



Neutral Citation Number: [2012] EWHC 2324 (QB)

Case No: 1SA90237

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Thursday, 9<sup>th</sup> August 2012

Before :

**MR. DAVID PITTAWAY Q.C.**

Between :

**Bethany Probert**  
**(A Child by her Litigation Friend**  
**and Mother Joanna Probert)**

**Claimant**

- and -

**Paul Moore**

**Defendant**

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Christopher Purchas QC and Bryan Thomas  
(instructed by Russell Jones & Walker) for the Claimant

Adam Chippindall  
(instructed by Greenwoods) for the Defendant

Hearing dates: 18<sup>th</sup> and 19<sup>th</sup> July 2012

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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## **Mr David Pittaway (sitting as a Deputy Judge of the High Court):**

1. The action arises out of a tragic accident on 3<sup>rd</sup> December 2009 when at or shortly before 5.00 pm Bethany Probert was seriously injured whilst walking along Abthorpe Road towards Silverstone, Northamptonshire. She was involved in a collision with a Saab 93 motorcar registration number KEO3AAF being driven by Mr Paul Moore who was driving to work at Force India adjacent to the Silverstone Racing Circuit. Bethany was 13 ½ years old at the time of the accident. She sustained multiple injuries in particular traumatic brain damage from which she has made an incomplete recovery. She suffers from both physical disabilities and cognitive impairment as a result of the accident. Her head injury is likely to have a significant effect on her personality, employability and ability to live independently in the future.
2. The facts behind this claim can be shortly stated.
3. The road in question, Abthorpe Road, is an unclassified relatively narrow single carriageway road between two villages in Northamptonshire, Abthorpe and Silverstone. At the point of impact, about 1 ½ miles south of Abthorpe, the metalled part of the road is 4.65 metres wide. There is a dirt strip between the edge of the grass verge and the metalled area of the road where the edges have been overridden by vehicles. The distance between the grass verges is 5 metres. There are no road markings. The road is undulating with numerous bends. There are verges either side of the road with hedgerows which in places encroach onto the verge. The photographs taken after the accident confirm the appearance of the hedgerow on the opposite side from where Bethany was walking encroaching onto the verge. There is no street lighting. The speed limit is the national limit of 60 miles per hour. There are farm and other houses shown on the plan set back from the road and a riding stables, The Hayes, from which Bethany had set out. There is also a Forestry Commission car park adjacent to woodland which is frequented by dog walkers.
4. Mr Moore used the road daily to travel to and from work. At the time of the accident there were several other vehicles using this section of the road. Mr Moore was driving his car at or shortly before 5.00 pm along Abthorpe Road when he manoeuvred to his nearside to allow oncoming vehicles to pass safely. It was dark. The accident occurred when Mr Moore's motor car collided with Bethany who was walking along the road in the same direction as Mr Moore was travelling. She was thrown forwards and laterally into the hedgerow. Mr Moore was aware that he had struck something. He stopped and looked but initially was unable to find in the dark what he had struck. He found Bethany in the hedgerow and another passer-by telephoned for an ambulance. Following the accident he moved his car back from where he had initially stopped in order to illuminate the hedgerow.

### **Factual witnesses**

5. Mr Moore was 55 years old at the time of the accident. He was driving to work at Force India whose premises are adjacent to the Silverstone Racing Circuit. He was employed as a fitter/trimmer. His shift began at 5.00 pm. His journey of about 4 to 5 miles from his home at Wappenham to Silverstone took him along the Abthorpe Road twice each day. He has been driving the same route for 15 years. He described the road as not having a large volume of traffic even when people were travelling to and from work. He recalled seeing pedestrians on

the road during the day. He said that he had not seen pedestrians, cyclists or horse riders after dark. The weather was overcast and the road was damp but it was not raining. He was driving with his headlights on full beam.

6. As Mr Moore started his journey he recalls that there was no other traffic on the road either going in the same or opposite direction. He describes maintaining a steady speed, varying the speed according to the road conditions. The first part of the road was relatively straight and inclines slightly as it approached a series of hills and bends close to where the accident occurred. He said that he was not late for work and was in no particular hurry. He said in his witness statement: *“The speed I was travelling at varies depending on the nature of the road. I estimate that approaching Mushroom Farm on my right I was travelling at about 50 mph.”* Mushroom Farm which is shown marked on the plan is adjacent to the scene of the collision.
7. Mr Moore became aware of two or three sets of headlights coming towards him as he approached Mushroom Farm. The lights were not particularly close together. The lights were about 30 yards away. The road at this point was relatively straight. He dipped his headlights and the first of the vehicles dipped its lights. He was not dazzled by the oncoming lights. He says that he instantly moved to his nearside to ensure that he passed the oncoming car safely. He did not need to brake. He says in his witness statement that having passed the first of the two vehicles his lights illuminated a figure in the road immediately in front of him. He says that he just saw a dark figure. He moved to the offside but struck the person. He did not brake until he struck the person. The collision was accompanied by a loud thud on the nearside of his windscreen. He maintained control of his vehicle and came to an emergency stop. He says in his witness statement: *“although I thought it might have been an animal such as a deer, I was more fearful that it was in fact a pedestrian.”*
8. After the accident Mr Moore got out of his car and went back to where the incident had occurred. He could see nothing because it was very dark. He asked a passing 4 x 4 to shine the lights of the vehicle into the ditch but he still found nothing. The vehicle left the scene. He flagged down another 4 x 4 and asked the driver to telephone 999. He spoke to Emergency Services whom he said in oral evidence told him to move his vehicle to where he believed the collision had occurred. He continued searching until he found Bethany lying face down in the ditch. He waited whilst the Ambulance Services and Bethany’s mother arrived. He says in his witness statement: *“I just did not see the girl before I hit her. I was not dazzled by the oncoming lights but neither my lights nor those of the oncoming vehicles illuminated the girl as she was wearing dark clothing all over.”* He does not believe that his front wheel went off the metalled area onto the dirt strip. He believes that he would have felt the change in surface through his steering wheel.
9. Immediately after the accident Mr Moore told the police officer at the scene: *“It was dark, vehicles were travelling towards me, as they passed travelling in the opposite direction, I just saw a person in front of me on my side of the road with the back of the person towards me. I did not have time to swerve and clipped the person with the nearside of my vehicle. The person then hit my windscreen. I immediately stopped.”* When interviewed by the police on 22<sup>nd</sup> December 2009, 19 days after the accident, he gave a similar account. He was asked what speed he was travelling. He said: *“between 50 and 60 I would say”*. He described his speed as being the same as on a normal day. He said that Bethany was close to but not right up against the verge. He told the police officer: *“I just never saw her, why I don’t know but I never saw her in time”*.

10. Mr Moore accepted in cross-examination that if he had been travelling at 50 to 60 mph it was too fast. He accepted that a proper speed would have been 45 to 50 mph or less. He was aware that the area where the accident took place was fairly narrow and there was restricted visibility ahead of him. He moved to his nearside close to the verge to provide adequate clearance. He accepted that he did not look to see if the nearside of the road was clear. He did not think that there was any possibility of a pedestrian being on the road. If he had thought of the possibility he would have slowed down in order to give him sufficient time to stop. He accepted that if there had been somebody there the collision was inevitable. He admitted that he was concentrating on the lights of the approaching vehicles. He was not looking to see if anybody was in the road ahead of him. He said that he realised that he had struck something but did not know what it was. He accepted that he was unable to see if the nearside of the road was clear. He admitted that he had not complied with provisions of Rule 125, 126 or 154 of the Highway Code.
11. Mrs Walker who kept her horse at livery at Hayes Farm regularly drove along the road between Abthorpe and Silverstone. She said that the road is regularly used by cyclists, both in the morning and evening, and joggers and dog walkers. In oral evidence she said that most days she saw somebody on the road. She said that at about 4.30 pm on the day of the accident she spoke to Bethany at the stables and asked if she wanted a lift home. Bethany told her that her mother was going to pick her up. She was wearing earphones. In cross-examination she qualified her evidence to the extent that she said that she had seen cyclists at night, in particular one cyclist every day, who wore reflective material and rode a cycle with lights. She said that she usually saw joggers in daylight hours but also at about 5.00 pm in the evening. She had not seen dog walkers at that time.
12. Mr Wade drove along the road two or three times each week at all times of the day and night. He had been a local taxi-driver since March 2010. Prior to becoming a taxi-driver he had worked as a driver for the local council and was familiar with the road. He said in his witness statement that he always travelled along that section of the road at 40 mph because of the risk of cyclists, horse riders and pedestrians. He described the Forestry Commission land where there is a car park and also pull-ins for cars visiting the site. He said that he had seen cyclists and horse riders at 5.00 pm with lights and reflective jackets. He also said that he had seen a jogger very recently at about 5.30 pm with a yellow jacket and markings on his trousers. He believes that he had also seen joggers in the evening around the time the accident occurred. He did not consider that there had been any material change in the usage of the road since the accident.
13. Mrs Mann was driving along the road at the time of the accident with her two daughters in the car in the opposite direction to Mr Moore. She was travelling at a speed of about 30 to 40 mph. She said in her witness statement: *"I was suddenly aware of a person walking in the road. The road at this point bears slightly to the left so my lights would be shining straight ahead towards the right hand side of the road and it was at this point that my lights picked up the face and front of a pedestrian. I did not know that the pedestrian was a girl at this stage but I could see her face lit up by my lights. I also saw that there were two white wires either side of her face which I thought must have been earphones. I was travelling slightly out from the left hand side of the road but went past her without difficulty. However, as the lights shone at her she moved over towards her left side verge further away from me. ... after I had passed her I looked in the rear view mirror and I saw that she had stepped back into the road to roughly the position she had been in when I first saw her."* She said that she told her

daughters that: *“she was walking in a dangerous position and that perhaps I should stop and tell her not to walk in the road.”* She said that she wished afterwards that she had done so.

14. PC Marrocco prepared a written witness statement and surveyed the scene for the purposes of the police report but he was not called to give oral evidence. He had been able to identify physical evidence at the scene of the collision; windscreen glass fragments, two pieces of a hair slide, a Wellington boot, a piece of plastic which he marked on a plan. The black knitted top which was reported as the rest position was not highlighted by a marker on the photographs of the scene.
15. One of the other witnesses, Mr Herriot, in his witness statement to the police, stated that he had been travelling along the section of the road at 40 mph when he saw a pedestrian walking in the road towards Abthorpe. Although, it is not entirely clear, from the direction in which the pedestrian was walking and the description of the clothing, the probability is the pedestrian was not Bethany. A Mr Bearman, in his witness statement to the police, also observed a pedestrian on the side of the road talking to a driver of a 4 x 4 vehicle. A Mrs Zimmerman travelling in the opposite direction at 45 mph observed that: *“the car that swerved did so in a violent manner but again I could see no reason for this.”* None of these witnesses gave oral evidence although their statements were included within the police report.

### **Expert Evidence**

14. Dr Ninham, instructed on behalf of Bethany and Dr Coley, instructed on behalf of Mr Moore, both experienced accident reconstruction experts, subsequently inspected the scene of the accident. They prepared detailed experts' reports from the information contained in the police report prepared by PC Marrocco, and as a result of their inspection. Their description of the road is set out in the preamble to this judgment. The two experts also prepared a joint statement. In my view, both experts sought to assist me to the best of their ability but, for the reasons set out below, the expert evidence in this case is of limited probative value in determining the speed that Mr Moore was travelling immediately before the collision.
15. Dr Ninham stated in his report that he found it difficult to walk along the verges because they were uneven. During his visit at night he found it very difficult to walk along the verges because he could not see the uneven surface. Dr Coley did not visit the scene at night. Dr Ninham recorded that PC Marrocco had located: *“a Wellington boot on the grass verge close to the area in the ditch/hedgerow reported as being the post-incident position of the pedestrian.”* He had been told by Mrs Probert that Bethany was one or two metres closer to Silverstone than the position of the Wellington boot.
16. Dr Ninham carried out a series of calculations, which he subsequently altered during the course of his oral evidence, to demonstrate the distance which Bethany was projected. He finally suggested that she had been projected a distance of 10.5 to 12.5 metres subject to the centre of the boxes on the plan being the location of the items found. The boxes covered a scaled area of one metre. He concluded that Bethany was struck by the very nearside of the front of the car. Dr Ninham observed from PC Marrocco's photographs of the car that the car's windscreen was broken at its upper nearside edge characteristic of a pedestrian impact. There was an area of cleaning below the front nearside headlamp at the corner of the car. The area of cleaning extended onto the bonnet and the top of the nearside wing. There appears to have been smear or wipe marks on the nearside “A” pillar and the nearside door window at

about the same height as the windscreen damage. Bethany came to rest to the nearside of the line of travel of the car. He also considered that her left frontal injury implied that, if struck from behind, she was spun round by the impact from the bumper and the leading edge of the bonnet.

17. From his observations Dr Ninham was only able to conclude that the car was travelling at a minimum speed of 28 mph at impact. This figure was taken from research studies calculated by reference to a full overlap between a pedestrian and car. He also attempted to calculate distances by reference to where Mr Moore said he had stopped after the accident before he reversed his car back to the scene of the impact. On that basis, which he also considered to be an unreliable estimate of speed based on stopping distances, he calculated speeds on impact of 43 or 50 mph. At best he concluded that the speeds he had calculated were consistent with Mr Moore driving at a speed of between 50 and 60 mph. If that was correct, Dr Ninham's view was that it was most unlikely Mr Moore would have been able to stop if he encountered a pedestrian wearing the clothing Bethany was wearing. For her to be visible from far enough away to brake, halt or steer to his right to sufficiently pass her, he considered that she would have to have been wearing light coloured or reflective clothing visible in the reflected light of Mr Moore's own headlamps. However, Mr Moore's ability to see her in silhouette from the lights of oncoming vehicles would have made the colour of her clothing less significant to her visibility.
18. Dr Coley in his report stated that the damage to the car extended inboard from the nearside edge by about 0.4 metres. He believed the damage indicated that part of Bethany's body overlapped the car to that extent with the cleaning marks along the front nearside indicating that part of her body could initially have passed along the nearside of the car. He accepted that the verge was uneven and at night it may have been difficult for her to have walked on the verge although it would have been possible for a pedestrian to step on to this area to allow a vehicle to pass. He referred to the width of a typical passenger car as being about two metres. If two vehicles were approaching and passing each other, each car would have had about 0.25 metres on each between their offside mirrors. He noted that PC Marrocco observed that there was no evidence that the car had been driven on the grass verge before the collision. Dr Coley described it as an almost fully overlapping collision with a small degree of glancing being shown by the cleaning marks along the front nearside wing.
19. He did not consider that the damage was consistent with an impact speed of 50 to 60 mph. He considered it was probably greater than 30 mph but less than 45 mph. He would not have expected the head of a 13 year old to have struck the windscreen at speeds of less than 30 mph. He placed reliance on there being very little damage to the bumper and bonnet of the car. At speeds of 45 mph or more he would have expected to see more damage such as a broken headlight and crumpling of the bonnet. Based upon his consideration of the research he believed that a pedestrian wearing similar clothing to Bethany would be difficult to detect by an unalerted driver using low beam headlights until quite close. He conceded that it was possible that oncoming vehicles headlights may have silhouetted her before Mr Moore's headlights began to illuminate her. He said in his report that if Mr Moore had been travelling at 30 to 40 mph there was still a possibility he would not have been able to brake or swerve before impact.
20. The joint statement of Dr Ninham and Dr Coley agreed the layout of the road where the collision occurred. They agreed that the verges would be difficult to walk on particularly at

night. They agreed that the hedgerow on the opposite side to where Bethany was walking overhung the verge. They agreed that the dent on the bonnet indicated Bethany's position across the width of the car at impact. The dent was approximately in line with the nearside dipped headlamp lens approximately 0.30 metres from the edge of the body of the car. They agreed that the presence of marks on the side of the car and the fact that Bethany was found on the verge meant that she was projected to the side as a result of the impact being close to the nearside corner of the car. They were agreed that it was not a glancing impact. They agreed that Bethany was walking partly on the metallised road surface.

21. The experts agreed that the three methods of establishing the speed of the car at the point of impact were unreliable. The uncertainty regarding the point of impact, the corner impact, and Bethany's post impact movement being arrested by the hedge made an assessment of the speed on the basis of pedestrian projection unreliable. The uncertainty regarding the location of the impact and where the car came originally to a halt and the rate at which it slowed made an assessment of the speed of the car on the basis of the distance in which it stopped unreliable. Assuming Mr Moore braked as hard as possible on impact they posited a speed in the range of 43 to 55 mph. They agreed that the third method of speed assessment from damage is normally the least reliable. Dr Ninham's opinion was the speed of the car on impact was very probably greater than about 30 mph and could have been as high as 55 mph. Dr Coley's opinion was the speed was probably greater than 30 mph and but probably less than 45 mph. He relied upon the lack of visible damage to the headlight cluster which he said was inconsistent with speeds of more than 45 mph. The joint statement said: *"If the collision was not a full overlap, then it is Dr Coley's view that this method would be unreliable for this case due to the unknown effect there would be on the pedestrian's rotation."*
22. They agreed that the headlamps of oncoming vehicles could have presented Mr Moore with glare which could have reduced the distance he could see clearly. It was also possible the headlamps would have presented a source of illumination behind Bethany creating a silhouette effect. They agreed that an alerted driver will very probably detect a pedestrian from further away than an unalerted driver. Dr Ninham's opinion was that on an unlit road without footways a prudent driver would be alert for pedestrians whereas Dr Coley's view was that alertness of a driver would depend on whether they would realistically expect to see a pedestrian in the area. They agreed that the extent to which Bethany's use of an iPod affected her ability to detect an approaching car would depend on the relative sound volume of the iPod and the car. If the sound of the oncoming cars masked the sound of Mr Moore's car the use of an iPod would probably have made no difference to her ability to detect Mr Moore's car.
23. As set out above, the calculations produced by each of the two expert witnesses, in particular the wide range of figures as to the speed of the car, are based upon a number of hypotheses which are only of limited assistance to me.

## Findings

24. Did Mr Moore drive along the section of the road negligently?
25. In my view a reasonably prudent driver would not have exceeded a speed of 40 or 45mph on this section of the road. This conclusion is fortified by the speed at which the other factual witnesses have said, which I accept, that they drove along the road. Mrs Mann said she was

travelling at 30 to 40 mph. Mr Wade said he always travelled along that section of the road at 40 mph because of the risk of cyclists, horse riders and pedestrians. Mr Herriot said in his statement to the police that he was travelling at 40 mph. Mrs Zimmerman said she was travelling at 45 mph. I am satisfied from the evidence that Mr Moore was travelling at a speed in excess of 50 mph immediately prior to impact. For the reasons set out below the extent to which that speed was in excess of 50 mph is less clear. In my view, he was probably driving at a speed closer to 50 mph than 60mph, in either case the speed was too fast for the type of road on which he was travelling particularly at that time of day.

26. I observe that the accident occurred at or shortly before 5.00 pm and Mr Moore's shift began at 5.00 pm in Silverstone. He has given evidence that he was not in a hurry. He has said he was not required to clock-in to work and that his employers were flexible as to the exact time he arrived. Nevertheless it would be a natural reaction to try to arrive at work on time unless by prior arrangement it had been agreed that he should arrive later. In my view, the fact that he was due to start his shift at 5.00 pm was probably a contributory factor to his speed.
27. As set out above Dr Ninham and Dr Coley are agreed that the three methods of reconstructing the speed of a vehicle usually applied are unreliable in this case. Calculations based on the projection of Bethany's body are unreliable. The fact that Mr Moore moved his motor car after the accident before the police attended has made it impossible to calculate his speed from the braking distance. The location of the car when it came to a stop immediately after the accident is unknown. Finally, the experts are agreed that normally the least reliable method is to assess the amount of damage to the vehicle.
28. There has been considerable discussion during the trial as to whether this was a case of full or partial overlap. The question is one of significance because where a body is struck fully in front of a vehicle it is possible to calculate, from the projection and ultimate destination of the body, the speed at which it has travelled. Although, the speed of the body will be less than that of the car, the calculation is able to give an approximation of the speed of the vehicle. In this case the experts are agreed that Bethany was partially in front of the vehicle at the time of impact. Dr Cooley has qualified this agreement by stating that she was close to being fully in front of the vehicle. He points to the damage to the bumper and the windscreen being in an approximate line, shown on one of the photographs taken after the accident. Dr Ninham does not agree that this was a case of almost full overlap. He points to the damage and marks to the side of the vehicle.
29. In my view had there not been a good degree of overlap it is unlikely that Bethany's head would have struck the windscreen. In coming to that conclusion I have also in mind the way in which a body can become contorted is itself unpredictable. In any event the experts are agreed that it is not possible to make a calculation of speed based on the projection of the body.
30. The issue is relevant, however, to the extent of the damage to the vehicle. If there had been almost full overlap Dr Coley would have expected to have seen more damage had Mr Moore been travelling in excess of 45 mph. He points to the fact that the headlight assembly was not dislodged on impact. He accepts that this view is based upon his impression from examining cars involved in other accidents. He also accepts that there are no research studies where there has been partial overlap or, indeed, studies involving children. Dr Ninham relies primarily on partial overlap as an explanation for the extent of damage.



31. I reject Dr Coley's evidence that Mr Moore could not have been travelling at more than 45 mph based on the extent of the damage to his car. In my view, the combination of partial overlap and the weight of Bethany probably accounts for the limited extent of damage. I accept Dr Ninham's evidence about the position of the impact high on the windscreen. Bethany would have been smaller than an adult and the car would need to have been travelling at a high speed to obtain the height of the indentation. It follows that I do not accept Dr Coley's evidence this was a case of almost full overlap, in my view, it was significant but not almost full.
32. Dr Ninham was criticised for stating that the evidence was consistent with Mr Moore travelling at 50 mph on the basis that it was equally consistent with him travelling at a lower speed. In my view nothing turns on this point. Dr Ninham explained that he gave this opinion by reference to Mr Moore's answers in the police interview that he was travelling between 50 and 60 mph. I accept his analysis that there is no scientific evidence that is inconsistent with Mr Moore's assertion after the accident.
33. Mr Moore was asked why he told the police that he had been travelling at that speed. He said that he believed the idea had been put into his head by the solicitor who had been instructed to accompany him to the interview when he had said, shortly beforehand, that the national speed limit for the road was 60 mph. Mr Moore said it would have been a natural reaction to say that he had been travelling at a lower speed. In my view there is force in the questioning put to Mr Moore that he had three weeks in which to consider the speed he had been travelling before he was interviewed. It is almost inevitable that he would have considered this issue by reference to his recollection of the events of that particular evening or the speed which he usually travelled along the road each day to and from work. He said in both his witness statement to the police and for this action he was travelling at around 50 mph. In these circumstances I have concluded that the speed at which Mr Moore was travelling immediately before the collision was in excess of 50 mph. For the avoidance of doubt I place no weight on the reference in the medical records, at the hospital to which Bethany was admitted, to the car travelling at 40 to 50 mph. Mrs Probert did not witness the accident and the source of this information is unknown.
34. In my view Mr Moore should have been aware of the presence of other road users whether pedestrians, cyclists or horse-riders, on country roads. Breaches of Rules 125, 126, 154 and 206 of the Highway Code (Revised 2007 Edition) were put to him in cross-examination, which he accepted. For the purposes of this judgment I set out only Rule 154 Country Roads:
- "Take extra care on country roads and reduce your speed at approaches to bends, which can be sharper than they appear, and at junctions and turnings, which may be partially hidden. Be prepared for pedestrians, horse riders, cyclists, slow-moving farm vehicles or mud on the road surface. Make sure you can stop within the distance you can see to be clear. You should also reduce your speed where country roads enter villages."*
35. I have been referred to *Powell v Phillips* [1972] 3 All ER 864, 868 d where it was held that a breach of the Highway Code itself creates no presumption calling for an explanation or a presumption of negligence but is one of the circumstances on which one party is entitled to rely in establishing negligence.

36. I accept the evidence of Mrs Walker and Mr Wade that they regularly saw pedestrians on the particular section of the road during the day, and in Mr Wade's case, at about 5.00 pm. In my view, the presence of pedestrians on the section of the road should not have been excluded at or about the time the school or working day has finished and people are returning from school or work or going to and from other activities including horse riding or dog walking. Mr Moore should have had in mind the particular circumstances of the road, the width, visibility, proximity to stables and other buildings.
37. The presence of oncoming traffic on a narrow country road should of itself have caused Mr Moore to reduce his speed. In my view he did not do so, he was overdriving. It is noteworthy that he made no reference to reducing his speed to the police at the scene or in interview three weeks later or in his witness statement. In fact in his witness statement he said that it was not necessary for him to brake. It was only during his oral evidence that he feintly suggested that he had taken his foot off his accelerator as the oncoming cars approached. I am satisfied that he did not do so. In my view, the action he took to move to his nearside was to ensure that there was sufficient distance between his car and the oncoming vehicles as they passed. In doing so, any possibility that he would have avoided colliding with Bethany was lost. He accepted in cross-examination that his concentration was focussed on the approaching vehicles. In my view he did not see Bethany before the collision, if he did it was merely a blurred form. I accept that after the accident he did not know whether he had struck an animal or a pedestrian although he feared the worst.
38. In these circumstances I am satisfied that the particulars of negligence pleaded against Mr Moore in this case have been made out.

### **Contributory Negligence**

39. The issue arises as to whether Bethany caused or contributed to the accident herself. The issue arises as to whether Bethany was at "fault" within the meaning of section 1(1) of the Law Reform (Contributory Negligence) Act 1945 ("the 1945 Act"). Section 1(1) of the 1945 Act provides:

*"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons....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 the damage..."*

40. I have been referred to a large number of cases on road traffic accidents involving children, some of which are very old and others of which are helpfully summarised by Christopher Clarke J in *Toropdar v D* [2009] EWHC 2997 (TCC) and which I do not propose to repeat here.
41. The starting point is *Gough v Thorne* [1966] 1 WLR 1387, where Lord Denning MR explained at 1390 that:

*"A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense*

*nor the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy."*

42. In the same case Salmon LJ at 1391 put it slightly differently:

*"The question as to whether the plaintiff can be said to have been guilty of contributory negligence depends on whether an ordinary child of 13 could be expected to have done more than this child did. I did say "ordinary child". I did not mean a paragon of prudence; nor do I mean a scatter brained child; but the ordinary child of 13"*

43. In summary the case against Bethany is that she should not have been walking along the road at 5.00 pm on 3<sup>rd</sup> December 2009. She should have waited for her mother to collect her from the stables as arranged or accepted lift from Mrs Walker, particularly where she knew or ought to have known there was insufficient grass verge for her to walk on. If it was necessary for her to walk home, she should have been wearing a high visibility jacket or other reflective markings before setting off to walk along the road. Instead, she was wearing dark clothing and using earphones which would have impaired her ability to hear approaching traffic on the road. She was walking on the same side of the road as vehicles approaching from behind her. She paid insufficient attention to vehicles on the road particularly she was not watching, listening, stepping up onto the verge as necessary or turning round frequently. As a consequence of Bethany not seeing Mr Moore before the accident and not having heard his approach the collision occurred.

44. It is common ground between the experts that the grass verges on the section of the road where the accident occurred were unsuitable for walking along. It is also agreed, as demonstrated by the photographs, that Bethany was walking along the correct side of the road when the accident occurred because of the presence of vegetation in the hedgerow on the other side and an approaching bend. The experts are also agreed that the sound of the approaching traffic would have masked the sound of the car behind her whether she had been using her earphones or not.

45. In my view the claim of contributory negligence in this case is not made out. As set out above the standard to be applied is the objective standard of an ordinary 13 year old child. There was a feint attempt by Mr Chippindall to introduce evidence about Bethany's character from the condition and prognosis report filed with the particulars of claim which was not pursued.

46. Mr Purchas says that Bethany was entitled to use the road at that or any time of the day or night. He relies upon a number of old cases when, perhaps, there were more pedestrians and less vehicular traffic on the roads. In the modern age, a prudent adult walking along a narrow country road at that time of day may consider wearing a high visibility jacket or other reflective markings or carrying a torch to signify presence on the road. It was accepted in evidence that the horse-riders from the stables always wore high visibility jackets and cyclists wore similar jackets or carried lights. The question of whether an adult would be at fault for not taking those precautions is not the issue I have to determine. Similarly, a prudent parent advising a child of Bethany's age about walking home may advise her to wait until she was collected or similarly wear distinctive clothing. Again that is not the issue I have to determine.

47. How does this translate to a 13 ½ year old child who decides to walk home on her own? Although there was no evidence from Bethany, one explanation could be she thought she

would meet her mother coming in the opposite direction whilst walking home. The reason for her decision will, however, remain unknown. It seems to me that an ordinary 13 ½ year old should not be expected to consider taking the same level of precautions as an adult. It would be asking too much of her to say that she should not have started to walk home at all, waited for her mother or accepted lift, or should not have started to walk home without borrowing a high visibility jacket, reflective markings or torch from the stables. In my view those actions for a child of her age would have been a paragon of prudence. Once she had started out on the road I am satisfied that she clearly did take steps for her own safety. She got out of the way of vehicles travelling along the road. Mrs Mann's evidence was that she observed Bethany climb onto the verge as she approached and then back onto the road after she passed. I am satisfied that she did not climb onto the grass verge or turn round when Mr Moore's car approached from behind her because she was not aware of its presence. Nor, in my view, did Bethany's use of earphones, on the facts of this case, make a material difference, because of the noise of the approaching vehicles.

48. In any event I am not satisfied that Mr Moore would have observed Bethany if she had been wearing distinctive clothing. Although it is said that he could have seen her from further back, Mr Moore's evidence was that his attention was focussed on the approaching vehicles. To ensure that he had sufficient space to pass them he manoeuvred his car to the nearside. I have already found that he did not slow down or brake and saw only a blurred figure before the impact occurred.
49. If I am wrong and Bethany did contribute to the cause of the accident I have to consider whether it would be just and equitable to make a finding of contributory negligence. In my view it would be inappropriate for me to do so where there was no positive act on her part which caused the accident itself. Her decision to walk home on her own was ill-informed but not culpable. In my view a clear distinction should be drawn between the facts of this case and other cases where children have run out onto the road in front of oncoming traffic.
50. In these circumstances judgment shall be entered for the claimant for damages to be assessed.
51. At the conclusion of the trial I indicated that it was not necessary for counsel to attend the handing down of this judgment unless it was not possible for them to agree any consequential orders. Subsequent to counsel being provided with copies of a draft judgement I agreed to Mr Chippindall submitting a written application for permission to appeal against my finding that there had been no contributory negligence on the part of Bethany. Having considered the application, I am not satisfied that it passes the threshold of CPR Part 52.3 (6) (a) and the application is refused. In my view, the application seeks to re-argue issues upon which submissions were made to me at trial. Having had the benefit of hearing the factual and expert witnesses in this case, I do not believe that an appeal against my decision on this issue has a real prospect of success. If the parties are able to agree the form of the order then there should be no need for another hearing. If the parties are unable to do so, this matter should be relisted before me for further directions.