

IN THE COUNTY COURT SITTING AT SUNDERLAND

Before :

**DEPUTY DISTRICT JUDGE DG MORGAN MBE**

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Between :

MR STEVEN JOHNSON  
- and -  
NATIONAL PLATFORMS LIMITED

**Claimant**

**Defendant**

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Mr Ian Pennock (instructed by Aegis Legal) for the Claimant

Mr Tom Panton (instructed by BLM) for the Defendant

Hearing dates: 26 January 2021  
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## **APPROVED JUDGMENT**

Handed down in the absence of the parties on 25 February 2021

**Deputy District Judge DG Morgan MBE:**

In this Judgment:

‘The Claimant’ is Steven Johnson

‘The Defendant’ is Nationwide Platforms Limited

‘Ruthmann’ is Ruthmann GmbH & Co, KG the manufacturers of the Model T275 Serial No 25845 mobile platform upon which the Claimant was working at the time of the index accident.

‘the 1969 Act’ means the Employers Liability (Defective Equipment) Act 1969

‘CPA 1987’ means Consumer Protection Act 1987.

References in brackets in the footnotes are references to the page numbers in the main bundle.

**Background**

1. The Claimant brings this claim for damages for personal injury and other losses against his employers, the Defendant, arising out of an accident that occurred on 26 March 2016 in the course of his employment as a platform operator.
2. The Claimant was an experienced operator having been employed by the Defendant in that capacity for some five years at the time of the accident.
3. The accident and its mechanism are uncontroversial. The Claimant was operating a Ruthmann Steiger T275 Mounted Platform on site at Northallerton

Town Football Club. At the time of the incident the Claimant and two others (telecoms engineers) were within the cage on the platform at a height of approximately 20 metres, when, as the Claimant began to rotate the cage, there was a loud bang and the cage dropped to one side.

4. The cause of the incident was subsequently attributed to the failure of the rotator bolt in the cage rotator assembly.
5. The Fire and Rescue Service attended and having extricated the two engineers first proceeded to extract the Claimant from the cage by lifting him free from the platform by attaching his harness to the Fire and Rescue Service' access platform and suspending him from the platform and then lowering him to the ground. In the course of the incident the Claimant suffered injuries including a swelling to the left side of his face, a crush injury to his lower abdomen, a crush injury to his right testicle, consisting of tenderness and bruising and subsequent symptoms of 'an electric shock' (orchidynia) and a crush injury of the groin area. The Claimant complains that following the accident he suffered from acute headaches.

### **The Evidence**

6. Somewhat unusually for a personal injury case no oral evidence was called before the court. The Claimant's evidence was agreed and his account of the facts both as to the circumstances of the accident and the injuries he sustained were accepted by and on behalf of the Defendant.
7. The Claimant's evidence therefore comprised:

- i) The Claimant's witness statement dated 18 November 2020 and the exhibits attached thereto<sup>1</sup>
  - ii) Medical report dated 31 July 2017 from Mr AC Clements, a consultant in Emergency Medicine<sup>2</sup>
  - iii) Medical Report dated 13 October 2017 of Mr JGW Feggetter, consultant urologist.<sup>3</sup>
  - iv) Addendum medical report dated 30 May 2018 of Mr JGW Feggetter, consultant urologist.<sup>4</sup>
  - v) Final (sic) medical report dated 13 March 2019 of Mr JGW Feggetter, consultant urologist.<sup>5</sup>
  - vi) Final medical report dated 29 December 2019 of Mr JGW Feggetter, consultant urologist.<sup>6</sup>
8. The evidence on behalf of the Defendant was also agreed and the following witness statements tendered in evidence:
- i) Statement of Mr Christopher Blakely (Regional Health and Safety Manager of Defendant) dated 8 December 2020 and the exhibits thereto.<sup>7</sup>
  - ii) Statement of Mr Derek Lightfoot (Regional Engineering Manager for the Defendant) dated 7 December 2020 and the exhibits thereto.<sup>8</sup>
  - iii) Statement of Mr John Weights (Head of Compliance for Specialist Vehicles for the Defendant) dated 8 December 2020 and the exhibits thereto.<sup>9</sup>

### **The Issues**

9. The key issue on liability is whether the Defendant is liable in law for the Claimant's injuries.

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<sup>1</sup> [75 – 96]

<sup>2</sup> [11 - 15]

<sup>3</sup> [16 – 25]

<sup>4</sup> [26 - 28]

<sup>5</sup> [29 – 37]

<sup>6</sup> [38 – 44]

<sup>7</sup> [102 – 121]

<sup>8</sup> [122 – 224]

<sup>9</sup> [215 – 224] + [128 – 193]

10. The Particulars of Claim filed by the Claimant plead breach of a number of regulations under:
  - i) the Management of Health and Safety at Work Regulations 1999;
  - ii) the Personal Protective Equipment at Work Regulations 1992;
  - iii) the Lifting Operations and Lifting Equipment Regulations 1998;
  - iv) the Provision and Use of Work Equipment Regulations 1998; and
  - v) the Work at Height Regulations 2005.
11. In addition the Claimant pleads a breach of the 1969 Act
12. Counsel for the Claimant, Mr Pennock, also brought into his submissions an additional argument, although not pleaded, that Claimant should also be able to rely upon a breach of the CPA 1987.
13. I can deal very shortly with the alleged breaches of the Regulations set out in paragraph 10 of this judgment (and to be fair to the Claimant they were not pursued with any great gusto) and that is they must fail. Historically if the Claimant had been able to prove breach of the Regulations he would have succeeded with his claim but the whole landscape changed with the passing of the Enterprise and Regulatory Reform Act 2013 where section 69 amends section 47 the Health and Safety at Work Act 1974 so that for accidents that occur on or after 1 October 2013 there is no civil liability for breach of health and safety regulations made under the 1974 Act. The amended section 47(2) of the Act now provides:

*Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.*

14. The principal issue for the court to determine is the application of the 1969 Act. If the court finds that there is ‘fault’ as defined in the 1969 Act the application of the CPA 1987 largely falls away.

**Submissions in relation to the 1969 Act**

15. Section 1(1) of the 1969 Act provides:

*(1) Where after the commencement of this Act*

- a) An employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of his employer’s business; and*
- b) The defect is attributable wholly or partly to the fault of a third party (whether identified or not)’*

*The injury shall be deemed to be also attributable to negligence on the part of the employer*

16. Section 1(3) of the 1969 Act defines ‘fault’ as follows:

*‘fault’ means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to damages in Scotland*

17. It is perhaps convenient to examine the Defendant’s position in relation to the 1969 Act first. The arguments advanced by Mr Panton were succinct.

18. The Defendant readily conceded that the Claimant suffered personal injury in consequence of a defect in equipment provided by his employer for the purposes of the employer’s business.

19. The Defendant argued that there was no evidence as to what the defect was attributable to nor any evidence that any third party, including the manufacturer, was guilty of ‘fault’ as defined by the 1969 Act and, if that be

the case, the claim must fail as the preconditions for liability set out in the 1969 Act are not met.

20. Mr Panton specifically referred to the letter dated 12 May 2016 from Ruthmann GmbH & Co KG (the manufacturers) to Lavendon Group plc (of which the Defendant was a division) which he averred neither admitted nor suggested ‘fault’.<sup>10</sup>
21. The Defendant’s position was that the burden of proof in establishing ‘fault’ as defined in the 1969 Act is no different in this case from any other civil claim in that it lies squarely with the Claimant.
22. Mr Panton complained that the CPA 1987 had not been pleaded and stated that its application had nothing to do with ‘fault’ and took exception to Mr Pennock’s use of the expression ‘incorrect bolt’.
23. The Claimant’s position that the 1969 Act applies relies upon the Defendant’s pleaded admission that the cause of the working platform dropping to one side was subsequently determined by the manufacturers to be the failure of a rotator bolt in the centre of the cage rotator unit.
24. The Claimant also relies upon the Defendant’s disclosure and written evidence to establish ‘fault’ under section 1 of the 1969 Act including the Defendant’s Accident Investigation Report dated 22 March 2016 (the day after the incident)<sup>11</sup> of which Mr Christopher Blakely was the author. At a joint inspection by the manufacturers Ruthmann and the Defendant it was recorded that ‘the rotator bolt has severely corroded and sheered internally within the

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<sup>10</sup> [P95 -96]

<sup>11</sup> [pp 82-87]

rotator mechanism which has allowed the lock nut to work its way out of the cage rotator assembly.’

25. The Claimant also relies on the letter dated 12 May 2016 from Ruthmann to Lavendon Group<sup>12</sup> as an admission by Ruthmann that the rotator bolt was defective in that incorrect metals had been used for the rotator bolt assembly and that there was therefore a prima facie case of negligent design which had not been rebutted by the Defendant calling evidence from the manufacturers or others.
26. It was submitted therefore that the Defendant must be liable under section 1(1) of the 1969 Act relying in support of that submission upon the intention of Parliament by producing a Hansard transcript of the Third Reading of the 1969 Act and the findings of the House of Lords in Knowles v Liverpool City Council.<sup>13</sup>
27. Mr Pennock highlighted that following the incident all 19 Ruthmann Stieger vehicles within the Defendant’s fleet were checked and 4 or 5 were found to have excessive corrosion to the rotator bolt and that Ruthmann circulated Service Instructions to change the screw and bushing to stainless steel (Instruction 0.923.125.000)<sup>14</sup> – the instruction being stated ‘to exclude comparable corrosion in future.’<sup>15</sup>

### **Conclusions upon Liability**

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<sup>12</sup> [p 85]

<sup>13</sup> Knowles v Liverpool City Council [1993] 1 WLR 1428 (1993)

<sup>14</sup> Statement of Mr Christopher Blakely [pp 102 – 107 @ para 25]

<sup>15</sup> [p96]

28. I have already dealt with the allegations of breach of duty set out in paragraph 10 in paragraph 13 above.
29. In relation to section 1 of the 1969 Act Counsel for the Claimant suggested that if the Claimant prima facie established fault within the definition 'fault' set out in section 1(3) of the 1969 Act recited in full at paragraph 16 above then the Defendant should submit evidence to rebut that position.
30. I do not accept that submission. It is for the Claimant to satisfy the court that there is fault and the test that is to be applied is the standard test in civil proceedings ie upon the balance of probability taking into account all of the evidence before the court and submissions made on behalf of all parties.
31. Having regard to all of the evidence I should ask myself various questions to which some of the answers are self-evident and not in dispute between the parties, ie:
- i) The Claimant's injuries were sustained whilst in the course of his employment with the Defendant.
  - ii) The injuries arose following the cage in which the Claimant was operating with two telecoms engineers unexpectedly dropping to one side resulting in the Fire and Rescue Services being summoned to assist in the extraction of the operatives from the cage.
  - iii) What was the cause of the cage dropping? Accident investigation was carried out jointly by representatives of the Defendant and Ruthmann. The records of the Defendant contained in the Accident Investigation

Report<sup>16</sup> confirm under the heading ‘Root Cause / underlying causation:

*‘A statement from Manufacturer Ruthmann after they have consulted with their Head of Research and Design stating that; they have inspected (by stripping down and removing the cage rotator bolts) a further 19 machines in this range and with the results from inspections carried on machines by Lavendon (Nationwide Platforms & Gardemann Germany), in each occasion the rotator bolts was found to have excessive corrosion’*

*The excessive corrosion of the bolt as contributed to it to sheer internally within the rotator mechanism allowing the lock nut to work its way out of the cage rotator assembly.’<sup>17</sup>*

- iv) The findings of the Accident Investigation was further confirmed by all three of the witnesses upon behalf of the Defendant in their respective witness statements and the letter from Ruthmann to the Defendant dated 12 May 2016 where following inspection of all 19 machines in the Defendant’s fleet *‘we implemented the initial changing of all the bolts.’* And went on to say; *‘To exclude comparable corrosion in future on the connection between the bolt and the bushing, we developed and issued Service Instruction to change the screw and the bushing to stainless steel (in detail compare Service Instructions 0.923.125.000).*
- v) The letter from Ruthmann also contained further confirmation of the corrosion and its cause:

*‘It could be found that corrosion on the original chromed bolts in the stainless steel bushing is mainly connected to a chemical reaction to the materials used <sup>18</sup> and the age of the machine and might be additionally negatively influenced by external corrosive mediums.....’*

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<sup>16</sup> [pp 82 -87]

<sup>17</sup> [‘ page 85]

<sup>18</sup> [Page 95]

- vi) The heavy corrosion of the sheared bolt and bushing is clearly shown in the photograph to the report of Mr Derek Lightfoot exhibited to the Claimant's statement.<sup>19</sup>
- vii) The court can properly draw the conclusion from the evidence that the principal cause of the corrosion of the rotator bolt was that there was a chemical reaction between the two metals used for the bolt and the bushing causing the bolt to shear and giving rise to the rotator assembly failing.
- viii) In answer to the question 'Should that have happened under normal circumstances?' the answer is unequivocally 'No'.
- ix) Why did it happen? Again it is abundantly clear to me that the specification of a chrome bolt to fit into a stainless steel bushing must have been at the time of manufacture whether by Ruthmann or by a third party engaged by them to design the machine – it matters not because section 1 (1)(b) provides .....*'The defect is attributable wholly or partly to the fault of a third party (whether identified or not).'*

I find therefore that the use/specification of metals that were likely to corrode by Ruthmann or others was a 'fault' for the purposes of section 1(3) of the 1969 Act.

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<sup>19</sup> [Page 91]

32. The Defendant is, upon those findings, clearly caught by the provisions of section 1(1) of the 1969 Act and therefore liable to the Claimant in damages for the injuries he sustained on 21 March 2016.
33. It is only right that I state at this point that I am entirely satisfied upon the records and evidence produced that the Defendant had in place an appropriate scheme of maintenance for the machine in question in accordance with Ruthmann's maintenance recommendations and in one instance was even more rigorous in terms of frequency than that recommended. The failed bolt was not a serviceable part nor was it recommended that it be inspected periodically by Ruthmann.
34. Ruthmann's specification of replacement bolts of stainless steel in place of the chromed bolts is a clear acknowledgment upon their behalf that the original specification was inappropriate because of the corrosion likely to occur because of the potential (and likely) reaction between the two metals
35. I previously indicated that if I reached the conclusion that the Defendant was caught by section 1(1) of the 1969 Act then there would be no need for me to consider in any detail the application or otherwise of the CPA 1987 but if either counsel believe it necessary or expedient to do so I will do so in an addendum to this document.

### **Quantum**

36. In assessing the damages for pain and suffering and loss of amenity I have had the benefit of reading the medical reports detailed in paragraph 7 above;

reading the Claimant's unchallenged witness statement as to his injuries and the effect upon him and hearing counsels' submissions on quantum.

37. At the time of the accident the Claimant was 30 years of age. He had at that time been in a long term relationship with his then partner and had been in full time employment since leaving school at the age of 16.
38. Mr Adrian Clements, a consultant in Emergency Medicine, gives a helpful overview of the Claimants injuries following his examination by him on or about 31 July 2017 some 16 months post-accident. The Claimant had reported to him that he was absent from work for some 6 days having gone into work the following day post-accident but was in such discomfort that his employers insisted he go to hospital. He reported that on attendance at Sunderland Hospital he had a severe headache for which he underwent a CT scan (result – normal) and testicular pain.
39. He reported that he had struggled with pain and mobility for some six weeks but was then able to continue with his normal day to day activities. He further described significant problems with sexual intercourse for the first six weeks but then the symptoms eased although he continued to suffer pain after intercourse. His headaches were acute for three days and were said to have resolved one week post accident.
40. Mr Clements recommended that the Claimant have a follow up consultation with a consultant urologist.
41. The Claimant was referred to Mr Jeremy Feggeter, a consultant urologist, who first saw him on or about 13 October 2017 and, following examination and a

review of the Claimant's medical records, confirmed that the Claimant had suffered a significant injury to his right testicle in the index accident.

42. The report confirms that the Claimant had suffered a compression injury to his right testis and groin area and that the Claimant had described a pain like 'an electric shock' in his right testicle some 30 to 40 times a day which was worse during and after sexual intercourse.
43. Mr Feggetter recorded that he was told by the Claimant that his relationship with his former partner had come to an end in March 2017 when she terminated the relationship claiming that when they had sex 'he moaned so much about the discomfort.' He also recorded that the Claimant was in a new relationship and his new partner had been made aware of his problem.
44. Mr Feggetter stated that the 'electric shock' symptoms were orchiodynia affecting the Claimant's right testicle for which the Claimant had, at that stage, only received symptomatic treatment from his GP and was awaiting an appointment from a specialist urological opinion in November 2017.
45. At that stage the prognosis was that the orchiodynia would settle and then flare up from time to time. It was said that it was difficult to give an exact prognosis in individual cases as that would be determined by the response to treatment and that prognosis should be deferred until the planned consultation in November and subsequent treatment had taken place.
46. The Claimant was seen again by Mr Feggetter in May 2018 and again deferred providing a prognosis to allow the response and progression to therapy to be assessed.

47. In his report of 14 March 2019 Mr Feggetter reports that the Claimant had been prescribed Gabapentin with some benefit in pain relief with no apparent side effects and had been offered a genito-femoral nerve block to alleviate his symptoms of pain and was waiting to be reviewed in pain clinic. He also recorded that the Claimant reported that his present symptoms caused 'mild discomfort' while at work due to pressure from his harness 'which he can manage.'
48. He also recorded that the Claimant stated that he continued to suffer pain during the day and after sexual activity.
49. In his final report dated 28 December 2019 Mr Feggetter reported that the Claimant had undergone a right genito-femoral nerve block procedure shortly after he had last seen the Claimant in March 2019. The procedure was an unqualified success. The Claimant had been asymptomatic since the procedure and had been 'fine' ever since and felt 'back to normal' with no further pain.
50. The possibility of recurrence of the symptoms requiring a further nerve block was assessed by Mr Feggetter as 'small' (0 – 5%).
51. To all intents and purposes the Claimant has made a full recovery three years post accident and has been absent pain since the spring of 2019 and able to lead a completely normal life without discomfort in any of the activities he undertakes both at and outside work.
52. As in the case as to liability there is a dearth of authority as to quantum for injuries of the type suffered by the Claimant.

53. Both counsel agree that there is little assistance to be gleaned from the Judicial College Guidelines. In Chapter 6 (E) (a) ***Reproductive System:Male*** guidance is given that for cases of orchidectomy with some psychological consequences but without loss of sexual function or impotence the relevant bracket is £18,830 to £21,190.
54. Mr Panton suggested that the guidance given at Chapter 6 (L) ***Hernia*** may give some assistance in that the relevant comparison would be 6 (L) (b) *‘Direct (where there was no pre-existing weakness) inguinal hernia, with some risk of recurrence, after repair’* where the bracket is £6,850 to £8,550.
55. Mr Pennock produced three authorities which he suggested may also assist upon quantum. The first was *Shepherd v Furniss & White (Foundries) Limited* (2001) where an award of £22,000 (£37,606 RPI) was made for a 5 year injury to the 35 year old Claimant’s scrotum and testis where the injury still subsisted at trial where the judge ‘suspected’ that it might resolve itself. The Claimant avoided sexual intercourse because of the associated pain.
56. The second authority was *Saviour John Agius v Wirral Hospitals NHS Trust* (2004) where the 63 year old claimant received £12,500 (£19,767, RPI) in an out of court settlement after an open mesh repair to his hernia where the Claimant’s cord blood vessels were damaged. Upon review it was confirmed the Claimant had an atrophied right testis due to thrombosis, surgery or scar tissue occluding the vascular supply in his spermatic cord. The Claimant did not accept the advice that a right orchidectomy was required.
57. The third authority was *Thomas v West Midland Area Health Authority* (1990) where the Claimant (a spastic quadriplegic) was 20 at the date of the

accident and 25 at the date of settlement. Following the failure of the hospital to diagnose torsion of the testis for 48 hours the Claimant lost his left testicle and underwent a fixing of the right testicle. Pain and suffering over 48 hours with his reproductive facility at hazard should the remaining testicle become diseased. The damages awarded were £7,000 ( RPI £15,918).

58. Mr Panton suggested in his submissions that the appropriate figure for quantum for PSLA was a figure of £6,500 whereas, unsurprisingly, Mr Pennock contended for a significantly higher figure of £22,500.
59. I do not find the cases of Agius and Thomas of any great assistance when applied to the circumstances of the Claimant's injuries.
60. This is a case where the Claimant has not undergone an orchidectomy and has been pain free for the last two years following his genito-femoral nerve block procedure and has been able to engage in all of his work and domestic activities with no adverse effects. Following the accident the Claimant was able to return to work within one week and has not lost time since then.
61. Prior to the nerve block procedure the Claimant had been prescribed pain killers first by his GP and then as prescribed by the pain management team following his referral to the hospital for that purpose. Mr Fegetter reported that the pain had been alleviated somewhat by the prescription of Gabopentin.
62. In the case of Shepherd the Claimant's symptoms following his accident were continuing at the date of trial and despite the somewhat mysterious allusion that there was the suspicion, 'if not more,' that the condition might resolve itself there is no indication upon what that may have been based.

63. There is the similarity in Shepherd that the Claimant's relationship of short duration came to an end because he was in such pain that he could not engage in sexual activity. Mr Johnson's relationship was of longer duration and his unchallenged evidence is that the pain caused sexual intercourse was the reason his relationship broke down although as reported by Mr Feggetter the Claimant had formed a new relationship and was able to participate in sexual intercourse with his new partner whilst still experiencing pain as a result.
64. I suspect that the broad brush approach by Mr Pennock in arriving at his figure of £22,500 is by dividing the damages for the 5 year (but continuing) injury in Shepherd on a pro rata basis with Mr Johnson's three year injury.
65. I find that there is some merit in using the Defendant's suggestion that the Judicial College Guidelines for hernia can be used as the starting point. Inguinal hernia can also be an extremely painful condition and may easily be compared to the Claimant's condition in this case. The relevant bracket is set out in paragraph 54 above but that bracket does not contain any assistance as to the period before repair.
66. We have a three year period in Mr Johnson's case before repair with a minimal risk of reoccurrence. Mr Clements reported that the Claimant had struggled with pain and mobility for some 6 weeks but was then able to continue with his normal day to day activities. Taking into account the fact that there was a very limited period off work, that some relief was provided by the prescribed medication and the ultimate successful genito-femoral nerve block I assess the damages for pain and suffering and loss of amenity for a three year injury in the sum of £15,000.00.

67. Special damages are agreed in the sum of £200.00.
68. Costs follow the event and the Defendant shall pay the Claimant's costs of the claim.
69. Since the draft of this judgment was circulated to counsel I have been informed that the claimant has beaten a Part 36 offer made upon his behalf the agreed consequences of which are that the Defendant must pay the Claimant's fixed costs calculated in accordance with CPR rule 45.29E to the last fixed costs point before the Claimant's Part 36 offer expired, in the total sum of £14,586.60.
70. In addition, pursuant to CPR Rule 36.17(4)(b) the Defendant is to pay the Claimant's costs from 28 August 2020 to the date of the judgment on the indemnity basis, summarily assessed in the amount of £10,271.87 plus interest on those costs at 8% APR from 28 August 2020 to the date of the judgment in the sum of £340.81 in the sum of £10,612.68. The total sum of costs and interest is £25,199.28.
71. I received written submissions from both counsel in relation to the indemnity costs order which was largely agreed with the exception of the brief fee on trial. I accept and adopt the Claimant's submissions upon that issue and find adopting the judgment of the Master of the Rolls in the Court of Appeal in Braodhurst & Anor v Tan & Anor [2016] EWCA Civ 94 that the Claimant is not bound by the Fixed Costs regime in respect of that fee and is entitled to recover it in full on the indemnity basis.

72. All monies due under this judgment are to be paid by 4.00 pm on 18 March 2021
  
73. Finally, I express my gratitude to both Mr Pennock and Mr Panton for their particular assistance in this interesting case.