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On the 13th day of Christmas, my true love gave to me: 13 axioms of fact finding!

By Markus Esly

The claimant bears the burden of proof in litigation or arbitration proceedings. It is equally well known that in civil proceedings, the standard of proof is the 'balance of probabilities'. But what does that mean in practice? How do tribunals in the common law tradition decide matters of proof, assess evidence (both witnesses and documents) and make findings of fact? How do they approach cases where there is either very little evidence, or where there may be competing explanations or theories for what happened, or where all the proffered explanations appear far-fetched? This article looks at questions of proof and fact-finding, and considers both a classic and a recent decision where the English Courts had to grapple with difficult questions of causation. The Courts found that none of the expert evidence offered an explanation that was more likely than not to be accurate. We also take you on a whistle-stop tour of the thirteen axioms of fact finding.

An unexplained death

In 1886, the body of a man, one Henry Wakelin, was found at night on a railway line near Chiswick in London, where the line crossed a public footpath. So far, so Christmassy. As to the circumstances that led to Mr Wakelin's death, not much was known. The train that had evidently hit him had its headlights switched on, but did not whistle or otherwise warn of its approach. The level crossing was protected by gates that could be opened manually. The railway company employed a watchman to operate the gates, but only during the day. From the spot where Mr Wakelin had been found on the line, an approaching train could be seen from a distance of more than half a mile, and the train's headlights would have been visible from that distance.

Mr Wakelin's widow sued the railway company for negligently operating the train that had killed her husband. She had no evidence as to precisely how the deceased ended up on the railway tracks, or the precise circumstances of the train hitting him. Such witnesses as appeared at trial only testified that the railway crossing was a ten minute walk away from his cottage, and that Mr Wakelin had left sometime after dinner, never to be seen alive again. The widow's case was essentially that it could be assumed that her husband had died using the level crossing (as he was lawfully permitted to do) and his death thus had to have been caused by the negligence of the railway company. The railway company led no evidence (by, for example, of the driver of the train). They submitted that there was no case to answer: in modern legal parlance, that the plaintiff had failed to discharge the burden of proof.

At first instance, the judge left a case of negligence for the jury to decide. The jury returned a verdict in the plaintiff's favour and awarded the widow £800 (according to the Bank of England's inflation calculator, £85,911.80 in today's money). If the case had been decided forty years earlier, the widow might have claimed ownership of the locomotive itself by virtue of it being a "*deodant*". This is because an article or piece of property that caused unlawful death could be forfeit at common law. By 1886, however, this had been abolished by Parliament. The Fatal Accidents Act had been enacted to provide for claims for damages instead. Anecdotally, the practice of claiming entire trains as *deodant* may have precipitated the change in law (per the late R.W.M. Dias QC of Magdalene College, Cambridge).

Did the train run over the man or did the man run into the train?

After successive appeals, the case - *Wakelin* v *The London and South Western Railway Company* (1886) 12 App. Cas. 41 - ended up in the House of Lords. Lord Halsbury confirmed the fundamental proposition that the plaintiff had to prove that the defendant's negligent act caused the death. Without evidence as to what caused the death, it would also not be possible for the defendant to explore whether the claimant was guilty of contributory negligence. His Lordship explained the problem in the case before him as follows:

> "*In this case I am unable to see any evidence of how this unfortunate calamity occurred. One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to shew that the train ran over the man rather than that the man ran against the train?*
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> *… if a man ran across an approaching train so close that he was struck by it, is it more true to say that the engine ran down the man, or that the man ran against the engine? Neither man nor engine were intended to come in contact, but each advanced to such a point that contact was accomplished.*"

There was no presumption in law that people look carefully both ways at level crossings, and Parliament had authorised the railway company to run its trains at high speeds, including over level crossings. The plaintiff's case thus failed because she had failed to discharge the burden of proof. Lord Watson agreed with the outcome and said:

> "*The evidence appears to me to shew that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned.*"

His Lordship's dictum illustrates that when a Court or tribunal makes findings of fact, this often requires inferences to be drawn, since in many cases there will be no direct evidence. Just how this is done is addressed below – but first, a reminder of the role of the judge in the common law tradition.

The role of the judge in the adversarial system

That a case can be lost because the claimant does not discharge the burden of proof is an inevitable consequence of the adversarial nature of proceedings in the common law tradition. In *Wakelin*, all the railway company had to do was parry. There was no need for a riposte. Suppose during witness evidence, the judge had become concerned with the paucity of evidence and wanted to hear from the driver of the train. Could the judge in English proceedings have adjourned the trial to require the parties to call further witnesses, or even subpoena them?

Who better to describe the role of the judge than Lord Denning? In *Jones* v *National Coal Board* [1957] 2 QB 55, the Court of Appeal heard an appeal against a judgment in favour of the National Coal Board, holding that the board had not been responsible for the death of a miner. He died when the roof of the mine collapsed at the location of a similar incident some weeks earlier. His widow argued that conditions had not been properly restored, and that the board had been negligent in failing to provide adequate structural support for the mine where her

husband worked. During the trial, the judge frequently intervened in the cross-examination of witnesses, told counsel for the claimant that the witness did not have to answer questions which the judge felt were misleading or irrelevant, and stopped cross-examination by the plaintiff's counsel of the board's expert entirely on the issue of whether appropriate materials had been used to support the roof of the mine following the earlier collapse. When the board's witnesses were answering questions, the judge had even warned them (using words such as "*You must be careful what you are saying!*" or "*You don't mean that*?").

The plaintiff appealed, on the basis that she had not had a fair trial. The appeal was allowed. Lord Denning held that the judge had overstepped the boundaries of proper judicial conduct. His Lordship noted that in the English system, the judge hears and determines the issues raised by the parties, but does not conduct an investigation or examination "… *on behalf of society at large*". However, he added the *caveat* that even in England, the judge was not just a mere referee or umpire. Their ultimate objective was to find out the truth. So the English judge must find out the truth as best as they can, but cannot descend into the arena of counsel because then they would be vulnerable to having their "… *vision clouded by the dust of conflict*." The advocates for the parties put their weights into the scales, and the judge at the end of the trial decides which way the balance tilts. To answer the question about calling further evidence, the judge:

> "*… must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales - the "nicely calculated less or more" - but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties.*"

Was it a dog or a lion?

Moving away from the imagery of the scales of justice into the arena of commercial conflicts, the standard of proof is of course the balance of probabilities. The question is: based on such evidence as is before the court or tribunal (no more, no less), are the facts alleged more likely than not to have occurred? The one area where the English Commercial Courts have grappled somewhat with the standard of proof is cases of fraud. Unless the claimant has found a smoking gun document in which the alleged fraudster comes clean, dishonesty will have to be inferred from the surrounding circumstances. The law recognises that most businessmen are honest, and expects allegations of dishonesty to be specifically set out and particularised in the statements of case. Providing 'full particulars' of dishonesty will involve identifying the individual who is alleged to have been dishonest, stating what it is they said or did, and asserting that they acted without any kind of honest belief. In *Three Rivers District Council* v. *Bank of England* [2001] UKHL 16, the House of Lords emphasised that the defendant is entitled to know the full case they have to meet. The claimant had to plead all the facts, and there had to be "*… some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved*." But does this mean that the standard of proof for establishing dishonesty is higher?

In a case called *Re H* [1995] UKHL 16, the House of Lords commented on the standard of proof and perhaps unwittingly sowed the seeds of some confusion in this area of the law. Their Lordships noted that:

> "*… When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that*

> *the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. …*"

Whilst the House of Lords in *Re H* ultimately declined to introduce a higher test of standard or proof in civil proceedings for serious allegations (partly due to the difficulty in formulating and applying such a different test), judicial commentary to the effect that 'the more serious the allegation, the more cogent the evidence required to overcome the unlikelihood of what has been alleged' continued to cause some difficulties. It is suggested that a requirement for 'more' or 'better' evidence depending on the inherent likelihood of an allegation would introduce confusion. It is also illogical. The likelihood or probability of something having happened always depends on the circumstances. In a subsequent decision, *Re B* [2009] AC 11, the House of Lords returned to the issue. Lady Hale emphatically stated that neither the seriousness of the allegation, nor the seriousness of the consequences for the defendant of the allegation being made out, should affect the standard of proof. She explained the logical fallacy or ascribing importance to the inherent probability, or improbability, of an event in the abstract:

> "*As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.*"

In *Bank St Petersburg PJSC* v *Arkhangelsky* [2020] EWCA Civ 408, the Court of Appeal considered this issue in commercial fraud proceedings, and stated that the above findings (made in care proceedings) were of general application. In *Bank St Petersburg* itself, the judge was faced with witnesses on both sides who (as he found) had misled the court. He then had to determine whether there had been an unlawful conspiracy to raid the premises, and seize assets, of the claimant between the defendant and corrupt Russian State officials. The judge found that dishonesty had not been proven, because he did not think that the evidence of events and interactions leading up to the raid and seizure was "*consistent only*" with illicit collaboration and corruption. The Court of Appeal held that this was the wrong approach. The judge had been overly concerned by the seriousness of the allegation, and should instead have asked simply himself whether a co-ordinated raid was more likely than not to have happened, based on all the evidence. Dishonesty, or any other serious allegations, does not have to be the only conceivable, or the only plausible, explanation. The standard of proof remains the balance of probabilities.

The thirteen axioms of fact-finding

So much for the standard of proof, but how precisely should judges or arbitrators go about determining whether the standard has been met? A useful and illuminating account of the principles governing judicial fact-finding was set out by the Judge in *Briggs* v *Drylined Homes Limited* [2023] EWHC 382 (KB), who identified no less than thirteen axioms of fact finding. We review these globally below. The first two have already been canvassed: the party alleging the fact or matter bears the burden of proof, and each determination of fact is done on the balance of probabilities. Next, judges and arbitrators must be careful to look at all the evidence together, rather than compartmentalising it, and proceed to review the evidence in a logical order – either based on how the case has been pleaded, or perhaps chronologically if that makes more sense to the judge. Recorder Dias KC also noted

that 'fence-sitting' is not permitted: the court or tribunal must decide whether a fact alleged happened or not. There is a binary outcome of the exercise, as Lord Hoffmann explained in *Re H*:

> "*If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.*"

Turning to the kinds of evidence that tribunals will be presented with, oral evidence of witnesses, sometimes based on their recollection of events. In that regard, the law recognises that the human memory has its limits and is indeed a "*notoriously imperfect and fallible recording device*". Decision-makers need to be careful not to assume that confidence displayed by a witness indicates better or reliable recollection, since legal proceedings inevitably give rise to a powerful bias on the part of those involved – including witnesses who may feel loyal to a party, or may even have an interest in the outcome of the proceedings. It is at this point in the fact-finding process that the idea of 'inherent probability or improbability' returns. While the standard of proof remains the same no matter how outlandish or serious the allegation, judges and arbitrators should bear in mind that (per Lord Hoffmann in *Re H*):

> "*Common sense, not law, requires that … regard should be had, to whatever extent appropriate, to inherent probabilities*"

While inherent probabilities do not alter the burden of proof (you do not need more or better evidence to prove facts that appear 'improbable'), questions of inherent improbability or implausibility come into play when assessing the type of evidence that is relied on as proving the fact in issue. In commercial cases, contemporaneous documents will be the most reliable evidence. They are, as Lord Pearce said in *Onassis* v *Vergottis* [1968] 2 Lloyd's Rep. 403, "*always of the utmost importance*". It bears emphasising just how important contemporaneous documents are. Leggatt J (as he then was) remarked in *Gestmin SGPS SA* v *Credit Suisse* (UK) [2013] EWHC 3560 that:

> "*In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.*"

Witness evidence is, of course, still useful. Where there is a documentary record, witnesses can put documents into context, and throw light on personality, motivations or working practices of a witness who produced the documents, or participated in contemporaneous exchanges. But no matter how often disputes lawyers remind their clients of the importance of recording matters contemporaneously, sometimes there are no documents. The court or tribunal will then have to assess the credibility of the witnesses, including the inherent plausibility or implausibility of their accounts. The case of *Natwest Markets Plc* v *Bilta* (UK) Ltd [2021] EWCA Civ 680 is a good example. This was a document-heavy commercial case. A financial institution was implicated in a fraudulent trading scheme operating by one of its partners. One issue was whether the financial institution turned a blind eye to the reasons why the trading scheme was apparently so successful and profitable. Key individuals attended a dinner together at a crucial juncture in the relationship between the parties. That dinner was the perfect opportunity for the bank to ask questions about the scheme. Nobody sent any emails or reported after the dinner.

In the litigation, it was alleged that the bank turned a blind eye to the obvious fraud. The Court of Appeal noted that:

> "*There may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. The case could be one about an oral promise which turns entirely on the word of one person against another's, and the uncontested facts may well not point towards A's version of events being any more plausible than B's. Even in a case which is fairly document-heavy (as this one was) there may be critical events or conversations which are completely undocumented. The … dinner is a good example. Whilst there are documents from which inferences might be drawn about what was or was not said at that dinner, there are no notes of the discussions and no memoranda or emails sent afterwards which appear on their face to record or report what was said on that occasion.*"

Absent documents that settle the point, the judge must assess the credibility of the witnesses, carefully observing their demeanour in the witness box under cross-examination, and being alive to the dangers of a witness honestly but mistakenly reconstructing events long after they happened. If a judge or arbitrator forms the view that a witness is not credible, that person's evidence should not entirely be discounted: it is quite possible that the witness lied about one thing but not another. Decision-makers should be slow to throw out all the evidence by a witness:

> "*If a court concludes that a witness has lied about a matter, it does not follow that he has lied about everything.*" (*R* v *Lucas* [1981] QB 720 , per Lord Lane CJ)

Perhaps unsurprisingly, there is judicial commentary of lying and the motives of liars. The late Lord Bingham wrote extra-judicially in "*The Business of Judging*" (Oxford University Press, 2000) that (after years on the bench) he was of the view that the human capacity for honestly believing something that bears no relation to what actually happened was unlimited. He also warned that:

> "*The ability to tell a coherent, plausible and assured story, embellished with snippets of circumstantial detail and laced with occasional shots of life-like forgetfulness, is very likely to impress any tribunal of fact. But it is also the hallmark of the confidence trickster down the ages.*"

One would hope that judges and arbitrators are less frequently faced with an accomplished perjurer or fabulist than with someone who might lie for other reasons. A witness might overelaborate to support what they genuinely believe to be a just cause, or depart from the truth to hide what they (rightly or wrongly) believe to have been mistakes, or other incriminating actions or failings on their part. The fact-finder will look at the demeanour of the witness and how they comport themselves, and then form a view as to whether they are to be believed.

Elementary, my dear Watson!

In some cases, the difficulty is not in assessing the veracity of the evidence, but in identifying what actually happened – usually in the context of causation. The well-known case of *Rhesa Shipping Co S.A.* v *Edmunds* ('The Popi M') [1985] 1 WLR 958 illustrates the difficulties that can arise where the cause of the loss cannot easily be pinpointed, and where the fact-finding axiom that 'sitting on the fence is not permitted' may reach its limit. The *Popi M* was lost in calm seas and fair weather. A very large amount of water suddenly entered the vessel's engine room through the hull plating. The owners of the vessel wanted to claim on their insurance. Coverage was denied. The matter went to court. The owner's case was that the ship had been lost by a peril of the sea, or alternatively due to negligence on the part of the crew. The peril of the sea that the owners had in mind was a submarine,

based on expert evidence. The underwriter's argued that the vessel was not seaworthy due to wear and tear: they relied on expert metallurgical evidence of their own as to how the hull might have essentially collapsed. Collisions at sea or unseaworthy vessels are not, in and of themselves, difficult to imagine. However, the experts quite openly stated that their reports set out a hypothesis that was improbable, but they supported it as the most likely explanation because all other explanations (including that proffered by the opposing expert) seemed almost impossible. In the end, Bingham J ruled out negligence by the crew and the owner's explanation for wear and tear leading to a collapse of the hull plating. Despite misgivings, he found that the submarine theory had to be accepted on a balance of probabilities:

> "*… That leaves me with a choice between the owners' submarine hypothesis and the possibility that the casualty occurred as a result of wear and tear but by a mechanism which remains in doubt. Cases must be decided on evidence. My conclusion is that despite its inherent improbability, and despite the disbelief with which I have throughout been inclined to regard it, the owners' submarine hypothesis must be accepted as, on the balance of probabilities, the explanation of this casualty.*"

The case went to the House of Lords on appeal. Lord Brandon noted that the Judge as having adopted the approach of Sherlock Holmes, who said to Dr Watson "How often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable must be the truth?". That was not, however, the right way to go about judicial fact-finding. His Lordship noted that judges could always find that the party who had the burden of proof had failed to discharge it, and while judges might not like to do that (their mission is to establish the truth, after all), sometimes that was the correct decision – as it was in this case, due to the unsatisfactory state of the evidence. Sherlock Holmes had been concerned with a situation where all possible alternatives had been eliminated, and that had not been the case in the matter before the judge. The wreck had sunk in such deep water that it had been impossible to send a diver to look at the hole in the hull, something that might well have thrown some light on the cause of the wreck. Finally, if a judge or arbitrator found that it was very improbable that a particular event had occurred, but then nevertheless went on to conclude that it happened on the balance of probabilities, then that finding would not accord with common sense. Despite the warning that fence-sitting is not permitted, there is no rule of law that requires a court or tribunal to find that, once all the most improbable or impossible explanations have been eliminated, the remaining explanation must be found to be correct on the balance of probability.

But it is never that easy when discussing legal concepts in the abstract. Lord Brandon's final statement, that common sense precluded a finding that a highly improbable event nevertheless occurred on the balance of probability, has attracted some judicial commentary. In *Datec Electronic Holdings Ltd* v *United Parcels Service Ltd* [2005] EWCA Civ 1418, the Court of Appeal described it as puzzling:

> "*On its face it is—if I may paraphrase it—that as a matter of common sense a high degree of improbability that an event will occur defeats an assertion that it has occurred. I cannot believe that Lord Brandon meant that judges either could or should disbelieve evidence that an event has occurred simply because its occurrence was highly improbable. The law, like life, is littered with highly improbable events, many of them defying common sense, which have nevertheless indubitably happened. What Lord Brandon was, in my respectful view, considering here was an occurrence which, albeit the least improbable of those canvassed, made little or no intrinsic sense. Such cases may fail for want of sufficient proof. To elevate the third of his propositions to anything higher than this would in my respectful view put it in conflict with his second proposition.*"

The rule of two?

A good example of life being full of improbable events would be a car that simply bursts into flames. That led to the case in *Nash* v *Volkswagen Financial Services (UK) Ltd* [2023] EWHC 2326. This case also illustrates what process of reasoning a court or tribunal may follow in reaching the 'third conclusion' – that a party has simply not discharged the burden of proof.

Mr Nash bought a Seat Leon on hire purchase terms. Six weeks later, he brought the car back to the dealership because he kept hearing a noise inside the vehicle. A member of staff confirmed that they, too, could hear the noise, and assured Mr Nash that they would look into the matter. They did not, however, give Mr Nash a courtesy car and asked him to come back four days later. Two days after the visit to the dealership, Mr Nash visited his mother and parked the car in her driveway. About 90 minutes later, a neighbour alerted him that the car was on fire. The fire brigade extinguished the car and wrote a brief report in which they attributed the source of ignition to an 'electrical fault'. The car was a write-off. Mr Nash took the matter to court. The defendant hire purchase company denied that the car had not been of 'satisfactory quality'. At trial, both Mr Nash and the defendant led expert evidence. His expert offered the not-surprising view that since the car was almost new and there had been no suggestion of improper handling or abuse, the only explanation for it bursting into flames whilst parked in a driveway was a fault with the car.

Much more difficult was the question of what might have caused the fire. The claimant's expert was of the view that since he was unaware of any evidence of any external fire, it must have started within the car's engine compartment, as a result of some kind of electrical fault. The opposing expert considered that an unidentified fault leading to a new car to burst into flames whilst parked was so unlikely that something else must have caused the fire. He advanced the hypothesis that a passer-by discarded a still-lit cigarette which landed in a pile of debris on the driveway, which started a fire there that then spread to the car. The Recorder at first instance held that the claimant had failed to discharge the burden of proof. On appeal, counsel for Mr Nash criticised the judge for not having followed the correct approach to deciding complicated questions of causation. It was submitted that the Recorder should have reviewed the competing theories advanced by both experts, and then made a finding as to which of the two theories was the more likely – or, in other words, ranked them by probability. The Recorder should then only have rejected the 'more likely' theory of causation if he felt that it was intrinsically so extremely improbable that it nevertheless had to be discounted. Instead, the Recorder had reviewed the evidence, found some fault with each theory, though he seems to have found the defendant's expert somewhat more convincing, and then concluded that Mr Nash had not proven his case – since the cause of the fire simply could not be determined.

The gist of Mr Nash's complaint was that the judge had made no findings of the comparative probabilities of the competing causes, and had thus failed to give sufficient reasons for his conclusion, such that an appellate court could not understand how he reached it, or whether it was correct (bearing in mind that very rare circumstances in which an appellate court would interfere with findings of fact). On appeal to the High Court, Mr Justice Friedman rejected Mr Nash's complaint. While in many cases, the exercise advocated by Mr Nash would lead the decision-maker to a finding of fact (decide which theory is more likely, and then conclude that there was a better than even chance of it having happened), there was no requirement in law for a court or tribunal to follow it. Above all, the "*unitary question*" was whether the claimant had discharged the burden of proof. Friedman J held that:

> "*In considering causation, whatever the route adopted, it is important not to allow the simple question of whether a court is satisfied that the damage has been caused by a particular cause to become over-complicated or technical. In an appropriate case, it is sufficient to ask the single*

> *unitary question and decide the case accordingly without having selected which of competing explanations is the more probable.*"

Conclusion

Nash v *Volkswagen Financial Services* is a good reminder that there is no duty on a judge or arbitrator to accept one of several competing theories of causation (or indeed choose between contradictory evidence of facts), or to pronounce on the comparative likelihood of conflicting theories. Expert evidence of causation can be complicated and highly technical. Judges and arbitrators do not have to engage in a mathematical exercise of ascribing probabilities to each hypothesis. Instead, they are entitled to take a step back, look at the evidence in the round, and decide whether they are satisfied that the party advancing a particular case has discharged the burden of proof. Common sense remains the guiding principle when making findings of fact, or finding that the burden of proof has not been discharged. As we all know, though, common sense itself sometimes seems to be at a premium these days.