the only evidence he had was the gamma readings on my blood tests*". Mr Jones recorded that his new doctor confirmed that his prescribed medication might raise his Gamma GT levels. Mr Jones said that he would never drink and drive, and wanted help in getting his licence back. It might be noted that in this letter Mr Jones accepted that Dr Serrano did have evidence to show that Mr Jones had been drinking to excess in the form of elevated Gamma GT readings.

### **My findings on the third defamatory meaning**

223. The third defamatory meaning is set out above paragraph 25 ("*Dr Serrano unreasonably refused to persuade the DVLA to revoke its decision in circumstances where blood, liver and kidney tests, when carried out by another doctor, showed that Mr Jones did not persistently abuse alcohol, and where tests subsequently carried out by an independent doctor brought in by the DVLA showed no trace of persistent abuse of alcohol*"). It is right to say that Dr Serrano did not persuade, or attempt to persuade, the DVLA to revoke its decision. However this was not in circumstances where blood, liver and kidney tests carried out by another doctor showed that Mr Jones did not persistently abuse alcohol, or where tests subsequently carried out by an independent doctor showed no trace of persistent abuse of alcohol. Indeed the tests showed that the opposite was true. The elevated Gamma GT readings were caused by persistent abuse of alcohol, as was Mr Jones' fatty liver. In these circumstances Dr



Serrano did not unreasonably refuse to persuade the DVLA to revoke its decision. The decision made by the DVLA was, in my judgment, a correct and sound decision.

224. I do not consider that the more general criticism that Dr Serrano was generally uncaring throughout this period can be sustained. Dr Hancock was acting, at Mr Jones' request, as his doctor at the surgery, but there is evidence showing Dr Serrano's continued involvement and review. The surgery, through Dr Hancock, was making contact with the DVLA, as were solicitors instructed on behalf of Mr Jones. However the reason that Mr Jones was not getting back his licence was because the evidence showed that he was, at least up to 24 January 2011, misusing alcohol to such an extent that it had caused physiological changes to his body in gout, elevated Gamma GT readings, and a fatty liver. It is true that Dr Serrano did not react to "poignant" letters pointing out the effects of the loss of licence, and livelihood, on Mr Jones, but there was nothing that he could properly do which would have changed the outcome.

#### **Further investigations and Mr Jones gets his licence back**

225. Mr Jones' evidence about when he got his licences back was confused. Mr Jones said he got his domestic licence back in November 2012 which was later clarified to be an error because he then said that he had got his class 2 licence back in about March 2012, and he clarified that the date of the return of his domestic licence was November 2011. Later information suggested that the licences were returned in February 2012. This is another illustration of the fact that persons can make honest mistakes in giving evidence.
226. On 2 September 2011 Mr Jones sent in his application for return of his licences, and copies of his blood tests and liver scan. Mr Jones stated "*I visited the new doctor in January this year (for the first time) due to swollen ankles. I had a very difficult consultation with him, he obviously misunderstood what I was saying and I found him to be very abrupt towards myself, my wife and my 7 year old son*". Mr Jones noted that his Gamma GT results were nearly normal, and were elevated because of his medication. As appears from my earlier findings although Mr Jones seems to have convinced himself that his elevated Gamma GT levels were caused by his medication, this was wrong.
227. On 15 September 2011 Mr Jones emailed Amber Rudd ("Ms Rudd"), his local MP, asking for assistance. He said that he had been wrongly diagnosed, and that the blood results proved he was not alcohol dependent. He noted that as his wife was earning some money he was not likely to get any income benefit, and was unable to pay his bills. Ms Rudd forwarded the email to DVLA by letter dated 20 September 2011, asking that the DVLA report the outcome of their review. The DVLA responded to Ms Rudd by letter dated 26 September 2011 setting out relevant background. The DVLA stated that "*I have noted the contents of Mr Jones's email and can assure you that the reason for the revocation of his driving licence has been explained to him previously and is no longer being contested*". It is not clear what was the source for the DVLA's assertion that the revocation was no longer being contested, but it is clear that Mr Jones' solicitors did not continue to press for a further review or pursue an appeal after receipt of Dr Wiles' letter dated 6 July 2011.

228. On 26 October 2011 Mr Jones saw Dr Busk, as part of the process for getting back his licence. In the course of that examination a number of questions had to be completed by Mr Jones in the presence of Dr Busk. I have set out those questions earlier. Mr Jones' answer about his earlier drinking was inaccurate and wrong.
229. On 9 November 2011 Ms Rudd wrote again to the DVLA asking that the DVLA expedite their consideration of the reports from Dr Busk. By letter dated 15 November 2011 the DVLA noted that the reports from Dr Busk and from Dr Schneider, Mr Jones' new GP, had not yet been received.
230. On 19 December 2011 Dr Schneider completed a form relating to Mr Jones. Question 1 asked for past and current consumption. Past consumption was said to be under 1 unit per day on 19 August 2011 and 4-6 units per week on 19 December 2011. Question 3 asked whether the patient had ever been advised to modify his drinking behaviour. Dr Schneider replied "yes" and stated "*Saw a doctor on the 27-1-2011 and he recorded in the patients notes "consumes perhaps 2 beers and 2 bacardis 2-3 times per week in evenings: total 30-40 units". The patient states that this record is incorrect and the patient did not actually state the consumption – misunderstanding which was later corrected in the notes. The patient states he said he had 2 beers and 2 bacardis per week*". A question about whether the patient had been diagnosed as suffering from alcohol misuse or alcohol related problems was answered no. A question about whether the patient had ever required help or treatment as a result of alcohol misuse from a support group was answered no. This report suggested that Mr Jones had questioned the account of drinking that he gave to Dr Hancock, and did not refer to Dr Serrano's report.
231. Dr Schneider gave evidence confirming the contents of his witness statement. He was very nervous and it was obvious that he didn't understand some of the questions asked of him or explanations given. Dr Schneider gave evidence about the interview he'd carried out with Mr Jones. He had not included the 24 January 2011 entries from Dr Serrano because although he'd seen that entry he'd later seen that Dr Hancock had questioned the previous entry and he was also aware that Dr Serrano had written to the DVLA and the DVLA were aware of it and he didn't feel the need to include it again. Dr Schneider said that Mr Jones did say to him that Dr Hancock's recorded entry was incorrect. Dr Schneider included this contest on the part of Mr Jones to be fair to the patient and therefore he said exactly what Mr Jones had said and showed it to him with his comment. When asked about the statement that the misunderstanding had been later corrected in the notes, Dr Schneider said that he couldn't remember why he had said this and wondered whether it might have been an inaccurate reference to 24 January 2011.
232. It is apparent that Dr Schneider did record a number of matters in his letter to the DVLA which were not correct. In my judgment the confusion is likely to have arisen both because Mr Jones was not giving accurate answers about his past drinking, continuing the approach that he had adopted with Dr Busk and because Dr Schneider had confused some of Mr Jones' answers.
233. By letter dated 16 January 2012 DVLA wrote to Mr Jones stating that they had now received medical information which had been passed on to the medical advisor for further advice.

234. By letter dated 9 February 2012 DVLA wrote to Mr Jones stating that “*from the information we have received you satisfy the medical standards for safe driving*” and stating that a driving licence would be issued as soon as possible. Mr Jones’ licence was returned, and he subsequently returned to work as a bus driver.

#### **Mr Jones’ email to Mr Mackenzie**

235. In April 2012 Mr Jones’s father had seen an article in the Daily Mail by Mr Mackenzie about foreign doctors working in the NHS. Mr Jones read the article and thought what he considered to be his harsh treatment by Dr Serrano would be something that Mr Mackenzie might be interested in. Mr Jones said that he thought that his experience was relevant because while Dr Serrano spoke good English it was clear to him that cultural differences, for example about sense of humour and a failure to listen properly, had played a big part in what had happened to him.
236. On 18 April 2012 Mr Jones sent an email to Mr Mackenzie. Mr Jones referred to the consultation and said “*within 10 minutes of seeing this doctor my life changed considerably and for the worst. He made my son cry and was rude to my wife and when he looked at my feet he dianosed me with gout. He asked me how much alcohol I drank and I told him I enjoy a social drink on occasions but no more than the average person.*”. Mr Jones continued stating that Dr Serrano’s attitude had changed when Mr Jones said that he drove buses, that Mr Jones had explained he only drank socially a couple of beers or glasses of Bacardi and that “*this is where the language barrier hit home. He took it that I drank every night and when I tried to explain he wouldn’t listen and just spoke over me*”. Mr Jones also said “*he didn’t take any tests to prove this fact, something I have spent the past year doing. I had liver scans and blood tests which proved I wasn’t alcohol dependent ... one man shouldn’t be able to take someone’s livelihood away in a stroke of a pen without tests to back up his theory*”.
237. It might be noted that Mr Jones did not report any discussions, whether joking or not, about half a bottle of Bacardi, and said that he had said to Dr Serrano that he drank only a couple of beers or glasses of Bacardi, which was not the version in his original witness statement or in Mrs Jones’ letter dated 24 January 2011. Mr Jones did not refer to Dr Henderson’s confirmation of his gout, the elevated Gamma GT readings, or the fatty liver caused by excessive alcohol.

#### **The investigations into the story**

238. The story was investigated on behalf of Mr Mackenzie by Charles Rae (“Mr Rae”). It appears that Mr Rae was acting for Mr Mackenzie and was not employed by Associated Newspapers, although he did say to Dr Serrano that he was from the Daily Mail. Mr Jones said that Mr Rae had phoned him several times. Mr Jones had told Mr Rae about the assistance he’d had from Ms Rudd. He’d kept his papers in a folder and if Mr Rae had asked to see them he’d have probably given it to them. He told Mr Rae about the misunderstanding over a half bottle of Bacardi and he’d certainly given the example when speaking to Dr Serrano that he could have drunk half a bottle of Bacardi if he wanted to and reported to Mr Rae that Dr Serrano had misunderstood it. Mr Jones had seen the article when it was published but hadn’t seen it more recently. He hadn’t contributed to the article to be malicious. He had no vendetta against Dr Serrano but just simply wanted to put his side across. He and his wife had had a

stressful year and Dr Serrano and the DVLA were blaming each other. He said he regretted the publication of the article now. Mr Jones said he'd had a year of heartache and headache because of a misunderstanding between him and Dr Serrano. Mr Jones had had no money for the article and had only had his expenses paid for coming along to give evidence. He'd had to take a week's holiday and he hoped he would get paid for his loss of earnings.

239. Mr Jones was asked in detail about the article. He said the suggestion that he had been reported for alcohol dependency was wrong. He hadn't said paragraph 3 of the article. He hadn't said he'd driven as a bus driver for 30 years. He said he'd passed his PCV licence 30 years ago. He'd then worked for about 5 years and come back to it. He said that tests had shown that he wasn't alcohol dependant. He was asked about the reading of 151 on the Gamma GT levels and he said he hadn't written the article. Mr Jones said he honestly couldn't remember what he'd said. He said he'd not raised what happened with Dr Busk because that wasn't significant. He was asked about the suggestion that Dr Serrano had written to the DVLA without any evidence whatsoever. Mr Jones couldn't recall if he'd said that or if he'd told Mr Rae that Dr Serrano had asked him to report himself. He said that when he'd spoken to the DVLA he was told that if he had reported himself he would lose his licence which was all because of a gross misunderstanding. As noted above this answer did not fit with the evidence that was given by Dr Parry, who suggested that if he'd reported himself in those circumstances an investigation might have taken place.
240. On 19 April 2012 Dr Serrano was at a study day for GP trainers and the Cooden Beach Hotel in Cooden Bexhill. At about 12 noon Dr Serrano checked his messages and saw that he was asked to call Mr Rae of the Daily Mail. At about 12.25pm Dr Serrano called Mr Rae who was pleasant at first but who Dr Serrano said became abrupt and confrontational. Mr Rae said that they were publishing the story about Mr Jones that night and Mr Rae said that the story would say that the patient had lost his licence because Dr Serrano had complained about him to the DVLA on the basis of a wrong diagnosis. Dr Serrano raised issues about patient confidentiality but said that Mr Rae still attempted to get him to talk. Mr Rae hadn't told him at that point or in any later conversation that they would focus on Dr Serrano being a foreign doctor and he hadn't said that the story would say that Dr Serrano's inadequate foreigner's English was the reason that he had misunderstood and misdiagnosed the patient.
241. There were six separate tape recordings of various conversations which took place. The first recorded Mr Rae speaking with Dr Serrano about the wrong diagnosis in which Dr Serrano made it clear that he would be happy, in fact delighted, to talk if consent was obtained. At this stage Mr Rae was saying it was entirely up to you to decide if you speak or not. It is apparent from the nature of the exchange that Mr Rae hadn't fully understood the doctor's obligations of confidentiality.
242. The second recording is of Mr Rae speaking with Mr Jones. It appears that Mr Rae dictated the form of consent which Mr Jones signed and had given no prior thought to the wording. It might be noted that Mr Rae put considerable pressure on Mr Jones, who didn't have a fax machine, to try and get it faxed over. It appears that Mrs Jones took the form to the Little Ridge Surgery.
243. The third recording was of Mr Rae to Mr Mackenzie. Mr Rae described Dr Serrano as a fly in the ointment and said that Dr Serrano spoke very good English although he

did note that he wasn't able to say whether he would have understood the nuances of what had been said. Mr Mackenzie declared that he wanted to run the story and then started telling an anecdote to Mr Rae about a person who he knew who had been drink driving. This was cut off part way through the recording.

244. Dr Serrano complains that the information about his good English was deliberately excluded from the article. Dr Serrano said to Mr Rae that he couldn't comment but did make it clear that he didn't accept that what Mr Rae was being told by Mr Jones was true. Dr Serrano said that he didn't tell Mr Rae that he needed patient's written consent to discuss the case in order to put them off an investigation, and that he was not hiding behind patient confidentiality. Dr Serrano said he was genuinely concerned about Mr Jones's confidentiality and did not want to end up being guilty of serious professional misconduct by disclosing confidential medical information about Mr Jones without clear and informed consent.
245. The consent didn't arrive at Roebuck House until after 1700 hours. At 1643 hours Dr Serrano rang Mr Rae from Cooden to tell him that he'd still not received the fax. Mr Rae said he couldn't hear Dr Serrano very well. Some time after 1700 hours Dr Serrano phoned Roebuck House and was told that there was a fax there for him. Dr Serrano sent a text to Charlie Rae confirming that a fax had been received and at about 1830 hours he received a call from Mr Rae.
246. The fourth transcript was between Mr Rae and Dr Serrano in which Dr Serrano asked whether Mr Rae had seen the At a glance Guide. Mr Rae said that Mr Jones was very upset and angry and that he was not alcohol dependant. Dr Serrano made it clear that he considered there were two sides to the story but he couldn't go in to detail. He needed the consent form in front of him. It was apparent that there were children shouting in the background during this conversation and Dr Serrano was making it clear that he couldn't speak without the consent form. It was apparent that Mr Rae was getting frustrated with Dr Serrano and considered that he was dodging the issue. Dr Serrano said that he felt that Mr Rae kept pressurising him.
247. After the conversation Dr Serrano rang the Medical Protection Society ("MPS") to obtain advice. They said a medical advisor would call back as soon as possible.
248. Dr Serrano rang Mr Rae and said that he would make a statement. Mr Rae said he was busy and would call back later. In the interim the MPS rang back just before 1900 hours. They said that Dr Serrano shouldn't make a statement but should obtain confirmation of Charles Rae's identification, that he was working for the Daily Mail and to refer him to the Medical Protection Society press office.
249. After 1900 hours Mr Rae called back. Mr Rae recorded the conversation. Dr Serrano gave details of the press officer of the MPS, who wanted identification from Mr Rae. Mr Rae said "I am who I am" and that he was from the Daily Mail. I note that Mr Rae said that he'd never heard of the MPS and when Dr Serrano said that he had been trying his best, Mr Rae was direct in saying that he had not. At that stage Mr Serrano's children woke up and the call had to be stopped.
250. Dr Serrano gave Mr Rae the telephone number for the MPS press office. Mr Rae tried again to get Dr Serrano to comment on Mr Jones's case.

251. On 19 April 2012 Dr Fynes had been told by Dr Serrano about the contact with the Daily Mail and she had advised Dr Serrano to contact the MPS which he had done. Dr Fynes's recollection was that Dr Serrano had spoken to the journalist more than once at home that evening. Dr Fynes recalled that Dr Serrano had been trying to make it clear that the account of the consultation with the patient was not correct but that Dr Serrano couldn't give further information without consent.
252. Dr Serrano saw the consent from Mr Jones at about 0800 hours the next day. It was addressed to Dr Serrano and said "*I am writing to give you authorisation to speak to Mr Charles Rae from the Daily Mail*". Dr Serrano said it was not a consent form that he could have relied on as it was inadequate. The form said that Dr Serrano could speak to Mr Rae, but it didn't say that Dr Serrano could give Mr Rae any medical information. Dr Serrano complained that Mr Rae and Mr Mackenzie could not have really believed that a responsible doctor would be willing to treat that form as entitling the doctor to disclose confidential patient information. Mr Jones was asked about his discussions relating to the consultation, and he was asked whether he would have given consent for his medical records to be seen. Mr Jones replied that he would have needed to think about that, and then after consideration confirmed that he was happy for Dr Serrano to speak about him and then he later confirmed that there was no objection to Dr Serrano referring to the medical records. The fact that Mr Jones wanted to think about whether he would have given consent is a practical illustration of the difficulties of reading the form of consent in the way for which the Defendant contends.
253. In my judgment the form of consent did not permit Dr Serrano to disclose details of the information contained in medical records to Mr Rae. This would have included the past declarations of drinking, the past blood tests, and the evidence supporting the diagnosis of gout. The MPS called Dr Serrano and reiterated that he shouldn't speak to Mr Rae and that the press office would deal with the matter.
254. The sixth transcript was of a conversation between Mr Rae and Ms Rudd. Ms Rudd remarked that matters seemed to have been very "high handed". Mr Rae said the doctor was playing silly beggars and that he'd been in a meeting. Mr Rae said that Mr Jones would lodge a complaint with the GMC. Mr Rae said that arthritis was a very long way from gout and that language had been a problem and Dr Serrano's bedside manner had been a problem and that Mr Jones had reported only drinking a couple of pints and couple of Bacardis. Mr Rae said that no test had been carried out. I accept that this was the version of events given to Mr Rae by Mr Jones, and repeated by him to Ms Rudd. However it was, as appears above, inaccurate. Gout is a long way from arthritis, but gout, caused by excessive consumption of alcohol, was what Mr Jones had. Language had not been a problem. Mr Jones had not reported drinking only a couple of pints and a couple of Bacardis. Tests had already shown elevated Gamma GT readings. There was no easy way for Dr Serrano to deliver the hard message that Mr Jones needed to confront his drinking and report himself to the DVLA.
255. At 0808 hours Dr Serrano sent Mr Rae a text informing him that matters would be dealt with through the MPS. Dr Serrano had sent blood results and scans to the MPS making it clear that there was evidence that contradicted the story that had been given. At 1150 hours the MPS issued a statement on behalf of Dr Serrano saying "*As I take my duty to maintain the confidentiality of my patients seriously, I would not wish to comment on this case in detail in the open press, particularly as it deals with such a*

*sensitive issue, however where there is a risk to the public, I have a professional obligation to take appropriate action”.*

**My findings on the fourth and fifth defamatory meanings and my findings on the article as a whole**

256. The fourth defamatory meaning is set out above paragraph 26 (“*Dr Serrano pretended not to be able to talk about Mr Jones’ complaints on the basis of patient confidentiality, when an appropriate consent form had been sent through*”). In my judgment the form of consent did not permit Dr Serrano to disclose confidential details contained within Mr Jones’ medical notes about Mr Jones’ past admissions of drinking excessive alcohol, his elevated Gamma GT readings, his gout and the causes for that, and his fatty liver. A form of consent which would have been effective to do that would have been similar to the one provided for the purposes of the complaint to the PCC. I find that Dr Serrano was genuinely, and properly, concerned about patient confidentiality, and this in part appears from the fact that he had been careful not to disclose confidential material to Mr Jones’ father in response to an earlier letter from him.
257. It is only fair to Mr Rae and Mr Mackenzie to record that I do not accept that they knew that the form of consent was inadequate. The tape shows that Mr Rae dictated to Mr Jones a form of consent off the top of his head, and that Mr Rae had really given no thought at all to the issues of confidentiality affecting Dr Serrano. Indeed it is plain from the tapes that Mr Rae genuinely, but wrongly, thought that Dr Serrano was being evasive. I accept that Mr Rae did not give evidence before me, even though a witness statement had been taken from him, and I note that the reasons given for not calling him were reasons which existed before the witness statement was taken, however in my judgment that is no reason to ignore the real evidence contained on the tapes which I have heard.
258. The fifth defamatory meaning is set out above paragraph 28 (“*Dr Serrano’s conduct was shocking*”). It is a comment. However it was based on facts which have not been protected by privilege, or shown to be true, or sufficiently true.
259. In these circumstances, and for the reasons given above, I find that the article was defamatory of Dr Serrano. The defamatory statements made about Dr Serrano have not been justified, and the facts and matters on which the comment was made, have not been proved.
260. I have recorded that there were relevant omissions to include material in the letter dated 11 February 2011 sent to the DVLA, but these findings do not satisfy the provisions of section 5 of the Defamation Act. This is because there are important differences between being wrongly accused of reporting someone without evidence to show persistent abuse of alcohol on the one hand, and it being said that the reporting letter, which was properly sent, should have contained more information. I will address these matters in relation to the issue of damages.

**The publication of the article and its immediate effect**

261. The article was published in the Daily Mail, on page 21, on Saturday 21 April 2012. On the morning of 21 April 2012 Dr Serrano had a phone call from a friend who was a doctor who told him about the story in the Daily Mail.
262. Dr Serrano read the story on the Mail Online and was deeply upset. Dr Serrano said his wife was upset by the article and he had been upset and ashamed by the anxiety and distress that she had been caused and that it was particularly hurtful and insulting to be attacked on the basis that he was a foreigner with an inadequate grasp of English when he'd been given no indication that any criticism of that kind was going to be made.
263. Dr Serrano said he was upset by the Mail Online comments made by those who had read the article. On 2 May 2012 Dr Serrano received a postcard which read "*Please learn English as you are about to be sued*". Dr Serrano said that the article came up regularly in comments to him and staff at Roebuck surgery. Some patients had written supportive letters and complained about the article but other patients had made malicious comments about the article to Dr Serrano. In June 2012 a child patient whose mother was upset about a diagnosis abused Dr Serrano on the telephone saying he was a terrible doctor and she had read about him in the Daily Mail. In July 2012 when seeing a patient with alcohol problems he asked whether she drove a car and her response was to recoil and say "*are you going to report me to the DVLA?*". In August 2012 he saw a patient who complained of headaches and it emerged that the patient was drinking 100 units of alcohol per week. When Dr Serrano made a link to the headaches and alcohol intake, the response of the patient was to say that he knew that Dr Serrano had a fixation about alcohol and a deep hatred of alcoholics because of what was said in the Daily Mail. In October 2012 he was abused by a patient unhappy with a prescription, saying that she knew all about Dr Serrano and the Daily Mail and that she was going to sue him.
264. Dr Fynes had seen the article on the website the following morning and she had been extremely shocked when she'd seen the headline, as was Dr Serrano. Dr Fynes considered that the most striking and distressing thing was the xenophobic tone and that her husband was being attacked for being a foreign doctor. Dr Fynes said that the inaccurate attack on Dr Serrano's language skills might have been laughable had it not been the basis for such a serious attack on his professional competency, and she felt physically sick after reading it. Dr Fynes said that the effect on Dr Serrano had been to cause a great deal of stress and strain and it had affected his confidence. Dr Fynes said that Dr Serrano had hoped the Daily Mail would do the decent thing and apologise but it had now dragged on for nearly 2 years with the Daily Mail making matters so much worse, taking the position that everything in the article was true. Dr Fynes said that bringing the proceedings to clear Dr Serrano's name had been very stressful and upsetting for him and that he was not himself and preoccupied with the case to the exclusion of his family. He had analysed the case over and over again in every little detail and discussed it with her. The whole case had been very intrusive and time consuming.
265. Jason Dicker was a clinical team leader paramedic with South East coast ambulance service who had started his career in 1992 and first met Dr Serrano when he began working at the hospital in 1996 as a senior health officer. At that time Mr Dicker was working as a paramedic in accident and emergency. Mr Dicker said he was good friends with Dr Serrano and that he was a very approachable individual with good



patient skills. From 1997 to 1999 he'd been the social secretary of the doctor's mess and had organised social events and weekends away. Dr Serrano had always been fond of English comedy and humour and had a sophisticated insight into English culture and English language. Mr Dicker said that Dr Serrano had been devastated when the article was first published and that being accused of an inability to understand English and being portrayed as a bumbling foreigner and heartless was a huge blow to him. Mr Dicker said that after the publication Dr Serrano had seemed ostracised and marginalised. Mr Dicker said that Dr Serrano's mood following publication of the article had been sombre and Dr Serrano had reported that his sleep had been affected.

266. I accept this evidence about the effect of the article on Dr Serrano.

### **Dr Serrano and Ms Rudd**

267. Ms Rudd had some correspondence with Dr Serrano. On 21 April 2012 Dr Serrano emailed and telephoned Ms Rudd asking her about her comments in the article. Ms Rudd replied stating that she was happy to get a further opinion for Mr Jones, as a constituent, and assist him in getting back to work. Ms Rudd said that she did not comment on the medical assessment or language fluency.

268. The story was picked up in the Hastings Observer, which quoted Ms Rudd saying "*It seemed very heavy handed that a man should lose his licence on a single letter, even from a doctor ...*". Dr Serrano emailed Ms Rudd about that statement in the light of her earlier comment on 27 April 2012, and Ms Rudd replied saying that there was no contradiction between her earlier statement to Dr Serrano and the statement to the Hastings Observer, because her comment related to procedure, and not medical matters. Dr Serrano replied stating that it was not possible to separate medical treatment and procedure, noting that the Mail Online were still posting the article, and asking Ms Rudd to clarify her comments. Dr Serrano noted "*It would have been very easy for me to release all the medical information to the press to defend my actions, but I felt this would be against Mr Jones' interest and I have worked hard to protect his highly sensitive medical data*".

269. Ms Rudd replied stating that she had not commented on medical discussion and recommendations, and had made that clear to the Daily Mail. She also said she did not consider it helpful to contact the Daily Mail to speak to them about their article.

270. There were issues about further correspondence with Ms Rudd, and the failure to disclose some of the correspondence. Dr Serrano said that he thought some correspondence was a scanned email, although further evidence from Ms Rudd's secretary suggests that was not correct. I do not accept that Dr Serrano was deliberately misleading me about this, and I note that Ms Rudd was not called to give evidence, and her views, one way or the other, did not assist me in determining the issues.

### **The complaint to the PCC**

271. By letter dated 11 June 2012 Berrymans Lace Mawer LLP ("BLM") solicitors acting on behalf of Dr Serrano wrote to the Press Complaints Commission ("PCC")

complaining about the article on the grounds of accuracy, harassment and discrimination. On 12 June 2012 the complaint was sent to Associated Newspapers.

272. Four main issues were raised in relation to the PCC. The first was that Mr Thwaites relied on the Defendant's comment made in the course of correspondence to the effect that the article would not have been written if the medical notes had been made available. The second was that Mr Browne pointed to an unsustainable claim for privilege made in part of the correspondence on behalf of Dr Serrano. The third was that Mr Browne relied on the fact that Dr Serrano had, before the complaint to the PCC, already entered into a Conditional Fee Agreement with another firm of solicitors, which was said to show that he did not intend to settle the matter. The fourth issue is that it was said that Dr Serrano wrongly rejected a form of apology, which Mr Browne said showed that his only interest in these proceedings was money.
273. As to the first matter, I did not derive any assistance from the comments made by the Defendant about whether the article would have been written if records had been disclosed. They were made in the course of exchanges leading up to a proposed settlement, and were not made by the persons involved in the original production of the article.
274. As to the second matter the claim for privilege should not have been made, but it did not, in my judgment, justify any adverse inference being made against Dr Serrano. It was his legal team that had made the claim for privilege and not him.
275. As to the third matter, the fact that Dr Serrano had entered into the CFA was disclosed part way through the process with the PCC on 1 August 2012. It was a feature of the PCC scheme that complainants could reject an unfavourable adjudication and litigate, and this had the potential to cause resentment with the system. However I accept Dr Serrano's evidence that he was genuinely hoping to resolve the matter through the PCC.
276. As to the fourth matter, it is right to record that, although the apology was not in terms that Dr Serrano had originally requested, he did agree to accept an apology, and then withdrew. The correspondence shows that on 2 August 2012 the Daily Mail offered to publish an apology and clarification to the effect that the article suggested that Dr Serrano had groundlessly caused a patient to lose his licence, Dr Serrano could not comment because of patient confidentiality and he had followed the correct procedure, and the article had also wrongly suggested that there had been a language barrier. BLM responded by letter dated 13 August 2012 accepting the apology provided it was accompanied by a clear heading "An apology to Dr Serrano" printed in bold and underlined, was in the same font size and prominence as the original, and a personal letter of apology was sent. On 17 August 2012 the Daily Mail responded saying that apologies were standardized on page 2 without any heading, using the same font style and size as the original, and that a personal letter would come from the Managing Editor. That was then accepted, but Dr Serrano withdrew. I accept the evidence that Dr Serrano withdrew from the apology because he considered it to be simply too small. I do not derive any assistance from the fact that he withdrew from the apology, any more than I derived assistance from what was said in the course of discussions. It is plain that it would have been in the mutual interest of the parties to resolve the claim, but it was not resolved.

**Dr Serrano's resignation and my findings about the reasons for the resignation**

277. On 20 November 2012 Dr Serrano wrote to Dr Rowan saying that “*in order to spend more time with my family I would like to resign from my position as a General Practitioner in Dr Rowan and partners surgery according to the term of our partnership agreement*”.
278. Dr Serrano said that his plan to take over the succession hadn't come about because his reputation had been questioned and the confidence patients had in his ability had been shattered. He couldn't be a figure head in a small community and that a doctor's good name was fundamental.
279. It was suggested to Dr Serrano that he'd hidden his resignation letter. He said there had been no reason not to provide it. He provided it as soon as he'd found it. He accepted that the claim in relation to his resignation had not surfaced until December 2013 and there was no reason for not raising it earlier. He was still at Roebuck surgery on 19 February 2013.
280. Dr Serrano accepted that there had been a meeting with Dr Rowan, Tracey White and him. Dr Rowan was intending to reduce his work. Dr Serrano had been unhappy about having a day off on Fridays and not being supported.
281. Dr Fynes was asked about Dr Serrano's letter of resignation and she agreed that he was a family man and didn't want the pressure of the administrative side of the business and that he was more interested in a clinical role. However Dr Fynes said that the Daily Mail article had affected him and that he'd lost confidence as a clinical practitioner. She was aware that her husband had been upset about having to practise on his own on 16 November 2011.
282. Dr Rowan said that Dr Serrano was his junior partner at Roebuck House for over 6 years prior to his resignation from the practice in November 2012. He gave evidence to set out the extent of his involvement in Dr Serrano's decision to refer a patient that he saw in January 2011 at Little Ridge surgery to the DVLA and his recollection of discussions that he'd had with Dr Serrano regarding the circumstances of his resignation from Roebuck House surgery. Dr Rowan said he'd known Dr Serrano for about 13 years. They had got to know each other on a drug and alcohol prevention course. After he'd qualified Dr Serrano had worked at Roebuck House, which is where there were four practices in one building. They had worked as partners since 2006. Dr Rowan said it had worked out successfully. There were always difficulties in any relationship but he said that they had coped with each other's differences.
283. Dr Rowan described Dr Serrano as intelligent, introspective, reliable and loyal. He said his English was excellent and always was. Dr Rowan had retired on 31 December 2013 and had 3 months off. He was now doing some part time work for Hastings Medical Centre. Dr Rowan was asked about the partnership deed which he had entered in to with Dr Serrano and in particular the provisions of clause 22.2.3 which provided that if both Dr Serrano and Dr Rowan gave notice on the same day Dr Rowan's notice would take effect over, or trump, Dr Serrano's notice. Dr Rowan said he hadn't contemplated giving notice. He'd been working on the practice for 30 years and he'd worked hard to try and find a successor. Dr Serrano had the qualifications and qualities to take over as senior partner.

284. Dr Rowan accepted that in the Hastings area the senior partner of a surgery such as Roebuck House might be considered a figure head in the local community. Dr Rowan made it clear that he felt very let down by Dr Serrano's resignation. It had caused incredible pressure and it meant that the succession he had planned wasn't able to come about. Dr Rowan's attitude about the Daily Mail article was to forget it and carry on. He accepted he was a robust individual. He said some doctors were born with golden spoons in their mouth. He knew the stress of taking on the press and that Dr Serrano was extremely upset by the article but Dr Rowan's view was that everyone knew he spoke perfect English and Dr Rowan described the article as a typical Daily Mail article, and the idea that his language had anything to do with it was rubbish. His understanding was that the public would have been sympathetic.
285. Dr Rowan confirmed that if Dr Serrano had said that he was resigning because of the Daily Mail article he wouldn't have thought much of it. He would have expected more loyalty, and as it was he was very upset by the abruptness of the resignation. He said that Dr Serrano had always been more interested in the clinical medicine and he might be doing more administrative work now because Dr Rowan had done it all before. Dr Rowan stated that by November 2012 he wanted to take Fridays off for a long weekend, and his long term aim was to go part time doing 2 to 2 and a half days a week.
286. The resignation letter followed a meeting at which Dr Serrano had wanted more assistance, Tracey White ("Ms White") was the practice manager at Roebuck House Surgery and made a statement about the meeting. Ms White was not cross-examined. By 20 November 2012 she had worked with Dr Serrano for 6 years and Dr Rowan wanted to reduce his working schedule to two days a week. Both doctors were saying it was hard to cope with the workload, and it was agreed that no new patients were to be registered. At the meeting Dr Serrano had been unhappy about not getting specific day off a week he wanted, but he had said nothing about resigning.
287. After Dr Serrano's resignation a notice in the surgery was put up on 18 December 2012 with Dr Rowan's name at the bottom announcing Dr Serrano's resignation, relating the difficulties in finding a replacement, and notifying that some patients near St Leonards were being asked to move. The notice concluded that "*You will appreciate that this comes at a time when I was attempting to reduce my own hours*".
288. Dr Roger Elias is now the senior GP in the Hastings area and is currently chairman of the Hastings and Rother clinical commissioning group. He had known Dr Serrano since he came to Hastings and he reported that Dr Serrano was an enthusiastic, diligent and skilful GP. Dr Elias had employed Dr Serrano in his practice after Dr Serrano had left Roebuck House. When he'd interviewed Dr Serrano he was aware of the controversy regarding the article in the Daily Mail, and said that Dr Serrano had reported that he felt compromised in continuing to practice and had wanted a fresh start.
289. Dr Elias said that his fellow partners and he had not believed the allegations made in the article for one minute. Dr Elias said that Dr Serrano had qualities of enthusiasm, diligence and honesty and was hard working. His English language skills both formal and colloquial were of a very high standard. Patient feedback had been overwhelmingly positive. Dr Serrano had taken on roles allowing patients to have better services in the field of diabetes and Dr Serrano was reengaging with his

previous role as a GP trainer. Dr Elias was aware that the proceedings had caused Dr Serrano considerable stress.

290. In my judgment Dr Serrano's resignation was part influenced by the article, because it is apparent that he had lost confidence after the publication of the article. However there were a number of other factors in play, namely his concern that he would end up running a very large practice without time to carry out his clinical practice, and his concern that Dr Rowan might, because of the terms of the partnership deed, engineer a situation where Dr Serrano was compelled to run the practice. The evidence showed that Dr Rowan thought that the article was so inaccurate that no one could be influenced by it, and that he would not have understood Dr Serrano's real hurt if Dr Serrano had spoken to him about it. No claim for special damages arising out of the resignation was made.

### **The conduct of the trial**

291. As noted above the case was hard fought on both sides with no quarter given. There was searching cross examination of the witnesses including Dr Serrano. Dr Serrano was asked in re examination about how being cross examined at such length had affected him and he said he found it hurtful and he was obviously stressed on occasions during the proceedings. He was asked about the nature of the cross examination and he said that counsel was simply doing his job.
292. I accept there was the obvious pressure of these legal proceedings on Dr Serrano. However the cross examination, while long lasting, did not seem to me to add to Dr Serrano's unhappiness. Indeed Dr Serrano seemed to relish the opportunity to give his side of this story, and part of the reason for the length of the cross examination was because Dr Serrano was so intent on getting his evidence out that the answers became very long.
293. In my judgment the cross examination of Dr Serrano, and of all the witnesses, was fair and appropriate on both sides. The defence mounted by the Defendant in this case was, like the original article, based on Mr Jones' evidence, supported as it was by Mrs Jones. It is true that the medical notes substantially undermined Mr Jones' account, but that is no reason to characterise the defence as anything other than properly advanced.

### **My findings on issues relevant to damages**

294. I accept Dr Rowan's description of Dr Serrano as intelligent, introspective, reliable and loyal. It was perfectly apparent that although many persons such as Dr Rowan might have moved on from the publication of the article, Dr Serrano had been genuinely hurt and upset by it, and particularly the part which related to his language skills. The fact that difficult patients, attempting to get the treatment that they considered their entitlement, had picked up and referred to the article showed that it did have a continuing effect on Dr Serrano's reputation, even if others such as Dr Rowan and Dr Elias realised that it was not a justifiable article, as I have found for the reasons set out above.
295. In my judgment Dr Serrano had become preoccupied with getting what he considered to be a proper apology from the Daily Mail, and at times during the trial he appeared

to be very fixed and determined, and other times moved by the whole process, particularly when the witness statements of Mr Dicker and Mr Elias were read out.

296. I do not consider that Dr Serrano brought the PCC proceedings in bad faith, and I note that reference was made, albeit late, to the fact that Dr Serrano had instructed other solicitors under the CFA.

### **Some legal principles relating to damages and my award**

297. It is established that libel damages have a threefold purpose namely: (1) to compensate for distress and hurt feelings; (2) to compensate for actual injury to reputation which has been proved or might reasonably be inferred; and (3) to serve as an outward and visible sign of vindication. Damages are to be compensatory, and not punitive, see generally *Cairns v Modi* [2012] EWCA Civ 1382; [2013] 1 WLR 1015.
298. Damages are at large and a wide range of matters may be taken into account including the conduct of the Claimant, his position and standing, the subjective impact of the libel on him, the gravity, mode and extent of publication, the absence or refusal of retraction or apology, and the relevant conduct of the Defendant to verdict.
299. In coming to a figure the standard tariffs for pain and suffering in personal injury awards can properly be taken into account, see *John v MGN Limited* [1997] QB 586. In this respect I note the Judicial College Guidelines, 12<sup>th</sup> Edition, awards for moderate and severe psychiatric damage. A great many authorities dealing with levels of damages in libel actions were provided to me and I have considered them, but I am conscious of the direction not to adopt an analytical approach involving conventional bands of damages, for the reasons given in *Cairns v Modi*.
300. My function “*is to try to relate the right range of compensation to the gravity of the particular libel and to any aggravating or mitigating features*”, paragraph 33 of *Cleese v Associated Newspapers* [2003] EWHC 137 (QB). It might be noted that when assessing the gravity of the libel “*the more closely it touches the Plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be*”. I also note that a reasoned judgment rejecting a justification defence is capable of providing some vindication of a Claimant’s reputation.

### **No aggravated damages**

301. In this case Mr Thwaites submitted that there should be an award of aggravated damages, because of the way in which the defence had been conducted and because the Defendant persisted in a plea of justification. In closing submissions it had seemed that this submission would not be pursued, but Mr Thwaites clarified, in written submissions dated 8 August 2014, that it was submitted that the Claimant should be compensated for distress and injury to feelings caused by persistence in a defence of justification.
302. In my judgment the proper defence of an action is not to be taken into account in aggravation of damages in libel proceedings. Any other approach would be an impermissible interference with the vital right of the free press to defend itself, and would therefore be wrong. I consider that this conclusion is consistent with the

decision of the High Court of Australia in *Triggell v Pheeney* (1951) 82 CLR 497, and the judgment of the Court of Final Appeal (Hong Kong) in *Blakeney Williams v Cathay Pacific Airways Ltd* [2012] HKCFA 61; [2013] EMLR 6 at paragraph 105. Lord Neuberger said in that case “*in my view, it is wrong in principle to award aggravated damages to a plaintiff in a defamation case, solely because the defendant has decided in good faith to raise a defence of justification, which is then run in a reasonable way. The fact that the defence fails, even where the Court regards it as not merely wrong but weak, is not enough, on its own, to bring aggravated damages into play*”. Lord Neuberger also noted that the absence of an apology where such a defence was advanced could hardly increase damages, where such an apology would have been inconsistent with the defence.

303. Both *Triggell* and *Blakeney Williams* are persuasive, but they are not binding on me. However in my judgment they are consistent with the approach of the common law, which provides that everyone has a fair right to defend themselves. In this case the absence of an apology, and the continued defence of proceedings, is relevant only to the extent that there was not mitigation of damage.
304. It is right that I can also take account of matters proved to be true, such as the omissions from the letter dated 11 February 2011 to the DVLA and the fact that Mr Jones was only told that the letter was going to be sent on the day that it was sent, to reduce damages, see *Pamplin v Express Newspapers* [1988] 1 WLR 116 at 120. However in this case these matters are a long way from seriously undermining the reputation of Dr Serrano, or supporting the suggestion that any award of damages should be nominal. This is because the evidence showed that even when all the information had been provided to the DVLA, the licence had not been returned until after the 1 year period.
305. As noted above, the Defendant submitted that Dr Serrano had lied on a number of occasions in these proceedings, but in my judgment Dr Serrano was doing his honest best to give accurate evidence about all the relevant matters. There were occasions on which his evidence was not right, but these were honest mistakes.
306. Taking all these matters into account including the effect of this judgment rejecting the defence of justification and the omissions from the letter dated 11 February 2011, and attempting to avoid the over elaborate analysis which *Cairns v Modi* disapproved, I come to an award of £45,000 for damages for libel.

### **No injunction**

307. There was nothing in the evidence to show that the article would be published again, or anything to suggest any concern that it might be published again. I therefore do not order any injunction.

### **Conclusion**

308. For the detailed reasons given above I find that the article has defamatory meanings which cannot be justified and that the article cannot be defended as honest comment. I award a sum of £45,000 by way of damages. I do not make any award of aggravated damages and I do not order any injunction.