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Case No: QB-2020-004513 / QB-2022-002259

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2024

Before :

ANNABEL DARLOW KC
(sitting as a Judge of the High Court)

- -

Between :

MIROSLAV YORDANOV **Claimant**

- and -

Defendants

(1) VALENTIN VASILEV
(2) THE PERSONAL REPRESENTATIVES OF THE ESTATE OF ALYOSHA ANGELOV(deceased)
(3) AVIVA INSURANCE LIMITED
(4) VLADMIR ATANASOV
(5) ZAD DALLBOGG LIFE AND HEALTH AD

Between:

VLADIMIR ATANASOV

Claimant

and

(1) VALENTIN VASILEV
(2) THE PERSONAL REPRESENTATIVES OF THE ESTATE OF ALYOSHA ANGELOV (deceased)
(3) AVIVA INSURANCE LIMITED

Defendants

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JAMES HAWKINS (instructed by GEORGE IDE LLP) for the claimant Yordanov
IAN DENHAM (instructed by OSBORNES SOLICITORS LLP) for the claimant Atanasov
ANDREW DAVIS KC (instructed by DWF LAW LLP) for the defendants Vasilev and Aviva Insurance Limited.
KATHERINE DEAL KC (instructed by WEIGHTMANS LLP) for the defendant Zad Dallbogg Life and Health AD.

Hearing dates: 14th, 15th and 16th May 2024
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JUDGMENT

ANNABEL DARLOW KC:

(Sitting as a Judge of the High Court)

1. This is the hearing of preliminary issues arising from a road traffic accident which occurred on 31 July 2019.

2. Two separate claims have arisen from the accident. The first claim is brought by Miroslav Yordanov and the second by Vladimir Atanasov. Following a case management conference on 25 April 2023 in respect of both claims, it was ordered that the following should be tried as preliminary issues:

   (i) Liability in both claims.
   (ii) Choice of law in the Yordanov claim.
   (iii) Contribution between defendants in the Yordanov claim.
   (iv) Atanasov's contribution to his own injuries, if any.

3. The evidence and consequent factual findings pertaining to the resolution of the preliminary issues in both claims substantially overlap. For this reason, a single judgment will be given in respect of both claims, although each remains separate. For convenience, the first set of proceedings will be referred to in this judgment as the 'Yordanov claim' and the second as the 'Atanasov claim.'

4. The trial of a further issue, namely Mr Yordanov's contributory negligence to his own injuries, was also ordered. This had been raised in pleadings on behalf of the Fifth Defendant in the Yordanov proceedings, namely Zad Dallbogg Life and Health AD ('Dallbogg'), albeit it was not relied upon by any other Defendant. However, shortly before the commencement of the trial, the Fifth Defendant conceded that the claim of contributory negligence as against Mr Yordanov was no longer pursued and so will not be considered further by the court.

The accident

5. At about 8.43 p.m. on Wednesday 31 July 2019, a fatal road traffic accident occurred on the B2198 Bracklesham Lane in Sussex, which involved four vehicles and seven people.

6. The B2198 Bracklesham Lane, Bracklesham, near Chichester is a single carriageway road with one lane in each direction. At the vicinity of the accident, the road, whose width varies between approximately six to seven metres, is subject to a 40 mph speed limit. The opposing lanes are divided by hazard warning lines and the road travels through semi-rural countryside lined with properties to the east and west of the road.

7. Two of the vehicles involved in the accident, a Volkswagen Eos ('the VW'), driven by Alyosha Angelov and an Alfa Romeo ('the Alfa'), driven by Vladimir Atanasov, were travelling southbound on Bracklesham Lane. The driver of the VW attempted to overtake the driver of the Alfa. At the time he did so, a third vehicle, a Nissan Qashqai ('the Nissan'), was travelling northbound on the same road. There is a slight bend in the section of the road which lay between the two southbound and one northbound vehicle as they began to approach each other. As the driver of the VW, having completed the overtaking manoeuvre, tried to steer the VW back into the southbound lane, contact occurred between the offside of the VW and the front offside of the Nissan. Contact also probably occurred between the nearside of the VW and the offside of the Alfa at around the same time.

8. Both the VW and the Alfa then lost control and left the road and each travelled onto the eastern grass verge. The VW collided with a telegraph pole, causing the pole to break away from its base, then struck a low embankment, rolled over and came to rest on its side in the southbound lane of Bracklesham Lane. The Alfa collided with a parked and unoccupied Audi A3 vehicle in a nearby driveway with sufficient velocity that both vehicles became airborne. Both vehicles then came to rest in the garden of an adjacent residence. Mr Angelov tragically died shortly after the collision as a result of injuries sustained in the accident. Mr Vasilev, Mr Yordanov and Mr Atanasov all sustained serious injuries.

9. At the time of the collision, it was daylight, close to dusk and the weather was fine and dry. The road was in good condition.

10. The Alfa Romeo GT registration EB1736BB was driven by Mr Vladimir Atanasov, who was the sole occupant of the vehicle. Mr Atanasov was the owner of the vehicle, which was registered in Bulgaria and had a manual left-hand drive. He was not wearing a seatbelt. The vehicle was insured by Dallbogg who are registered in Bulgaria.

11. The Volkswagen Eos TDI Cabriolet CF06 AVC was driven by Mr Alyosha Angelov. The vehicle was owned by Valentin Vasilev who had purchased the vehicle in the United Kingdom in 2018 and was its registered keeper. The vehicle was insured by Aviva Insurance Limited ('Aviva') who are registered in England.

12. The front seat passenger of the VW was Miroslav Yordanov, who was wearing a seatbelt. The rear seat passengers were Valentin Vasilev and his partner, Zafirka Kovacheva. Neither were wearing seatbelts.

13. The Nissan Qashqai was driven by Mrs Glenda Luff and her husband, Mr John Luff, was the front seat passenger.

The 'Yordanov claim': Choice of Law

14. There is a dispute as between the Fifth Defendant, on the one hand, and the Claimant and the First and Third Defendant, on the other, as to the applicable law in relation to the claim. The Fifth Defendant submits that the applicable law should be that of Bulgaria and all other represented parties to the 'Yordanov claim' submit the applicable law should be that of England. In respect of the 'Atanasov claim', it is accepted by all represented parties that the applicable law should be that of England.

The Legal Framework

15. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), sets out the rules which determine the law which governs non-contractual obligations arising between parties in most civil and commercial matters.

16. Article 1 of the Rome II Regulation provides that the Regulation shall apply in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters and excludes a number of obligations from the scope of the Regulation.

17. Article 4 of the Rome II Regulations is in the following terms:

Article 4

General Rule

1. *Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*
2. *However, where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.*
3. *Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.*

18. Article 14 of Rome II preserves the freedom of choice of the parties and provides that the parties may agree to submit non-contractual obligations to the law of their choice, including by an agreement entered into after the event giving rise to the damage occurred. That choice '*shall not prejudice the rights of third parties*.'

19. Article 15 of Rome II provides that the law applicable to non-contractual obligations shall govern matters including the basis and extent of liability, the grounds for exemption from liability, any limitation of liability and division of liability and the existence, nature and assessment of damage or the remedy claimed. Of relevance in the context of a personal injury claim which will require consideration of the standards of driving applicable to a reasonable competent driver, Article 17 provides that in assessing the conduct of the person claimed to be liable, account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

The Matters in Dispute

20. On behalf of the Fifth Defendant, it is asserted that the 'person claimed to be liable', namely Atanasov and 'the person sustaining damage', namely Yordanov, were both habitually resident in the same country, namely Bulgaria, at the time of the accident. Thus Article 4(2) should displace Article 4(1), which would indicate that English law should apply, consistent with England being the country where the damage occurred. Consequently, the court should apply the law of Bulgaria to the determination of liability, contributory negligence and damages in so far as the claim against the Fifth Defendant is concerned. In the alternative, the court should determine under Article 4(3) that the tort is manifestly more closely connected with Bulgaria.

21. These contentions are opposed by the Claimant and the First and Third Defendants, who dispute as a matter of fact that Yordanov and Atanasov were both habitually resident in Bulgaria on 31 July 2019. In the alternative, they ask the court to conclude, under Article 4(3), that there is a manifestly closer connection between the tort and England than with Bulgaria.

22. In respect of the Atanasov claim, the parties have reached a prior agreement that the law applicable to the claim should be that of England.

Analysis of Articles 4 (1) and (2)

23. In determining the law applicable to non-contractual obligations, the starting point is that the applicable law to a claim in tort will be that of the country in which the damage occurs. Article 4(1) sets out the default position and identifies a decisive criterion which will

determine the applicable law in the vast majority of cases, in which the place of damage corresponds to the injured party's place of residence. It is thus consistent with the aims of Rome II, which emphasise the importance of the predictability of the outcome of litigation and certainty as to the law applicable.

24. Article 4(2) was described in the Explanatory Memorandum to Rome II[1] as introducing a '*special rule where the person claimed to be liable and the person who has allegedly sustained damage are habitually resident in the same country, the law of that country being applicable. This is the solution adopted by virtually all Member States, either by means of a special rule or by the rule concerning connecting factors applied in the courts. It reflects the legitimate expectations of the two parties.'*

25. The objectives and rationale expressed thus in the Memorandum are reflected in Recital 18:

    The general rule in this Regulation should be the lex loci damni *provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.*

26. Article 4(2) of Rome II thus creates a special rule which will only become of relevance if, at the time the damage occurs, there is a mismatch between the habitual residence of both parties and the place where the damage occurs.

27. In the context of a claim involving multiple defendants, the court must consider whether and if so how, Article 4(2) applies to a multi-party case. This issue was considered by Dingemans J (as he then was) in *Marshall v Motor Insurers' Bureau* (2015) EWHC 3421 (QB), in which it was submitted that the wording of '*person'* in the singular in Article 4(2), restricted the application of the rule in that paragraph to proceedings involving a single claimant and defendant. Dingemans J declined to accept that such a strict interpretation was either reasonable or correct. Applying the narrower interpretation to the hypothetical example of a coach crash which would be excluded from the effect of Article 4(2) simply because there was more than one injured person, served to demonstrate that the proposition advanced was unsustainable [17].

28. The point was also considered by Linden J in *Owen v Galgey and others* [2020] EWHC 3546 (QB), before whom the holding of Dingemans J as to the wider application of Article 4(2), had not been challenged. Linden J identified that support for a 'respectable' argument that Article 4(2) applied only to two party cases might be found in the references therein to two persons 'both' having their habitual residence in the same country, together with the fact that the paragraph was intended to provide a special rule, thereby justifying a narrower approach [29]. Linden J recognised the force of the argument to that effect in *Marshall* and examined the proposition that, in the event of a multi-party dispute, reliance could be placed on the habitual residences of the parties under Article 4(3), thus achieving a result consistent with Article 4(2). He observed, however, this approach would provide a less direct or certain route to the correct answer and was thus less consistent with the overall scheme of the Article and the Regulations [34 to 35].

29. It has not been contended by any party to these proceedings that this court should reach a different conclusion to that drawn by Dingemans J in *Marshall* and I therefore conclude that Article 4(2) may apply to a multi-party case such as the instant proceedings.

[1] Explanatory Memorandum of the Commission of the European Communities (COM (2003) 427, dated 22 July 2003.

30. The court must further consider whether or not, in a multi-party case, designation of the applicable law under Article 4(2) should apply to all parties to the claim, regardless of the application of Article 4(1), or any agreement parties may have reached pursuant Article 14. In *Dicey, Morris and Collins on The Conflict of Laws (16th Edn)*, the authors suggest that in such circumstances, Article 4(2) is to be applied separately, as between each pairing of claimant and defendant. Any other solution would open up the possibility of the determination of the applicable law being subject to manipulation by way, for example, of the joinder of claims simply in order to achieve a particular desired outcome under Article 4(2). In the particular context of a road traffic accident involving multiple vehicles, it should not be necessary to assess the habitual residence of all potential claimants and defendants; instead; '*Each potential claim arising from the accident stands alone for the purposes of applying the rule of displacement in Art.4(2). The habitual residence of other involved parties may, however, be a circumstance to be taken into account in applying the 'escape clause' in Art. 4(3).'*[2]

31. Support for this approach may be found in *Briggs, Private International Law in English Courts*[3], in which it is observed that if a defendant does direct injury to two persons in a single act, neither being the consequence of the other, the applicable law will be identified for, and by examining, each claim individually. If a defendant injures two people, of whom one but not the other shares the same habitual residence as the defendant, one claim will fall within Article 4(2) and the other under Article 4(1). The editors point out that the joinder of two claimants, which is a procedural step, cannot obviously affect the issue of applicable law, which is a substantive matter.

32. The analysis in *Dicey* and *Briggs* emphasises that the choice of parties to submit to the law of a particular country, shall not prejudice the rights of third parties, as provided by Article 14. The Fifth Defendant should not therefore be bound or prejudiced by the agreement entered into by the parties to the Atanasov claim; neither should they be bound by any agreement between other pairings within the Yordanov claim.

33. For the purposes of Article 4(2) therefore, the court must determine the habitual residence, as at 31 July 2019, of the pairing of the Claimant, Mr Yordanov and Mr Atanasov, who is claimed to be liable for the damage and who was insured at the time of the accident by the Fifth Defendant. In determining whether Article 4(2) displaces Article 4(1), the determination of the court will be limited only to the pairing of the Claimant and the Fourth Defendant (and, by extension, the Fifth Defendant, whose habitual residence is irrelevant for these purposes[4]). The remaining pairings, as between the Claimant and the First, Second and Third Defendant, will be subject to English law, consistent with their own choice and agreement.

Determination of Habitual Residence for the purposes of Article 4(2)

34. Article 23 of Rome II provides a definition of habitual residence, but only in respect of companies and other bodies and a natural person acting in the course of his business. It does not otherwise include a definition of habitual residence in relation to individuals.

35. Settled case law has established that the terms of a provision of European Union law, which makes no express reference to the law of member states, must normally be given an independent and uniform interpretation throughout the European Union, to ensure a uniform application of European Union law and the principle of equality; (see *Mercredi v Chaffe* (Case C-497/10 PPU) (2012) Fam.22 at para 45).

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[2] *Dicey, Morris and Collins on the Conflict of Laws (16th Edn) at 35-030.*

[3] Adrian Briggs, *Private International Law in English Courts* at p. 552.

[4] See *Winrow and Hemphill* [2014] EWHC 3164 (QB) [25]

36. My attention has helpfully been drawn to a number of authorities in which the concept of habitual residence has been considered by the European Courts of Justice and to decisions of the courts of England and Wales. From these authorities, the following key propositions may be distilled:

(i) 'Habitual' denotes a residence that has a certain permanence or regularity (*Mercredi,* ibid [44]).
(ii) Habitual residence must be established on the basis of all the circumstances specific to each individual case (*A (Case C-523/07), (2010) Fam 42* at paragraph 37.) Factors to be taken into account include duration, regularity, conditions and reasons for the stay; nationality, linguistic knowledge and manifestation of an intention to settle permanently through the purchase or lease of a residence or application for social housing (*A,* ibid, [38-40]) .
(iii) A peripatetic life, over a short period was liable to constitute an indicator that the individual in question did not habitually reside in the state in question (*A* ibid, [41]).
(iv) The mere fact of residence in a particular country is insufficient; habitual residence is the location where the person has established his permanent or habitual centre of interests, with all relevant factors being taken into account (*M v M* (2007) EWHC 2047, as cited in the judgment in *Winrow and Hemphill and another* (2014) EWHC 3164 (QB) [12]).
(v) The intention of the parties as to future residence is not a determinative factor; in *Re LC (Children)* (2014) 2 WLR 124, Baroness Hale, with whom Lord Sumption agreed, held:
59. The first principle is that habitual residence is a question of fact: has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual? It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so…[5]

37. Whilst a number of the judgments of the European Court place a certain emphasis on the degree of integration into a social and family environment, these observations should be contextualised as relating in particular to the habitual residence of children. Many of the standard metrics which might denote habitual residence in the case of adults; for example, purchase or rental of accommodation in a particular location and place of work, cannot readily be applied to determine habitual residence of a child. Thus, factors such as integration might assume a proportionately greater importance in respect of a child than they might when determining habitual residence for an adult.

Analysis of Article 4(3)

38. In the Explanatory Memorandum to Rome II, Article 4(3) was explained as follows:

Like Article 4(5) of the Rome Convention, paragraph 3 is a general exception clause which aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation.
Since this clause generates a degree of unforeseeability as to the law that will be applicable, it must remain exceptional. Experience with the Rome Convention, which begins by setting out presumptions, has shown that the courts in some Member States tend to begin in fact with the exception clause and seek the law that best meets the proximity criterion, rather than starting from these presumptions. That is why the rules in Article [4](1) and (2) of the proposed Regulation are drafted in the form of rules and not of mere presumptions. To make clear that the exception clause really must be exceptional, paragraph 3 requires the obligation to be 'manifestly more closely connected' with another country.

[5] As cited in *Winrow* at paragraph 40.

39. In order to displace the law indicated by Articles 4(1) or (2), it is thus necessary to show that the '*centre of gravity'* of the case is with the suggested applicable law (*Marshall,* ibid at paragraph 20). The test under Article 4(3) has been described as '*stringent*'; it requires that it be clear from all the circumstances of the case that the entire tort and not just a specific issue arising from it, is manifestly more closely connected with a country other than that indicated by Article 4(1) or (2).[6] There must be a *clear preponderance of factors* pointing to the country in question. [7] It is not, however, necessary to demonstrate the absence of any 'real' or 'genuine' connection with the country whose law is otherwise applicable.[8]

40. Whereas on the plain wording of Article 4(3), it might be suggested that Article 4(3) may only point to the law of a country other than that indicated by Article 4(1) or (2), this is accepted not to be the correct reading of the Article as a whole.[9] It is also accepted that the burden of establishing that Article 4(3) applies rests on the party seeking to disapply Article 4 (1) or (2) and the standard required to satisfy the test is high (see *Winrow* ibid at paragraph 42, *Marshall* ibid at paragraph 20).

41. The circumstances to be taken into account in determining whether Article 4(3) displaces either of Article 4(1) or (2) were considered by Slade J in *Winrow*:
    (i) The country in which the accident and damage occurred and the habitual residence of the parties remained to be taken into account, notwithstanding that each was the determinative factor for the purposes of Articles 4(1) and (2) respectively (paragraph 43).
    (ii) The habitual residence of the claimant at the time that any consequential loss is suffered, may also be relevant (at paragraph 43).
    (iii) The '*centre of gravity*' referred to that of the tort, not that of the damage and consequential loss caused by the tort (at paragraph 45) but the link between the consequences of the tort and a particular country remained to be considered as a relevant factor (paragraph 50).
    (iv) The nationality of the claimant and defendant (at paragraph 54).
    (v) Place of residence after the accident, although this is to be viewed in the context of residence and length of residence at the time of the accident (at paragraph 56).
    (vi) The country in which the greater part of the loss and damage are suffered (at paragraph 59).
    (vii) The country in which the vehicle driven by the Defendant was insured and registered, albeit that neither were deemed strong connecting factors (at paragraph 60).
    (viii) The pursuit of proceedings before an English court was to be taken into account but was not a strong connecting factor (at paragraph 61).

42. Article 4(3) was considered by Dingemans J (as he then was) in *Marshall*, a case which concerned a road traffic accident in France in which two individuals habitually resident in England had been seriously injured, one fatally. The factors indicating that the tort was manifestly more closely connected with France than with England or Wales, included the fact that those injured or killed in the accident were struck by a French car, driven by a French national, on a French motorway. The fact that the parties had a pre-existing relationship in or with a particular country was noted but would not suffice if considered on its own. Any claims against the driver and another vehicle involved would be governed by French law [21].

43. Dingemans J observed that many of the potential problems associated with multi-party claims might be addressed by a proper approach to Article 4(3). In this context, he noted that; '*it would be an unusual result of choice of laws provisions if at the moment that Mr Marshall*

[6] *Briggs*, *Private International Law in English Courts*, *ibid*, p. 556 at (d)(i).
[7] *Dicey*, at 35-032.
[8] *Dicey*, at 35-032.
[9] See eg *Briggs* ibid, p. 556-7, *Marshall* at paragraph 19.

was hit by the Peugeot motor car his claims against Ms Bivard and Mr Pickard were subject to two different governing laws.' [18]

44. In *Owen v Galgey* [2020] EWHC 3546 (QB); [2021] I.L.Pr.7, a dispute arose as to the law applicable to a claim for damages for personal injury sustained by a British citizen during a holiday in France, in a swimming pool at a property owned by two British citizens who were, like the claimant, habitually resident in England. Linden J distilled the text of Article 4(3) as calling for, '*a consideration of factors which are relevant to an assessment of the degree of connection with the alternative country contended for. Convenience or the risk of complexity in the proceedings, of itself, is unlikely to be a directly relevant factor in assessing this question, one way or the other'* (at paragraph 37). The court is called upon to compare the factors connecting the tort with Country A and those which connect it with Country B and consider, as required by Article 4(3), '*all the circumstances of the case*' [39-41]. The strength of connection to one country in a case in which a particular claimant and defendant in a dispute shared the same habitual country of residence might be undermined where some of the other parties to the dispute had their habitual residence in a different country.

45. Linden J adverted to potential issues falling to be considered for the purposes of Article 4(3) in *Winrow* and *Marshall*. He observed, however, that with regards to the relevance of habitual residence at the time of the consequences of the tort, he preferred the view that the decision should be taken instead with reference to the circumstances at the time of the tort. The place where any indirect damage was suffered was a less weighty consideration [49].

46. Additional factors indicated by Linden J as potentially relevant to the Article 4(2) determination, included the country in which any insurer defendants were registered at the time of the tort and damage [48]; the fact that the first and second defendant had a significant and long-standing connection to France and owned the property where the damage occurred, and that works on the swimming pool were being carried out by a French company, governed by French law. The first and second defendants were insured by a French company under a contract also governed by French law. Conversely, the only significant connections with England were the nationality and habitual place of residence of the claimant and the first and second defendants [75-77]. The tort/delict in the case was closely connected with the state of the swimming pool, which was part of a property in France and resulted from the French law contract between the defendants.

The approach of the court to fact-finding

47. In respect of my consideration of all the witness evidence before the court, in the context of both habitual residence and the facts of the accident more generally, I remind myself that the burden of proof rests exclusively on the person making the claim, who must prove the claim to the conventional civil standard of a balance of probabilities.

48. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560, a number of observations were advanced by Leggatt J (as he then was) as to the approach to be taken to the assessment and reliability of witness evidence. These included that (i) an obvious difficulty which affects allegations and oral evidence based on recollection of events occurring several years ago, is the unreliability of human memory, which is notoriously imperfect and fallible; (ii) memory may be especially unreliable when recalling past beliefs; (iii) the process of civil litigation may engender powerful bias in witness recall, particularly where a witness has a 'tie of loyalty' to a particular party; (iv) the court should avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

49. Other important axioms of fact-finding include, but are by no means limited to; the necessity for findings of fact to be based on evidence, including inferences that may be safely and fairly drawn from the evidence, but not mere speculation (*Re A (A child) (Fact Finding Hearing: Speculation)* (2011) EWCA Civ 12). The court must take account of the inherent probability or improbability of an event having taken place as part of the natural process of reasoning (*Re BR (Proof of Facts)* (2015) EWFC 41). In the context of this particular case I bear in mind in particular that witnesses were attempting to recall an extremely traumatic and distressing incident, in which a number of them sustained serious injury, which occurred almost five years ago.

The Evidence as to Habitual Residence

50. Mr Miroslav Yordanov is a Bulgarian national, originally from Sevlievo, a small town in Bulgaria. He provided both written and oral evidence to the court. He arrived in the United Kingdom in April 2019 and had thus been in the country for about three months before the accident. He had spent most of his life in Greece and had worked there since about 1992. He also worked in Scotland for a few weeks in 2018. Whilst in England, he had undertaken seasonal work and lived at South Downs Workers' Village ('the holiday village'); this was temporary accommodation supplied by an agency, the cost of which was deducted from his wages. The vast majority of those who lived at the holiday village were Bulgarian or Rumanian and he spent most of this time in the company of other Bulgarians. Before the accident, his overseer in England had offered him a permanent job, including accommodation, which he wished to accept and he would have remained in England. His wife and children had remained resident in Bulgaria and lived there in a house which he had purchased in 2007. Atanasov was also from Sevlievo and he had recognised him when he first saw him at the village.

51. Additional evidence relevant to the location of Yordanov's habitual residence was provided by Mrs Stanka Yordanova, wife of Mr Yordanov. In her witness statement dated 13 January 2020, she stated that Yordanov had worked in Greece since 1992 and continued to do so until February 2019. In 2005, they bought a house together in Bulgaria. He would work in Greece for the duration of the fruit and vegetable season and return to Bulgaria in the off-season and engage in factory work. Yordanov planned to work in England for seven or eight months and return to Bulgaria in around November 2019. Mr Yordanov also worked in Scotland for a short period in 2016.

52. Vladimir Atanasov is a Bulgarian national, also from Sevlievo. Mr Atanasov gave written and oral evidence to the court. He grew up and was educated in Greece, leaving in 2015. He began visiting the United Kingdom in 2016 and his usual pattern was to spend approximately six months working in the United Kingdom before returning to Bulgaria for the rest of the year for the off-season, where he lived with his mother in Sevlievo. Mr Atanasov produced records from HMRC, demonstrating that he was paying tax in this country from 2016 onwards. The length of time he spent in the United Kingdom increased over the years so that he was spending longer in this country than in Bulgaria. At the time of the accident, he lived at the South Downs Holiday Village on Bracklesham Lane and had a close family relative, his brother, who was also resident in this country. He has stated that before the accident, he had planned to stay permanently in the United Kingdom and return to Bulgaria only for holidays, but in the event, returned to live and work in Bulgaria.

53. Valentin Vasilev is a Bulgarian national who gave written and oral evidence to the court. He speaks some English but gave evidence through an interpreter at court. At the time of the accident, he had been living and working in the United Kingdom for three years together with his partner, Zafikka Kovacheva, who was in the VW with him when the accident occurred. During the entirety of this period, he did not return to Bulgaria. In July 2019, he and his

partner both lived at the holiday village, where most residents were Bulgarian or Rumanian. Most of his work colleagues were British.

Submissions as to Choice of Law

54. On behalf of the Fifth Defendant, Ms Katherine Deal KC contended that both Yordanov and Atanasov were plainly habitually resident in Bulgaria. She relied upon the fact that Yordanov had not been in England prior to April 2019; worked via an agency and stayed in temporary accommodation together with numerous other foreign nationals. He owned a house in Bulgaria, where his wife and children remained and where the latter were educated. There was no evidence that he had established social, administrative or economic roots in England. She submitted that the court should place little or no weight on the evidence of Mr Yordanov that he had been offered a permanent job in England which he intended to accept; the evidence was not supported by the evidence of his wife, the schedule of loss or indeed any other source.

55. In respect of Mr Atanasov, Ms Deal submitted that he was a temporary economic migrant, without evidenced social, economic or administrative links to England. He lived in temporary accommodation and worked on short term agency contracts. He drove a Bulgarian-registered and insured vehicle and returned back to Bulgaria shortly after the accident. Ms Deal submitted that both Atanasov and Yordanov were living in a 'Bulgarian bubble', surrounded by individuals of the same nationality.

56. Turning to Article 4(3) in the event that the court rejected the submissions on habitual residence, Ms Deal accepted that the burden on the party seeking to displace Article 4(1) and (2) imposed a high hurdle but there was no requirement that the facts should be exceptional. Factors closely connecting the tort to Bulgaria included the fact that Atanasov was in a Bulgarian registered and insured vehicle and the accident involved, on the Claimant's case, deliberate racing between individuals who were all known to each other and lived in a Bulgarian enclave. The consequences of the tort would continue to be suffered in Bulgaria. The habitual residence of Vasilev was not a relevant factor, as his status in court was essentially that of a witness. An outcome subjecting a single road traffic accident to two different governing laws, was neither prohibited nor impossible. The objectives of foreseeability and predictability would be 'thrown out of the window' if an analysis of Article 4(3) depended on the decision making of third parties.

57. On behalf of the Claimant Yordanov, Mr Hawkins reminds the court that in order for Article 4(2) to apply, the court must be satisfied that both Yordanov and Atanasov had a common habitual residence in Bulgaria. The available evidence indicated that both had significant roots in Greece and not Bulgaria which diluted the strength of any connection with Bulgaria. Both individuals were working in England at the time of the tort and in considering the question of habitual residence of an adult, the location of place of work should assume a greater importance than was apparent from the European judgments, which decided the habitual residence of children and focussed on criteria which were of marginal relevance in respect of an adult.

58. The factors to be considered by the court under Article 4(3) included the fact that proceedings had been brought before an English court; other parties were included in the proceedings who were not habitually resident in Bulgaria and the Third Defendant was an English insurer. Weighing up all relevant factors, it could not be said that the centre of gravity lay in Bulgaria rather than England. It would be undesirable for the court to find that different systems of law governed the same accident.

Discussion and conclusions

Article 4(2)

59. Applying the factors discussed under the sub-heading 'Determination of Habitual Residence' above, it cannot be said that the residence of either Yordanov or Atanasov, whilst in England, evinced the necessary characteristics of permanence or regularity so as to satisfy the requisite criteria for habitual residence. They both lived in temporary accommodation, within a holiday village, in accommodation that was for all practical purposes dependent upon their continued employment through a particular agency. By contrast, in Bulgaria, both lived in permanent accommodation; Yordanov in a house which he and his wife had owned for many years and Atanasov in a flat together with his mother.

60. The factors of duration, regularity, conditions and reasons for the stay in a particular country also indicate that in the specific circumstances of each, the habitual residence of both was in Bulgaria and not England. Each regularly returned to Bulgaria when not working abroad, to the same place of residence on each occasion. Their residence in Bulgaria did not depend upon availability of employment but was rooted in a far wider centre of interests; each was a Bulgarian national with close family in Bulgaria. Yordanov's wife and children lived with at least some regularity in Bulgaria in the family home and Atanasov lived with his mother in the small town where he had grown up. By contrast, the continued presence of both Yordanov and Atanasov in England would be determined by the availability of employment and by no other material factor.

61. As observed at paragraph 37 above, considerations as to degree of social and family integration may be of less importance in the context of determining the place of habitual residence of an adult. Nevertheless, no strong evidence was placed before the court to indicate any significant social or family integration by either Yordanov or Atanasov, in contradistinction to their position in Bulgaria. The holiday village in which both lived was accepted to be dominated by Bulgarian and Rumanian workers and both appeared to have socialised largely with other Bulgarians.

62. I have considered the weight, if any, that should be attached to the evidence that both Yordanov and Atanasov stated in evidence that their intention prior to the accident was to remain in England. I have concluded I can attach very little weight to this evidence; as was observed in *A* what is required is a manifestation of an intention by means of some action having been taken. In this instance, there was no such manifestation; for example, a contract of full-time employment, or a longer-term lease on a place of residence within the jurisdiction. In the event, both Yordanov and Atanasov returned to Bulgaria and did not remain in England, although circumstances had changed so much since immediately before the accident that nothing can turn on this factor alone.

63. Applying Article 4(2) indicates therefore that Article 4(1) is displaced and the applicable law is that of Bulgaria. Matters do not rest there however, as I must go on to consider Article 4(3).

Article 4(3)

64. There are a significant number of circumstances indicative of a close connection between the tort and England. Firstly, the accident occurred on an English road, in England and involved a third and fourth vehicle, both registered in England. The immediate damage and the primary consequences of the damage all occurred in England; the accident was attended by the emergency services and investigated by the police of this jurisdiction and both Atanasov and Yordanov received significant medical care in English hospitals. In particular, Yordanov was hospitalised for several weeks after the accident, two of which were spent in a coma and received medical care in England for many months thereafter.

65. At the heart of this case is the determination that the court must make as to whether the driving of Atanasov and/or Angelov was negligent and thereby caused the damage and injury alleged. In doing so, the court must apply English road traffic regulations and English mandatory road safety rules. There is thus a very close connection between the tort itself and English law; the connection is of relevance to the determination of the issues and is not mere happenstance, or background. The proceedings have been brought before an English court.

66. Although the finding of the court is that both Yordanov and Atanasov were habitually resident in Bulgaria within the meaning ascribed in European case law, they nevertheless each had close and significant relations with England. Both were living and working in England at the time of the collision. Atanasov, in particular had paid tax in England for several years and had a regular and established connection with England, having spent at least half of each year in England for the last four years. The vehicle in which Yordanov was travelling at the time of the accident was acquired and registered in England and was insured by an English-registered insurer.

67. As noted in *Dicey,* whilst it should not be necessary for the court to consider the habitual residence of other involved parties for the purposes of Article 4(2), this may be a circumstance to be taken into account in applying the 'escape clause' in Article 4(3), in which connections to other persons and things involved in the harmful event assume relevance.[10] Considering the position of Mr Vasilev, the First Defendant, in the Yordanov claim, I am satisfied that at the time of the accident, his habitual residence was in England and not Bulgaria. By the time of the accident, he had lived and worked in England for three years. His partner, Ms Kovacheva, also lived and worked in England. Although retaining many links to the Bulgarian community, the majority of his work colleagues were British. I am unable to accept the contention of Ms Deal that the residency status of Yasilev is an irrelevance; he remains a party to both sets of proceedings despite the late change in the allegations against him, was the owner and keeper of the VW Eos and his insurance policy with Aviva is the reason why the latter is a defendant in both sets of proceedings.

68. Conversely, the only connections with Bulgaria and the tort are the nationality and habitual residence of the Claimant and the First Defendant, together with the fact that the vehicle of the first Defendant was Bulgarian-registered and insured by a Bulgarian-registered insurer, the Fifth Defendant. When considering the circumstances relevant to Article 4(3) as opposed to Article 4(2), the significance of habitual residence must be set against the fact that both lived and worked in England at the time of the collision. Neither, for example, were present in England as tourists, in the country on a vacation for a few days, before returning home to Bulgaria.

69. Although I have considered the contention that the longer-term consequences of the damage continue to be experienced in Bulgaria, I am unable to attach any significant weight to this factor. Firstly, as observed by Linden J in *Owen v Galgey*, the location where any indirect damage was suffered was a less weighty consideration. Secondly, very little evidence has been placed before the court touching on the topic and it is right to observe that Yordanov remained recuperating in England for many months after the accident and was joined in this country by family members. I have also not placed any significant weight on any pre-existing relationship between the parties. The evidence was to the effect that Yordanov and Atanasov were, at most, on 'nodding-terms' and were neither friends nor colleagues.

70. Balancing these factors and the degree of connection between each and the tort as I must, I have concluded that the Claimant has crossed the high hurdle set by Article 4(3) and proved that it is clear from all the circumstances of the case that the tort is manifestly more closely

[10] *Dicey* 35-030, 35-033.

connected with England than Bulgaria and it is in the former country that the centre of gravity is located.

71. When considering the objectives of foreseeability and predictability, I am unable to conclude in all the circumstances of the case that the legitimate expectation of Atanasov and Yordanov, following a multi-vehicle, multi-party road traffic accident which occurred in England, where both lived and worked at the time, could have been that Bulgarian law should apply to subsequent proceedings arising from the collision. On the contrary, the legitimate expectation would have been that the consequences of the collision would be governed by law of the country in which the accident took place and where they both lived and worked.

72. If the Fifth Defendant is correct in contending that the law applicable to the pairing between it and the Claimant should be different, regardless of that applicable to the remaining parties, the consequence would be that two different governing laws would apply to the determination of the claims by Yordanov against the five Defendants, and indeed to the claim by Atanasov, all of which arose from the same road traffic accident. This would be a highly unsatisfactory conclusion, the undesirability and illogicality of which may best be illustrated by the fact that different laws would apply to Atanasov in his status as Claimant in the Atanasov claim, as opposed to his status as Defendant in the Yordanov claim. As observed by Linden in *Owen v Galgey*, one of the factors which may result in a different answer under Article 4(3) to that given under Article 4(2) may be that the claim against another defendant or other defendants is governed by the law of another country [40].

73. Whilst on behalf of the Fifth Defendant, reliance has been placed on the provision in Article 14 that choice of law shall not prejudice the rights of third parties, no evidence or submission has been placed before the court to indicate that any prejudice would be suffered by the Fifth Defendant by reason of the application of English law. On the contrary, it has been submitted to the court that the application of Bulgarian law to the preliminary issues would produce an identical results as that resulting from an application of English law. Furthermore, there is no indication that the choice of parties to either claim has been influenced by improper motives aimed at manipulation of choice of governing law. None of these points however serve to detract from the central conclusion of the court that the governing law should be English and not Bulgarian. I should add however that had the court reached a counter-factual determination that the clear preponderance of factors pointed to Bulgaria not England for the pairing in question, the consequent result of two governing sets of laws would not have displaced that finding in favour of England, simply to achieve uniformity.

74. Although foreseeability and predictability are, as emphasised by Ms Deal, important objectives behind the Regulation, Recital 14 of Rome II also identifies the goals of doing justice in individual cases and creating a flexible framework of conflict of law rules. Article 4(3) is itself intended to bring a degree of flexibility enabling the court to adapt rigid rules to the circumstances on an individual case. The purpose of the rules are to enable to the court to treat individual cases in an appropriate manner and not to apply an inflexible rule regardless of the circumstances of a particular case.

75. Having determined that English law should apply to the Yordanov claim, I then turn to the claims themselves.

76. In so far as they remained applicable by the commencement of the trial, the respective contentions of the parties are summarised below.

The 'Yordanov' claim: the case for the Claimant

77. The allegations of negligence against the First Defendant, Mr Vasilev are no longer pursued.

78. In respect of the Second and Third Defendant, it is alleged that the driver of the VW, who is accepted by all parties to have been Mr Angelov, was negligent in that he drove at excessive speed; drove the VW on the incorrect side of the road; attempted to overtake the Alfa when it was unsafe to do so; failed to keep any or a proper lookout; engaged in racing with the Alfa; failed to take action to avoid a collision with the Alfa and/or the Nissan; failed to exercise the skill and/or care expected of a reasonable driver and failed in all the circumstances to take reasonable care for the safety of the Claimant.

79. A certificate of insurance issued by the Third Defendant had been issued to the First Defendant. Should judgment be obtained against the First Defendant and/or Angelov, such judgment would relate to a liability required to be covered by section 145 of the Road Traffic Act 1988. Pursuant to section 151 of the Road Traffic Act 1988, the Third Defendant would be liable to satisfy any such judgement as might be obtained against Mr Angelov.

80. In respect of the Fourth and Fifth Defendant, it is alleged that Mr Atanasov was negligent in that he engaged in racing with the VW; drove in such a way as to influence the driving of the VW and expose the occupants of the VW to a foreseeable risk of injury; drove at excessive speed; failed to take steps to avoid a collision with the VW and/or enable the driver of the VW adequate opportunity to avoid collision with the Alfa and/or the Nissan; accelerated and/or matched the speed of the VW and/or failed to slow down to let the VW pass and/or drove unpredictably whilst being overtaken, thereby failing to comply with rule 168 of the Highway Code; failed in all the circumstances to exercise the skill and/or care to be expected of a reasonable driver and failed to take reasonable care for the safety of other road users and in particular the occupants of the VW.

The case for the Defendants

81. For the First and Third Defendants, it is alleged that when Angelov attempted to overtake the Alfa, the speed of the Alfa was manipulated by Atanasov to prevent the VW passing and returning to the correct lane.

82. The Second Defendant has been unrepresented throughout these proceedings.

83. No defence was put forward by the Fourth Defendant Atanasov, who was not represented in his capacity as Defendant in the Yordanov claim.

84. The Fifth Defendant denies that the vehicles were racing and that the Fourth Defendant was liable for any risks to which Angelov exposed the passengers of the VW. The Claimant is put to proof as to the allegation that the Fourth Defendant drove negligently. Indemnity and/or a contribution from the Second and Third Defendants, pursuant to the provisions of the Civil Liability (Contribution) Act 1978, is claimed and by its amended defence, the contribution was sought in the alternative pursuant to Bulgarian law.

The ‘Atanasov’ claim: the case for the Claimant

85. No claims are pursued against the First Defendant. Against the Second Defendant, the Claimant asserts that Angelov was negligent in that he drove into the line of oncoming traffic and performed an overtaking manoeuvre when it was unsafe to do so; failed to heed the presence of the Nissan Qashqai; drove into and collided with the Nissan causing further collisions involving Atanasov’s vehicle; drove in a reckless and unsafe manner; failed to exercise reasonable care and skill; exposed the Claimant to a foreseeable risk of danger and injury, and generally failed to drive with sufficient and due care and attention.

86. Against the Third Defendant, the Claimant asserts that the insurer is liable to the Claimant, for the same reasons as relied upon by the Claimant in the Yordanov matter.

87. The First and Third Defendants allege contributory negligence against the Claimant, in that he engaged in racing with the VW; drove in such a way as to influence the driving of Angelov and to expose himself and the occupants of the VW to a foreseeable risk of injury; drove at excessive speed; failed to take steps to avoid the collisions and/or give Angelov adequate opportunity to avoid collisions; accelerated and/or matched the speed of the VW whilst the VW was attempting to overtake and/or failed to slow down to let the VW pass and/or drove unpredictably whilst being overtaken and failed to comply with rule 168 of the Highway Code and failed to exercise the skill and/or care to be expected of a reasonable driver. The Second Defendant was unrepresented.

Witness Evidence

88. In making findings of fact, I have had regard to the entirety of the evidence, which includes but is not limited to the evidence summarised below.

89. Mr Miroslav Yordanov, by witness statement dated 23 January 2023, gave an account of his movements during the early evening of 31 July 2019. He was together with Mr Vasilev, Mr Angelov and Ms Kovacheva and after visiting his brother-in-law, Ivan Marinov, at another site, they went by car and visited a petrol station where he had by chance seen Mr Atanasov. Atanasov drove away from the petrol station first and his own party then began to drive back to the holiday village. Mr Yordanov recalls travelling around a sharp corner, whilst their vehicle attempted to overtake that of Mr Atanasov. His next recollection was of waking up after spending two weeks in a coma at St Richard's Hospital in Chichester.

90. In oral evidence to the court, he stated that each of his group had drunk a beer at the site with Marinov and he had bought more beer at the petrol station. To his recollection, no-one in their car had been intoxicated. He reiterated that he had no recollection of the journey home once they had left the petrol station.

91. Mr Ivan Marinov recalls being visited by Yordanov, Angelov and Vasilev and his wife in the early evening of 31 July 2019. During the visit, with the exception of Vasilev's wife, they each drank one small can of beer and none of the Yordanov party appeared drunk when they left at approximately 5.30 to 6 p.m.

92. Valentin Vasilev, by witness statement dated 16 June 2023 and oral evidence to the court, stated that on the day of the collision, he drove Yordanov and Angelov to a caravan park, before returning to collect them, having picked up Kovacheva from the holiday village in the intervening period. Mr Angelov had left his phone at the holiday village, which he was anxious to retrieve. It was decided that Angelov would drive the VW Eos back to the village; he cannot recall how this decision came to be taken because he knew he was the only driver insured to drive the VW.

93. Vasilev stated that Angelov drove normally before coming up behind the Alfa and started to overtake. As he did so, the Alfa increased its speed. As Angelov slowed down, the Alfa mirrored the change of speed, so that Angelov could neither overtake nor pull in behind the Alfa. Angelov again increased his speed to try and overtake. Vasilev noticed a slight bend in the road ahead and shouted at Angelov to do something and to slow down, because he was worried they would crash on the bend. He hugged his wife and closed his eyes, after which he could recall nothing further. Mr Vasilev comments that he could not say who was responsible for the accident but Atanasov should not have driven as he did. He himself did not see the

oncoming Nissan but when he saw that Angelov was neither overtaking nor returning to the correct lane, he panicked.

94. Mr Vasilev had been interviewed on 13 August 2019 during the course of the police investigation into the collision, under caution and in the presence of a legal representative. During the interview, he made no comment but provided a prepared statement, in which he gave an account of the incident. This account did not include the allegation that Atanasov had mirrored the VW's changes of speed by both accelerating and decelerating so as to thwart the attempted overtaking manoeuvre. The relevant part of his statement reads; '*One of my overriding recollections of that journey is when Alyosha began to attempt to overtake a vehicle. As he drew alongside he was unable to make the manoeuvre as the other vehicle must have accelerated.*' It was suggested to Mr Vasilev in cross-examination that if Atanasov had both increased and decreased his speed to prevent the VW from returning to its correct lane, Vasilev would have mentioned this to the police, not least so as to exonerate Angelov from responsibility for the accident.

95. Zafikka Kovacheva provided a police witness statement dated 14 August 2019, later produced by her as an exhibit and also gave oral evidence to the court. She was collected from the holiday village by Vasilev and driven to a nearby caravan site where they joined Yordanov and Angelov. They purchased a box of twelve beers and had two or three each; she was not drinking and cannot recall the size of the beers. She does not believe any of them were intoxicated. Angelov became concerned that he did not have his phone with him and so they started the journey to the village to collect his phone. Angelov was driving very fast to get back and retrieve his phone and was agitated. Kovacheva was worried about his speed and told him to slow down.

96. Ms Kovacheva recalled they overtook a car carrying a canoe on its roof. They came up behind a car she recognised as belonging to Atanasov, an acquaintance from the Village; at this point, Atanasov was driving much more slowly than the VW. Angelov wanted to overtake and accelerated. As he drew alongside Atanasov's vehicle, the latter sped up so that they were driving side by side and Atanasov was unable to pass. A car appeared ahead, travelling towards them and Angelov braked or slowed down to pull in behind but Atanasov must have done the same, to allow Angelov to overtake, because the two cars remained side by side, now heading straight for the oncoming car. Vasilev took her hand and told her that they were going to die, because it was obvious that they were about to crash. She could not say what speed they were travelling at but it felt very fast.

97. Ms Kovacheva stated in oral evidence to the court that Angelov braked and tried to go back into the correct lane when he saw the oncoming car, but there was a bus directly behind the car and insufficient time. She did not see the bus herself and had not looked to check it was there but Angelov had said he could not abort the manoeuvre because of the presence of the bus. She maintained that Atanasov had earlier prevented Angelov from returning to the correct lane by altering his speed up and down. Asked why she had not given this account to the police in her witness statement, Ms Kovacheva said that she had not been asked those questions. She agreed she had not mentioned the bus in her witness statement to the police and that if she was correct, the bus would also have to be travelling at about 80 mph.

98. The impression she had at the time was that both cars were side by side and neither driver was giving up. She estimated the two vehicles were alongside each other for about 50 to 60 seconds. All of the occupants of the VW were telling Angelov to slow down but he paid no attention to them. Angelov and Vasilev had been friends. Angelov had only drunk one beer. She said; '*both cars were side by side it was like a race, not one person or another was giving up.*'

99. Vladimir Atanasov provided a witness statement dated 31 July 2023. At about 8 pm on the day of the collision, he was returning to the holiday village along Bracklesham Lane, having visited a petrol station. He was not wearing a seatbelt and had not consumed alcohol. He was driving at around 70-80 km/h, according to the vehicle's speedometer which displayed speed in kilometres. The VW Eos appeared behind him and he recognised the vehicle as belonging to Vasilev and assumed that Vasilev was the driver. The VW was travelling very quickly, although he could not estimate the speed, and appeared to be forcing him to increase his own speed. After driving behind him for about one to two minutes, the VW started to overtake. Mr Atanasov states that he did not increase his own speed to prevent the other vehicle from overtaking and continued to drive as before. His last recollection before the collision was of the VW overtaking and another vehicle approaching on the other side of the road. He did not have the opportunity to think for long or to react. He accepts that he was driving in excess of the speed limit but denies racing with the VW.

100. In oral evidence to the court, Mr Atanasov maintained that he had been driving at around 70 to 80 km/h (i.e. approximately 43.5 to 50 mph) and he did not know the speed of the VW. He recalled seeing the VW pulling out to overtake but maintained that he could recall nothing further of the events of the accident. He did not remember seeing the Nissan Qashqai and accepted that he had not braked, decelerated or otherwise reacted at any point, including after the first point of impact.

101. He was asked about Rule 168 of the Highway Code, which states that a driver who is being overtaken should maintain a steady course and speed, slowing down if necessary to let the vehicle pass and that speeding up or driving unpredictably while someone is overtaking, is dangerous. He accepted the appropriate course of action when being overtaken was to slow down to allow the other vehicle to pass. He also agreed with the suggestion that if he had accelerated to a speed of about 80 mph whilst being overtaken, the only reason for this would be to race or prevent the other person from overtaking. When it was suggested to him that the driver of the overtaking vehicle would not have known whether he himself would accelerate or decelerate in response to the attempted overtake, he agreed with this proposition.

102. Mr Atanasov further agreed that the expert evidence indicated that both the VW and his own car must have been accelerating for a sustained period to reach the likely speed at the point of collision and that the Nissan would have been in view for almost five seconds, during which time the VW was attempting to pass his own vehicle.

103. Following the oral evidence of Mr Atanasov to the court, a number of written concessions were made by counsel acting for Mr Atanasov in his capacity as Claimant. The concessions included the following:

(i) The contention that Atanasov did not vary his speed after the VW moved into the offside lane, was unsustainable.
(ii) At some point after the overtaking manoeuvre was commenced, the speed of the Alfa was increased.
(iii) Atanasov would have been aware of the presence of the Eos from the commencement of the overtake and thereafter.
(iv) The expert opinions of Mr Sorton and Dr Walsh, both in their individual reports and their joint report, as to the speed of the two vehicles, was no longer challenged and it was accepted that their speed at the point of first collision was in the region of 80 mph.

<u>Other witnesses to the collision.</u>

104. Michael Donaldson, a local farmer and a driver who witnessed part of the events, was first interviewed at the scene of the accident on 31 July 2019 and gave an account which was reduced into writing. It appears that a page of this account is missing from the records provided. Subsequently, he provided a police witness statement on 15 August 2019 and a statement for the purposes of these proceedings on 13 June 2023. In his initial account, he stated that he had been driving a VW pick-up truck northbound on Bracklesham Lane, following behind and travelling in convoy with, a blue Mini. The greater height of the pick-up truck afforded him a view over the top of the Mini. Mr Donaldson saw a sudden plume of dust and witnessed two vehicles barrel-rolling down the road towards him, of which one, the VW, was on fire. He immediately provided assistance to the injured and contacted the emergency services.

105. In his witness statement of 15 August 2019, Mr Donaldson provided further detail. He stated that the first thing he noticed prior to the collision were the front headlights of the Alfa Romeo, travelling towards him from the opposite direction at a distance of approximately 150 metres. He estimated the speed of the Alfa to have been about 80 mph. At this point, the road was virtually straight, apart from a very slight kink to the right. Vegetation to the sides of the road initially obstructed his view of the left-hand lane but when his view improved, he saw the soft-top VW which appeared to him to be racing the Alfa and trying to get ahead of the other car. From his observations, the vehicles were matching their speed, doing about 80 mph side by side and appeared to be racing. In his view, it was a very dangerous piece of driving by both vehicles. The two cars continued to race towards him and when at about 50 to 60 metres away, he saw a collision between the Alfa and the VW, causing the Alfa to be pushed and rotated sideways. In his most recent statement, of 13 June 2023, he added that before the collision, he recalled seeing two separate sets of headlights side by side immediately before the collision. In cross-examination he was asked why, in his initial account, he had not mentioned seeing the two vehicles side by side. He was asked if he had been influenced by reading press reporting and social media posts, as between his initial account and his witness statements. He denied this suggestion and explained that an officer had warned him against looking at social media on the night of the accident.

106. Luke Leleu was a passenger in the blue Mini Cooper travelling southbound on Bracklesham Lane in the convoy with Mr Donaldson. He became aware of the collision when he sighted a cloud of smoke and debris on the road ahead. He states that his vehicle was not overtaken by any other vehicle and there were no vehicles directly on the southbound road ahead.

107. Mrs Glenda Luff states that she was travelling northbound on Bracklesham Lane at a speed of about 35 mph and when looking ahead to a kink in the road, saw firstly the oncoming Alfa and then the VW on the wrong side of the road.

108. The post mortem report indicates that Angelov's post mortem blood ethanol was 34 mg/100ml, which is below the legal limit of 80mg/100ml. The toxicologist indicated that in the light of the time interval, the blood alcohol concentration may have been higher at the time of the incident, depending on Mr Angelov's drinking pattern and that she is unable to exclude the possibility that he may have been experiencing some impairment due to alcohol at the time of the incident.

The Expert evidence

109. The Claimant Yordanov relied upon an expert report into the accident, prepared by Mr Sorton, a road traffic reconstruction consultant and the First and Third Defendants relied upon an expert report prepared by Dr Walsh, a collision reconstruction consultant. The Claimant

Atanasov and the Fifth Defendant in the Yordanov claim did not serve expert evidence as to the circumstances of the collision.

110. A farm shop, K & G's Farm Shop and Pet Supplies, is located approximately 644 to 690 metres to the north-east of the accident scene. The collision occurred very close to Elmstead Cottage. The VW came to rest after the accident at the entrance to a property called Primrose Cottage, which is located on the south-eastern side of the B2198, between about 72.5 and 89 metres to the south-west of the accident scene. CCTV obtained from the farm shop and Primrose Cottage has been considered by the experts. I have also viewed the relevant CCTV.

111. There were no material areas of disagreement between the experts, who therefore did not give oral evidence to the court, and a joint statement of their findings was prepared. Their findings included the following:

(i) The speed of the VW and the Alfa at the point they passed the farm shop was estimated by Dr Walsh to be in the mid-50s in mph and by Mr Sorton to be in the vicinity of about 40 mph.
(ii) Notwithstanding the exact speed at which they passed the farm shop, both vehicles must have been accelerating for a sustained period in order to achieve the likely speed in the low to mid 80s at the location of the first impacts.
(iii) The driver of the Alfa, Atanasov, would have had a view of the approaching Nissan for at least 4.5 seconds prior to impact. Atanasov, driving the left-hand drive vehicle, would have had an advantage over the driver of the VW and the benefit of a slightly better view through the slight bend at the locus and thus the Nissan would have entered the available field of view of Atanasov shortly before it entered that of Angelov.
(iv) 4.5 seconds provided ample time for both drivers to slow down and even stop, if necessary, in advance of reaching the location where the first impacts occurred.
(v) Both drivers had the opportunity to reduce their respective speeds and to travel in the correct lane as they approached the impact site.
(vi) The Alfa and the VW were alongside one another for a sustained period of time and it was not credible that both drivers would be unaware of the presence of each other at this time.
(vii) Atanasov had ample opportunity to slow down so that the VW could return to the correct side of the road ahead of the Alfa, well before the impact site.
(viii) Angelov had ample opportunity to slow and pull in behind the Alfa, well in advance of reaching the impact site.
(ix) The VW and the Alfa Romeo were travelling at speeds substantially higher than the 40 mph speed limit. Mr Sorton estimates a speed of about 80 mph, Dr Walsh estimates a speed of between 82 to 86 mph for the Alfa and a slightly higher speed for the VW, because it was slightly ahead of the Alfa at the location of the first impact. The difference between the respective estimates was not deemed by either expert to be material.
(x) The hazard of the approaching Nissan, at a closing speed likely to have been in the vicinity of 120 mph, would have been obvious to any driver paying attention to the driving environment.
(xi) Evidence derived from the scene, relating to the presence of rolling tyre marks on the east grass verge, demonstrated that Atanasov had not applied the service brake pedal before impacting the stationary Audi A3.
(xii) The VW driver probably steered to the nearside to try to avoid a head on impact with the Nissan, but a glancing collision nevertheless occurred between the offsides of those vehicles.
(xiii) A glancing contact occurred between the nearside of the VW and the offside of the Alfa Romeo at around the same time as the other collision.
(xiv) The Nissan Qashqai was being braked as it departed from the field of view of the CCTV camera. Dr Walsh estimated that it had slowed to between 9 mph and 16 mph at the time of the first impact. The approach speed of the Nissan was agreed to be about 35 mph.

112. A police collision investigator, DC Simon Rideout, prepared a Fatal Road Traffic Collision report, dated 20 August 2020. He concluded that the cause of the collision appears to have been Angelov embarking upon an overtaking manoeuvre in which he failed to overtake and then failed to return to the correct side of the road in time to avoid colliding with the approaching Nissan and the Alfa. He analysed the footage from the farm shop and concluded that the VW may have been positioned slightly closer to the centre of the carriageway than the Alfa and travelling slightly faster than the Alfa.

113. Mr Sorton has viewed the farm shop footage but concluded that the quality is too poor to permit him to express an opinion as to the lateral position of the vehicles as they pass the farm shop and in particular as to whether the overtaking manoeuvre has commenced by this point. He opines that the VW must have commenced its overtaking manoeuvre at some point beyond the farm shop. He observes the respective performance data of the VW and the Alfa; the latter was a more powerful vehicle in terms of both maximum speed and acceleration performance.

114. Mr Sorton states that there came a point when the VW and the Alfa were travelling side by side and faced with the Nissan. Angelov probably tried to steer back towards the nearside of the carriageway but was unable to avoid an impact with the Nissan, following which an impact occurred between the VW and the Alfa. This impact caused the VW to begin to rotate, then the vehicle started to straighten before impacting the telegraph pole.

115. In his opinion, both cars were being driven at a speed in excess of 60 mph and a speed of 80 mph for each was realistic. Had Atanasov maintained a speed equal to about 40 mph whilst Angelov attempted to overtake him, the latter could have completed the manoeuvre within a relatively short distance and time, particularly given that the vehicles were close together as they passed the farm shop. On Mr Sorton's calculations, if the Alfa's speed had remained constant at 40 mph, the VW could have completed the overtake by travelling an extra distance of 36 metres, or the equivalent of eight car lengths. He can thus be certain that had Atanasov maintained the same speed that he was travelling when he passed the farm shop, Angelov's overtaking manoeuvre would have completed long before the accident site. The damage sustained by both vehicles is inconsistent with a travelling speed close to 40 mph.

116. It would have taken a significant distance for both cars to have been accelerated from a speed equal to 40 mph to the probable speed at initial impact, i.e. 80 mph. Thus, if Atanasov had accelerated in response to Angelov's overtake, it is probable that both cars would have travelled a very significant distance with the VW on the wrong side of the road.

117. Mr Sorton states; '*This is not a case where Mr Angelov could have been suddenly caught out by Mr Atanasov accelerating causing problems in terms of the overtaking manoeuvre being safely completed. Having realised that the speed of the Alfa Romeo was increasing and matching that of the Volkswagen Eos, it would have been open to Mr Angelov to have simply braked and dropped back in behind the Alfa Romeo… the inference to be drawn from Mr Atanasov accelerating to a high speed is that he intended to prevent Mr Angelov from overtaking his motor car or at least make that overtaking manoeuvre more difficult and obviously potentially more hazardous.*'

118. In the opinion of Dr Walsh, it is difficult to say precisely for how long the Nissan was in view whilst the VW was attempting to overtake the Alfa, but the period is likely to have been at least several seconds. Dr Walsh has set out in considerable detail the basis for his finding that, if travelling at a constant speed of 84 mph on the approach to the first collision, Atanasov would have had about 4.6 seconds in which to react to the approaching Nissan. He notes that, for most of the driving population, 0.75 seconds to 1.5 seconds is a reasonable range for driver perception and response times to a readily identifiable hazard appearing in front of the driver. In his opinion, 4.6 seconds afforded the driver of the Alfa ample time to slow down.

Any appreciable slowing of the Alfa would have allowed the VW to return to the nearside lane and avoid the impacts. Allowing for a driver response time of between 2.17 seconds and 1.125 seconds, the driver of the Alfa could have stopped respectively at the area of, or 39 metres short of, the point of impact, if the Alfa driver had reacted to the approaching Nissan and initiated emergency braking.

119. The positive absence of any braking on the part of the Alfa, coupled with the high estimated speed of 84 mph, supports the proposition that Atanasov had been applying the throttle pedal up to and potentially beyond the point of impact between the vehicles. Dr Walsh opines that the only explanations for this conduct appears to be that the driver of the Alfa was either racing or engaging in some form of (unsuccessful) brinksmanship with the driver of the VW.

120. In his estimation, the driver of the VW had a view of the Nissan for at least 4.1 seconds, positioning the VW approximately 154 metres away from the area of impact. Allowing for a driver response time of between 1.125 and 1.7 seconds, the driver of the VW could have stopped respectively at the area of, or 20 metres short of, the point of impact, if he had reacted to the approaching Nissan and initiated emergency braking. The VW driver also had enough time to have braked and moved fully into the correct lane in response to the oncoming Nissan.

121. The driver of the Nissan, as demonstrated by CCTV evidence, perceived the oncoming danger and responded by braking and slowing to a speed between 9 mph and 16 mph at time of impact.

122. In the opinion of Dr Walsh, the physical evidence does not support the proposition that the Alfa had been slowed down, preventing the VW driver from returning to the correct lane. It appears very likely that the VW driver executed a late swerve in an effort to avoid the Nissan and in doing so caused a contact between the VW and the Nissan.

My Assessment and Findings

Speed of the VW and the Alfa

123. Although Mr Atanasov maintained in his evidence that he had not changed his speed in response to the overtaking manoeuvre and that he maintained a speed of between 70-80 kph (i.e. 43.5 to 50 mph), the concession was made during the trial on his behalf that this evidence was unsustainable. In my judgement, this concession was rightly made. The account given by Atanasov as to the speed at which his vehicle was travelling suffered from a number of fundamental problems, which may be summarised briefly in light of the concession made. It was entirely inconsistent with the conclusions of both experts and with DC Rideout, which were based on multiple factors, including the damage sustained by the vehicles, the CCTV evidence and detailed calculations including those based upon the impact between the Alfa and the stationary Audi A3. It was inconsistent with the evidence of Mr Donaldson, who was an independent witness, highly familiar with the road, who had a good view of both vehicles immediately prior to the collision and who estimated their speed at about 80 mph. In this regard, I note that I find Mr Donaldson's explanations for the inconsistencies, such as they were, between his initial and later accounts, to be entirely plausible. I also find his estimate of the speed of the vehicles to be convincing in light of his view of the two cars and his high level of knowledge and experience of road users on that particular stretch of road.

124. None of the occupants of the VW are able to provide a numerical estimate of the speed of the VW but it has been described it as travelling very fast and certainly at speeds that caused them to be fearful and warn the driver to slow down. On a common sense analysis, supported by the experts, the VW must have been travelling at a similar or even slightly higher speed to the Alfa at around the time of the first collision.

125. I therefore reach the conclusion that at or about the point at which the Alfa and the VW passed the farm shop, they were travelling at somewhere between about 40 mph and 50 mph. It is not possible to be more precise because of the poor quality of the farm shop footage. At the point of the first collision, both vehicles were travelling at or slightly above a minimum speed of 80 mph.

The overtaking manoeuvre

126. At some point in the approximately 690 metres between the farm shop and the scene of the accident, the VW had moved into the offside lane in an attempt to overtake the Alfa. It is not possible to be sure to the requisite standard that this manoeuvre had commenced by the farm shop; although it has been suggested on behalf of Aviva that the CCTV indicates that the VW may have pulled slightly closer to the centre of the carriageway at this point, in my view the CCTV is too poor to enable such an observation to be reliably drawn and it is unsupported by either expert. In any event, on the balance of probabilities, the manoeuvre commenced shortly after the vehicles passed the farm shop, in light of the expert conclusions as to the necessary time and distance required to accelerate to approximately 80 mph and my own finding that Atanasov accelerated only in response to the attempted overtake.

127. Regardless of the exact point at which the VW was steered into the offside lane to commence overtaking the Alfa, the VW and the Alfa were therefore travelling side by side for a sustained period of time and a significant distance. The experts' conclusion that the vehicles were travelling side by side for a sustained period is supported by Ms Kovacheva's evidence, and the evidence from both herself and Vasilev to the effect that both were terrified and believed they were going to die.

128. I have concluded that Atanasov deliberately accelerated and maintained a high speed in order to prevent the VW completing its overtaking manoeuvre. The reasons I have reached this conclusion include the expert evidence as to the acceleration of the Alfa as between the farm shop and Elmstead Cottage. There is no reasonable alternative explanation to account for the very marked acceleration of the Alfa, by about 40 mph, over a distance of under half a mile. Atanasov was close to his destination and was not in a particular hurry. The only differential as between the farm shop, when the Alfa was travelling at or relatively close to the speed limit, and the site of the accident, was the appearance on the scene of the VW and its attempted overtake.

129. The calculations undertaken by Mr Sorton clearly indicate that, had Atanasov maintained a speed equal to the limit of 40 mph at the time Angelov commenced his overtake, Angelov could have easily completed the manoeuvre within about eight car lengths; this was clearly not achieved. The overwhelming evidence of both experts, based on the physical evidence at the scene, was that Atanasov had not applied the brake even before impacting the stationary Audi A3. In Dr Walsh's view, the evidence supports the proposition that Atanasov had been applying the throttle pedal up to and potentially beyond the point of first impact. Therefore even after the first collision, which was not of sufficient severity to have caused Atanasov significant injury, it is more likely than not that Atanasov was still accelerating. The only reasonable inference to be drawn from this circumstance is that Atanasov was still intent on racing the VW, even in the face of imminent collision.

130. I have carefully considered the oral evidence of both Mr Vasilev and Ms Kovacheva, to the effect that the driver of the Alfa was accelerating and decelerating during the overtaking manoeuvre, so as to match the movements of the VW and block its return to the nearside lane. In determining the credibility and reliability of this evidence, I have had regard to the evidence of the witnesses as a whole. I take into account that both sustained injuries in the accident which was undoubtedly a terrifying and traumatic incident. With respect to Mr

Vasilev, I must have due regard to the fact that he failed to make mention of this striking feature of Atanasov's driving in his police interview of 13 August 2019, when matters were far fresher in his recollection and when he might be expected to have wished to ensure that the police were aware of evidence that might exonerate Angelov, who had died in the collision. In so far as Ms Kovacheva is concerned, although she referred in her first witness statement to Atanasov braking at the same time as Angelov, this was in the context of trying to allow Angelov to overtake, rather than a deliberate blocking manoeuvre. I must also take into account that Ms Kovacheva referred to Angelov having been prevented from returning to the nearside lane by a bus, a circumstance not previously mentioned before her evidence to the court. Her evidence on this point was not capable of belief; no other witness had mentioned a bus and it is highly implausible that a bus travelling at around 80 mph, but unnoticed by any other witness before, during or after the collision, would have suddenly appeared on the scene. Her inclusion of the bus in her evidence does, however, indicate to me a tendency or willingness on her part, which may be subconscious, to seek to exonerate Angelov from blame for the accident. I must take this factor into account when viewing her evidence as a whole and in particular when considering her evidence in respect of how the collision was caused.

131. I have also considered the credibility of the account; if correct, it would constitute a deliberate attempt to force the VW into a position where a head-on collision was unavoidable. Such a collision would have had catastrophic consequences not only for the driver of the VW and the oncoming vehicle, but would have also posed a serious and obvious hazard for the Alfa. The Alfa would have been exposed by its very close proximity to a major collision with unpredictable consequences. Nothing I have heard as to the previous relationships between Mr Atanasov and anyone within the VW indicates that Atanasov might have born ill will towards any of those individuals, or wished them to be harmed or even killed. Rather, the court finds that Atanasov deliberately raced the driver of the VW in an extremely dangerous act of brinksmanship.

132. I have also considered the possibility that Atanasov deliberately braked in order to permit the VW to overtake and Angelov simultaneously braked in order to abandon the manoeuvre. I do not consider this a realistic scenario; it would depend upon the drivers of both vehicles simultaneously decelerating to the same speed at the same time. If Angelov and/or Atanasov had been intent on braking to enable the VW to pass, it might be expected that each would continue decelerating until reaching a speed sufficient to permit the VW to return to the nearside lane; theoretically up to a point where both vehicles were stationary or travelling at walking pace. There is no evidence that this occurred; to the contrary, the evidence is that each vehicle was travelling at about 80 mph at point of impact and that Atanasov had not braked even after the first collision.

133. Evidence has been given that Angelov consumed alcohol on evening of the collision. There is no compelling evidence before the court to indicate that Angelov was or might have been intoxicated at the time of the accident; none of the witnesses have given evidence to this effect and his consumption of alcohol appears to have consisted of two or three beers. The toxicology evidence, absent back-calculation, is simply inconclusive.

The cause of the collision

134. The collisions between the VW and the Nissan and the VW and the Alfa, which happened at around the same time, occurred because the VW was in the process of returning to the nearside lane as it closed the distance between itself and the oncoming Nissan.

135. In my judgment, the driver of both the VW and the Alfa both contributed to the two impacts and each had an equal opportunity successfully to avoid both or indeed any collisions. Both instead drove negligently, extremely dangerously, at excessive speed, and both exposed other road users, themselves and the passengers of the VW, to whom they owed a duty of care, to a foreseeable risk of serious injury or death. Both conspicuously failed to exercise the care and skill to be expected of a reasonable competent driver. The two impacts caused both vehicles to lose control and were thus the direct cause of the injuries sustained by the passengers, including the Claimant and drivers of both cars.

136. In respect of Atanasov, he contributed to the collision by:

(i) accelerating as he passed the farm shop by at least 40 mph, to reach a speed of approximately 80 mph at the point of impact. In my judgement, the only reasonable explanation for this conduct was that Atanasov wished to engage in a race with the VW and encourage the VW to race against him and to prevent the VW from successfully overtaking his own car. There is no other competing explanation capable of displacing this conclusion; Atanasov was not in a hurry to return to the holiday village and was in any event, very close to his intended destination. Although he had been driving faster than the speed limit at or around the farm shop, he only accelerated in response to the appearance of the VW, which he accepts recognising as belonging to an acquaintance, which may well have sparked some misplaced competitive rivalry. As opined by Mr Sorton, if Mr Atanasov had not accelerated at the point in time that the VW was attempting to pass his own car, the manoeuvre would have been completed long before the point at which the collisions occurred.

(ii) Failing to keep a proper, or any lookout. The expert evidence of Dr Walsh indicates that the Nissan would have been obvious to the driver of the Alfa Romeo for about 4.6 seconds, over a distance of about 173 metres, prior to impact. No evidence has been presented to the court capable of undermining or displacing the conclusions of Dr Walsh, which are based upon an approaching speed of the Alfa of 84 mph; an estimate of a slower speed would of course increase the time over which the Nissan was visible.

(iii) Failing to drop back, decelerate, or even to maintain his initial speed, to allow the VW to complete the overtaking manoeuvre. In so doing, he failed to comply with the provisions of section 168 of the Highway Code and drove dangerously.

(iv) Failing to brake or otherwise react, in response to the oncoming Nissan.

(v) Deliberately racing with the VW at speeds that were manifestly excessive.

137. On behalf of the Fifth Defendant, it was submitted that the high speed of the Alfa was a ‘technical breach’ of the Highway Code, which had no causal connection to the collisions. I reject this contention. But for the very high speeds of the Alfa and the failure of the driver to let the VW safely pass, the VW would have successfully completed the overtaking manoeuvre and returned to its correct lane well before encountering the oncoming Nissan, thereby avoiding the collision both with the Nissan and with the Alfa.

138. In respect of Angelov, he contributed to the collision by:

(i) Accelerating shortly after he passed the farm shop, by about 40 mph, in order to attempt to and continue to attempt to, overtake the Alfa. Again, the overwhelming inference to be drawn from this conduct was that he wished to engage in racing with the Alfa and encourage the driver of the Alfa to race against him.

(ii) Attempted to overtake and persisted in an attempted overtake, when it was clearly unsafe to do so.

(iii) Failing to keep a proper, or any, lookout. The expert evidence indicates that the Nissan would have been obvious to the driver of the VW for at least 4.1 seconds, positioning the VW approximately 154 metres away from the area of impact.

Allowing for a driver response time of between 1.125 and 1.7 seconds, Angelov could, within this time, have stopped the VW short of the point of impact, if he had but reacted to the approaching Nissan by braking. It should be noted that during this time, the passengers of the VW were pleading with the driver to slow down. Again, no evidence has been placed before the court capable of undermining the expert conclusions.

(iv) Failing to move back fully into the correct lane in response to the oncoming Nissan.

(v) Failing to abandon the attempted overtake and decelerate to the speed necessary to drop back into the nearside lane, or otherwise take any steps to avoid the collisions.

(vi) Deliberately racing with the Alfa at excessive speeds, which greatly compounded the existing dangers posed by overtaking on a single carriageway.

139. On behalf of Aviva, it was submitted that responsibility for the collisions lay entirely with Atanasov, who had forced Angelov into a position in which he was unable to pass Atanasov and could not safely predict whether Atanasov would accelerate or decelerate in response to the attempted overtake. This contention is unsustainable; a reasonable competent driver would have reacted to the threat posed by the oncoming Nissan and the excessive speeds of the Alfa by decelerating to a speed below that of the Alfa and returning to the nearside lane. But for the fact that the VW was still both partially in the path of the oncoming Nissan, despite the braking of the latter vehicle, and attempting to return to the nearside lane and thus directly into the path of the Alfa, neither collision would have occurred. The driver of the VW could have avoided all collisions by desisting from the obviously extremely dangerous overtaking manoeuvre.

140. The cause of the collision may best be expressed in the words of the witness Ms Kovacheva: '*both cars were racing side by side it was like a race not one person or another was giving up.*'

141. In considering all of these matters, I have had careful regard to the fact that each of the drivers was constrained to act in an emergency situation and that due allowance should be made for the fact that each driver, considered separately, had to respond in what might be termed 'the agony of the moment.' Nevertheless, I take into account that the period available to each driver to react to the oncoming vehicle was one of at least four seconds and there is no indication that either driver was forced to contend with any other competing hazard or distraction than that posed by the oncoming Nissan. Further, both drivers had embarked upon a course of conduct prior to the appearance of the Nissan which a reasonable driver would have recognised imposed an additional duty of vigilance particularly in respect of oncoming traffic. In the case of the VW, this was because the driver had chosen to overtake another vehicle, at speed, on a carriageway with a single lane of traffic in each direction and in the case of the Alfa, because the driver had chosen to accelerate in response to the attempted overtake.

Conclusions: the Yordanov Claim

142. I find in favour of the Claimant that he has established primary liability against both Angelov and Atanasov. Both are thus jointly and severally liable for the damage and injury occasioned to the Claimant, the quantum of which is to be assessed separately. The Fifth Defendant, as insurers of Atanasov, is directly liable to the Claimant. On behalf of Aviva, a concession was made both in writing and orally, and not disputed by any other party, that for these purposes, the Third Defendant would have to satisfy any unsatisfied judgment against the Second Defendant in respect of his driving, pursuant to the provisions of section 151 of the Road Traffic Act 1988 in both the Yordanov and the Atanasov claims. The court accordingly declares that the Third Defendant is liable to meet any unsatisfied part of the

judgement against the Second Defendant. There is no finding in favour of the Claimant against the First Defendant that any liability has been established.

Contribution

143. Having made this finding, I must go on to consider the amount of the contribution recoverable from the relevant parties that is just and equitable, having regard to the extent of their responsibility for the damage in question. Section 1(1) of the Civil Liability (Contribution) Act 1978 provides that any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage, whether jointly or otherwise. Section 2(1) of the 1978 Act is in the following terms:

...any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

144. On behalf of the Third Defendant, it is submitted that the contribution in respect of Angelov should be nil. I am unable to accept this proposition; for all the reasons set out above, in my judgment, Angelov made a highly significant contribution to the cause of the accident and the damage occasioned to the Claimant.

145. Perhaps more realistically, on behalf of Atanasov, it was accepted on his behalf, albeit in relation to his capacity of Claimant in the Atanasov claim, that he was in material breach of his duty of care as a driver, which must include abiding by the rules of the Highway Code. Atanasov could have slowed to allow the VW to pass. It was submitted, however, that the majority of the blame should fall on the shoulders of Angelov, who waited far too long in the offside lane, in the hope that the Alfa would relent, whilst driving at considerable speed. If Atanasov was found liable, it was suggested that a reduction of 45% would accurately reflect the degree of his responsibility for the damage.

146. I have reached the conclusion, taking all matters into account, that a just and equitable division of contribution as between the Second and Fourth Defendants and the respective insurers, is one of 50% each. Each, in my judgement, and for the reasons set out above, was equally responsible for the collision; they were racing each other in a joint course of dangerous driving, neither giving way to the other. As is abundantly clear from the conclusions of the experts, each could have avoided the collision altogether, if they had taken simple steps open to any reasonable competent driver who had maintained a proper lookout and perceived the risks of the oncoming Nissan. Whilst it was submitted on behalf of Atanasov that it was the VW that was in the incorrect lane and should therefore bear the greater share of responsibility, it was the presence of the Alfa in the nearside lane, having failed to drop back and decelerate, that contributed to the impact with the VW and the loss of control by both vehicles.

Conclusions: the Atanasov claim

147. For the reasons set out above, I find in favour of the Claimant that he has established primary liability against the Second Defendant who is liable for the damage and injury occasioned to the Claimant, the quantum of which is to be assessed separately. Further to the concession made on behalf of the Third Defendant in respect of section 151 of the Road Traffic Act 1988, the court declares that the Third Defendant is liable to meet the judgement against the Second Defendant. There is no finding in favour of the Claimant against the First Defendant that any liability has been established.

Contributory Negligence

148. Having reached the finding above, I must then go on to consider the issue of contributory negligence. I remind myself that the burden of proving contributory negligence by the Claimant rests of the Defendant.

149. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides:

Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for that damage.

150. The question of apportionment should be dealt with broadly, applying common sense principles. As explained by Denning LJ (as he then was) in *Davies v Swan Motor Co (Swansea) Ltd* (1949) 2 K.B. 291:

Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be "just and equitable" having regard to the claimant's share in the responsibility for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness…

151. In *Stapley v Gypsum Mines Ltd* (1953) AC 663, Lord Reid stated:

A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but the claimant's share in the responsibility for the damage cannot, I think be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. [682].

152. During the course of the trial, it was agreed by all parties that any reduction made by the court in respect of contributory negligence based upon the manner of driving by Atanasov, should exactly reflect the figure reached by the court under the Civil Liability (Contribution) Act 1978. I therefore determine that the following reductions should be made to any award for damages and injury otherwise made by the court to the Claimant:

(i) 20%, to reflect the Claimant's failure to wear a seatbelt, and a further

(ii) 50%, to reflect the finding that the Claimant drove negligently, in breach of his duty of care to other road users and contributed to the cause of the collision.

For the avoidance of any doubt, the total reduction to any award will be one of 70%.

153. Finally, I would wish to express my appreciation and thanks to all Counsel for their very considerable assistance to the court.