



Neutral Citation Number: [2021] EWHC 3398 (QB)

Case No: QB-2020-004312

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Friday 17<sup>th</sup> December 2021

**Before:**

**HUGH MERCER QC**  
**(Sitting as a Deputy Judge of the High Court)**

-----  
**Between:**

**ARTHUR DELLER**  
**(A child by his father and litigation friend CRAIG**  
**DELLER)**

**Claimant**

**- and -**

**(1) MS DEBORAH KING**

**First**  
**Defendant**

**(2) GUY MCGARVEY**

**Second**  
**Defendant**

-----  
**David Sanderson** (instructed by **Stewarts Law**) for the **Claimant**  
**Marcus Dignum QC** (instructed by **BLM**) for the **First Defendant**  
**Shaun Ferris** (instructed by **Liddell & Co**) for the **Second Defendant**

Hearing dates: 15, 16, 17 November and 3 December  
-----

**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.

.....

HUGH MERCER QC

## **Hugh Mercer QC:**

1. This claim arises out of a road traffic accident which occurred on the southbound carriageway of the M5 motorway, approximately 2.5 miles south of Junction 21 on Monday 29 August 2016 at around 10.45 am.
2. A collision took place between an Audi A2 vehicle driven by Ms Deborah King, the first defendant and the claimant's mother, and a Volkswagen Bora driven by Mr Guy McGarvey, the second defendant. Mr McGarvey was accompanied by his wife seated in the passenger seat, together with his son Kyle and his daughter Eve both seated in the rear of the VW.
3. The claimant was four years old at the time and was seated in a child's car seat in the rear offside passenger seat of the Audi, next to his sister Sophie and directly behind his mother. His father and litigation friend Craig Deller was a front seat passenger. The claimant was very seriously injured in the collision. The family had been travelling from their home in Bedfordshire for a holiday at Butlins in Minehead.
4. This is a trial of liability and contributory negligence in accordance with the Order of Master Cook of 15 March 2021. I should add that Master Cook had previously (on 28 January 2021) ordered that proceedings brought by the McGarveys against Ms King and her insurer in the County Court (F97YX074) should be transferred to the High Court "for disposal of all issues of liability and contributory negligence" and that those issues were to be tried together with this action as a preliminary issue by the same judge as a single trial.
5. I heard oral evidence from occupants of the Audi and VW vehicles (Mr Deller, Ms King, Mr McGarvey, Mrs McGarvey, Kyle McGarvey) and also from Simon Roberts who was a front seat passenger in a vehicle following the VW. Although subject to the handicap of giving evidence over five years after the event, each of the factual witnesses appeared in my judgment to give evidence to the best of their recollection. I bear in mind however that, as submitted to me, playing and replaying a memory risks making slight modifications to that memory over time. Also, as Mr Sanderson for the Claimant observed, the sequence of events in an accident which took only a few seconds in all can fade even though the essential memory remains.
6. I also heard oral evidence from the following expert witnesses: Victoria Eyres (Reconstruction/Tyres for the claimant); Dr Darren Walsh (Reconstruction for the first defendant); David Price (Tyres – for the first defendant); James Wade (Reconstruction/Tyres – for the second defendant).

### The accident

7. It was a bright summer bank holiday Monday with excellent visibility. Traffic was busy but moving freely. Ms King recalls filling up the Audi with fuel before leaving home and also checking the tyres on the Audi either at the same time as she took fuel or on a separate visit to the Sainsbury's fuel station near her home. Ms King had stopped at a service station a few minutes before the accident to have a break and does not recall anything untoward with the tyres in the service station. At the time of the accident, the Audi was in lane 1 (the left hand lane of the motorway) following a lorry when Ms King decided to overtake the lorry to have better visibility for the exit where

the family was to leave the motorway. There is some debate in the evidence as to whether the Audi did go into lane 2 as Mr Deller does not recall this and Mr McGarvey recalls first seeing the Audi in lane 1. However, it seems to me that Ms King has no reason to invent this, that Mr Deller as passenger would be paying less attention to the road prior to the loss of control than Ms King and that Mr McGarvey first seeing the Audi in lane 1 is consistent with him noticing the Audi after it returned to lane 1. Both Mr Deller and Ms King recall a concrete event when suddenly the Audi started vibrating and a warning light lit up on the dashboard – Ms King says that this occurred as she moved from lane 1 to lane 2 to overtake the lorry. It is unclear which warning light lit up but I accept the evidence of Dr Walsh and Mr Wade on this issue about the effect of a puncture on the performance of the wheels and the interaction with the ABS system. I find on the balance of probabilities that it was the ABS light which lit up. Mr Deller recalls a ping when the light came on and Ms King describes aborting overtaking the lorry to return to lane 1. Both described the car vibrating as if they were driving on a rough road surface. It is relevant to what followed that Ms King successfully returned to lane 1 which would have involved a sufficient steering input from her to move from lane 2 to lane 1. We know that that manoeuvre was completed successfully and no one suggests that that manoeuvre was accompanied by oversteer.

8. Ms King wanted to pull over to the hard shoulder to check what was wrong and all witnesses agree that this is what she did. What is not agreed is the manner in which she did that, i.e. whether it was a sharp turn or a gradual left turn similar to that which moved the Audi from lane 2 to lane 1. Very fairly she said that she did not recall making a pronounced turn to the left albeit earlier in her evidence she had said that she moved from lane 1 to the hard shoulder in the same way as she had moved from lane 2 to lane 1. It was her husband who clearly recalled her making a sharp turn to the left. He recalled the fact that she normally has her hands at the position 10 to 2 on the steering wheel (treating the wheel as a clock face) but that on this turn her right hand went up to the clock face position 12, i.e. a 60 degree turn. He commented that this turn to move to the hard shoulder was “too sharp for me”. On the other hand, Mr McGarvey described the movement of the Audi to the hard shoulder as “gradual” albeit he also agreed in cross examination that the Audi swerved into and out of the hard shoulder and the latter observation accords with Mr Robert’s evidence which, for the reasons given below, I accept.
9. Whilst in lane 1 and before moving to the hard shoulder, both Ms King and Mr Deller were asked about the speed of the Audi. Mr Deller said that they were travelling at around 40-50 mph but then added that he did not recall the speed but his witness statement records the turn to move to the hard shoulder as taking place “when it felt as though we were still travelling quite quickly”. Ms King said she was driving at 40-50, possibly slower. She also described slowing down from an initial speed of approximately 70 mph by braking and changing down at least one gear. I find that the Audi was travelling at around 40-50 mph when Ms King started to move the hard shoulder.
10. To return to the nature of the turn, I start first with my impression of Ms King’s driving skill and experience. She has been driving for twenty years and has no convictions and a clean licence. Through her work, she has had involvement in the operation of a fleet of cars and drove a work vehicle from that fleet. She prefers to drive her family rather than be driven. She is clearly an experienced driver. Her evidence was that she checked the pressures on her car about every other week which is indicative of someone who takes real care in relation to their driving. Her clean driving record is also indicative of

a careful driver. My starting point is that Mr Deller's evidence as to the nature of the turn might therefore be regarded as somewhat surprising.

11. I must also have in mind that the balance of the expert evidence as recorded in the Joint Statement of the Tyre Experts is that sometime before the Audi came to rest a circumferential split probably occurred in the sidewall pre-impact. Though Ms Eyers says that it is not possible to state conclusively that the tyre sidewalls separated prior to the collision, this does not seem materially different from "probably occurred" as stated by Mr Price and Mr Wade. If there were a difference, I would prefer the evidence of Mr Price who came across in the witness box as having an impressive knowledge of the performance and characteristics of vehicle tyres including engaging in practical research on airfield skid pans to assist his work. Ms Eyers agreed that she was not specialist in tyres. The relevance of a split occurring between the side walls of the tyre and the tread is the impact on the vehicle's handling. Mr Price's evidence which I accept is that vibration of a car (and associated noise) is likely to increase considerably and quickly once the tyre's sidewalls start to separate from the tread. The split between the side walls and the tread could have occurred whilst the Audi was in lane 1 and could have provoked a hasty manoeuvre by Ms King but neither she nor her husband refer to anything provoking a sharp turn and I would have expected them to do so had this been the reason for the nature of the turn. I bear in mind that, though a puncture is an unfortunate event, whilst still in lane 1 Ms King was in full control of the Audi. The "shaking" described by Ms King as occurring when she pulled out to overtake the lorry is consistent with joint statement of the tyre experts that such shaking is consistent with the sidewalls beginning to split from the tread. That event undoubtedly led to the very sensible desire of Ms King to move her vehicle to the hard shoulder but would not explain a sharp turn onto the hard shoulder.
12. I turn then to consider the evidence on whether the Audi had suffered a puncture. Mr Price and Mr Wade agree that the severity of the damage to the tyre is only consistent with the tyre running in a collapsed state. Ms Eyers believed that the tyre had been run under-inflated for some time but now considers that the pre-impact failure of the tyre is more likely. In so far as there remains a difference, I prefer the evidence of Mr Price who was also an impressive witness in that he came across as having deep experience in tyres. I find on the balance of probabilities that the rear offside tyre failed pre-impact due to a puncture. The accident reconstruction experts agree in their joint statement that, despite a left rear offside puncture, it should have been possible to maintain control of the Audi while travelling in a straight line and that any adverse effects to the vehicle handling would not commence until Ms King attempted to brake or steer. However, the earlier progress of the Audi from lane 2 to lane 1 demonstrates that it is not all steering inputs which result in oversteer. I will return to the issue of the turn from lane 1 onto the hard shoulder in considering any possible liability of the First Defendant below.
13. Mr Price gave very clear evidence on the concept of oversteer which was essentially agreed by the other experts. The phenomenon occurs because of the impact of a punctured rear offside tyre on vehicle handling when effecting a turn to the left (turns to the right are not affected). The risk is that a distinct steering input to the left may give rise to a greater turn than intended due to the effects of the rear offside puncture, in particular if accompanied by a braking input. If a distinct steering input to the left was applied when travelling at motorway speeds, "it would likely result in oversteer" as stated in the tyre experts' joint statement. It is unclear whether 40-50 mph would be considered to be "motorway speed" but the fact that a turn is attempted at a significant speed is a factor in oversteer. Mr Price said in evidence that the main factors are more

the speed and the angle of turn rather than braking which he described as “not a huge factor” albeit it does combine with the other two factors. His view was that if you do not turn hard then you would get across to the hard shoulder without a problem.

14. At all events, there came a point on the hard shoulder where Ms King lost control of the Audi. She herself put that point as sometime after joining the hard shoulder. In oral evidence she said that the Audi was on the hard shoulder for a “couple of minutes” before the fishtailing started but she conceded that it might not be that long. The problem with that evidence is that the experts are agreed on the likely reason for oversteer being a steering input combined with an appreciable speed. On the expert evidence, had Ms King successfully entered the hard shoulder and gradually slowed the Audi to a stop by moderate braking, she would not have lost control of the Audi. Thus, although she said that if she had the same situation today she would not apply the brakes, applying the brakes does not according to the expert evidence explain or render likely the loss of control.
15. Mr Deller was very clear that it was after the turn onto the hard shoulder which was too sharp for his taste that the Audi was immediately out of control. He commented that, until then, things were bumpy but under control. He described the Audi thereafter as being in a spin. I accept Mr Deller’s evidence and reject Ms King’s evidence on when the loss of control occurred because the experts agree that it is the steering input when combined with appreciable speed and braking input which can give rise a loss of control in oversteer cases. Accordingly, the loss of control commenced immediately after the turn from lane 1 to the hard shoulder which I find in accordance with Mr Deller’s evidence to have been a sharp turn in which Ms King turned the steering wheel approximately 60 degrees.
16. Ms King gave evidence, and I accept her evidence on this point, that after losing control she fought with the Audi to compensate to the right and to the left as the rear of the vehicle went from side to side. She described the Audi “snaking” to the left and right more than once. Mr Price’s evidence was that his experience was that such fishtailing becomes more extreme as they progress and that, though in theory steering corrections are possible, the usual course is that the swings to left and right of the rear of the vehicle become “sharper and sharper” until the car goes into a spin. It is noteworthy that Mr Deller believed during this period that the Audi was in a spin when it was not and that he did not recall Ms King trying to steer the car left and right to compensate for the swings due to the fishtailing. During the course of the snaking or fishtailing the Audi was out of control, probably to a lesser extent at first but, by the time it effected the sharp turn to the right and rejoined the motorway perpendicular to the traffic, I find that the Audi was totally out of control. It follows that at no point after the loss of control did Ms King regain control. As Ms King put it, by the time the Audi turned back onto the motorway, she was “hanging onto the wheel”.
17. The position and angle of the Audi at the moment of impact with the VW are known as is the fact that the turn started on the hard shoulder and there is no tyre mark evidence on the road. The absence of a tyre mark indicates that the turn was made at less than the critical speed. Ms Eyres and Mr Wade did not dissent from Mr Walsh’s diagram which illustrates the movement of the Audi from the hard shoulder to a position straddling lanes 2 and 3, facing the central reservation. Mr Walsh calculated the time taken for the turn from the moment at which there was the initiation of a visible manoeuvre and arrival at the point of impact as about 4 seconds on the basis of a likely

speed of 15-30 mph with Ms King braking throughout. Though he thought that a speed of closer to 30 mph was “probably realistic”, the approximate time of 4 secs remains in his view virtually the same whether the starting speed for the manoeuvre was 15 or 30 mph. In the joint statement, the experts agreed a minimum time of 3.5 secs from the time of initiating the turn to the end of the turn, based upon the physics of the turning manoeuvre. It was referred to as being from the Audi being “fully established within the hard shoulder” but Mr Walsh clarified that as being the start of the turn of the Audi back towards the motorway.

18. I turn to consider the VW Bora. At the outset, when the Audi was approximately 100 yards ahead, Mr McGarvey’s attention was first attracted to the Audi by the fact that it was as he put it wobbling as if driving on an uneven surface. The VW was in lane 2, the middle lane. His evidence puts the Audi in lane 1 at this point though he saw it move onto the hard shoulder almost immediately. He recalls seeing that the offside rear tyre of the Audi was deflated and recalled the fact that he himself had suffered a puncture on the M4 in the past and recognised the wobbling of the Audi as likely to be related to a puncture.
19. Mr McGarvey’s approach speed was, according to him motorway speed of 60-70 mph. Mrs McGarvey doubted that Mr McGarvey was doing as much as 70 as he tends not to drive that fast but I accept Mr McGarvey’s evidence on this issue that his approach speed was 60-70 mph when he first saw the Audi as he was the driver. He said in his oral evidence that he lifted his foot off the accelerator when he saw that the Audi was in difficulties and I accept this evidence even though he was challenged on this on the basis that he had not said this in his witness statement. He did say that he “slowed” which must be either by not accelerating or braking as there is no suggestion he changed gear. He also referred on one occasion in oral evidence to having braked but his overall evidence was that he eased his foot off the accelerator. In his witness statement, he said that he slowed “to 40 mph” but he accepted in cross examination that he did not switch on his hazard lights. On a motorway in busy traffic, to slow a vehicle to 40 mph without switching on hazard lights would be potentially hazardous. I also bear in mind that the speed of the VW at impact as agreed by the experts was in the range 38-46 mph but that the VW did take evasive action very close to impact by turning slightly to the left. On the balance of probabilities, as the VW turned slightly just prior to impact, Mr McGarvey would also have braked at the same time, thereby reducing his speed at impact to the 38-46 mph range calculated by the experts. It follows that, although I accept that Mr McGarvey did slow down, the speed of the VW after noticing that the Audi had problems would be likely to be between 40-50 mph and probably at the upper end of that range.
20. Mr McGarvey’s perception of the Audi, the rear of which he observed to be swinging left and right was that it was out of control. His perception was correct. He agreed that at no time did he see the driver of the Audi regain control. His perspective is that he had himself had a puncture on the motorway and had not lost control of his vehicle. So far as he was concerned, all that was needed was for the Audi to slow down gradually and accordingly he could “get past without incident”. He said in his oral evidence that as the Audi was slowing down, the wobble would be getting less. That evidence does not square with the expert evidence of Mr Wade which is that once you have lost control, to recover control you need to be lucky or to have had specialist training. Mr Price’s evidence is that the fishtailing or snaking would increase until the car spins. I

accept Mr Price's and Mr Wade's evidence. It follows that even though the Audi was in what was normally a safe place, it was out of control with no or almost no prospect of the driver regaining control and it was on that basis that the VW approached the Audi at a speed of 40-50 mph. Indeed Mr McGarvey realistically accepted that things don't always go according to plan.

21. There came a point in the approach of the VW when it became apparent to an observer that the Audi, the rear end of which was at all times since the loss of control swinging from side to side, was going to leave the hard shoulder. It is evident that Mr McGarvey did not react at that point because it was a minimum of 3.5 secs before the impact and Mr McGarvey's reaction was limited to a slight deviation to the left combined, as I have found, with limited braking which is not consistent with him having had 3.5 secs plus to react. Mr Walsh has calculated the distance which the VW would be from the point of impact if travelling at a speed of 40 mph.
22. I should deal with one matter which is the speed of the Audi at impact, if indeed it was moving. The McGarveys are clear that the Audi was moving. This is wholly natural because they experienced the shock of the Audi crossing their field of vision slowing from its speed on initiating the manoeuvre which was approaching 30 mph. They would certainly have seen the Audi to be moving but that does not help me on the speed of the Audi at impact. The experts point to the mark on the road of the wheel rim of the Audi as it was shunted by the VW in a direction of travel almost parallel with the dashed lines demarcating lane 2 and lane 3. The fact that this mark was almost parallel to the direction of travel of the VW shows in accordance with unanimous expert evidence that the Audi had zero or almost zero momentum in the direction of the central reservation. If the Audi had had forward momentum at the moment of impact, the mark on the carriageway would have been some form of diagonal mark indicating movement in an oblique line (effectively the hypotenuse of a right angled or near right angled triangle where the other two sides are the direction of travel of the VW the direction of travel of the Audi) towards the central reservation. It follows that I accept the expert evidence that the Audi was at rest at the moment of impact.
23. Immediately prior to impact, both Ms King and Mr Deller recall a brief exchange to express relief. Mr Deller turned towards his children, saw the approaching VW and braced himself for the impact. Ms King turned, saw Sophie who was the rear nearside passenger and caught a glimpse of Arthur, the claimant in this action before the impact. It is very difficult to estimate the time that these events took but, taking into account both the nature of the events and the fact that the McGarveys firmly believed the Audi still to be moving, in my judgment the time the Audi spent at the place of impact was very brief indeed and I would put it at 1-2 seconds before impact.
24. This is important as it fixes the total available time for Mr McGarvey to react at a minimum of 4.5 secs (3.5 secs for the Audi to effect the turn plus at least 1 sec at rest prior to impact). In making this finding I take into account the evidence of Ms King that a lorry and some cars passed the Audi whilst it was out of control. It might have been said by Mr McGarvey that there came a point at which the progress of the Audi out of control was obscured by passing traffic such that he could not have seen the change of direction but no such suggestion is made.

The applicable legal standard

25. I was referred by Mr Dignum QC to the statement of Lord Dunedin (*Fardon v Harcourt Rivington* (1932) 146 LT 391, 392) as restated by Lord du Parc in the case of *London Passenger Transport Board v Upson* [1949] AC 155 at 176 in specifically rejecting (as too favourable to the driver) the view of the Master of the Rolls in the Court of Appeal that a driver is entitled to assume that a pedestrian would conform to common sense and ordinary care:

*'If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.'*

26. Laws LJ added a cautionary observation in the case of *Ahanonu v Southeast London Kent Bus Company* [2008] EWCA Civ 274 at paragraph 23:

*"There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care."*

#### Liability of the First Defendant

27. I start with the possible liability of Ms King. The Claimant had originally alleged a lack of care in relation to the final turn of the Audi back onto the motorway but, in the light of the evidence, such an allegation must necessarily fail as was recognised by Mr Sanderson. No fault whatsoever can be alleged in relation that final turn – a driver who is “hanging on” to the steering wheel in the final stage of a loss of control cannot be liable for the final turn which, whether voluntary or involuntary, is the final stage in a series of events commencing with the loss of control. Additional suggested failures alleged against Ms King included her possibly having run out of fuel and a lack of maintenance but were also not pursued by the Claimant.
28. The question is therefore whether Ms King bears any responsibility for the sharp turn which led to the loss of control. A factor which I can exclude at the outset is knowledge of the oversteer effect of rear tyre punctures. Though it might well be desirable if this were better known by drivers generally, it was not suggested that any reasonable driver should have knowledge of the oversteer effect with a rear tyre puncture. Also, merely because a turn of a vehicle onto the hard shoulder results in oversteer does not take the turn outside the range of reasonable reactions.
29. I need then to address the evidence as to the nature of the turn made in this case. I have already referred to Mr Deller’s evidence which describes a 60 degree turn of the wheel. There is expert evidence from cross examination that the average manoeuvre to change lanes on a motorway takes between 3 and 6 seconds based on observational studies of the manoeuvre time (as described by Mr Walsh) whereas the experts seemed to agree that a swerve as described in the evidence in relation to the movement from lane 1 to the hard shoulder or the even sharper turn from the hard shoulder to lane 1 would be likely to take less than two seconds. Also Mr Roberts said that the Audi “suddenly and



unexpectedly swerved” towards the hard shoulder. That of itself tends to confirm Mr Deller’s evidence with regard to the angle of the turn and I accept it. Even though Mr Roberts seemed less certain of his evidence when in court, he found the experience of giving evidence stressful but that does not detract from what I find to be the truth of his evidence which I accept. Mr Deller referred to the sharp angle of the turn arising from “panic” but no reason has been put forward to justify panic at that early stage in the events (as opposed for example to panic after the loss of control) and in any event driving a car carries with it the risk of stressful circumstances in which reasonable drivers are expected not to cede too easily to panic.

30. Even putting aside the puncture with the consequent risk of oversteer, if a vehicle in lane 1 executes a sharp turning manoeuvre onto the hard shoulder by turning the wheel 60 degrees to the left whilst at a speed of 40-50 mph in circumstances where the vehicle to the knowledge of the driver is suffering a serious malfunction affecting the handling of the vehicle (as Ms King knew from the severe vibration and the sensation of driving on a rough road surface even though she did not at the time know that her rear offside tyre was punctured), that of itself in my judgment gives rise to a risk of harm and to the possibility of danger. This is supported by Ms Eyers’ view that “attempted sudden steering input while the vehicle was travelling at speed” where the driver used “a steering input that was too sudden for the road speed of the vehicle” would be a possible explanation for loss of control even if the puncture had not occurred prior to the Audi moving onto the hard shoulder. Mr Eyers’ evidence, which I accept, is that “the swerve of the vehicle into lane two is likely to have followed a series of excessive (relative to the vehicle’s speed) steering inputs”. Though I am only concerned on the issue of liability with the first of those turns (as no one suggests that Ms King is liable for steering inputs provided once the vehicle was out of control), that evidence still assists in relation to the first turn in moving from lane 1 to the hard shoulder. Indeed, the expected result of a sharp steering input would be to require an almost immediate correction so as to avoid the Audi leaving the hard shoulder onto the grass verge. I do not regard a finding that the turn gave rise to a possibility of danger as a counsel of perfection because unusual or unforeseen circumstances, in particular as to the handling of a vehicle travelling at speed such as the vibration in this case, demand caution in executing any manoeuvre. No reason or justification has been advanced for Ms King executing such a sharp turn. I infer that she was keen to reach the safety of the hard shoulder but a significantly less sharp turn could have been used to achieve the same end.
31. Mr Dignum QC for Ms King submitted that the experts agree that, where a vehicle has suffered an offside rear puncture, “it is only possible to maintain control of a car in these circumstances if you steer so little that it is almost a drift towards safety”. In my judgment the expert evidence does not go that far. Ms Eyers was clear that gradual steering towards the hard shoulder should not give rise to loss of control and in cross examination did not dissent from the view that it was possible to move to the hard shoulder at motorway speeds on a straight stretch of road if steering in an appropriate fashion. Mr Price described deflation of a rear offside tyre making turning to the left difficult as the car may turn more than expected and in oral evidence considered that a sharp 60 degree steering input to the steering wheel made oversteer more likely. Mr Price agreed in his oral evidence that if you do not turn hard you can get across to the hard shoulder without a problem even if your vehicle has a rear offside puncture. Despite quoting the relevant witness evidence, Mr Walsh did not address in his report

the loss of control or the allegation of a sharp turn made in the Particulars of Claim or the effect of a sudden sharp steering input to the left at 40-50 mph on a vehicle with known handling problems. I find this somewhat surprising as such an evidently competent accident reconstruction expert would be likely to have had views on whether such a sharp steering input was reasonable even without the driver having the knowledge that the origin of the vibration was a rear offside puncture. Mr Wade did not consider the sharp steering input in relation to Ms King's loss of control. The joint statement of the tyre experts refers to the impact of a "distinct" steering input at motorway speeds being likely to give rise to oversteer, not *any* steering input.

32. Though Dr Walsh and Mr Wade agree that the loss of control was induced as a consequence of the failure of the rear offside tyre, I do not understand them by that agreement to be excluding other causes or addressing whether Ms King's sharp turn, in circumstances where she was not aware of the puncture, gave rise to a situation where the possibility of danger emerging should have been reasonably apparent to Ms King. Dr Walsh and Mr Wade do agree that the more severe the steering input relative to the speed of the vehicle, the more pronounced the potential oversteer. In oral evidence Mr Wade also agreed that it was very difficult to effect a controlled lane change by a swerve and that the sharp turn described was not a normal turn and could be one of less than two seconds. Thus although the oversteer effect will have been more severe due to the sharpness of the turn, the sharpness of the turn onto the hard shoulder at a speed of 40-50 mph in a vehicle which clearly had a problem affecting its handling as demonstrated by the considerable vibration is in my judgment negligent.
33. It follows that I find Ms King liable in negligence for the sharp turn which gave rise to the loss of control.

#### Liability of the Second Defendant

34. In his approach to the Audi, as described above Mr McGarvey noticed the Audi, saw the vibration and then the loss of control with no sign of Ms King having regained control and he was conscious that things do not always go according to plan. Though he slowed to 40-50 mph as found above, he did not switch on his hazard lights. In saying that the Audi was in a safe place (the hard shoulder), that he believed that the driver could stop safely and that he felt able to proceed past the Audi, he was plainly taking a serious risk of harm where the possibility of danger emerging was reasonably apparent given that the Audi was and remained out of control. His subjective belief based on his own experience of a puncture on the M4 was not a reasonable belief, first because that experience shed no light on what occurs when the driver loses control and second in the light of the expert evidence from Mr Wade that once a car loses control, there is almost no prospect of the driver regaining control unless he or she is lucky or has had specialist training. It follows that it was in my judgment negligent for Mr McGarvey to seek to pass a vehicle out of control even though he did so in lane 2 and having slowed to 40-50 mph as there remained a significant risk that the Audi may re-enter the carriageway and, if it did so, there could be no expectation that it would be confined to lane 1. Whilst a lorry and other vehicles also passed the Audi while it was out of control, we do not know whether the drivers of those vehicles observed the fact that the Audi was out of control as it is this knowledge which takes Mr McGarvey's decision outside the range of reasonable reactions.

35. Even if it were not negligent to decide to pass a vehicle which is known to be out of control, what followed is further independent evidence of negligence. Knowing that the Audi was out of control should have placed that vehicle at the centre of Mr McGarvey's attention as the most critical thing happening on the motorway at that time. In the absence of Mr McGarvey's view of the Audi being obscured in some way as noted above, in my judgment he should have been carefully tracking the progress of the Audi as the VW approached the Audi. Mr Walsh's diagrams are informative in this regard because, although they assume an approach speed of 40 mph, they illustrate the fact that the Audi whilst on the hard shoulder would have been well within the vision of a driver of the VW keeping his eyes firmly on the road in front of him. In fact, Mr McGarvey's evidence was that he had observed the Audi successfully reaching the hard shoulder and he presumed that it was safe. He gave no evidence that he saw the wheels of the Audi change direction as it initiated a turn back onto the motorway.
36. Mr McGarvey's evidence was that he first saw the Audi coming back onto the motorway when he was about 50 feet away or about 15 m. According to Mr Walsh's evidence in re-examination, a vehicle at 40 mph travels at 17.9 m/sec which means that to travel the 15 m would take less than a second so that it cannot be the case that the 50 feet is even approximately accurate as it is agreed that the Audi would take a minimum of 3.5 secs to execute the turn until the point of rest. Mr Wade agreed in cross examination that this was correct but had written in his report that a distance of 50 feet would have left insufficient time for Mr McGarvey to have braked or swerved and to have avoided the collision. This is disappointing evidence from an expert who purported to be applying the rules for expert witnesses as one would expect Mr Wade to have drawn the court's attention on the issue of avoidability to the fact that Mr McGarvey should have seen the Audi at an earlier point in time. Although Mr Wade did not originally calculate the time taken for the Audi to travel to its place of rest, he would know that a speed of 40 mph equates to less than one second to travel 50 feet and that the Audi must take more than 1 sec to re-enter the carriageway or if he did not know that he needed to calculate it.
37. It follows that Mr McGarvey did not use the full 4.5 secs available to him for perception response time plus braking. The examples with diagrams included by Dr Walsh in his report are based on an approach speed of 40 mph whereas I have found the VW Bora to be approaching at closer to 50 mph. But Dr Walsh's unchallenged evidence is that if the approach speed of the VW was 70 mph and Mr McGarvey only had 4 secs available to him, the VW could have been braked to a halt provided that the driver responded with a normal perception and response time.
38. In terms of perception response time, the experts agreed that 0.75-1.5 secs was the likely range and that because Mr McGarvey knew that there was an out of control vehicle and should have had his foot covering the brake, the PRT should be at the lower end of that range. Doing the best I can, I find that Mr McGarvey should have responded within 1 sec. Applying the stopping times/distances in Ms Evers' letter of 19 October 2021 including the brake rise time, even if the VW were travelling at 50 mph (which I am told equates to 22.35m/sec) when the Audi initiated the turn, it should have come to a halt within 34-38m or 2.95-3.34 secs assuming the application of emergency stop braking of 0.7-0.8g plus 1 sec for PRT. Accordingly, I find that a non-negligent driver in the shoes of Mr McGarvey would have been able to stop his vehicle. It follows therefore that I also find Mr McGarvey to have been negligent in failing to stop when

it became apparent, or should have become apparent to a reasonably careful driver in the shoes of Mr McGarvey, that the Audi was re-joining the motorway carriageway.

Claimant's application to adjourn an issue on causation

39. Mr Sanderson applied during the course of the expert evidence for one matter relating to causation to be adjourned to a later date. I understand this to be the issue of whether the Claimant's injury would have been more or less severe if I were to find that the Second Defendant's vehicle when driven in a non-negligent manner would nevertheless have collided with the Audi. On that hypothesis, a causation issue would arise as to whether some damage would have been caused to the Claimant in any event and therefore whether there should be a deduction from the Claimant's damages to cater for that eventuality. As it is, my judgment above finds that the Second Defendant has been negligent in at least two respects: deciding to pass a vehicle out of control and, even if the decision to pass the Audi were not negligent, in not keeping the Audi under sufficiently close observation to see that it was initiating a turn back onto the motorway. Had he so observed the Audi, the VW should have come to a halt before impact. Accordingly, I do not believe that Mr Sanderson's additional argument arises at all. However, I am conscious that the Court of Appeal could disagree with my analysis above and so I feel that I should deal briefly with this application.
40. Mr Ferris for the Second Defendant argues that the order of Master Cook on 15 March 2021 draws no distinction between different elements of "liability" and that therefore, just as in the case of a cyclist who is injured when he is not wearing a helmet and is found contributorily negligent, it is the Claimant's obligation to bring to court all the evidence needed to prove his case. If it became necessary to investigate different possible speeds of approach of the VW, some of which were negligent and others were not, then the Claimant, so Mr Ferris argues, has a problem in that he could not prove causation. Mr Sanderson for the Claimant argues that to have relevant medical experts waiting in the wings during the trial and giving evidence before it were clear that their evidence had any practical purpose would be wasteful, disproportionate and contrary to the overriding objective. Bearing in mind that this matter does not seem to me to arise in the light of my judgment and that the prospect of overturning both elements of the negligence findings against the Second Defendant appears improbable in the light of the findings of fact, I will deal with this very shortly. In my judgment it would not be in accordance with the overriding objective for expert medical witnesses to be waiting in the wings to deal with such a contingency. Had the matter been raised before Master Cook, there is a good prospect that this specific aspect of causation would have been split from the liability trial, not least as it seems to have greater affinity with quantum as it must be likely that the same medical experts would be engaged in relation to both quantum and this aspect of causation. Moreover, that is the only course which I consider to be consistent with the overriding objective as the contrary submission increases costs and it was not suggested that any concrete benefit would accrue in this case. Of course this matter was not raised before Master Cook and I am urged to apply the court order as it was made and not to entertain a late application to carve part of the causation issue out of a trial on liability. The application is made late and should have been made sooner but this is the opposite of seeking to bring surprise evidence half way through the trial – it is applying for the freedom to adduce additional evidence at a later date. In the normal course of events, there would be force in Mr Ferris' objection as the whole point of case management is to organise the trial in advance but I cannot see

that the additional costs of requiring the attendance of relevant medical experts before me could possibly be proportionate or result in the litigation being conducted “in the most cost-efficient way possible” so that, in the unusual circumstances of this case, I would have acceded to Mr Sanderson’s application had it remained relevant in the light of my judgment.

### Contributory Negligence

41. In the light of my conclusions above, I need to deal with the issue of contributory negligence as between Ms King and Mr McGarvey as canvassed in a short remote hearing on 3 December 2021.

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

#### **Apportionment of liability in case of contributory negligence.**

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

43. In *Stapely v Gypsum Mines Ltd* [1953] AC 663, at 682 Lord Reid said:

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

44. In the context of road traffic claims, *Eagle v Chambers* [2003] EWCA Civ 1107; [2004] RTR 115 was cited to me where Hale LJ applied the established approach that there were two aspects to the apportionment of liability: the causative potency of the action and its blameworthiness.

45. Mr Ferris submits for Mr McGarvey that, in terms of causative potency, the trigger for the accident was the sharp turn by Ms King which created a hazard and left her car broadside on to the flow of traffic. Mr Dignum QC relies on the fact that the accident was avoidable despite his client’s conduct in setting in chain a course of events, to use the term of Lord Ackner in *Fitzgerald v. Lane* [1989] AC 328 at 344. In contrast to cases involving a car and a pedestrian, both drivers in this case were in charge of what has been called “a destructive weapon”. It is right that I have found that Mr McGarvey could have avoided the Audi of Ms King and that that reduces the causative potency of the initial sharp turn by Ms King in that it is a negligent response to a dangerous situation created by Ms King but nevertheless I find that Ms King’s action in creating the initial danger gives rise to slightly greater causative potency than Mr McGarvey’s.

46. As regards blameworthiness, it is common ground that I must focus not only on the act itself but also on the context. I have found a sharp turn, such as that made by Ms King, to be negligent even in circumstances where there is no puncture and consequential risk

of oversteer. I have found Mr McGarvey's actions to be negligent both in seeking to pass a vehicle which was out of control and in failing to stop once it became reasonably apparent that the Audi was re-joining the motorway.

47. I take account of the requirement of the Highway Code that drivers must not drive without reasonable consideration for other road users. It is unclear whether a combination of examining blameworthiness and such reasonable consideration includes examining whether joint tortfeasors' conduct is selfish or unselfish. Certain civilian systems of law, such as France, impose a legal duty to assist fellow citizens in danger but it seems to me that English law does not go that far. Both drivers in this case came under a duty to act with reasonable consideration by making a more gradual turn onto the hard shoulder on the one hand and by holding back from passing the Audi until it no longer appeared out of control on the other. Mr Dignum QC argues that Ms King had a good plan (to reach the hard shoulder) whereas Mr McGarvey had a bad plan (to pass a vehicle out of control). Mr Dignum QC in effect argues that Mr McGarvey was impatient to get past and is in that respect more blameworthy. However I do not accept that Mr McGarvey acted out of impatience. I accept Mr Ferris' submission that Mr McGarvey simply made an error of judgment in thinking that the Audi would stop normally even though it was out of control. However, in seeing that the Audi was out of control, Mr McGarvey needed to have reasonable consideration both for Ms King's safety and for the safety of the other occupants of both vehicles given that he acknowledged that it was an unpredictable situation. I do not put this on the basis of selfishness. Mr McGarvey was otherwise proceeding carefully and I acknowledge that slowing so as not to pass the Audi also involves an element of risk from the vehicles behind. Nevertheless, by passing a vehicle observed to be out of control, Mr McGarvey's conduct seems to me to be more blameworthy than Ms King's.
48. Doing the best I can on the basis of both the causative potency of the actions and the blameworthiness, I find that there was 60% contributory negligence on the part of Mr McGarvey.

#### Interim payment

49. The final matter to consider is the amount of the interim payment to award to the Claimant which has been agreed between counsel at £50,000. I queried at the remote hearing (which Mr Sanderson did not attend as it was focused on contributory negligence) whether this was a sufficient sum but have been reassured that it is sufficient for the time being, covering for example the appointment of a Case Manager to conduct an Initial Needs Assessment, and can be supplemented by requests for further interim payments supported by evidence as and when necessary. Accordingly, I approve the sum of £50,000 as an interim payment.