



Neutral Citation Number: [2020] EWHC 46 (QB)

Case No: HQ16P01352

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2020

Before :

GEOFFREY TATTERSALL QC
(sitting as a Deputy Judge of the High Court)

Between :

Joanne JAGGER
- and -
Austin HOLLAND (1)
CAMBRIDGE LIVE LIMITED (2)
STANLEY THURSTON (T/A S. C. THURSTON &
SON) (3)

Claimant

Defendants

Bernard Doherty (instructed by **Barr Ellison LLP**) for the **Claimant**
Nigel Lewers (instructed by **Kennedys**) for the **First Defendant**
Derek O’Sullivan QC (instructed by **DAC Beachcroft**) for the **Second Defendant**
Richard Hartley QC (instructed by **Clyde & Co**) for the **Third Defendant**

Hearing dates: 26-29 November, 2-3 & 5 December 2019

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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GEOFFREY TATTERSALL QC

Geoffrey Tattersall QC :

Introduction

1. Shortly after noon on 4 November 2015 Joanne Marie Jagger [“the Claimant”], then aged 50 years, was wheeling her pushbike across Midsummer Common in Cambridge [“the Common”] when she was in collision with an articulated lorry driven by Austin Holland [“the First Defendant”] which ran her over and caused her to suffer devastating injuries as a result of which her right leg was amputated and she was placed in an induced coma for 17 days. It is unnecessary to describe the full extent of her injuries or her current level of disability because this trial is concerned solely with issues of liability. However, as will become apparent from what I say below, this accident has had a profound effect not only on the Claimant herself but also on some of those who witnessed the accident and went to assist her.
2. Some brief explanation of the circumstances in which the accident occurred is necessary at the outset of this judgment.
3. For very many years Cambridge City Council [“the Council”], through its Events Department, has organised an event consisting of a bonfire, fireworks display and fair each year on 5 November [“the event”] and such event was usually attended by about 20,000 people. Although the event was to be repeated in 2015, on this occasion the organiser of the event was to be Cambridge Trading Limited [“the Second Defendant”], a not-for-profit charity to organise and run events throughout the City and it seems that all the staff employed by the Second Defendant had previously been employed by the Events Department of the Council. The Second Defendant, although incorporated in 2014, began operations in April 2015 so that the 2015 November bonfire/fireworks event was the first such event it had carried out.
4. The Second Defendant contracted with Stanley Thurston (trading as S.C. Thurston & Sons) [“the Third Defendant”], who ran a business setting up and operating fairgrounds, to run and organise the fairground event, as he had done in many previous years.
5. The First Defendant had been invited by the Third Defendant to provide the dodgems ride. It was in the course of the First Defendant delivering his dodgems ride to the Common on an articulated lorry to set up such ride on the day before the event was due to take place that the Claimant sustained her accident.
6. So it was that at the hearing before me there appeared Mr Bernard Doherty for the Claimant, Mr Nigel Lewers for the First Defendant, Mr Derek O’Sullivan QC for the Second Defendant and Mr Richard Hartley QC for the Third Defendant.
7. With no disrespect to the parties intended, for ease of reference in this judgment I will refer to the parties by the following abbreviations adopted in most of the parties’ submissions: the Claimant [“C”], the First Defendant [“D1”], the Second Defendant [“D2”] and the Third Defendant [“D3”].
8. In this judgment I will initially describe the locus where the accident occurred and thereafter will consider the pleaded cases of the parties and the concessions made during the trial, the contractual position between D2 and D3, the non-expert evidence,

the expert evidence, my findings of fact and, after considering the parties' submissions, will express my conclusions on liability.

The locus

9. Some explanation of the locus is necessary.
10. The Common is a large open grassed area in the centre of Cambridge, approximately triangular in shape and about 21 acres in size, bounded on the north side by the River Cam, on the west side by Victoria Avenue, on the south side by Maids Causeway and on the east side by housing. It is crossed by established asphalt footpaths in good condition, but the public are permitted to walk on any part of the Common which has led to other informal paths developing. The widest of these footpaths has an orientation from north northwest to south southeast and is crossed by another path running from northeast to southwest.
11. In a plan annexed to the witness statement of Andrew James Keightley ["Mr Keightley"], the north northwest to south southeast plan is footpath 4 to the intersection ["the intersection"] of these two paths and footpath 2 from such intersection towards the housing and the footpath running northeast to southwest is footpath 3 from the entrance to the Common on Victoria Avenue to such intersection and footpath 1 from such intersection to the River Cam. In this judgment I will refer to such numbered footpaths. Vehicles other than Council service vehicles are not normally permitted on the Common.
12. At the time of the accident the site was being set up for a bonfire and fireworks display, together with a fairground. The area for the fireworks display had already been fenced off and supporting facilities were being set up in adjacent areas. The fairground for the bonfire night event was in the area bounded by these pathways 1 and 2 and was directly to the east of the intersection and large vehicles containing the attractions which formed part of the fairground were being delivered to the site.
13. C's accident occurred near to footpath 2 which runs approximately north-south from a footbridge, called the Fort St George Bridge over the Cam, and an entrance on Victoria Avenue to an entrance on Maids Causeway. It may be thought that such accident occurred because there was no clear agreement between D2 and D3 as to who bore the responsibility of ensuring that the vehicles which were to form the fairground operated by D3 gained safe access to the area which was to constitute the site of the fairground ["the fairground site"].
14. As a result of the accident, in August 2018 D2 was convicted of offences under section 3(1) of the Health and Safety at Work Act 1974 in that it [a] failed to conduct its undertaking in such a way as to ensure so far as was reasonably practicable that persons not in its employment, namely C, were not exposed to risks to their health and [b] failed to make a suitable and sufficient risk assessment.

The pleaded cases of the parties and the concessions made during the trial

15. C initially began proceedings solely against D1 and, when D1 blamed D2 and D2 in turn blamed D3, C amended her claim to join each of D2 and D3 as Defendants to those proceedings.

16. C's claim by C against D1 was on the basis that he had failed to see or heed the presence of C.
17. C's claim as against D2 and/or D3 was, put succinctly, that each was an occupier of that part of the Common where C's accident took place and C was a lawful visitor, that each was in control of the operation and management of the setting up of the fairground on the Common, including the movement and placement of vehicles and that in all the circumstances each owed a duty of care to members of the public using the Common, including C, to take reasonable care to keep them reasonably safe from dangers caused by that activity. They had breached that duty, inter alia, in that they had allowed C to walk across the Common when it was unsafe to do so by reason of vehicles being allowed access thereto at the same time, failed to ensure that pedestrians and vehicles were properly and safely segregated and failed to ensure that any persons engaged to assist in the setting up of the event and/or the fairground had in place a proper plan and took proper safety precautions.
18. In its Defence to C's claim, D2 alleged that the safe movement and marshalling of fairground vehicles into and around the fairground site was the sole responsibility of D3 within both the Common and the fairground site, denied that D2 owed a duty of care in tort to C in relation to the operation and movement of fairground vehicles delivering to the fairground site or involved in the setting up of rides within the fairground site and alleged that any duty of care in relation to such activities was owed, if at all, by D3 alone.
19. D3 denied such allegations and contended that D2 was wholly responsible for traffic circulation within the Common and for directing and marshalling fairground vehicles to the fairground site, particularly given that, pursuant to the Open Space Hire Agreement dated 21 September 2015 ["the OSH Agreement"], the precise terms of which are set out below, notwithstanding that D3 was given permission to occupy the land designated red on the attached plan, D2 retained control, possession and management of the Common which included the fairground site.
20. D2 brought an additional claim against D3 and sought a contractual indemnity or damages, and/or an indemnity or contribution pursuant to the Civil Liability (Contribution) Act 1978. It did so on the basis that in September 2015 D3 had entered into the OSH Agreement with D2 whereunder D3 was permitted to set-up, organise and run a fairground at the event and there were express terms of such Agreement that D3 was responsible for, inter alia, producing a method statement detailing the proposed management of the fairground and any activities associated therewith.
21. D2's claim for a contractual indemnity was made pursuant to the indemnity clause in the OSH Agreement, as to which see below, on the basis that C's accident was not directly caused by any negligence on the part of D2 and that D2 was thereby entitled to a complete indemnity from D3 in relation to C's claim for damages.
22. D3 admitted that the OSH Agreement contained such indemnity clause but denied that D3 was liable to indemnify D2 and/or that D2 was entitled to contribution since C's injury loss and damage was caused directly by D2's negligence.

23. D2 also alleged that D1 was a servant, agents or contractor of D3 for whom D3 was vicariously liable.
24. D1, D2 and D3 all denied liability and each alleged contributory negligence by C.
25. Shortly before the hearing both D1 and D2 admitted liability to C, but D3 did not admit liability.
26. In such circumstances it was necessary to consider firstly, whether C was guilty of any contributory negligence; secondly, whether D3 was liable to C in negligence; thirdly, the respective liabilities of such of the defendants amongst themselves as were adjudged liable to C; and fourthly, whether D3 was vicariously liable for the acts of D1, such being pleaded by D2 but not by D1.
27. In the event, shortly before the conclusion of the factual evidence, the parties agreed that I should find that there was contributory negligence by C to the extent of 12½% and Mr O’Sullivan, for reasons which are explained below, abandoned his contention that D3 was vicariously liable for the acts of D1.
28. Accordingly, I am required to determine whether D3 has any liability to C in negligence for this accident and the respective contributions between themselves of such defendants as are found liable to C. Although it might be thought that such may reduce the relevance of some of the evidence, such evidence is important because it sets the scene for the relative contributions of the parties to the happening of C’s accident.

The contractual position between the Second and Third Defendants

29. By its letter dated 5 August 2015 D2 invited D3 to provide a fairground for the event. In such invitation D3 was described as “Organiser”. There were a number of Specific Conditions for the event, the first of which was that:

“Organiser shall be responsible for supplying Site Plan and Draft Event Control Document, namely a plan showing the layout of proposed rides, staff and caravans, their sizes and the distances between them and report containing a method statement detailing the proposed management of the Event and any activities associated with the Event including: a health and safety statement; health and safety policy including a statement as to how the Organiser ensures that sub-contractors are checked in terms of health and safety; contingency plans; work programme (eg in respect of the setting up of stages) at least 4 weeks in advance of the event (by Wednesday 7th October).”
30. The OSH Agreement made on 21 September 2015 between D2 and D3 and signed by Ms Midgley, on behalf of D2, and D3 just over 6 weeks prior to the event taking place, contained the same Specific Conditions save that the date for the D3 to produce a Site Plan and Draft Event Control Document [“ECD”], together with evidence of insurance and names and vehicle pass requirements, was Thursday 8th October and

not the preceding day. It also provided that the fairground was to be in the area designated red on the plan. Other Conditions to the Agreement provided that D3:

“acknowledges that ... (b) [D2] retains control, possession and management of [the Common] and [D3] has no right to exclude [D2] from [the Common].”;

“shall take all necessary measures to comply with and to ensure compliance by it and all of its employees, contractors and agents with the requirements of the Health and Safety at Work Act 1974 etc, and any other acts, orders, regulations and codes of practice relating to health and safety, which may apply to [D3’s] employees, contractors and agents and other persons in the performance of this agreement.” [“the health and safety clause”]; and

“shall indemnify [D2] and keep [D2] indemnified against all claims, demands, actions or proceedings in respect of death of, or injury without limit to, any person or damage to or direct or indirect loss or damage to property belonging to any person during the course of, or in consequence of the hire of the Venue for the Event unless directly caused by [D2’s] negligence.”

31. During the evidence of Ms Alderton, I was referred to the Fair Organiser Agreement [“the 2016 Agreement”] made between D2 and D3 in respect of the bonfire event held *the next year* on 5 November 2016. That Agreement provided, inter alia, that:

“2.1. [D3] shall be responsible for the safe operation and risk management of the funfair and of the rides and stalls.

2.2. [D3] shall be responsible for the layout of the Funfair within the Event Footprint in accordance with the Site Plan and the management of the safe arrival and exit of all Funfair related vehicles on and off the site and the Event Footprint.

...

3.5. All vehicles shall report to Site gate staff before entering the Site and [D3] or [D3’s] Representative shall give specific directions and information that drivers must follow while on site.

3.6. [D3] shall be responsible for the management of the safe arrival and exit of all Funfair related vehicles on and off the Site ensuring vehicle and pedestrian separation at all times utilising fencing and qualified security personnel installed and provided by the [D2]. There shall be no access or exit to and from the Fairground area for any Funfair vehicles until a route is staffed and operated by [D3].”

32. Likewise, during the evidence of D3, I was referred to the Management Control Document [“MCD”] prepared by D3’s son for the 2016 event. Such MCD expressly identified the hazard of “vehicles on site” and the action required was “No movement of essential vehicles unless stewarded”.
33. Unsurprisingly, D2 suggests that the 2016 Agreement and such MCD are material because they reflect the responsibility of D3 as it existed in 2015. By contrast, D3 suggests that, C’s serious accident having happened in 2015, it was important to clearly establish who was responsible for the movement of fairground related traffic from the entrance to the Common to the fairground site both before and after the event. I will deal with this below.

The non-expert evidence

34. I heard much evidence as to the circumstances of the accident. In respect of all the evidence given orally, I will set out the witness’s evidence in chief contained in his/her witness statement, a brief summary of what was said in the very detailed cross-examination of such witnesses by counsel, and set out my preliminary observations as to such witness’s evidence. Having reviewed all the evidence, I will then set out my findings of fact on the totality of all such evidence.
35. C could naturally give very little material evidence. Although she was present at the beginning of this hearing, she did not give oral evidence because all parties agreed that she need not do so. In her witness statement she stated that at about 11.40 am on 4 November 2015 she had decided to cycle to a shop in Fitzroy Street near to the Grafton Centre in the centre of Cambridge. Her normal route thereto would take her through the Common which was safer than cycling on the main road and was in any event the most direct route. It appears that she proceeded southwards along a pathway towards Victoria Avenue, just before Victoria Road the pathway continued parallel to the road and then in a south east direction along pathway 4 to reach the intersection and thereafter walked along footpath 2
36. As C approached the Fort St George Bridge, which is at the entrance to the Common, she dismounted to cross the bridge and thereafter walked through the Common with her bicycle. She had few memories after that point. She stated “I remember taking a few steps, seeing a man in front looking back at me anxiously, looking over my right shoulder and seeing a big black shape and then feeling fearful. The next memory I have is waking up in Addenbrooke’s Hospital and finding out I had spent 17 days in a medically induced coma.” We now know that she was in collision with the vehicle being driven by D1.
37. D1 too did not give oral evidence to me because shortly before the trial his solicitors served a Civil Evidence Act Notice with medical evidence annexed thereto to the effect that he was currently struggling with severe anxiety giving rise to a post-traumatic stress disorder. In the event, perhaps somewhat surprisingly given that the medical evidence in support of such Notice was somewhat brief, no party served a Counter-Notice requiring him to give oral evidence and thus his evidence was admitted in evidence without any of the other parties being able to challenge his account. I accept Mr Lewers’ submission that I should draw no adverse inference against D1 from the fact that he did not give oral evidence in this case since all other parties had the opportunity to serve a Counter-Notice but elected not to do so.

38. In his witness statement D1 said that this was the first time that he had attended this particular event and, as was usual at an event, he had been informed by D3 of the fact that he had a pitch and that when he attended on the day when the fairground was being set up, namely 4 November 2015, he would see the size and location of his pitch. On the morning of that day he thus drove his black Foden articulated lorry registered number SV02 HTX with a 40-foot trailer which weighed approximately 40 tonnes to the Common. He proceeded through the gateway marking the entrance to the Common and once on site switched on his hazard warning lights which were on in addition to his main headlights which had been on throughout his journey.
39. On site, D1 drove along a pathway, proceeded very slowly with his hazard and main headlights on, turned right at a junction and stopped his vehicle on another pathway. He then got out of the cab of the tractor unit of his vehicle to ascertain where his pitch was. He left the engine running and his lights on. He walked towards D3's son who showed him where his pitch was. He then laid the markers and walked back to his cab on the offside of his vehicle and walked along the offside of his vehicle where his two colleagues were. They had just uncoupled the pay booth which was slightly off the pathway to the offside. The Isuzu pickup vehicle in which such colleagues had travelled to the site was to manoeuvre the pay booth into position.
40. Having satisfied himself what they were doing D1 got into his cab, checked his mirrors all around and started to move towards the left of the footpath onto the grassed area and towards his pitch. There was a maximum speed limit of 5 mph and he was driving at 2-3 mph with his engine revving and the hazard and headlight still on. The next thing D1 saw and heard was somebody in front of him shouting for him to stop and waving his arms. It was Thomas Harris. D1 stopped immediately. Mr Harris was saying words to the effect that "he is underneath". D1 got out of his cab and discovered C underneath his lorry. At no point prior thereto had D1 seen C. When he had returned to his cab to drive off to his pitch he had "checked the area around me very carefully" and had not seen anybody walking or on a bicycle. Had he done so he would not have moved his vehicle.
41. D1 said that C should have heard the engine of his vehicle which was noisy and revving when moving, his vehicle had both its hazard warning lights and its headlights on and observed that C "would appear to have been far too close to my vehicle to allow me to see her" and that "she did not appear to have taken any steps to move away from my large vehicle." These observations are no doubt reflected in the contributory negligence of C agreed by all parties at 12½%.
42. I turn to consider the oral evidence given before me. Because of the agreement as to the degree of contributory negligence of C and D2's abandonment of his pleaded case that D3 was vicariously liable for the admitted negligence of D1, it is only necessary to record such evidence as relates to the possible negligence of D3 and the respective contributions of such of the defendants as I adjudge are liable in negligence for C's accident.
43. Vince Richards had worked with D1 on a number of occasions at various sites when D1 needed assistance at an event. He had travelled to the event on 4 November 2015 in a separate vehicle because such vehicle would be used to go and pick up a second lorry of equipment and any equipment which required to be moved could be coupled up to the rear of such vehicle. When they arrived at the Common in their separate

vehicles D1 drove through the gateway very slowly and put on his hazard lights: his headlights were already on. He then drove along pathway 3 to the intersection of the paths on the Common and turned right along footpath 2 so that the fairground site was on his left and stopped. The fairground site was thus on D1's nearside. Mr Richards stopped his Isuzu vehicle a little way behind. D1 got out of his cab and went towards his pitch. Mr Richards got out of his vehicle and, together with Mark Mansfield, another showman, uncoupled the pay booth from D1's articulated lorry and moved it to the side of the pathway so that later he could use the Isuzu to manoeuvre such pay booth into position. D1 returned to his cab. At that time Mr Richards was on the offside of the pay booth and could clearly see down the offside of D1's lorry. D1 began to drive off footpath 2 extremely slowly towards his pitch and to the left. His vehicle was extremely noisy and loud, and the revving of his vehicle could clearly be heard once it started to move. His headlights and hazard warning lights were on. As D1 moved to the left Mr Richards heard another showman shouting D1 to stop and D1 immediately did.

44. In cross-examination by Mr O'Sullivan, Mr Richards said that he did not recall Mr Keightley beckoning the lorry to come forward but he could not dispute that such had happened, although he recollected no one directing vehicles into the fairground area because he, D1 and Mr Mansfield were to manoeuvre the lorry onto the fairground site on their own. There was a lot of activity near the fairground area. He was standing at the rear offside of the lorry. According to Mr Richards, he, unlike Mr Mansfield, had been trained to marshal vehicles in a safe manner by the use of hand signals. He looked down the offside of the lorry and gave D1 a thumbs up signal. He believed that Mr Mansfield was on the nearside of the lorry, but he could not say where precisely he was standing or whether he had been given any instruction where to stand.
45. In cross-examination by Mr Hartley, Mr Richards seemed confused as to whether he had trained as a banksman before or after the accident, but he had received no refresher training from D1. He did not recall Mr Keightley asking D1 to move his lorry, albeit that he would have been right behind it. He did not see D1 get back into the cab of his lorry and D1 said nothing to Mr Richards before moving forward. He could not explain why, immediately after the accident, he had not told the police of the thumbs up signal and why such was also not in his witness statement prepared for this trial.
46. Mr Richards seemed to me to be a reluctant, reticent but honest witness. During his evidence it became apparent that he had problems with reading. I am satisfied that he did not intend to mislead me, but in some respects I find his evidence is inaccurate, such as the giving of a thumbs up signal to D1 before he drove forward to indicate that as far as he was concerned it was safe to proceed. He may well now believe that he had given such a signal but if he had given such a signal, I believe that he would probably have told the police that and, even if he had forgotten to do so, such an important part of his account demonstrating that D1 had been banked by him immediately before the accident, would have been in his witness statement, which it was not. As to the possible involvement of Mr Keightley, given that Mr Richards concedes that there was a lot of activity in setting up the fairground site and he does not deny that Mr Keightley was assisting D1, it seems to me probable that such happened.

47. Mr Mansfield was not called to give evidence but, as Mr Lewers reminded me in his Closing Submissions, his police statement was contained in the agreed bundles of documents before me. It is noteworthy that he does not describe himself as having acted as a banksman for D1.
48. Linda Sneap, who is a first cousin of D3, stated that on each of the previous many occasions she had attended the event there had never been anyone on site, from the Council, or in 2015 D2, to direct or manage their vehicle travelling through the Common to the fairground site. At the time of the accident she was already on site with her husband, who had arrived first separately, and they were setting up their attraction, the Fun House. Her husband was in the driver's seat of their lorry manoeuvring the Fun House into position and she was walking towards him and calling out to ask him something. She did not herself witness the accident, but her husband pointed over to behind her. She ran over to D1's lorry and saw that there was somebody underneath his vehicle. It was C. She climbed under the vehicle and remained with C until the ambulance arrived some considerable time later. She was asked by the police to stay with C and did so. C told her about her family and in relation to the accident she said, "I thought he had seen me", from which it was clear that she was referring to D1. She reported this to a police officer.
49. In cross-examination Mrs Sneap said that she and her husband had been attending the event for many years so that they would usually know where their ride was to be positioned in the fairground area. She did not know whether they had received any documents about safety, she was unaware of any Health and Safety legislation about taking rides to a fairground and there had been no briefing from D3. She stressed that they were very careful about what they did, that they had been doing it all their lives and setting up rides was in her opinion a matter of common sense. They were not "documents people" but if they had been sent a risk assessment, they would have complied with it if told to do things in a different way. Usually there were given an arrival time by D3 and she believed that her husband would have been given an arrival time by D3. Whoever was on the gate to the Common had let her in although she could not remember whether anyone was there. There was no sign warning of the presence of pedestrians or cyclists. She agreed that during the setting-up phase of the fairground vehicles were using the footpaths, the 10 metre safety strip between the fairground area and the footpath and the fire lane. She was unaware of anyone from D2 controlling the area over which she had travelled.
50. I found Mrs Sneap to be an impressive and reliable witness to whom C owes a genuine debt of gratitude, as was acknowledged by Mr Doherty. Although she could not assist much with details of what had happened in relation to C's accident, the abiding impression she gave me was that there was no real co-ordination of what was going on site, particularly in setting up the fairground site, and that, because everyone knew what they had to do to set up their individual attractions on such site, all the showmen, sometimes assisting each other, got on with doing what they had to do to set up the fairground.
51. Joseph Sneap was manoeuvring the Fun House into position. His lorry was facing towards D1's lorry but he was a couple of hundred metres away from him as he was parked on the pathway. He saw people running towards D1's lorry. He shouted to his wife that something bad had happened and she immediately ran to the lorry. Having switched his engine off, he did too. He became aware of a lady under D1's lorry. He

had not seen her before. Even though he had a full view of the nearside of the that lorry he had not seen a pedestrian or bicycle on its nearside. He had attended this fair for some years and had not known the organisers of the fair, initially the Council and latterly D2, to cordon off any of the Common to prevent pedestrians “coming across showmen’s vehicles when they are attempting to set up”. He was also aware that there was “nobody of the gateway monitoring people walking in.”

52. In cross-examination Mr Sneap said that someone from D2 would have let him onto the Common but he did not know their identity. He reached his pitch with some assistance from a fellow showman. He agreed that he had never been sent a site plan or any risk assessments by D3, whom he agreed was in charge of the fairground site and had marked out the pitches for the fairground attractions, but assumed that he would have been in the same position as the previous year. He was told nothing about traffic movements. He said that all the fairground contractors worked from HSE 175 [referring to *Fairgrounds and Amusement Parks: Guidance for safe practice* published by the Health and Safety Executive [“HSE”]] and that everybody had a copy of that document. If he had needed help with his vehicle, he would have asked a fellow showman for such help. Asked whether D3 had ever assessed his competence, he said that he had known him for 35 years and to some extent it was “all done on the nod”. He agreed that at the time of the accident pedestrians were walking all over the Common.
53. I accept Mr Sneap’s evidence that there were many pedestrians on the Common at the time of C’s accident, that an employee of the D2 might well have allowed him access to the Common and that he had been banked into position by a fellow showman because they would assist each other in getting their vehicles onto the fairground site, even before they had reached such area. I also accept from Mr Sneap’s evidence that everyone believed that they knew what was to be done and that matters were done “on the nod” without ever asking who was responsible for the safety of pedestrians when vehicles were being driven onto the site, albeit at a very low speed. However, I cannot accept Mr Sneap’s evidence that all showmen on site were familiar with HSE 175. In this respect I believe he is mistakenly applying to 2015 something which only applied in years subsequent to 2015 when everyone, armed with the benefit of hindsight, had familiarised themselves with advice published by the HSE.
54. Thomas William James Harris was another showman who was on site setting up his attraction, the Haunted House. He said that he was in the process of manoeuvring his lorry to set up such attraction. He was facing D1’s lorry which was not far away, and he saw D1 get into his cab and start to move his vehicle to the left extremely slowly. He then saw a woman, in fact C, “walking with her bike beside her extremely close to the front of the passenger side” of the cab. She continued walking towards the front of the cab and then disappeared. In a further witness statement given to D3’s solicitors he described C “appear around the front passenger corner” of D1’s vehicle. At that time D1’s lorry had its headlights and hazard lights on, and the engine would clearly have been heard. C was “so close to the vehicle that [D1] had no chance of seeing her”. He too confirmed that there was not in 2015, and has never been previously, “any cordoned off area for pedestrians and vehicles so that they were separate” and expressed the view that there should have been people from D2 both at the entrance to the Common and at the intersection given that there were vehicles passing through the Common together with pedestrians and cyclists.

55. Mr Harris was cross-examined about the accident by Mr Doherty. He said that it was impossible to say whether D1's vehicle or C was moving quicker at the time of the accident but the impression he gave me was that C had been trying to walk around the front of the vehicle before she was run over by it. In the event, given that contributory negligence is now agreed, this is no longer relevant.
56. More relevant to the issues of the defendants' liability inter se, in cross-examination by Mr O'Sullivan and Mr Hartley, Mr Harris said that this was the first occasion on which he had brought an attraction to this event although he knew the Common very well and knew of the presence of pedestrians. He was driving a vehicle with his son as his banksman. He was told what time to attend at the Common but did not have a site plan. He parked on a footpath and he was manoeuvring the Haunted House into position and was assisted in so doing by one of the two banksmen provided by D3. Asked about a risk assessment he agreed that he had seen such a document since the accident.
57. I accept Mr Harris's evidence and that he was being assisted to move the Haunted House from the Common onto the fairground site by employees of D3.
58. Elaine Claire Midgley was formerly the Manager of the Events team at the Council and in 2015 was the Business Development Director employed by D2, had general oversight of outdoor events management and was the line manager of both Ms Frances Alderton, the Event Manager and Mr Keightley, the Production Manager. She had no day-to-day decision-making responsibilities in relation to the event and her involvement was as line-manager. One of her first tasks was to review and approve the event management documentation, namely the MCD, which she did. During the planning, set-up and the event itself there was a command structure so that Ms Midgley was silver and Ms Alderton was bronze. As bronze, Ms Alderton had authority to put the event on hold, manage an emergency response or make payments within her budget. She was required to report to Ms Midgley if action was required that was beyond her authority. If action was required beyond her authority, Ms Midgley would escalate to Steve Bagnall, D2's Managing Director who was gold command.
59. As to the organisation of the event, D2's contract with D3 was only in relation to the fairground site. Although she had only met D3 once before, she was aware that the Council had previously provided a fairground on the Common for two or three events for at least 15 years. In 2015 D3 had signed the Open Space Hire Agreement dated 21 September 2015 referred to above. D2 considered that, as D3 had organised a fair on this site for some years, he had control over his own operation, was familiar with his own duties and responsibilities and would organise the movement of fairground vehicles.
60. Ms Midgley did not visit the site for this event prior to the accident, was advised by Ms Alderton of the accident about 20 minutes after it had occurred and attended the site immediately. Thereafter the police attended, and the decision was made to cancel the fair. That evening she met with others, including D3, and drafted Additional Traffic Management Protocols ["ATMP"] so that vehicles already on site could be safely removed.

61. In cross-examination by Mr Hartley, Ms Midgley agreed that the MCD used in 2015 was the document detailing how the event should be managed. This document had been amended from the document used for the May Fair because they had started preparations for the event later than was usual. She agreed that it was “defective” because there was nothing in the MCD about the setting up of the fairground. However, in the Risk Assessment [which was Appendix 1 to the MCD] there was, at page 49, a hazard identified as “Mix of vehicles, pedestrians and cyclists in public park” in respect of which the likely effect was “Accident involving vehicle and pedestrian or cyclist” which provided that the risk, categorised as a medium risk, should be minimised by:

“Contractors being briefed in advance that public part

Signage at vehicle entrance identifying hazards and speed limits

Walking pace speed limit for all vehicles

Lighting provided

Signage for cyclists to dismount where required

Banksmen used where necessary”

and that the person responsible was named as Mr Keightley. Ms Midgley did not know whether Mr Keightley had adopted these measures to minimise such risk, but it was possible that they were not. It may be noted that such Risk Assessment did not expressly address the setting-up of the fairground or the separation of vehicles and pedestrians/cyclists.

62. Ms Midgley agreed that there were vehicles in addition to the fairground vehicles on site at the time of the accident, namely vehicles including those relating to the bonfire and providing catering facilities etc [“production vehicles”], and council vehicles and that there had been no discussion with Mr Keightley as to his responsibility for the movement of all vehicles on site. She agreed that the position was “wholly unsatisfactory” and that she would have wanted it conveyed to the owners of the fairground vehicles that they were responsible for getting their vehicles from the entrance to the Common to the fairground site. She had understood that D3 was responsible for the fairground vehicles at all times when they were on the Common and that such had been made clear by Ms Alderton to D3 but she agreed that there was no document which recorded that D3 had acknowledged such responsibility. She had not herself addressed her mind to the issue of moving vehicles because this was an operational issue and not within her remit. She agreed with Mr Hartley that she would not defend that as a system. She agreed that that part of her witness statement which stated that D2’s “expectation was 100% that [D3] would organise the movement of the fairground vehicles” was misleading.
63. Asked to comment on the expert evidence of Mr Pope, D3’s site safety expert, Ms Midgley agreed that it was reasonable that there should only be one MCD, that she could produce no documents to show that D3 was to be responsible for all movement of vehicles connected with the fairground whilst they were on the

Common, and that the contract with D3 did not make it clear whether or not he was responsible for only the fairground area. She also agreed that D3 would only have had power to restrict the access of pedestrians to the Common with the permission of Mr Keightley and that D2 could have diverted pedestrians around the area being used to set up the fairground and that such would have prevented C's accident.

64. In cross-examination by Mr Doherty, Ms Midgley said that she had some experience of risk assessments and that if more than one person was involved, it was a necessary pre-requisite for the management of the risk for responsibility to be allocated. She had understood that D3 was responsible for movement of fairground vehicles throughout the Common. She had spoken to D3 about ATMP which were drafted after C's accident and devised to address vehicle movements on site and, in particular, to safely remove the fairground vehicles from the site the next day. Such ATMP, inter alia, restricted vehicle movement to the footpaths, wherever possible, and required the use of temporary pedestrian barriers, managed by stewards, to restrict access by the public for the duration of pathways being crossed, additional signage and vehicles being guided by banksmen wearing high visibility tabards. She agreed that the steps taken to minimise the risk of a pedestrian colliding with a vehicle at the time of C's accident were insufficient.
65. In cross-examination by Mr Lewers, Ms Midgley said that, although D3 had been required by the 2015 Agreement to supply a draft ECD, he had not done so. In this context two matters should be noted.
66. Firstly, on 19 October 2015 Ms Alderton had emailed D3 saying that she "desperately need[ed] a plan of the fair site by tomorrow". Subsequently on the same day, Mr Keightley emailed Ms Alderton stating that "under the new CDM Rules [presumably referring to the Construction (Design and Management) Regulations 2015 ["CDMR"]] we have to have an accurate site plan of all temporary structures", that "without we will be in breach of the rules" and that "without which the fireworks can go ahead but I'd advise against the fair being set up". Although such latter email concluded by saying "feel free to forward this to [D3] as a warning", it does not seem that any of this information / warning was communicated by Ms Alderton to D3.
67. Secondly, although a site plan was produced in that D3 said that it would be the same as in previous years [Ms Alderton having stated in her email sent to D3 on 19 October 2015 'can you forward a drawn plan or is it exactly the same as last year'], no request for a draft ECD was made by any employee of D2, nor was it stated by Mr Keightley that he would advise against the fair being set up for non-production of the ECD.
68. Although I have no doubt that Ms Midgley was an honest witness who was trying her best to be accurate in what she said, it has to be said that the organisation of this event was wholly inadequate and chaotic. Her preparation time for this event was less than was usual and the MCD approved by her failed to make it clear that D3 was responsible for vehicle movements of fairground vehicles at all times when they were on the Common, as was her belief. That was a regrettable omission.
69. Given that, as it transpires, D3 believed that he *only* had responsibility for vehicle movements when they were within the fairground site, there should have been clarity as to who was to be responsible, as occurred in the 2016 Agreement. Although the risk of a pedestrian coming into contact with a vehicle was acknowledged in the Risk

Assessment which formed Appendix 1 to the MCD, whether such risk was sufficiently recognised/minimised depends on the evidence of Mr Keightley as to what measures were in place. Whilst I accept that the movement of vehicles on site at the event was not within her remit, she should have ensured, as the line-manager for those who responsible for such operational matters, that such was done. The fact that ATMP were drafted and implemented immediately after C's accident illustrates that it was possible to devise a safe system for vehicles gaining access to and egress from the fairground site and that C's accident was thus plainly avoidable. Although Ms Midgley's concession to Mr Hartley that D2 could have diverted pedestrians around the area used to set up the fairground is probably not justified because it was the Council, and not D2, who had power to restrict access to rights of way on the Common, it cannot be forgotten that D2 was created by the Council and would have doubtless have had good prospects of persuading the Council to so divert pedestrians, if it had wished.

70. **70.** Frances Alderton said that in June 2015 she was appointed as the Event Manager for the event, although she had previously involved been in the running of the event, and that preparatory work therefor started in August 2015. She had prepared and circulated the MCD, a document which was reviewed annually. This was the first Bonfire event managed by her. When asked for site plan D3 had simply said that it would be the same as the previous year and no further documents were received, or sought, from him. He also provided a list of vehicles attending the event although such list did not contain details of D1 or his vehicle.
71. The overall area for the fairground was marked out by Mr Keightley and herself with wooden stakes but was not fenced. She did not give D3 any instructions as to how to get vehicles from the entrance to the Common to the fairground site but Mr Keightley generally dealt with vehicle movements on site more than her so that, for example, he would bring production contractors' vehicles, but not the fairground vehicles, onto the site on set-up and take-down days. She had understood that it was the responsibility of D3 and the individual ride owners to marshal their own vehicles whilst moving the rides onto and off the site. She did not have any conversation with D3 about the provision and use of banksmen.
72. Ms Alderton did not see the accident but immediately thereafter all vehicle movements on the Common were stopped, a decision was made to cancel the fairground element of the event and, after a meeting with others including D3, ATMP was created which included restricting vehicle movements to paths, wherever possible, and when vehicles were required to cross a pathway, a pedestrian barrier, manned by stewards, was used to separate the vehicles and the public. Prior to C's accident, D2 had not previously discussed segregating or closing parts of the Common. It was usually the case that the Council's safety officers would undertake a walk around a site before an event, but they had not visited the site before the accident occurred.
73. In cross-examination by Mr Hartley, Ms Alderton conceded that the MCD did not deal with the setting-up of the fairground and was thereby insufficient and agreed when she had said in her witness statement that Mr Keightley would oversee the movement of the production vehicles, but not the fairground vehicles, this was not made clear, nor even referred to in any document. Such notwithstanding, she believed that D3 had a responsibility for fairground vehicles on the Common, but she could not

explain why she had such a belief. She agreed that, although a permit system was adopted from 5 November 2015 to obtain access to the site, on the previous day, the day of C's accident, no such system was in operation and there was no security checking process. She conceded that this was inadequate. She had not told Mr Keightley that he was to oversee the movement of production vehicles, but that was her expectation. After the fairground part of the event was cancelled, there were about 10 additional staff provided by the Council to remove the fairground vehicles from the Common and D2 assumed the responsibility of implementing ATMP. The issue of separation between pedestrians and vehicles on the Common during the setting-up phase of the fairground had not been raised as a concern by the Council's Safety Advisory Group who had seen the MCD and its annexed Risk Assessment.

74. In cross-examination by Mr Doherty, Ms Alderton said that she had had no conversation with D3 about the provision and use of banksmen. She had understood that the responsibility for this was that of D3 but she accepted that this was unsatisfactory. She conceded that the ATMP "agreed" with D3 were part of continuing discussions with, inter alia, D3 as to how the fairground vehicles could safely leave the Common. I gained the impression from her that D3 was probably presented with ATMP and had no option but to assent to it.
75. In cross-examination by Mr Lewers, Ms Alderton said that she did not know whether any signs had been erected on site to warn pedestrians of the presence of vehicles. She agreed that when D3 had supplied a list of showmen and their vehicles, neither D1 nor his vehicle were on the list. It was put to her that when D1 arrived on site there was nobody on the gate to check his vehicle and she could not contradict this. Although she had asked D3 for a site plan because Mr Keightley had told her that D3 had not supplied one, she had overlooked the fact that D3 had not supplied an ECD and she acknowledged that she should have pursued this further.
76. I am satisfied that Ms Alderton's evidence was given honestly and for the most part accurately. Her concession that the MCD was deficient was both frank and realistic, given that such document did not even begin to address how the fairground was to be set up. She conceded that she gave no instructions to D3, either orally or in writing, as to how the fairground vehicles should travel across the Common to the fairground site, did not discuss with D3 the provision or use of banksmen and had simply assumed that the D3 and the owners of the individual attractions on the fairground site would marshal their own vehicles across the Common and onto the fairground site. I have no doubt that all these matters could and should have been addressed by D2 in the MCD.
77. Mr Keightley said that he had been the Production Manager for this event, either as employed by the Council or D2, for 6 years and had 30 years' experience working as a Production Manager. He would meet all production contractors' vehicles on arrival on site and lead them to their place of work. He would "also assist the fairground if required or if I spotted a potential issue." He was not requested to manage the fairground contractors "due to their having their own management structure" and he had "always been instructed by the current and previous Event Manager that the fair/showmen were primarily responsible for all aspects of their set-up, operation and take down.": see his witness statement made to HSE. He believed that D3 was responsible for the movement of all vehicles connected with the fairground on the

Common and he referred to the fact that in 2012 there was a discussion with D3 about fairground vehicles arriving at the Common when D3 was not present, and it was made clear to him that no vehicles were to arrive on the Common until he himself was there to direct them. He agreed that there was no written confirmation of such discussion. Mr Keightley did not direct the fairground vehicles at all when they were manoeuvring them onto or off the fairground from the pathways because such was the responsibility of D3.

78. On the day of the accident the first fairground vehicles began arriving at the site at about 1000 am. On occasion, Mr Keightley had to ask fairground vehicles to move to a more suitable location as they were blocking the main access route near the entrance to the Common. Throughout this time he was supervising the production contractors building the stage, marquees, bonfire, sound system and lighting. At about 1130 am, D1's vehicle arrived and parked just before the intersection. D1 started walking into the fairground area and Mr Keightley asked him to get back into his vehicle and move to the east of such intersection along footpath 2 and he acted as a banksman to assist him in moving to such location. D1 again got out of his vehicle and someone beckoned him to get his vehicle into the fairground area. There were two people acting as banksmen, directing the vehicle into such area. However, whilst D1 was doing this, he became aware that there had been an accident involving C. He had not seen her before the accident and did not know where she had come from.
79. In cross-examination by Mr Hartley, Mr Keightley was asked about a report he had made to the Council on 24 November 2015 in which he had stated that he had directed and banked D1's vehicle onto footpath 2. He "took it upon himself" to direct that vehicle and asked D1 to follow him and after getting him to such footpath he had returned to what he had been previously doing. He had done this although the fairground was not his area of responsibility.
80. He said that on that day there was no security on the site until the evening of 4 November 2015 and no one was checking permits. As to the division of responsibility for production and fairground vehicles, it had been stipulated by the previous manager [ie before the 2015 event] that he, Mr Keightley, was responsible for the former and D3 was responsible for the latter. There is no evidence that D3 was so informed.
81. Asked about his responsibility, pursuant to page 49 of the Risk Assessment [Appendix 1 to the MCD], Mr Keightley said that when, in 2011 the Council had amended their requirements for risk assessments to contain initials of the person responsible, he had said that it was not feasible for him to be responsible for the organisation of all vehicles on site. As to the steps which were to be taken by 30 October 2015, none of these actions to minimise the risk had been taken by that date although by the time of the accident he would have briefed contractors, he could only say that it was his usual practice to put up signage but could not say for sure that he did that, the lighting would not be installed until the following day and could only say that he might have put up signs for cyclists. He agreed that no part of his Risk Assessment differentiated between the production and fairground vehicles.
82. Finally Mr Keightley agreed with Mr Hartley that it would have been preferable to have prevented pedestrians having access to the areas being used by the fairground vehicles when they were setting up the fairground on the Common. Although

separation did not seem to have been an issue in previous years, it was now a fairly obvious risk.

83. In cross-examination by Mr Doherty, Mr Keightley repeated that, after the conversation with D3 in 2012 referred to above, D3 was thereafter always the first person to arrive on site, that he would not ordinarily exercise any authority over fairground vehicles on the Common or interfere with vehicles outside the fairground area and that when the fairground was being set up in 2016 arrangements were made such that pedestrians were not able to come into contact with moving vehicles.
84. In cross-examination by Mr Lewers, Mr Keightley said that he would be at or in close proximity to the entrance to the Common to meet production vehicles but not to meet any other vehicles.
85. In re-examination by Mr O’Sullivan, Mr Keightley said the minimising measures in the Risk Assessment were “unfeasible” given that he was the only employee of D2 on site at the time, although Ms Alderton might have been in the mobile office on site. He had no recollection of having acted as a banksman to Mark Thurston, but it was possible that he had done so.
86. I accept the accuracy of almost all Mr Keightley’s evidence. He was probably the only employee of D2 on site and there was no security at the entrance to the Common to check passes. He was predominantly engaged in dealing with receiving the production vehicles on site but might well have been in the vicinity of the entrance to the Common when some of the fairground vehicles arrived. Although he was very busy, he would have assisted any vehicle, particularly if it was blocking a footpath which might have needed to be used by production vehicles. Even in the absence of any documentary confirmation, I am satisfied that he had had a conversation with D3 in 2012 as to the fact that fairground vehicles sometimes arrived on site before D3 and that thereafter D3 was always on site first but I am not persuaded on the balance of probabilities that Mr Keightley had told D3 that it was his responsibility to direct such vehicles to the fairground site. In respect of D1’s vehicle I am satisfied that, notwithstanding that D1 did not refer to this in his witness statement, Mr Keightley did act as a banksman for his lorry and directed it to footpath 2. He did so even though he believed that he had no responsibility to do so, having been told by the previous Events Manager that D3 was responsible for all movement of fairground vehicles. He accepted that the need for separation of pedestrians/cyclists and moving vehicles was fairly obvious.
87. Shane Gibson, an employee of D3, said that when he arrived at the Common, D2 did not have anyone on site to direct vehicles as to where they were to go or to supervise the fairground vehicles as they took a route onto and then through the Common which brought them into potential contact with pedestrians and cyclists.
88. In cross-examination by Mr O’Sullivan, Mr Gibson said that D3 had employed 6-7 people on that day. He had not been given any safety briefing by D3. He had just attended, was part of his team and gave help to other showmen to their pitches in the fairground area. No one from the D2 was directing vehicles on that day. He did not believe that D3 had any responsibility for the fairground vehicles *before* they came onto the fairground area.

89. However, Mr Gibson adopted a different tack when being cross-examined by Mr Lewers in that he agreed that one of his duties was to assist people like Mr Harris who were reversing their vehicles on the footpaths in order to reach the fairground site. He agreed that he was not a qualified banksman but said that one person, George Sharp, had undergone training as a banksman. Then, by contrast, he said that he would only offer to help fairground vehicles once they had reached the fairground site and that he was not asked to assist vehicles on the Common generally or before they reached the fairground area.
90. In re-examination he said that if a fairground vehicle had banksmen, he would not get involved.
91. I found Mr Gibson's evidence contradictory as to the precise role he had been required by D3 to adopt when fairground vehicles were not already on the fairground site and I am satisfied that he did assist fairground vehicles, whether as a banksman or otherwise, *before* they had reached the fairground site.
92. Stanley Thurston, D3, said that he had agreed with D2 to manage the fairground element of the event, as he had done for very many years in the past. However, he only had responsibility for the fairground and not for any other activities taking place on the Common which he believed were the responsibility of D2. By contrast, at the May fair event where he was in charge of all the event, he accepted that he would be responsible for anything that happened on the Common during such event. In 2015 he had supplied a site plan as requested but did not supply a draft ECD as he had never heard of this and had not been asked to provide such a document, whereas in subsequent years he had been asked to and had provided such a document.
93. He accepted that once fairground vehicles arrived within the fairground site they fell within his responsibility and that he used banksmen to safely navigate vehicles within the fairground site to their allocated spaces. However, he maintained that it was the responsibility of D2 to get vehicles safely across the Common to the fairground site and that D2 should have provided banksmen present along the route to the fairground site to ensure that vehicles could safely navigate to such area. As to C's accident, it had occurred outside of the fairground site and he was therefore not responsible for it. It was either the responsibility of D2 or of that of D1 himself to provide banksmen. He denied the pleaded suggestion that it was part of his role to get vehicles safely onto the fairground site on the basis that he only took responsibility for vehicles *after* they had entered the fairground site.
94. In cross-examination by Mr O'Sullivan, D3 said that the fair consisted of about 8 major rides together with many more rides for children and stalls, all of which had to be transferred onto the fairground site. He was the organiser and was in control of the fairground site. It was a commercial enterprise in which he employed 4 people, including his son, together with casual labour. Having delivered his ride to the fairground site, he had left his son temporarily in charge whilst he returned home to collect another ride. Mr Keightley was on site. On entering the Common with his two vehicles he had been stopped and checked by persons in black uniforms and some people were putting barriers on footpaths. Although he agreed that he had not said this in his witness statement, he said that he had been banked by an employee of D2 to the footpath. He had not been asked to say this in his witness statement, although he appreciated the importance of this. He said that the system was that D2's

employees would act as banksmen for the fairground vehicles until they were fully on the fairground site and he had said that this was the responsibility of D2 at paragraph 28 of his witness statement. He accepted that his statement in paragraph 42 of his witness statement, that he was not responsible for vehicles when outside the fairground area, was not accurate because he provided banksmen to manoeuvre them *into* the fairground area. His only explanation for this inaccuracy was that he was not asked about this.

95. D3 agreed that the 2015 Agreement required him to supply a site plan and a draft ECD and conceded that he did not supply a site plan and said instead that it would be as in the previous year and that he had failed to produce a draft ECD, although he had never been pressed by D2 to produce this. He agreed that paragraph 22 of his witness statement which deal with these matters was mistaken. His only explanation was that such statement was made in October 2018 and he had forgotten about the 2015 documents. He agreed that the 2015 Agreement contained the health and safety clause referred to above which required him to take all necessary measures to comply with Health and Safety legislation.
96. In cross-examination by Mr Lewers, D3 repeated that he had been stopped at the entrance to the Common and had been marshalled across the footpaths by D2's staff walking in front of his vehicle until it reached the fairground area. His expectation was that the same would happen in relation to all fairground vehicles.
97. In cross-examination by Mr Doherty, D3 conceded that, in running his business, he had a duty not cause harm or injury to others and he would have intervened if what had been done by D2 was not safe because he could not sit back and do nothing. He accepted that the evidence of Mr and Mrs Sneap and Mr Harris was that neither of their vehicles had been banked by D2, as should have happened until they reached the fairground site, but he maintained that he was just getting on with his job and was looking after his area of responsibility. He agreed that his witness statement failed to register surprise that the system for banking vehicles had broken down in 2015, whereas it had worked well in previous years, and that had he supplied a draft ECD, in accordance with the requirements of the 2015 Agreement, such document might have made it clear that he was only accepting responsibility for the fairground site so that any misunderstanding as to the respective responsibilities of D2 and D3 could have been clarified. That notwithstanding, he maintained his belief that he bore no responsibility for C's accident.
98. In re-examination D3 stated that in any event any draft ECD would only have related to the fairground site and would not have dealt with pedestrians because he could not control their access to the Common and the MCD prepared by his son for the 2016 event provided that "segregating pedestrians from vehicle activity is the ultimate aim".
99. I thought that D3's evidence was generally unsatisfactory. He was an intelligent and astute man who in my judgment well understood what he was being asked in cross-examination, chose not to answer direct questions and was unable to satisfactorily explain inaccuracies in or omissions from his witness statement.
100. I am satisfied that it is possible that he was stopped at the entrance to the Common but not by Mr Keightley as I am satisfied that he would have recognised him from

previous events. However, I do not accept his evidence that he was banked onto the fairground site by an employee of D2. In the context of this case, I am sure that he well understood the significance of D2's employee so banking him and it is inexplicable that, if it were true, he would have not referred to this in his witness statement. I am sure that, knowing that his nephew Mr Mark Thurston's witness statement had said that he was banked to the fairground site, in cross-examination D3 chose to recount, untruthfully, a similar experience.

101. Moreover, I formed the overall view that D3 was attempting to distance himself from any responsibility for events until fairground vehicles reached the fairground site because C's accident had served to emphasise that such had occurred, in part, because there was no clear definition who was personally responsible for vehicles en route from the entrance to the Common to the fairground site and vice-versa. I believe that no one had addressed their mind to such issue before C's accident and that, in the absence of any documentation supplied to D3 or any conversation with D3 to the contrary, D3 had genuinely believed that he had no responsibility for the movement of vehicles before they reached the fairground site.
102. Mark Stanley Thurston ["Mr Thurston"], a nephew of D3, said that on arrival at the Common he had provided his details to someone from D2 and that he "got a banksman provided by [D2] who walked in front of my vehicle from the gates all the way through to the area set out for the fair", which route involved going to an intersection, turning right and at some point turning across the grass to the fairground area. Although he remembered that there were some barriers along the route, since C's accident additional barriers had been introduced and a system introduced whereby staff employed by D2 opened and closed barriers so that pedestrians were separated from vehicles.
103. In cross-examination by Mr O'Sullivan, Mr Thurston said that he had attended very many events. He himself had been banked when delivering his vehicle to the fairground area but he did not know by whom. He said that there was someone on the gate at the entrance to the Common and remembered someone wearing a hi-viz jacket which had the name of D2 on the back.
104. Notwithstanding that Mr Thurston was related to D3 and thus perhaps inclined to support his case, I accept his evidence that he had given details to an employee of D2 at the entrance to the Common and that an employee of D2 had walked in front of his vehicle to the fairground site. It was contained in his witness statement and he rejected any suggestion that he was untruthful or could not distinguish this event in 2015 from many similar events he had attended, both before and after C's accident. However, in the light of C's accident, I am satisfied that he would have had good reason to remember this event.
105. Having reviewed the evidence and expressed my initial comments thereon, I will consider the expert evidence and express my views thereon, before making my findings of fact as to the circumstances in which C's accident happened.

Expert evidence

106. At the outset of the trial I was told that I was to hear evidence from four accident reconstruction experts and four site safety experts but as the trial progressed the relevance of such expert evidence diminished.

The evidence of the accident reconstruction experts

107. The parties' respective accident reconstruction experts were Dr Richard Lambourn [C], Dr John Horsfall [D1], Dr Darren Walsh [D2] and Dr John Searle [D3].

108. There was a broad measure of agreement between all such experts save on one issue, namely *where* the accident happened. The majority, Dr Lambourn, Dr Horsfall and Dr Searle believed that the accident occurred at the eastern edge of the footpath or at a point less than 4 metres from the edge of the footpath. By contrast, Dr Walsh, instructed by D2, opined that the accident occurred at a greater distance from such footpath, such that the impact with C took place about 15 metres from the path. The significance of this was that if Dr Walsh was correct, the impact took place within the fairground area.

109. In the light of Mr Harris's evidence as to where he was when saw C immediately before the accident, Mr O'Sullivan abandoned his reliance on Dr Walsh that the accident was likely to have taken place within the confines of the fairground site. In my judgment Mr O'Sullivan was correct in doing so because, had the accident taken place where Dr Walsh had opined, Mr Harris could not have seen the accident. In such circumstances no party elected to adduce any expert evidence and the parties were agreed that I should take into account the Joint Statement of the accident reconstruction experts with references to the disclosed individual reports.

110. Now that contributory negligence has been agreed at 12½%, the only relevance of the Joint Statement is to note two matters. Firstly, in relation to the use of banksmen, all the experts agreed that the use of banksmen positioned out to the side of D1's vehicle in line with its front would have been visible to the driver, would have been able to prevent pedestrians from walking in front of the vehicle when it was about to move and warn D1 if such were to happen: see paragraph 7. Secondly, in relation to the view which D1 would have had of C, Dr Lambourn, Dr Horsfall and Dr Walsh agree that it is likely that the presence of C was, or ought to have been, if D1 had properly checked his mirrors, evident to D1 for a considerable period of time before D1 moved off across the grass towards the fairground site, Dr Searle adding that even before C had reached the rear of the lorry C could probably have been seen approaching by D1: see paragraph 9 of such Joint Statement.

The evidence of the site safety experts

111. The parties' respective site safety experts were Ms Camilla Fowler [C], Mr Michael Hopwood [D1], Mr Michael Widdowson [D2] and Mr Steven Pope [D3].

112. As to these experts, it was agreed that the reports of Ms Fowler and of Mr Widdowson should be admitted in evidence, without the need for them to give oral evidence: the former because she was unwell and the latter because Mr O'Sullivan did not consider it necessary to call him. The other two

experts Mr Hopwood and Mr Pope both gave evidence and were cross-examined. For present purposes it is sufficient to set out their respective conclusions.

113. Ms Fowler's conclusions were that a risk assessment conducted by D2 did not sufficiently identify the risk of D1's vehicle coming into collision with C. Where possible, members of the public should have been prevented from having access to the area where the fairground vehicles were manoeuvring either by means of a temporary traffic order closing the area as a public right of way or by segregating pedestrians from vehicles by the use of barriers and marshals to direct vehicle, pedestrian and cyclist movements, with reversing being minimised and by contractors coming onto the site being provided with relevant safety information.
114. Mr Hopwood's overall conclusion was that the actions of both D2 and D3 had the same or similar potential shortcomings. As to D2, he opined that there was little, if any, organisation of fairground vehicles when they arrived at the Common, that such vehicles were not marshalled or banked through the Common, that, although CDMR required that responsibility for the movement of such vehicles should have been agreed between D2 and D3, it was not and D2 could not simply rely on D3 to ensure the safe movement of such vehicles and because there were numerous pedestrian and cyclist access points onto the Common, in the absence of physical segregation or separation between vehicles and pedestrians and cyclists, there were no suitable alternatives in place. As to D3, he opined that showmen attending the event had not been provided with sufficient pre-event information as to what they should do on arrival at the Common, that there was little, if any, organisation of fairground vehicles when they arrived at the Common, that such vehicles were not marshalled or banked through the Common and that there should have been agreement as to which party was responsible for the safe movement of such vehicles.
115. Mr Widdowson's conclusion was that all three defendants were at fault. In relation to the risks posed by pedestrians sharing the same space as vehicles delivering attractions to the fairground site and the need to implement a safe means of delivering attractions to such site, he opined that D1 had failed to discuss and agree with D2 and D3 risk assessments and measures to eliminate or reduce such risks and should not have driven from footpath 2 into the fairground site without the assistance of specially deployed traffic marshals or banksmen. He opined that D2 had failed to discuss with D3, D1 and other contractors their risk assessments and measures necessary to eliminate or reduce such risks and had failed to put in place effective measures to protect the public from such risks. He further opined that D3 had failed to demonstrate that he had a written Health and Safety plans detailing arrangements for the effective planning, organisation, control and monitoring of the fairground event, particularly as it was within the ambit of D3's responsibility, he having concluded that the fairground site, could not for the purposes of the setting-up phase be limited to such area but had to include access ways and manoeuvring space for vehicles delivering to the fairground once they had left the footpaths adjacent to the fairground.
116. Mr Pope's conclusion was that D2, as overall organiser of the event, had the responsibility of producing the ECD, which would incorporate in it information supplied by D3 [in fact D3 supplied none], that Mr Keightley's opinion that that D3 was responsible for the movement of all vehicles connected with the fairground was not justified by any provision in the 2015 Agreement or the Risk Assessment [which

was Appendix 1 to the MCD] and had the responsibility for ensuring that the whole event was planned, organised and run safely and in particular that barriers and/or warning tape was deployed to keep pedestrians away from areas in which large vehicles were manoeuvring.

117. Although Mr Hopwood and Mr Pope were cross-examined at some length about many matters including the HSE guidance *Fairgrounds and Amusement Parks: Guidance on Safe Practice* as to the conduct of fairgrounds, the parties agreed that which of D2 and/or D3 bore responsibility for the matters referred to by the experts was ultimately a matter for my judgment and not that of the experts. In my judgment the parties were correct to so agree. Indeed, it is noteworthy that in their closing submissions the parties made very little reference to such expert evidence.
118. I do not propose to set out in full the lengthy experts' Joint Statement, the material parts of which are summarised below.
119. All experts agreed that the Common was a large grassed area, transected by a number of footpaths, many of which were tarmaced, to which the public had free access and from which road vehicles, save those used for maintenance of the Common, were normally excluded. This is uncontroversial.
120. There were disputes as to firstly, whether the overall attraction should be considered one event that included the fairground or whether the fairground would be considered a separate event and secondly, as to whether D2 was responsible for the control of and usage of the paved footpaths by fairground vehicles when the fairground was being set up. In this context it should be noted that although this was the first year that D2 had run the event, the Council had previously run the event for very many years and the event was managed staff previously employed by it and D3 had run the fairground for many years.
121. On the facts of this case, there can be no doubt that D2's employees, either when employed by the Council or by D2 from April 2015, had many years' experience of planning, management, organisation and procurement of outdoor events such as this event and had a specific event MCD which was vetted and approved by the Council's Safety Advisory Group. Moreover, although the event run by D2 contained many elements including the bonfire itself and the firework display, the stage, the catering outlets and the fairground, there was but one event for which D2 was ultimately responsible for all matters save where they had delegated responsibilities to other parties, in particular to D3 in respect of the fairground.
122. All the experts agreed that a public space used for an attraction or event became a temporary work site so that legislation, regulation and guidance relevant to general health and safety, construction, industry standards for workplace transport and event management and safety were applicable. Accordingly, all experts agreed that there were five critical elements to control the hazards, namely the overall site management, designing a safe site, considering the safety of various transport vehicles, safe vehicles and safe drivers.
123. Given my finding that D2 was ultimately responsible for all matters save where delegated to D3, it inevitably follows that D2 was responsible for the majority, if not all, of these critical elements to control such hazards. For example, it is in my view

unarguable that D2 was not responsible for *overall* site management, for the design of an *overall* safe site or for ensuring the safe movement of *all* transport vehicles on the site and such responsibility cannot fairly be attributed to D3.

124. In such context reference was made by the experts to the HSE Guidance *Fairgrounds and Amusement Parks: Guidance on Safe Practice* but there was much debate between them as to which party, D2 and/or D3, constituted the “Organiser” on the facts of this case.
125. Mr Hartley submitted that this Guidance, considered in conjunction with CDMR, made it clear that D2 would be the “organiser” of the entire event, particularly since by the OSH Agreement D3 only demised the fairground site.
126. I accept such submission. It seems to me that the reality of the situation here was that this was one event of which there were various elements as identified above, one of which was the fairground, and that D2 was the “organiser” of the entire event and had an overall responsibility for all aspects of safety on the site save where that happened within the fairground site where such was the responsibility of D3.
127. The experts further agree that as to the elimination of the risk of a pedestrian being struck by a vehicle on site, the most effective measure which could have been taken was the implementation of a temporary traffic order, restricting or prohibiting the use of the public right of way, although such was probably not practicable or would have been difficult to enforce. Notwithstanding the agreed view of the experts, I am far from convinced that on the facts of this case such a temporary traffic order was not practicable or would have been difficult to enforce. I say this because such an order would have been made by the Council and it cannot be forgotten that D2 had been incorporated for the very purpose of running outdoor events which the Council had until April 2015 itself elected to run.
128. In any event, on the basis that a temporary traffic order would have been impracticable or difficult to enforce, the experts all also agreed that an appropriate control system for ensuring the safety of members of the public would have included clear instructions being given to drivers when entering the site, warning signs indicating the presence of pedestrians to drivers, the use of pedestrian barriers/fences to ensure segregation between members of the public and vehicles and, as a last resort, the use of trained banksmen or lookouts.
129. On the facts of this case I am satisfied that the establishment of an appropriate control system for ensuring the safety of members of the public or a traffic management plan can only have rested with D2 and not D3.
130. Although the Joint Statement went on to discuss at length the roles of the various defendants, save for my observations made above, I did not find this particularly helpful, save in so far as Mr Pope observed, in my judgment correctly, that if D2 was not satisfied that D3 had failed to supply appropriate documentation to it, as D3 was required to do, D2 could have determined that the fairground party of the event should not take place.

My findings of fact

131. I now set out my findings of fact as to the circumstances in which C's accident happened. These must be read in conjunction with my initial comments in relation to the evidence given before me, as set out above.
132. It will be of little comfort for C for me to make the self-evident observation that this was an accident waiting to happen, given that on the day of the accident pedestrian and cyclists were free to use the Common in the way they usually did, notwithstanding the presence of very large vehicles manoeuvring their way into position onto the fairground site and generally.
133. The Common was a large grassed area to which the public had a right of access. It was transected by a number of footpaths and vehicles were normally excluded from the Common, apart from occasional use by the Council's maintenance vehicles. In such circumstances, it was critically important that during the setting-up phase of the fairground, appropriate arrangements were made for the separation or segregation of any vehicles and pedestrians/cyclists.
134. For many years in the past this event had been planned, managed, organised and promoted by the Council and in 2015 by D2. It had a specific event MCD which was vetted and approved by the Council's Safety Advisory Group [a group consisting of Council officers and representatives of the police, ambulance and fire services] on 8 October 2015 and such event contained many elements, of which the fairground was but one part. Whilst the OSH Agreement placed obligations on D3 to produce a site plan and a draft ECD, it cannot be forgotten that by such Agreement D3 expressly acknowledged that D2 retained "control, possession and management" of the Common and had no right to exclude D2 from any part of the Common. In my judgment this was one event for which D2 bore overall responsibility: see my findings in respect of the evidence of the site safety experts above.
135. There was no risk assessment which sufficiently identified and addressed the risk of vehicles coming into collision with pedestrians/cyclists and I am wholly satisfied that there should have been. Although there was a generic risk assessment dealing with the mix of vehicles, pedestrians and cyclists and the risk of accidents, it did not specifically address the setting-up phase of the fairground when the risk of accidents was bound to be at its highest. In my judgment this was the responsibility of D2, as the organiser of the entire event, because it was responsible for the separation/segregation of pedestrians/cyclists and vehicles throughout the whole of the Common. Moreover, the Risk Assessment [Appendix 1 to the MCD] had given to Mr Keightley, an employee of D2, the task of supervising vehicles and fairground vehicles in an area from which pedestrians and cyclists were not excluded.
136. I am satisfied that in order to create a safe environment for both pedestrians and cyclists, access by both to the Common whilst fairground vehicles were manoeuvring onto the fairground site should have been restricted by the use of barriers and/or stewards or by diverting their route away from the area adjacent to the fairground site. Of course, this could have been achieved by either D2 or D3 persuading the Council to make a temporary closure order in respect of rights of way over the Common. I accept that, given that the Council had previously run the event

for a number of years and this was the first year that it had been run by D2, it would have been much easier for this to have been undertaken by D2 rather than D3.

137. D3 was contractually obliged to supply a site plan and a draft ECD. He was prompted as to the former but after 21 September 2015 was never asked to produce the latter. Given my findings set out below I am satisfied, that on the balance of probabilities, such requirement was probably waived, and that the production of any such draft ECD would not have caused the existing MCD to be amended. In any event the draft ECD produced by D3 would only have related to the fairground site.
138. There was no evidence adduced by D2 or D3 which would justify my finding that at the time of C's accident there had been erected appropriate signage at the vehicle entrance to the Common identifying hazards and imposing a walking pace speed limit for all vehicles and that cyclists should dismount where required or that there was appropriate signage at other entrances to the Common warning pedestrians and cyclists that there would be traffic movements of vehicles unusually on that day, particularly to set-up the fairground. The erection of appropriate signage was in my judgment the sole responsibility of D2.
139. Although at the time of C's accident, pedestrians and cyclists had, as usual, unrestricted access to the Common, D2's preparations for the event did not address the risk of pedestrians coming into contact with moving vehicles during the setting-up phase of the fairground. Both Ms Midgley and Ms Alderton were right to concede respectively that the MCD was defective, insufficient and inadequate because it did not address the setting-up phase of the fairground or provided inadequate measure to address the particular risk of an accident involving a vehicle and a pedestrian/cyclist. I am sure that this document was reviewed by Ms Alderton from a draft used in previous years and approved by Ms Midgley and the responsibility to implement it was given to Mr Keightley.
140. As to whether the measures provided for by the Risk Assessment to reduce the risk of contact between a vehicle and a pedestrian/cyclist were in fact put in place by Mr Keightley, I accept his evidence on this point, namely that although contractors were briefed, he cannot be sure whether signage was erected, albeit that it would have been his usual practice to erect such signage. In such circumstances I cannot find that the measures to minimise such risk were in fact taken and, in any event, as hereinbefore appears, such measures were insufficient to properly address the risk.
141. Although I was not told precisely when the MCD was created, I note that the first page of the Risk Assessment bears the date 4 September 2015 which was significantly *before* 7 or 8 October 2015 when D3 was required to supply the draft ECD by virtue of the Specific Conditions contained in D2's letter to D3 dated 5 August 2015 and the OSH Agreement made on 21 September 2015.
142. D2's case is that the MCD was approved in the form it was because it was assumed that D3 would be responsible for addressing such risk, as had been assumed to be the case in previous years, even though such was not discussed with D3 nor recorded in any documentation. As appears below I am not satisfied on the balance of probabilities that such an assumption can properly be justified or could be relied upon by D2.

143. Although there is reference to a discussion with D3 in 2012, the upshot of this discussion was that no vehicles were to arrive on site until D3 was himself there to direct them. Although I accept that this was referred to by Mr Keightley in his witness statement and I do not have any doubt that a discussion about the early arrival of vehicles on site took place, I am not satisfied that the upshot of such discussion was that D3 had to be present on site so *as to be responsible for the movement of fairground vehicles from entering the Common, travelling through the Common and manoeuvring their vehicles onto the fairground site*. Had the conversation been to that effect, I have absolutely no doubt that there would have a file note of such discussion and probably an exchange of letters between the Council/D2 and D3 to that effect.
144. Although, as appears from my initial comments on D3's evidence, I am satisfied that in some respects D3's evidence is inaccurate, I have found it difficult to conclude, save for the observation I have made in the last sentence of paragraph 100 above, whether such inaccuracies were deliberate untruths by taking the opportunity to embellish his case, or whether by confabulation because he had attended so many events in the past, but I cannot, on the balance of probabilities, conclude the former.
145. In any event, I am satisfied that D3 did *not* understand the significance of the requirement, by virtue of the D2's letter dated 5 August 2015 and the OSH Agreement made subsequently, that he should supply a draft ECD. It is probably a fair assumption that D3 had received similar documentation requiring a draft ECD in previous years because the impression I have is that plans for this annual event were for the most part recycled by both the Council and D3 each year with some amendments and he had not previously supplied this. In fact, D2 does not appear to have appreciated the significance of D3 supplying a draft ECD either because it had *already* drafted the MCD in early September 2015 and although it might have been thought that the contents of the draft ECD to be supplied by D3 might have been intended to inform the MCD produced by D2, on the facts of this case I do not accept that this was the case.
146. Whether fairground vehicles had unrestricted access to the Common would depend where Mr Keightley and possibly other employees of D2 were at the time. Mr Keightley was heavily engaged with the production vehicles and setting up matters unconnected with the fairground. If a production vehicle was scheduled to arrive, he would probably be at or in the vicinity of the entrance to the Common. However, if necessary and appropriate, particularly if fairground vehicles were blocking footpaths, he would bank them to footpaths adjacent to the fairground site. Although he did not believe that he was obliged to give such assistance, he did so as part of his overall responsibility for the smooth running of the event.
147. On the day of C's accident I am satisfied that Mr Keightley acted as a banksman to D1's lorry to move it the short distance beyond the intersection to its stationary position on footpath 2, notwithstanding that D1 did not refer to him so doing in his witness statement and Mr Richards could not recollect him doing so. In my judgment there is no reason why Mr Keightley would give such evidence if it were not true. Such evidence would constitute a deliberate untruth, which I think is highly unlikely in Mr Keightley's case, and it is seemingly contrary to Mr Keightley's own belief that

D3 was responsible for all movements of fairground vehicles once they had entered the Common.

148. I am also satisfied that Mr Thurston's vehicle was probably banked to the fairground site by an employee of D2. Mr Keightley had no recollection of so doing but conceded that it was possible.
149. However, I do not accept that any employee of D2 acted as a banksman for D3's vehicle, as was suggested by D3.
150. I accept the evidence of Mr Sneap and Mr Harris that other showmen acted as a banksman for their vehicles. I accept that Mr Gibson was on site to assist D3 with his attractions, but also there to give help to other showmen as might be required to assist both before and after they had reached the fairground site and did so. I note that D3 had also said that he provided banksmen to manoeuvre fairground vehicles *into* the fairground area. In order to do this would inevitably require such banksmen to move such vehicles from a position not on the fairground site onto such site.
151. I am satisfied that D1 drove his lorry across the grass and into collision with C at a time when no one was acting as a banksman to him and that the accident occurred at a point not more than 4 metres from the edge of footpath 2. He was certainly not banked by Mr Keightley who by this time had returned to where the production vehicles were setting up the non-fairground part of the event. I believe that it is unlikely that either Messrs Richards or Mansfield banked D1's vehicle either, because they were pre-occupied with attempting to uncouple the pay booth.
152. However, even if I am wrong about this, I do not accept that Mr Richards gave a thumbs up signal to D1, who could and should have seen for himself that the offside of his lorry was clear of pedestrians, so that such would have been unnecessary. There is no oral evidence from Mr Mansfield as to whether he was able to confirm that C was not in the immediate vicinity of such lorry or gave a signal to that effect to D1 and he does not suggest in his statement to the police that he was acting as a banksman for the nearside of D1's lorry. From Mr Harris's description of events C, who first appeared at the front nearside corner of the lorry, must have been walking along the nearside of D1's lorry immediately before the accident.
153. Each of D2 and D3 believed that the other was responsible for safety of fairground vehicles as they travelled through the Common and *before* they reached the fairground site. This obvious lack of safety could have been remedied by a provision, such as there was in the 2016 Agreement, that a named person [in the 2016 Agreement, D3] should be responsible for the safe arrival and exit of fairground vehicles on and off the site but the 2015 Agreement was silent on this crucial issue or by the putting into effect *before* C's accident of the ATMP which were created and implemented immediately thereafter.
154. As to whether D3 assumed any such responsibility, whilst I note that D3's case was that he assumed responsibility *only* for movements of fairground vehicles within the fairground site, the vehicles had to travel across the 10 metre safety strip from the footpath, where pedestrians and cyclists would habitually be, to gain access to such site and it would be difficult to conceive that D2 would be responsible for vehicle movements *up to* the boundary of the fairground site and that D3 would be

responsible whilst on such site but not before. Mr Gibson told me that he was employed with others by D3 to both assist vehicles manoeuvring onto the fairground site both *before* and after they had reached such site and I accept his evidence. In such circumstances I find that D3's employees did offer assistance to fairground vehicles, where necessary, to enable them to gain access the fairground site.

155. **155.** I am not satisfied, given the seeming indifference of each of D2's witnesses to the need for clarity as to who was responsible for the safety of pedestrians and cyclists on the Common during the setting-up of the fairground when large fairground vehicles were manoeuvring on the Common to gain access to the fairground site, that the MCD, already approved by Ms Midgley, which did not address risks posed by the setting-up of the fairground, would have been subsequently amended to reflect the contents of any draft ECD which D3 might have supplied pursuant to his obligation to do so.

The parties' closing submissions

156. The parties' counsel made detailed closing submissions which I will endeavour to summarise in relation to the two issues which I have to determine, namely the liability of D3 to C and the appointment of liability as between those defendants which are adjudged to be liable to C.

The liability of the Third Defendant to the Claimant

157. Mr Doherty submitted that D3, by the acts of his employees, had assumed a responsibility to act as a banksman for fairground vehicles, notwithstanding that they had not yet reached the fairground site. He cited the examples of Mr Sneap and Mr Harris. He reminded me the classic test of negligence set out in *Donoghue v Stevenson* [1932] AC 563, at 580, namely "a duty to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure those who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind as to the acts or omissions which are called into question".
158. Mr Doherty also submitted that, albeit that health and safety regulations did not give rise to a cause of action by C, any such breach of regulation could inform the duty of care owed at Common Law. In this context he contended that there had been a breach of Regulation 3(1)(b) of the Management of Health and Safety at Work Regulations 1999 ["the 1999 Regulations"] in that D3 failed to make a suitable and sufficient assessment of the risks to the health and safety of a person not in his employment arising out of or in connection with the conduct by him of his undertaking.
159. Mr Lewers submitted that D3 owed a duty at Common Law to take reasonable care for the safety of members of the public using the Common when fairground vehicles were travelling across it, that he was an "organiser" within the meaning of *Fairgrounds and Amusement Parks: Guidance for safe practice* published by HSE and that the reality of the situation was that both D2 and D3 were responsible for the safe passage of fairground vehicles amongst fairground vehicles and should have agreed between themselves as how such was to be managed.

160. Mr O’Sullivan noted that D3 accepted that he would have owed C a duty of care in tort had the accident occurred within the fairground site but contended that he owed no such duty because the accident occurred outside the fairground site.
161. He submitted that, independently of any contractual duty owed to D2, any duty of care owed by D3 to C did not arise from activities occurring during the setting-up phase of the fairground but arose in this case because he was the organiser of the fairground site and in control of the fairground, a fact recognised by a majority of the witnesses; was thus in control of the movement of fairground vehicles in the setting-up of the fairground; and did exercise such control because his staff assisted with the movement of fairground vehicles before they reached the fairground site, as was conceded by Mr Gibson. In such circumstances it was entirely foreseeable, and indeed inevitable, that fairground vehicles would use both the footpaths and the adjoining grass strips during the setting-up of the fairground when a person such as C would be present on the Common during the setting up phase and would be thereby caused injury.
162. In support of such submissions. Mr O’Sullivan relied on a number of matters. Firstly, he relied on the existence of D3’s contractual obligations to D2, which although such could not be directly relied upon by C, contemplated D3 owing a duty of care to C, particularly given the existence of the health and safety clause. Secondly, he relied on the 2016 MCD which pre-supposed that D3 owed a duty of care to C in relation to the movement of fairground vehicles and contended that such document generally reflected the legal responsibilities of D3 in 2015. He referred to Regulation 3(1)(b) of the 1999 Regulations and HSE 175 which he submitted clearly contemplated that D3, as the organiser of a fairground, owed duties to the public before such fairground vehicles entered a defined fairground site. Thirdly, he submitted that this court could and should conclude that D2’s letter dated 5 August 2015 inviting D3 to provide a fairground for the event and the OSH Agreement together, constituted an appointment of D3 as a “principal contractor” within the meaning of CDMR.
163. Mr Hartley resisted any finding of liability against D3. He asked me to firstly consider the effect of CDMR which came into force on 6 April 2015, were thus in force at the time of the accident and applied to the setting-up of the fairground. It should be noted that in any event a breach of CDMR gives rise to no civil right of action for breach of a duty under CDMR [see section 69 of the Enterprise & Regulatory Reform Act 2013] but he conceded that the Regulations and the guidance issued thereunder inform the duty of care owed at Common Law.
164. Mr Hartley’s argument ran as follows.
165. Regulation 2(1) of CDMR contained the following definitions:
- “client” means any person for whom a project is carried out.”
- “contractor” means any person (including a non-domestic client) who, in the course or furtherance of a business, carries out, manages or controls construction work.”

“principal contractor” means the contractor appointed under regulation 5(1)(b) to perform the specified duties in regulations 12 to 14.”

166. Mr Hartley submitted that on the facts of this case the client was clearly D2 and that both D2 and D3 were contractors.
167. Regulation 5 of CDMR provided that:
- “(1) Where there is more than one contractor, or if it is reasonably foreseeable that more than one contractor was working on a project at any time, the client must appoint in writing -
- (a) ...
- (b) a contractor as principal contractor.
- ...
- (5) If the client fails to appoint a principal contractor the client must fulfil the duties of the principal contractor in regulations 12 to 14.”
168. Mr Hartley submitted that since none of D2’s witnesses could refer to any document whereby the responsibility for the safe movement of traffic within the event had been given to D3 and such witnesses agreed that there had never been any conversations to that effect, it cannot be disputed that D2 did not appoint a principal contractor in writing so that it, D2, was required to fulfil the duties of the principal contractor in Regulations 12 to 14.
169. In summary the duties of the principal contractor in Regulations 12 to 14 are to draw up a construction phase plan or make arrangements for one to be done [Regulation 12(1)], to plan, manage and monitor the construction phase and coordinate matters relating to health and safety during the construction phase to ensure that, so far as is reasonably practicable, construction work is carried out without risks to health and safety [Regulation 13(1)] which includes, inter alia, organising co-operation between contractors and coordinating implementation by the contractors of applicable legal requirements for health and safety [Regulation 13(3)(a) and (b)] and ensuring that a suitable site induction is provided [Regulation 13(4)(a)] and to consult and engage with workers [Regulation 14].
170. I unreservedly accept this submission and Mr Hartley’s interpretation of CDMR as set out above.
171. As to the liability of D3 in tort at Common Law, Mr Hartley submitted that the best case which could be advanced by D2 was that if D3 had produced a draft ECD it would have become obvious that D2 and D3 had different understandings as to D3’s responsibility for the safe movement of fairground vehicles at this event and that such different understandings of responsibility would have been addressed. I do not accept that any such argument by D2 could succeed because I am not satisfied that the

supplying of a draft ECD would on a balance of probabilities have led to any amendment of the MCD or that in any event D2 would have addressed the alleged different understandings of responsibility. Any such finding would be inconsistent with the chaotic organisation of the event by D2.

172. In so far as D2 relied on the 2016 Agreement to that effect, I believe such is misconceived because the 2016 Agreement and/or the 2016 MCD was expressly created with the hindsight of C's accident having occurred in 2015. I am satisfied that there is no legitimate basis on which I could adjudge that the contents of either the 2016 Agreement and/or the 2016 MCD were indicative of the obligations or responsibilities of D3 at the time of C's accident.
173. **173.** Mr Hartley submitted that such was demonstrably wrong for three reasons. Firstly, the Construction Phase Plan [Plan 1] annexed to the 2016 MCD prepared by D3 showed that there was a new designated route between footpaths 1 and 2 so that the layout of the site and in particular the entry and exit to the fairground site were markedly different in 2016 to that in 2015. Secondly, although D2 did ask for a site plan it did not ask for any ECD. It did not even acknowledge that there was a vacuum of responsibility for traffic movements and allowed the event to proceed when D3 had produced no documents as required by the 2015 Agreement save for an incorrect list of persons and vehicles attending. Thirdly, D2's documentation for the organisation of the event was variously described by D2's own employees as defective, insufficient, inadequate, unrealistic, wholly unrealistic and unfeasible. Even a cursory consideration of the MCD would have revealed that it and the Risk Assessment [Appendix 1 to the MCD] did not safely address the hazard of vehicles potentially coming into contact with pedestrians and cyclists.
174. I accept each of these submissions but in my judgment the most significant was that the Risk Assessment referred to above did not begin to address the obvious risk of injury to a pedestrian exercising a public right of way on the Common at a time when fairground vehicles were in the process of setting up their rides on the fairground site without any segregation or separation of vehicles from pedestrians.
175. In my judgment, given that by the OSH Agreement, D3 was required to acknowledge that D2 retained control, possession and management of the Common, D2 alone was responsible for, and had authority to control, the movement of pedestrians and cyclists on the Common and to provide that both pedestrians and cyclists must be separated or segregated from vehicles.
176. As to HSE 175, Mr Hartley submitted that in terms of such Guidance, the organiser was D2. I accept this submission because para 153 of such Guidance expressly provides that "where the fair is part of a larger event, the promotor will usually be the organiser" which was the case here.
177. I have no doubt, having regard to HSE 175, the CDMR and the overall facts of this case, that D2 was the organiser of the entire event and that it had delegated responsibility to D3 only in respect of events taking place within the confines of the fairground site.
178. Given my findings on the evidence which I have set out above, the most that can be said against D3 is that he and his employees, including Mr Gibson, agreed to give

such assistance as might be necessary to the showmen who were forming part of the fairground immediately *before* they had reached the fairground site and did so on a number of occasions. In such circumstances I have to ask myself whether in such circumstances D3 owed a duty of care to C.

179. After much reflection I have concluded that I cannot accept that D3 assumed any responsibility to act as a banksman for the fairground vehicles just because his employees elected to provide banking services on very few occasions. By contrast D3 did have a responsibility to act as a banksman for vehicles which were on the fairground site. I thus do not accept that D3 owed as duty of care to C. My reasons for so concluding may be summarised thus.
180. **180.** D2 retained control, possession and management of the Common, as provided for in the OSH Agreement, and had power, particularly since it was an adjunct of the Council, to control the movement of pedestrians/cyclists on the Common. It was in overall control of the event and was responsible for the safety of those using the Common.
181. D3 only had a responsibility for fairground vehicles once they had travelled through the Common onto the fairground site. D3 had no responsibility for vehicles as they travelled through the Common. Such was the responsibility of D2. The fact that D3's employees may have occasionally assisted fairground vehicles to enter the fairground site does not in my judgment create a liability.
182. Apart from the citation of the general principle enunciated in *Donoghue v Stevenson* no party was able to cite any decided case in which liability to a claimant has been established in similar circumstances.
183. In such circumstances it is unnecessary to consider D2's claim for contractual damages against D3. Mr O'Sullivan concedes that, since I have adjudged that D3 did not owe C a duty of care as alleged, it must necessarily follow that D3 was not guilty either of a causatively relevant breach of the health and safety clause in the OSH Agreement nor of any causatively relevant failings in relation to the obligation on D3 to produce an ECD together with method statement which were imposed on him by reason of the letter dated 5 August 2015 and the OSH Agreement. Both these documents are referred to above at paragraphs 29-30. It thus unnecessary to consider D3's pleaded allegation that D2 waived the contractual obligation imposed on him to produce an ECD together with method statement, although I have already expressed the view that, given that D2 had already prepared the Risk Assessment before the date when D3 was required to produce the draft ECD and that there was no attempt to prompt D3 into producing such document, it seems highly probable that such requirement was waived by D2.
184. As to the contractual indemnity contained in the OSH Agreement, such cannot assist D2 because C's accident was directly caused by D2's negligence.

The apportionment of liability as between the Defendants

185. Section 2(1) of the Civil Liability (Contribution) Act 1978 provides that:

“Assessment of contribution

Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."

186. The parties' submissions on this issue may be summarised thus.
187. Mr Doherty had no submissions to make on behalf of C as to apportionment.
188. Mr Lewers submitted that D2 and D3 should bear the majority of blame for the accident and between them it should be in the region of 80%. He rejected Mr Hartley's submission that the liability of the occupiers of the site was merely fortuitous and coincidental.
189. Mr O'Sullivan submitted that that the lion's share [by which he meant at least two thirds] of responsibility for the accident must rest with D1 and that the collective responsibility of D2 and D3 should be less.
190. Mr Hartley observed that, given that D1 had not given oral evidence in these proceedings and had only admitted primary liability shortly before trial, so that the inevitable focus of much of the trial was as to whether D3 bore responsibility for the organisation of the event, there might be a temptation for the court to allow D1 to creep under the judicial radar so as to diminish his blameworthiness. He submitted that the major responsibility for the accident lay with D1 and the much more minor cause was the lack of proper organisation of the event, whether by D2 or D3. He submitted that D1's blame should be in the region of a minimum 80%.
191. I am satisfied that for the following reasons the principal cause of C's accident was the negligence of D1.
192. Firstly, although the separation of pedestrians and moving vehicles would have been likely to have prevented the accident from happening, it was not the principal cause of the accident which was D1's driving in that he came into contact with C, a pedestrian, whilst moving his vehicle onto the fairground site. D1 was an experienced HGV driver and was experienced at delivering his vehicle to fairground sites.
193. Secondly, in order for the accident to occur C was undoubtedly present on the nearside of D1's lorry and should have been seen by D1, either by use of his mirrors or with the assistance of effective banksmen. I note that the role of Mr Richards and Mr Mansfield, who had travelled to the fairground site separately in the Isuzu vehicle but in a convoy with D1, was to act as banksmen for D1 when he had to manoeuvre his vehicle into position on the fairground site. Moreover, D1's continued use of his hazard warning lights meant that he could not indicate where he was intending to travel, which was a breach of the Highway Code.
194. Thirdly, I do not think that D1 was being properly banked as he drove forwards to the fairground site. If, for whatever reason Messrs Richards and Mansfield were attending to other tasks, he should have waited until they could act as banksmen which would not have taken long or should have secured assistance from others. If correctly

positioned at the rear of D1's lorry, such banksmen would have seen any pedestrians/cyclists who were present and would have been able to warn such persons of the manoeuvre which D1's lorry was about to make and to advise them to wait for a short time whilst the lorry carried out its manoeuvre. In such circumstances D1 ought not to have driven forward because it was plainly unsafe for him to do so.

195. I am thus satisfied that by exercising reasonable care D1 could have avoided C's accident. D1 would have realised that, given the size and weight of his vehicle that the consequences of his vehicle being in collision with a pedestrian would have been catastrophic for the latter. I am satisfied that the fact that any other party had responsibility for the organisation of the event does not in my judgment detract from D1's substantial blame.
196. By contrast, the admitted negligence of D2 was that it failed to provide a safe environment in which D1 could manoeuvre his lorry without coming into contact with pedestrians. Such a safe environment would have been provided by separating vehicles from pedestrians/cyclists by temporarily prohibiting pedestrians/cyclists from the area where fairground vehicles were manoeuvring themselves to gain access to the fairground site, by the use of barriers or the use of traffic marshals. In my judgment D2's responsibility for C's accident was significant and by no means minor.
197. In my judgment although D2 had failed to pass on its responsibility to D3 by appointing D3 as the principal contractor, and Mr Keightley had banked D1 to footpath 2, a footpath open to pedestrians and cyclists, and should therefore have appreciated the risk to pedestrians/cyclists caused by the movement of such vehicles, such matters do not increase the level of D2's culpability in relation to D1.
198. Although I note that both D1 and D2 seek to put a greater degree of culpability on the other, in my judgment D2 bears a significantly lesser degree of culpability than D1.
199. I have already concluded that D3 was not negligent.
200. Having regard to the test set out in section 2(1) of the Civil Liability (Contribution) Act 1968 I am required to assess the respective responsibility of D1 and D2 for C's accident. In my judgment D1 must bear the major part of blame for being the primary cause of the accident: but for his driving into collision with C there would have been no accident. I have concluded that on the facts of this case D1's negligence should be assessed at 65% of the total damages recoverable by C, after a deduction of 12½% for contributory negligence and it necessarily follows that D2's negligence will be assessed at 35%.
201. I add that had I found that D3 was negligent, which I have not, I would have found that the liability of D1 should remain unchanged but that the apportionment as between D2 and D3 should be such that D2 should bear the greater proportion of the blame, because D2 was in charge of the whole event which was taking place, of which the fairground was but one part and that D2 should be liable as to 25% and D3 should be liable as to 10%.

Conclusions

202. If follows therefore that, because of the agreement as to the existence and degree of contributory negligence, there will be judgment for the Claimant against D1 and D2 for 87½% of the recoverable damages on a full liability basis, that liability as between D1 and D2 should be apportioned so that D1 bears 65% and D2 35% of the obligation to compensate C.
203. At the conclusion of the hearing I canvassed with counsel whether any applications consequential to this judgment could be determined on the basis of written submissions without the necessity for a further oral hearing. However, counsel agreed that they preferred that this judgment should be circulated, as is the norm, for the correction of typographical and obvious errors of fact and that thereafter the case should be listed for judgment to be formally handed down. The parties undertook to endeavour to reach agreement on any applications consequential to this judgment.
204. On reflection, I have decided to adopt a slightly different approach whereby this judgment will be circulated for correction of typographical and obvious errors of fact and a final version of this judgment will be handed down immediately thereafter without the necessity for any party to attend. The parties should thereafter endeavour to agree any further applications consequential to the judgment and if all matters are agreed I will make a consent order to that effect administratively. If matters cannot be agreed, a further hearing will be arranged at the instigation of any party and I will then determine at an *inter partes* hearing any outstanding ancillary matters.