Case No.: KB-20230-NCL-000027

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
NEWCASTLE UPON TYNE DISTRICT REGISTRY
NEUTRAL CITATION NUMBER: [2024] EWHC 2299 (KB)

Newcastle Civil and Family Courts and Tribunals Centre
Barras Bridge
Newcastle upon Tyne
NE1 8QF

BETWEEN:

MISS GRACIE LEA ATKINSON (A CHILD PROCEEDING BY HER MOTHER AND LITIGATION FRIEND, MRS JOSIE BLACKBURN)	**CLAIMANT**
- and -	
MR THOMAS KENNEDY	**(1) DEFENDANT**
GRAB AND DELIVER LIMITED	**(2) DEFENDANT**

Mr Nicholas Braslavsky KC and Mr Toby Coupe (instructed by **Irwin Mitchell LLP)**
for the **Claimant**
Mr Andrew Davis KC (instructed by **Keoghs LLP)**
for the First and Second Defendants

Hearing dates:
23 and 24 July 2024

Judgment

His Honour Judge Freedman:

Introduction

1. Gracie Lea Atkinson, who was born on 2 September 2014 brings this claim through her Mother and Litigation Friend, Miss Josie Blackburn, for damages for injuries and consequential loss sustained as a result of a road traffic accident on 20 September 2021, when she was crossing the road on foot at the Junction of Hillhead Parkway and Chadderton Drive in Chapel House, Newcastle Upon Tyne. The collision involved a DAF four-axle tipper large goods vehicle ("LGV") operated by Grab and Deliver Limited (the Second Defendant) and driven my Mr Thomas Kennedy (the First Defendant).

2. Whilst Grab and Deliver Limited have been joined as Second Defendants to the action, they are sued on the basis of vicarious liability, with no separate allegations being levelled against the Company. Accordingly, and for ease, I shall refer to Mr Kennedy as the Defendant and Gracie as the Claimant.

3. This hearing was concerned only with liability. But I have well in mind the devastating injuries suffered by the Claimant, involving multiple fractures and degloving injuries to both legs, requiring extensive treatment and prolonged hospitalisation. As her mother told me, there was a real possibility of amputation of her right leg but, fortunately this proved not to be necessary. Nevertheless, the Claimant has been left with ongoing and severe problems. Her mobility is severely impaired to the extent that at least, for some of the time, she is reliant on a wheelchair. On the other hand, and to her enormous credit, she remains an active little girl. Mr Partington, in his report describes her very positive attitude and observes that she has been able to take part in many school activities. The Claimant is now approaching her tenth birthday.

The accident

4. The accident occurred at about 3.00pm, at the end of the school day. The Claimant, who was then only just seven years of age, attended Knop Law Primary School. On this occasion, she was collected from school by Amanda Kitching, who has a daughter at the same school, Amelia. Ms Kitching collected the girls from school at about 2.45pm. The school is located on Hillhead Parkway about 70 metres south of the junction where the accident occurred. The school car park was closed so that Ms Kitching, along with other parents, had to park her car further along the Hillhead Parkway, close to a different school, approximately five minutes' walk away.

5. Ms Kitching, Amelia and the Claimant walked along the footpath on the west side of Hillhead Parkway, in a northerly direction. Hillhead Parkway is in a residential area, with a single lane in each direction. Grass verges border both sides, with footpaths adjacent. Chadderton Drive is a minor residential road.

6. The location of the accident, at the junction where Hillhead Parkway meets Chadderton Drive is to be seen on the Google Maps and plans, as well as being depicted in the numerous photographs. The speed limit on Hillhead Parkway was 20 mph: this was signposted over 600 metres to the south of the junction. At about 280

metres from the junction, there were signs alerting drivers that they were entering a "School Safety Zone". The road surface was painted with red stripes positioned at approximately every 20 metres.

7. The Defendant was driving the LGV in a northerly direction along Hillhead Parkway, that is the same direction in which the Claimant, Amelia and Ms Kitching were walking. He was delivering sand and stone to an address in Chapel Park, this being his last job of the day. He therefore had to execute a left hand turn from Hillhead Parkway into Chadderton Drive. This involved turning at approximately 90 degrees. The junction at the bell mouth area has an overall width of 17.3 metres. But at a point approximately 9 metres from the give way markings at the junction, the width of the road reduces to 5.4 metres.

8. At the junction where the accident occurred, Ms Kitching, Amelia and the Claimant came to a stop on the footpath, adjacent to the mouth of the junction. There were a number of parked cars in the vicinity, as well as several pedestrians.

9. Ms Kitching remained on the footpath, but the Claimant and Amelia made their way onto the road, attempting to cross Chadderton Drive very close to the mouth of the junction. As they did so, the Claimant collided with the nearside of the Defendant's LGV and, in doing so, she fell to the ground. The nearside wheel of the third rear axle went over the Claimant's legs. At the critical moment, Amelia must have been a step or so behind the Claimant because she was able to avoid any collision with the wagon.

10. It is agreed that as the Defendant turned left into Chadderton Drive, his speed was between 11.2 and 11.8 mph. It is to be noted, however, that he had failed to observe the 20 mph speed limit until he reached the School Safety Zone. Although he did not see the Claimant or the other pedestrians immediately prior to impact, as he was completing the turn into the junction, he became aware of a "flash" in one of his nearside mirrors. This caused him to apply his brakes. He bought his vehicle to a halt at a point approximately 11/12 metres west of the impact area.

11. It was a clear, dry and bright day. There was no impairment of visibility for either pedestrians or drivers. I shall return to the question of timings, but suffice it to note at this stage, that the Defendant had a good opportunity to see the Claimant, and the other pedestrians on the footpath, at the junction; and, equally, the Claimant, Amelia and Ms Kitching had a good opportunity to see the wagon proceeding along Hillhead Parkway and turning left into Chadderton Drive.

The issues

12. The essential issue is whether it is established that the Defendant's driving fell below the standard of a reasonably competent and careful professional driver, such as to cause this accident. To put it another way, on the balance of probabilities, if he had exercised his Common Law duty of care to the Claimant, as a child pedestrian, would this accident have been avoided. It is axiomatic that the standard of the Defendant's driving must be looked at objectively, and assessed by reference to the prevailing circumstances and conditions at the time of the accident. There is no room for hindsight.

13. If primary liability is made out, somewhat unusually, given that the Claimant was only aged seven at the time of the accident, it is alleged that there should be a finding of contributory negligence. This is on the basis that the Claimant walked directly into the side of the lorry, which was there to be seen, right in front of her.

Witness evidence

14. I have already mentioned that I heard evidence from the Claimant's Mother, albeit she could not shed any light on the circumstances of the accident. She was on the way to meet her daughter and the Kitchings at the usual meeting point, when she received a call that an accident had happened. She was at the scene within a minute or two of the accident happening.

15. Rachel Leslie, Deputy Head of Services and Children North East was in the immediate vicinity when the accident occurred. She was in the process of picking up her son from school. She was walking in a southerly direction along Hillhead Parkway. She saw the Claimant and Amelia and Ms Kitching waiting at the junction to cross the road. After passing the junction, she heard a scream and immediately turned round. She observed the Claimant lying in the road with her head a couple of steps away from the pavement from where she had crossed. Her feet were pointing to the other side of the road. Of note, in her police statement, in relation to the LGV, she said, "… *it was not travelling at any excessive speed*". She made similar observations in the witness statement which was given to the Defendant.

16. Linda Finch was able to provide direct evidence as to the accident. At the time of the accident, she was employed as an escort for children with learning disabilities. She is very familiar with the location of the accident and her children used to attend Knop Law Primary School. At the time of the accident, she was driving her car along Hillhead Parkway directly behind the Defendant's LGV. In her estimation, the wagon when travelling along Hillhead Parkway was within the 20 mph speed limit.

17. In her witness statement given to the Defendant, she stated:

At paragraph 14:

> "*I confirm the lorry slowed on approach to the junction with Chadderton Drive. I do not recall seeing any brake lights illuminating, but I can't say for certain whether they did, or did not. However, I do recall it slowing."*

At paragraph 15:

> *"Once at the mouth of the junction with Chadderton Drive, the wagon began to slowly turn left into the junction. There was nothing unusual about its approach or the manner in which it turned. It turned into the junction from its own lane on Hillhead Parkway. It did not have to turn into the opposite lane to make the turn."*

18. She described the accident itself as follows*:*

At paragraph 20*:*

"The wagon continued its turn into Chadderton Drive and was well into the junction when suddenly I saw one of the children who had been standing waiting at the junction to cross, step onto the road and walk into the side of the wagon at the rear. I then saw her fall to the ground with her legs being ran over by the wagon's back wheels …"

At paragraph 22*:*

"The wagon stopped very quickly as he must have heard the little girl scream."

19. Her view of how the accident occurred appears at paragraphs 23 and 24 of this witness statement, as follows*:*

"I do not believe the wagon ever went too fast for the circumstances at any point from starting to follow it to the point of the accident. It was never going fast.

I do not believe the accident was the fault of the driver of the wagon. It all happened in a second when the wagon was well into the junction and the child suddenly decided to step into the road, without fear of danger, into the rear of the wagon."

20. I remind myself that, to some extent, this is opinion evidence and that the question of speed and the cause of the accident are obviously matters ultimately to be determined by the Court. On the other hand, this is an eyewitness who had a clear and uninterrupted view of the movement of both the Claimant and the wagon driven by the Defendant in the seconds immediately prior to the collision. It is also of note that the evidence of Linda Finch was not challenged.

21. Mr Davis KC also seeks to rely upon the statements given to the police by other witnesses who were not called to give evidence. Obviously, the fact that they did not give live evidence and were, therefore, not subject to cross-examination affects the weight which should be accorded to their evidence. That said, the observations of redacted Witness 2 should not be ignored, for she had a clear view of the inside of the turning lorry whilst walking up Chadderton Drive. In her witness statement, she stated, "*the two young children ran out into the road".* It was her impression that the driver of the wagon would not have seen the Claimant run out because he had already made the turn. Similarly, redacted Witness 1 formed the view that the driver did not have any chance of avoiding the accident.

22. Perhaps somewhat surprisingly, no oral evidence was adduced from Ms Kitching. However, her observations in the statement which she gave to the police are obviously of some importance. She said this:

"The girls were still holding hands and were running over the junction.."

23. As to responsibility for the accident (and, again, I remind myself that this is ultimately a question for the Court to determine), she said this:

"I don't think anyone is to blame, I think this has been a freak accident. It caught us all off guard, and for a split second, this accident has happened."

Defendant's account

24. Understandably, and unsurprisingly, the Defendant was severely traumatised by the accident. This was evident when he gave his oral testimony in Court. It is, of course, appropriate to make due allowance for the obvious distress which he experienced whilst giving his evidence.

25. The Defendant was interviewed by the police nine days after the accident, on 29 September 2021. This is obviously his most contemporaneous account of the incident and, in my judgment, likely to be the most reliable. To understand fully what the Defendant says about the accident, it is necessary to cite a number of passages from that interview, as follows:

> *"I came to the junction to turn left and there was quite a few cars parked on both sides of the road. I came along, I can't remember the road, I indicated to turn left and there was two cars parked, staggered I think where I needed to turn left and there was people walking up the right hand side pathway, as I turned into the junction I was watching the people walking up the path and I went quite wide and I was watching them so I didn't get too close to the path and as I turned halfway round the corner, I watched them and I looked in my other mirror and a little girl just ran into the back wheels of my wagon."*

He was asked by the interviewing officer, *". . . did you see her running from the kerb into the side of your wagon or ...".*

His reply (of some significance), was:

> *"I just like, it was just like a flash in my left hand mirror."*

26. He was then asked in more detail about the build up to the accident. To make sense of what he says, it is necessary to cite the questions as well as the answers, as follows:

> *". . . On your approach to the junction, what kind of speed and what kind of gear were you in?*
>
> *I'll have been in about probably fourth in a low range and I think I'll have been doing maybe 12 mph.*
>
> *. . . Did you take any actions when you prepared to turn left?*
>
> *I went wide because there was two cars and when you get round the corner, they seemed to be staggered so I wanted to try and get the wagon so I didn't have to stop and shunt in front of it to get through it. I mean, I remember two cars being staggered and there was people walking up*

this side and with me going wide, I was watching them so I didn't get too close to the kerb so my wagon was positioned so I could get through the two cars.
Is this the kerb on your . . .

On my driver's side.

. . .

I was watching the people walking up there because I knew I had to go wide to get through the gap of the two cars parked, staggered, if I remember rightly.

. . .

Did you see anyone standing on the left hand side as you turned?

I didn't, no, no. There was a car parked there as well I think at the top of the road, not like on the junction, at the top of the main road as I was going round.

So when you were approaching the junction, did you see any pedestrians coming along?

I didn't because I was concentrating on them ones walking up there and knowing that I had to go wide.

But before you got the junction, was there anybody?

There was people walking along on the side. I don't know how close they were to the junction, but ...

...

... At what point were you aware that the collision happened and what actions did you take?

I was halfway around the corner, and I knew that I was OK on that side, and I checked in my left hand side mirror and I just seen like a, it was, I cannot explain. It was just like a flash and then I realised it was a little girl and I stopped straightaway . . ."

27. The account, which he gave in his witness statement broadly reflected what he told the police. Similarly, his oral evidence did not materially deviate from the account given to the police. He was, however, asked in more detail about the vehicle which was parked on the corner of Chadderton Drive and which allegedly restricted his view. He said that it was a red car although on being pressed by Mr Braslavsky KC, he conceded that he may not have been correct about the colour of the vehicle.

28. He was also questioned about the audible warning sound fitted on his vehicle. This emits an audible spoken warning stating "*stand clear, this vehicle is turning left".* Apparently, (according to the agreed expert evidence) the system is designed to emit

the warning at speeds up to 20 mph, when the left hand turn indicator is activated. In fact, it appears that the audible warning on this vehicle sounded only when the speed of the LGV was approximately 5 mph. The Defendant himself thought that the audible warning sound activated at a speed of approximately 7 mph. In his witness statement, he said that the audible warning sound came on before the accident. However, in evidence, and given the speeds demonstrated on the tachograph, he was forced to accept that the warning cannot have come on a prior to the accident.

29. I should make it clear at this stage that the relevance of the audible warning sound is that it is part of the Claimant's case that it behoved the Defendant to know when the audible warning came on. Furthermore, it is said that a reasonably prudent driver would have turned left at the junction, at a speed slow enough to ensure that the audible warning sound was activated.

30. Generally, and whilst the Defendant did not accept that there was anything wrong with the manner of his driving in the immediate build up to the accident, he did acknowledge that it was incumbent upon him to proceed with "*meticulous care"*, not least because of the large number of pedestrians in the vicinity and the presence of parked vehicles.

Expert evidence

31. There is a large measure of agreement as between the collision reconstruction experts, Mr Stuart Blackwood instructed on behalf of the Claimant and Mr Charles Murdoch, instructed on behalf of the Defendant. In the joint statement, however, there were some areas of disagreement although, as it seems to me, these are narrowed somewhat following the cross-examination of Mr Blackwood.

32. It is helpful to summarise the areas of agreement on the salient points:

> (i) The speed of the Defendant's vehicle at a point approximately 470 metres south of the junction was over 35 mph, at a point where the speed limit was 20 mph.
>
> (ii) As the Defendant drove the vehicle along Hillhead Parkway, his speed gradually reduced so that at a point approximately 35 metres south of the junction, the recorded speed was 19.3 mph.
>
> (iii) When turning left and to the point of impact, the speed was in the range of 11.2 to 11.8 mph.
>
> (iv) The Claimant, Amelia and Ms Kitching would have been readily visible to the Defendant on the nearside pedestrian footway and/or at the junction of Chadderton Drive for a period of time prior to the accident: in Mr Blackwood's opinion they should have been visible for at least 6 seconds whilst Mr Murdoch agreed in evidence that they would have been visible for *several seconds*.
>
> (v) Pedestrians looking south along Hillhead Parkway would have had a clear view of the the approaching LGV: about 100 metres from the corner of Hillhead Parkway and roughly 40 metres, for an adult, if making observations from the crossing point at the junction.

(vi) The only physical deposit to be found on the road was a transfer of white fibres and body matter on the westbound lane of Chadderton Drive. The fibres were about 1.9 metres from the south kerb edge with the area of marking extending for about 2.8 metres in length. The white fibres and body matter were created by the nearside third axle wheel coming into contact with the Claimant's legs or feet.

(vii) Although there is some difference of methodology, both experts calculated the straight line distance from the kerb to the point of impact as being approximately 2 metres.

(viii) If the Claimant walked to the point of collision, she would have been in the road for a time period of between 1.3 and 1.4 seconds.

(ix) If she had jogged or ran across the road, she would have been in the road for a period of between 0.9 and 1.1 seconds.

(x) Whilst there is some dispute as to whether it is possible to calculate when precisely braking occurred following impact, both experts agree that the front of the LGV in its post collision position was between 11.2 and 12.4 metres west of the impact area.

(xi) Whilst there is some disagreement as to what would have been the Defendant's precise Perception Reaction Time ("PRT") in the particular circumstances, it is agreed that a baseline PRT for a reasonably prudent driver would have been 1.5 seconds.

33. The areas of disagreement, such as they are, and which are of importance, relate to the to the issue of timings, and more specifically, the opportunity which the Defendant might have had to avoid this collision. However, and notwithstanding the difference of approach, ultimately, Mr Blackwood agreed with Mr Davis KC that if the Claimant jogged into the road, then, effectively, the Defendant had no opportunity of avoiding the impact. If she walked into the road, there is a divergence of opinion as to at what speed the Defendant needed to be travelling in order to avoid the collision. I should make it clear that it is accepted by both experts that at the speed at which the Defendant was in fact travelling, this accident was unavoidable, even if it be the case that the Claimant walked into the road.

Claimant's case

34. Mr Braslavsky KC, in his very attractive and persuasive closing address submits that this case is relatively simple and straightforward. He invites the Court to the view that only limited assistance is to be derived from the detailed calculations undertaken by the experts (I assume that it is for that reason that Mr Braslavsky KC did not closely cross-examine Mr Murdoch in relation to the points of disagreement as between the two experts). Rather, he urges the Court to consider the matter in the round and to conclude that, in the particular and peculiar circumstances, this accident was avoidable if the Defendant had driven with (to use his expression) *meticulous* care.

35. His starting point is to remind the Court that the Defendant does not have an unblemished driving record. In 2017, he received a 12 month driving ban when found to be driving a grab wagon whilst having cocaine in his system. More especially, on 13 September 2021, only one week before the accident, the Defendant committed an offence of careless driving by driving too close to a cyclist. Furthermore, as noted above, when proceeding along Hillhead Parkway, the Defendant effectively ignored the 20 mph signs, travelling at speeds in excess of 30 mph.

36. Mr Braslavsky KC submits that these matters tend to show that the Defendant was not a careful professional driver. The inference which I am invited to draw is that his standard of driving at the time of the accident was yet another illustration of his failure to drive with sufficient skill and care.

37. Turning to the accident itself, Mr Braslavsky KC places heavy reliance on the following matters:

> (i) The Defendant was driving a large goods vehicle which potentially posed a significant danger to both other vehicles and pedestrians.
>
> (ii) It was school closing time and there was an unusually large volume of both vehicles and pedestrians at this location.
>
> (iii) He was executing a left hand turn onto a side road at a time when he was aware of the presence of a number of pedestrians walking along the footpath to his left.
>
> (iv) There were also pedestrians on the right hand side of Chadderton Drive; he had to concentrate on these pedestrians because the left hand manoeuvre required a wide turn.
>
> (v) His concentration on the presence of pedestrians on the other side of Chadderton Drive meant that he was not aware of how close to the junction the pedestrians walking along the footpath to his left had reached, at the point when he started his left hand turn.
>
> (vi) According to his own evidence, there was a vehicle parked on the corner of Chadderton Drive which restricted his view.

38. Turning to the specific allegations of negligence, Mr Braslavsky KC submits that the root cause of this accident was the Defendant's failure to see the Claimant, Amelia and Ms Kitching waiting to cross Chadderton Drive whilst still on the pavement. He points out that, on any analysis of the evidence, they were visible for several seconds as he approached the junction; and that he had a clear view from his elevated position in the LGV. Moreover, since he was aware of pedestrians approaching the junction to his left, it was incumbent upon him to keep looking to see where these pedestrians were going and what they were doing. Mr Braslavsky KC makes the point that Rachel Leslie was able to see the Claimant, Amelia and Ms Kitching standing waiting to cross the road; and she herself was able to walk across Chadderton Drive and pass them before the accident occurred behind her.

39. Mr Braslavsky KC submits that, having seen these three pedestrians, a reasonably prudent driver would have made an assessment as to whether it was safe, in the particular circumstances, to continue with the left hand manoeuvre. He submits that the only way to make a meaningful assessment was to bring the LGV to stop or, at the very least*, watch, wait and assess*. Had he done so, he would have seen Amelia and Miss Kitching waiting to cross the road, and it would then have been incumbent upon the Defendant to bring his vehicle to a halt. Mr Braslavsky KC submits that whatever the Defendant now says he would have done if he had seen them by the side of the road is of no import: the touchstone is what a reasonably prudent driver would have done in the circumstances.

40. Mr Braslavsky KC also places reliance upon parts of the Highway Code to firm up the submission that the Defendant should have come to a stop before turning into Chadderton Drive. Rule 170 of the Highway Code, which was in place at the time requires motorists to take extra care at junctions and to be aware of the fact that the pedestrians may not have seen or heard them. He also makes reference to the amendment to Rule 170, which came into force on 29 January 2022, which is to this effect: "*to give way to pedestrians crossing or waiting to cross a road into which or from which you are turning. If they have started to cross they have priority, so give way*". He argues that this amendment merely reflects what is the appropriate standard of care for all motorists at junctions.

41. Necessarily, it is the Claimant's case that if the Defendant had brought his vehicle to a halt, this accident would not have happened. As to this, it is submitted that the stationary vehicle either would have permitted the Claimant to cross at Chadderton Drive without coming into contact with the LGV or, alternatively, she would have seen it in good time and remained on the pavement. Mr Braslavsky KC also factors in the likelihood that if the vehicle had come to a halt, the Claimant would have heard its loud audible warning system and this would have been an additional reason why, in all probability, she would have remained on the footpath.

42. The Claimant's secondary case is that if the Court were to find that it was not a reasonable requirement for the Defendant to bring his vehicle to a halt before turning into Chadderton Drive, then he should have reduced his speed to something in the order of 5/7 mph. It is submitted that a turning speed of 11.2 - 11.8 mph was too fast in all the circumstances. Mr Braslavsky KC points out that when interviewed by the police, the Defendant stated that his turning speed was "*8, 7, 8, 9"* which tends to suggest that that is the speed which he thought he ought to have been travelling at.

43. Mr Braslavsky KC submits that at a speed of between 5 - 7 mph, the probability is that the audible warning sound would have been activated. This would have alerted the Claimant to the approach of the LGV so that she would not have stepped into the road.

44. Finally, in relation to terms of factual causation, it is submitted that with a PRT of 1.5 seconds, if the Defendant had reduced his speed to, say, 7 mph, then even on Mr Murdoch's analysis, this accident would have been avoided. It is the Claimant's case that even assuming a speed of 10 mph, the accident would have been avoided because Mr Blackwood is correct to make the assumption that a reasonably prudent driver would have already had his foot on the air brake as he turned into the junction.

Defendant's case

45. In contrast to Mr Braslavsky KC, Mr Davis KC undertakes a more rigorous analysis of the expert evidence in his closing submissions. This is not surprising because he spent some considerable time skilfully cross-examining Mr Blackwood; and he did so with no small measure of success.

46. At all events, Mr Davis KC submits that insofar as there are any material differences between the experts, the evidence of Mr Murdoch should be preferred. It seems to me that he is entitled to make that submission for various reasons but a good starting point is that Mr Murdoch's evidence was effectively unchallenged. Mr Davis KC adds into the equation a number of deficiencies in Mr Blackwood's analysis of matters. It is not necessary to enumerate all such alleged deficiencies because, as it seems to me, the absence of any effective challenge to Mr Murdoch's evidence has inevitable consequences.

47. Mr Davis KC stresses, as he is entitled to, that the unchallenged evidence of Mr Murdoch is that this accident very likely could not have been avoided unless it be found that the Defendant was under an obligation to stop before making the left hand turn. He relies upon what Mr Murdoch says in the joint statement at paragraph 3.96:

> " . . . *If Mr Murdoch's analysis of the perception of movement is accepted, Mr Kennedy would not be expected to be able to recognise that Miss Atkinson was moving until about 0.5 seconds after she left the footway. Therefore, even had Mr. Kennedy responded to Miss Atkinson slightly earlier than he actually did, he still could not have stopped the DAF, before running over her leg (s).*"

48. In relation to the failure on the part of the Defendant to see the Claimant, Amelia and Ms Kitching waiting to cross the road, Mr Davis KC submits that this does not imply a failure to keep a proper lookout: the undisputed evidence was that he was doing 3-point checks during the course of the manoeuvre. Moreover, it was reasonable for him to be concentrating on the road ahead given the nature of the manoeuvre which he was undertaking. Further, he submits that as evidence of the fact that he was keeping a proper look out, he saw the Claimant in his mirror immediately prior to the moment of impact, and indeed, reacted at that moment. Further, he points out that his view may well have been obstructed by a parked vehicle.

49. In any event, he submits that the fact that the Defendant may not have seen the Claimant and the others immediately prior to the impact is of little or no relevance. He argues that if he had seen them, he would have noted that the two children were with an adult. He would have made the reasonable assumption that they would wait on the footpath until he had negotiated the left hand turn. Of course, this mirrors the Defendant's own evidence to the effect that if he had seen them on the footpath, he would not have done anything different.

50. In relation to the specific allegation that the Defendant should have brought the LGV to a halt, Mr Davis KC submits that this is to impose far too high a burden on a reasonable driver. It is, he says, an allegation made with the benefit of hindsight. The reality is that it was reasonable for a driver to assume that having seen the large wagon, the adult and the two children would wait on the footpath until the wagon completed its turn. To put it another way, it was not foreseeable that the Claimant would step in to the side of the wagon (even allowing for the unpredictability of the

behaviour of children), such as to require a reasonably prudent driver to stop his vehicle before turning into the junction.

51. Mr Davis KC points out that none of the witnesses, including Ms Kitching, thought that the lorry should have stopped before it turned into the junction. Furthermore, he relies upon the evidence of Miss Leslie to the effect that it would have been obvious to anyone keeping a reasonable lookout that the vehicle was turning left into Chadderton Drive.

52. It is also pointed out that it would have been unsafe for the lorry to have stopped. For example, as Mr Blackwood accepted in cross-examination, there would be risks involved if people were allowed to be close to a lorry which would then need to move off. The reality is that, because of blind spots and the number of pedestrians in the area, the driver of a large wagon would not be able to satisfy himself that it was safe to set off from a stationary position at the junction.

53. Mr Davis KC, of course, accepts that if the wagon had been brought to a halt, the audible warning sound would have been activated. But he argues that there was no obligation on the Defendant to ensure that the audible warning sound was set off. He points out that there is no obligation in law to have such an audible sound fitted. It must follow that there can be no breach of duty, if the speed of the vehicle at which it was being driven was such as not to cause the audible sound to be activated.

54. In relation to speed, the primary submission made by Mr Davis KC is that 11.2 - 11.8 mph was a comparatively slow speed and, certainly, reasonable in all the circumstances. He correctly points out that if the Court finds that this was a reasonable speed, then it is agreed that even if the Claimant walked into the road, this accident was unavoidable.

55. In any event, Mr Davis KC submits that even if the Court were to find that the wagon should have been driven at a slower speed, on a proper analysis of the expert evidence, this accident still could not have been avoided. That is certainly the case if the Claimant jogged into the road. Even if she walked into the road, the accident was only avoidable at a speed of, say, 7.5 mph if the Defendant had happened to be looking in the direction of the Claimant at the moment when she moved out into the road. However, as Mr Davis KC observes, it would be appropriate for a driver to be carrying out 3-point checks so that there would be less opportunity and time available to stop. Mr Davis KC places reliance upon the leading text of *Krauss* which was cited by Mr Blackwood. In particular, it is said:

> "*If the driver's attention may have been directed elsewhere when the hazard came into view (e.g. checking mirrors), then the upper bound on this interval may be increased to 2.5to 3.0 seconds "*

Mr Blackwood accepted that if the Defendant had been looking elsewhere, then the time interval would increase and perhaps be doubled.

56. On this basis, Mr Davis KC submits that the suggestion of a speed of 10.2 mph, a speed at which the accident could potentially have been avoided, is wholly untenable. Further, and as noted above, he says it is highly debateable whether even at a speed of 7.5mph. this accident could reasonably have been avoided.

Discussion

57. As it seems to me, in investigating how and why an accident occurred, there is always a danger of applying a too theoretical, and, therefore, artificial approach, particularly in circumstances where the Court is concerned with extremely short time periods. Attempts by experts to postulate certain time frames frequently does aid and inform the assessment of whether an accident was reasonably avoidable, but, ultimately, a Court must take a step back, look at the matter in context, and determine how and why the accident occurred; and whether, applying the appropriate standard of care, the accident could reasonably have been avoided. It is important to stress again that there is no scope for hindsight when evaluating the evidence. The question of what would have been a reasonable manner of driving must be looked at objectively, in context and at the time when the accident occurred.

58. With those matters in mind, it seems to me that the most useful and most appropriate starting point is to consider the eyewitness evidence. Manifestly, the impression formed by those who had the opportunity to witness the accident and the moments preceding provides assistance to the Court in coming to a view as to whether the accident was caused by negligent driving. I stress that the eye witnesses can do no more than lend assistance; and that, ultimately, it is the Court which must make the final judgment.

59. Here, I do derive considerable assistance from what the various witnesses observed and recorded in their statements. I do not need to rehearse the lay witness evidence, to which I have referred earlier in this judgment. Suffice it to note that the five lay witnesses who were able to observe the movement of the wagon did not consider that it was travelling too fast. It is noteworthy that Ms Kitching, in particular, told the police that the lorry "*didn't appear to be too quick*". Miss Finch's evidence is also of value given that she was driving behind the lorry: she says that there was nothing about the manner in which the lorry was being driven which caused her any concern.

60 I agree with Mr Davis KC that if any of these witnesses thought that the wagon was being driven in anything other than an appropriate manner, they would have said so.

61. Similarly, and although I say again that the question of fault is a matter for the Court, it would be quite wrong to overlook the observations of the various witnesses to the effect that the accident was not the fault of the driver of the wagon. I am particularly struck by what Ms Kitching had to say given that she was the "responsible adult" and might have had a motive for blaming the wagon driver. What she said is worth repeating:

> *"I don't think anyone is to blame. I think there's been, this has been a freak accident. It caught us all off guard and for a split second, this accident has happened."*

62. Of course, a court can come to a different view, but it seems to me that this is powerful evidence.

63. Before turning to the two central allegations made on behalf of the Claimant, there is one important finding of fact, which needs to be made, that is in relation to whether the Claimant walked into the road or moved at a faster pace. This depends upon my assessment of the lay witness evidence, albeit that I received only a very limited amount of oral evidence. Miss Finch said "*Gracie seemed to walk into the side of the lorry*". Redacted Witness 1 stated that the female and the child stepped off the footpath after the lorry had begun to turn.

64. Redacted Witness 2, who was walking up Chadderton Drive, and therefore had a clear view of the inside of the turning lorry described "*the two young children ran out into the road*".

65. As it seems to me, the person best placed to describe what happened was Miss Kitching, Amelia's mother. She said: "*The girls were still holding hands and were running over the junction . . .*". It is difficult, if not impossible, to conceive that Miss Kitching was mistaken about this. Equally, I cannot think of any reason why Miss Kitching would say that they ran into the road if such were not the case. She was standing right beside them and must have seen very clearly their actions.

66. On the balance of probabilities, therefore, and in reliance, principally upon the (untested) evidence of Miss Kitching, I find that it is more likely than not that the Claimant and Amelia ran out into the road. This does not mean that they were necessarily moving at a fast pace, but it was quicker than simply stepping out into the road.

67. As to the Defendant, and the care with which he drove this wagon, Mr Braslavsky KC is of course entitled to point to earlier incidents when he failed in his duty of care to other road users. I bear these matters in mind. Equally, Mr Braslavsky KC is entitled to highlight the fact that on the approach to the junction, and when travelling along Hillhead Parkway, the Defendant exceeded the speed limit to a substantial extent. He is to be criticised for this and his explanation that he had not seen the 20 mph speed sign was not convincing.

68. On the other hand, I only derive limited assistance from the evidence in relation to his driving on previous occasions and his driving in the lead up to the accident. The focus is, necessarily must be on the quality and standard of his driving as he negotiated the left hand turn.

69. The thrust of Mr Braslavsky KC's submissions is that the Defendant failed to keep a proper look out, when turning left into Chadderton Drive. He says that this must have been the case for otherwise he would have seen the Claimant, Ms Kitching and Amelia standing on the footpath waiting to cross the junction. Certainly, as I find, they were there to be seen for a number of seconds before the Defendant turned the corner. The Defendant explains his failure to see them on the basis that he was concentrating on the pedestrians walking on the other side of Chadderton Drive, being concerned that in taking a wide turn, the wagon would potentially come in close proximity to them. He also recalls a vehicle parked on the corner, which may, to some extent have obscured his vision. He maintains that at all times, he was looking in his mirrors and monitoring the three-points.

70. Although in obvious distress, and struggling, at times, to be coherent, overall, I found the Defendant to be an honest and plausible witness. I think that he was doing his

very best to tell me his recollection of what occurred; and not in any way seeking to fabricate evidence. My impression was that it was a bit of a mystery to him as to why he had not seen the Claimant, Amelia and Ms Kitching standing on the footpath, waiting to cross and he could only explain his failure to do so because of his concentration on pedestrians elsewhere.

71. Although the Claimant and Amelia and Ms Kitching would only have been in the Defendant's sight for a very short period of time, and although there were other pedestrians and parked vehicles which demanded the Defendant's attention, nevertheless, I think that there may have been a degree of inadvertence on his part, in not seeing them standing on the footpath while waiting to cross. But his failure to see the Claimant is to be seen in the context that he was focusing on the road ahead, that he was concentrating and that he was driving with care and attention.

72. The issue which then arises is what the Defendant should have done had he seen them waiting at the mouth of the junction. It is of course Mr Braslavsky KC's primary case that it was incumbent upon the Defendant to bring his wagon to a halt so as to survey the scene and satisfy himself that it was safe to proceed. Mr Braslavsky KC is entitled to say that little reliance should be placed on the Defendant's own evidence to the effect that if he had seen them, he still would not have stopped because he had right of way.

73. The issue to be determined is whether it was incumbent upon a reasonably prudent (professional) driver to stop at the mouth of the junction on seeing the Claimant, Amelia and her mother standing on the footpath. I have little hesitation in concluding that there was no obligation upon a wagon driver in these circumstances to stop at the mouth of the junction. It would have been evident to the driver that the pedestrians had a clear view of the large wagon, certainly as it started to turn the corner. I am satisfied that the lorry was indicating so that it was obvious that it was turning into Chadderton Drive. The driver would have seen two children in the company of an adult. To suggest that it ought to have been within the contemplation of a reasonable driver that one or other of the children would walk into the side of the wagon without apparently seeing it, to my mind, stretches credulity.

74. Of course, it is correct that if the Defendant had stopped, the audible warning sound would have been activated. But I agree with Mr Davis KC that there is no obligation on a wagon driver, in these circumstances, to ensure that an audio warning sign fitted to his vehicle is activated. Mr Davis KC makes a valid point that if there was no obligation in law to have such a piece of equipment fitted to a wagon, it can scarcely be said to be a breach of duty if a driver fails to ensure that he is travelling at a speed such that it is activated.

75. I also agree with Mr Davis KC that there were certain dangers attached to the lorry being brought to a halt at the mouth of this junction. Mr Blackwood accepted that to stop at that point would create a substantial risk to pedestrians, particularly as it moved off.

76. Naturally, with the benefit of hindsight, it is easy to say that this accident could have been avoided if the wagon had been brought to a halt. However, to my mind, to find that not to do so constituted a breach of duty is to impose far too high a burden on a wagon driver in these circumstances.

77. It is worth pointing out that none of the witnesses suggested that the wagon should have stopped prior to making the turn. This is neither decisive nor conclusive, but it does inform my assessment of the situation.

78. In concluding that there was no requirement for the Defendant to stop, I have also had well in mind the Highway Code. It is of course the case that extra care should be taken at junctions and that proper regard should be had to the safety of pedestrians. The amendment to Rule 170 does require a driver to give way to pedestrians *crossing or waiting to cross a road into which or from which you are turning ...* but this must be seen in context. It seems to me that it is not a mandatory requirement that every time a pedestrian is standing on a footpath, evincing an intention to cross the road, a vehicle must come to a halt and allow the pedestrian to pass. Obviously, the position is otherwise if the pedestrian is already stepping off the pavement. At all events, as is said so often, context is everything. Here, I am satisfied that the wagon was so readily visible to pedestrians on the footpath and being driven at such a speed that there was not a requirement to bring it to a halt.

79. Mr Braslavsky KC also places reliance upon the observations of Dame Janet Smith in *O'Connor v Stuttard* [2011] EWCA Civ 829 at paragraph 16 [17]:

> "*In my judgment, it behoved the Defendant to ensure that the Claimant was aware of his presence and was keeping still before he proceeded. If that meant stopping his car, so be it. I do not think that such would be a counsel of perfection in these circumstances. He was going only slowly so there would be no difficulty in stopping. His was the only moving vehicle in the street at the time, so there was no pressure upon him to keep traffic moving. It may be, I cannot say, that it would have been possible for the Defendant to ensure that the Claimant looked at him and stopped playing by sounding his horn but without actually stopping his car. But, in these circumstances, the onus was on him, as an adult and as the driver of the car, either to sound his horn or stop or both so as to ensure that the Claimant kept still while he proceeded. This may sound exacting, but, in my judgment, it is not an unreasonable burden to place on a motorist who is driving very close to a young child."*

80. Of course, there can be no challenge to the general thrust of what Dame Janet Smith said in *O'Connor*. However, I say again that context is critically important. A motorist travelling along a very quiet residential street where a young boy is kicking a ball against a wall on the pavement is an altogether different scenario from two girls standing on the footpath in the company of an adult. It was eminently foreseeable that the ball would go into the road and the boy would run after it. In marked contrast, in my judgment, it was not foreseeable that either the Claimant or Amelia would step or jog into the road at the moment when they did.

81. Mr Braslavsky's fall- back position is that the Defendant was driving too quickly as he turned the corner. I disagree. It seems to me that a speed in the range of 11.2/11.8 mph is a reasonable speed at which to make this manoeuvre in a safe manner. It is comparatively slow. Again, it seems to me that it is to impose far too high a burden on a wagon driver to suggest that the speed should have been reduced to a speed below 10 mph, even where there are child pedestrians and parked vehicles in the vicinity. Although I have found that the Claimant, Ms Kitching and Amelia were there to be seen on the footpath, nevertheless, I am satisfied that he was proceeding

carefully and the speed at which he was travelling is evidence of that. Equally, I should add that the fact that he was able to see the Claimant in his wing mirror, probably just before she made contact with the side of the wagon, is again evidence of the fact that he was keeping a reasonable look-out.

82. Even if I am wrong in my assessment as to what was a reasonable speed for this manoeuvre, I am entirely satisfied that if the Defendant had been travelling a little slower, this accident would still have happened. Both experts agree that if the Claimant jogged into the road then the Defendant would have had no opportunity to avoid the accident. That is indeed my finding and therefore I am satisfied that even at a speed of 7 or 8 mph, this accident would have occurred.

83. Moreover, even if it be the case that the Claimant was walking, the available time was extremely limited to avoid an impact. It seems to me that this is a case where it can properly be said that the PRT should be increased from 1.5 seconds bearing in mind that the driver's attention would have been directed elsewhere. The research of *Zebala* must also be factored in: there will inevitably be an interval of time between the start of the pedestrian's motion and the moment when the driver can notice that movement. That is likely to be at least half a second. On the other hand, the PRT should arguably be reduced to a very limited extent on the basis that the brake would have been covered at the time when the manoeuvre was being executed. That said, there must be some allowance for brake build up time.

84. Taking all these matters together, I am entirely satisfied that insofar as Mr Blackwood argued that there was an opportunity for this accident to be avoided if the Defendant had been travelling at 10 mph, he is wrong about this. I am unpersuaded that the accident could have been avoided even at a speed of 7 mph: such was the unchallenged evidence of Mr Murdoch, who effectively stated that the accident could not have been avoided unless the wagon came to a complete stop.

85. To summarise my conclusions: it was not reasonably foreseeable that the Claimant would step or jog into the side of the DAF and there were no measures which a reasonably prudent professional driver was required to take, (whether by reduction of speed or stopping) to prevent the occurrence of this accident. In any event, on the balance of probabilities, reduction of speed would not have prevented the accident. The only way in which the accident could have been avoided would have been for the Defendant to stop his vehicle and I am satisfied that there was no obligation upon him to do so.

86. For the sake of completeness, I turn briefly to the question of contributory negligence. Mr Davis KC acknowledges that it would be very unusual to find a seven year old guilty of contributory negligence. On the other hand, he says that this is an *exceptional* case in the sense that the Claimant walked out into the side of a vehicle directly in front of her. This is not simply a case of a child stepping into the path of a vehicle.

87. Mr Braslavsky KC submits that the authorities are all one way, to the effect that a child aged seven should not be held to have failed to take reasonable care for their own safety. He relies upon the dicta of Denning LJ in *Gough v Thorne* [1966] 1 WLR 1387 to the effect that there should only be a finding of contributory negligence if blame can reasonably be attached to the child and that will only be so if the child has some road sense. In *Andrews v Freeborough* [1967] 1 QB, Davies LJ

concluded that an eight year old child should not be found guilty of contributory negligence even when stepping off the kerb in front of a car. Yip J in *LS v Kelly & Ellis* [2018] EWHC 2031 (QB) agreed that the finding of contributory negligence against an eight year old child would indeed be *uncommon*.

88. My view is that this is an unusual case in the sense that it is not simply a situation where a child steps into the path of a vehicle, but rather into the vehicle itself. On the other hand, based on Mrs Blackburn's evidence, it would seem that the Claimant had no more than a very basic understanding of road safety and, in particular, she had not been instructed in the Green Cross Code.

89. In these circumstances, whilst I find it surprising that the Claimant jogged off the pavement into the side of the wagon, I do not find that she was culpable such as to attract a finding of contributory negligence. Accordingly, if I were to have found in her favour, it would have been on the basis of full liability.

Conclusion

90. It goes without saying that the Claimant is deserving of every sympathy. However, no case can be decided on the basis of sympathy. I am constrained to find that this accident occurred through no fault of the Defendant. Accordingly, there must be judgment for the Defendant.

91. I apprehend that counsel will be able to agree an appropriate order without the need for a further hearing.

92. Finally, I express my gratitude to all Counsel for their succinct and skilfully crafted submissions, as well as their assistance throughout the trial.