Neutral Citation Number: [2021] EWHC 97 (QB)

Case No: QB 2019 001 348

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 January 2021

Before:

HIS HONOUR JUDGE GARGAN
(Sitting as a Judge of the High Court)

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Between :

SABOOR GUL **(A child proceeding by his Father and Litigation Friend GHAFOOR GUL)**	**Claimant**
- and -	
(1) MR JAMES MCDONAGH **(2) MOTOR INSURERS BUREAU**	**Defendants**

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MR PAUL ROSE (instructed by **Sintons, Newcastle)**) for the **Claimant**
MR DAVID RIVERS (instructed by **Sintons, Newcastle**) as Junior Counsel for the **Claimant**
MR TIMOTHY HORLOCK QC (instructed by **Weightmans, Liverpool)** for the **Second Defendant**
The First Defendant playing no part in the proceedings

Hearing dates: 30th November and 1st December 2020

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Approved Judgment

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

The judgment was handed down at a hearing on 8th January 2021 held by CVP when the judge was sitting at Teeside Combined Court.

His Honour Judge Gargan :

(1) Introduction

1. The claimant was born on 16 February 2002 and is now 18. On 17 October 2015, aged 13 years and 8 months, the claimant sustained catastrophic injuries in a road accident when he was struck by a Ford Focus motorcar (the Focus) being driven recklessly by the first defendant.

2. The second defendant has been joined to the proceedings because it has a contingent liability to satisfy any judgment the claimant obtains against the first defendant who was uninsured. The first defendant has played no part in these proceedings.

3. The second defendant admits primary liability and judgment for damages to be assessed was entered against the first defendant on 11 September 2019.

4. The claim comes before the court for the trial on the question of contributory negligence as a preliminary issue.

5. The accident happened at about 13:35 on a Saturday afternoon and there were a number of people in the area, including a number of police officers. The witnesses are able to give evidence about the events leading up to the collision and about what happened in the immediate aftermath of the impact but no witness actually saw the claimant crossing the road and being struck by the Focus. Although the second defendant does not agree the evidence of the witnesses from whom the claimant has served statements it does not challenge that evidence and has not required the witnesses to attend for the purposes of cross-examination.

6. The claimant and the second defendant each appointed Accident Reconstruction Experts (ARE), Mr Blackwood for the claimant and Mr Sorton for the second defendant. The experts have prepared a Joint Statement in which they conclude that there are no significant areas of disagreement between them on the material issues and it has not been necessary to call them to give oral evidence.

7. Therefore, no live evidence has been called and the trial proceeded by way of submissions. I take this opportunity to thank counsel for the way in which they conducted the hearing.

(2) The law: basic principles

8. The starting point is section 1(1) of the Law Reform (Contributory Negligence) Act 1945 which provides:

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

9. Whether and, if so, to what extent a finding of contributory negligence should be made involves a balance of blameworthiness and causative potency: see **Davies v Swan Motor Co** [1949] 2 KB 291:

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

10. The test for negligence is objective. Where the court is asked to assess whether to make a finding of contributory negligence against a child the court does not apply the same standards as it would apply to an adult. The most helpful guidance as to the approach the court should take is set out in **Gough v Thorne [1966] 1 WLR 1387:**

10.1 **Lord Denning** at p.1390:

> "A very young child cannot be guilty of contributory negligence. An older child maybe. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age to be expected to take precautions for his or her safety: and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy."

10.2 **Lord Salmon LJ** at p.1391:

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

11. There is no hard and fast rule as to the age at which a child may be held to be guilty of contributory negligence-although counsel could find no reported cases in which a finding has been made against a child under the age of 8. When judging the actions of a child, the standard of care is to be measured by that reasonably to be expected of a child of the same age, intelligence and experience.

12. The claimant in this case was 13 and would have just started Year 9 at secondary school. He can properly be expected to have a degree of road sense-not as much road sense as an adult but considerably more than an 8 year old.

13. Having established the basic principles both counsel acknowledged that the Court of Appeal has repeatedly said that the fact sensitive nature of road traffic claims is such that comparison with other cases is rarely helpful. Nevertheless they have both cited a number of additional authorities to illustrate the way in which different facts have led courts to different outcomes. I will return to those cases once I have made my findings on the material facts.

14. Mr Horlock QC also draws the court's attention to Rule 7 of the Highway Code which provides as follows:

> "Crossing the Road
>
> 7.
>
> The Green Cross Code. The advice given below on crossing the road is for all pedestrians. Children should be taught the Code and should not be allowed out alone until they can understand and use it properly. The age when they can do this is different for each child. Many children cannot judge how fast vehicles are going or how far away they are. Children learn by example, so parents and carers should always use the Code in full when out with their children. They are responsible for deciding at what age children can use it safely by themselves…
>
> …
>
> D
>
> If traffic is coming let it pass. Look all around again and listen. Do not cross until there is a safe gap in the traffic and you are certain that there is plenty of time. Remember even if traffic is a long way off it may be approaching very quickly.
>
> E.
>
> When it is safe, go straight across the road, do not run. Keep looking and listening for traffic while you cross, in case there is any traffic you did not see and in case other traffic appears suddenly…"

(3) The first defendant's driving: An overview

15. The first defendant was 39 at the time of the accident. He had an extensive criminal record. On 8th September 2015 the first defendant was sentenced to 12 weeks imprisonment suspended for 12 months for making false representations in relation to Apple products. Immediately before the accident the first defendant was attempting to sell Apple products to passers-by on Uxbridge Road in Shepherd's Bush. As far as I am aware the first defendant has not been convicted of any offence in relation to this conduct but on balance of probability I find he was engaged in a further criminal enterprise.

16. The first defendant's conduct was reported to the police. The first defendant realised that the police were approaching him and made his way to the Focus which was parked on Caxton Road. He was confronted by police officer who opened the car door. In order to make good his escape the first defendant drove off with the door open and the front wheels spinning. The Focus then turned left from Caxton Road onto Bulwer Street where the accident occurred at its junction with Aldine Street. Despite colliding with the claimant and sustaining substantial damage to the windscreen on the driver's side the first defendant continued to drive away from the police, no doubt worried that if arrested the suspended sentence would be activated.

17. There is limited footage of the first defendant's driving before the accident and the accident locus is not covered. However, it is agreed that the first defendant was driving down Bulwer Street at over 40mph, even though it was subject to a 20mph limit.

18. As a result of the accident the first defendant was charged with causing serious injury by dangerous driving. The standard of his driving after the accident gave rise to a further charge of dangerous driving. The first defendant pleaded guilty to these offences and was sentenced to a total of 45 months' imprisonment, of which 30 months was imposed for the offence of causing serious injury.

19. I have been shown CCTV footage of the first defendant's driving after the incident. The sentencing judge, Mr Recorder Burton, described that driving as "*appalling … reckless and furious driving".* Counsel for the claimant has described it as "*egregious"* and counsel for the second defendant said it was variously "*atrocious", "irresponsible" "reckless"* and "*appalling"*.

20. The CCTV footage speaks for itself. However, for the purpose of the judgment I describe two post-accident incidents. After the accident the first defendant continued down Bulwer Road to its junction with Wood Lane at high speed and emerged over the give way lines without stopping, turning right and forcing his way into the moving traffic. In doing so, he narrowly avoided a collision with a 4x4 vehicle and a bicycle travelling in the opposite direction on Wood Lane. Later in the footage the first defendant approached a queue of traffic which had been stationary at a Pelican Crossing and was just setting off. The first defendant overtook that traffic by passing onto the opposite side of the road and, when faced with oncoming traffic, went onto the offside pavement to complete his manoeuvre. Having viewed the footage it is easy to understand the difficulties counsel faced in finding sufficiently pejorative adjectives to condemn the first defendant's driving.

21. However, when considering the comparative blameworthiness of the parties, I must consider the quality of the first defendant's driving at the time of the accident and not his subsequent behaviour.

(4) The claimant: an overview

22. The claimant's day started as a normal Saturday. His father was working in his shop from about 11:00 and the claimant went to the shop with him and got on with his homework. As part of his education the claimant used to visit a learning centre for English and Maths known as "Explore and Learning" a couple of times a week, usually on Saturdays and Sundays. This centre is based in the Westfield shopping

centre. The claimant would usually arrive at the centre at about 14:00. His father said that, on the day of the accident, the claimant set off to walk to Education and Learning at about 13:00.

23. The claimant's route involved leaving the shop by the back door, turning right from the shop and then turning left onto Aldine Street which he would follow to its junction with Bulwer Street. The claimant then needed to turn left onto Bulwer Street to reach the junction with Wood Lane where he would turn right. The claimant would usually cross Bulwer Street at the end of Aldine Street because he believed that the pavement on the further side of the road was bigger and, it seems to me, because he wanted to be on that side of the road when he reached the Wood Lane junction. The claimant was familiar with this route and had walked it with his father on "*lots of occasions*".

24. The claimant reached the junction between Aldine Street and Bulwer Street at about 13:37 and was hit by the Ford Focus as he was crossing to the opposite pavement.

25. The claimant suffered a very severe brain injury and was wholly unable to participate in the trial. Five years after the accident he has spastic/dystonic limb disorder. He is non-verbal and no consistent form of communication has been established. He is entirely reliant on others for his care.

(5) The accident locus

26. Bulwer Street runs east-west from Caxton Road to Wood Lane. It is a residential street with car parking available in marked bays on both sides of the street. Between Caxton Road and the junction with Aldine Street traffic can travel along Bulwer Street in both directions, east and west. Bulwer Street becomes a one way street to the west of its junction with Aldine Street. Therefore, traffic emerging onto Bulwer Street from Aldine Street can turn left or right. There is at least one "speed cushion" in the one way section of the road

27. There is a "built-out" section of the pavement on the western side of the Aldine Street/Bulwer Street junction which protects pedestrians and gives them a better view of any oncoming traffic. It is agreed that the claimant was crossing from this built-out section and was travelling north to the opposite pavement.

28. The carriageway, including the parking areas, is about 8.15 metres wide. The distance between the built out section of the pavement and the start of the marked parking bays on the north side of Bulwer Street is 4.6 metres and the gap between the lines delineating the parking bays on each side of the ride is around 3.65m to 3.8m.

29. The distance between Caxton Road and the built out pavement from which the claimant crossed is somewhere between 75m-77m. This represents the field of view which would have been available to both the claimant and the first defendant.

30. There are two sets of photographs in the bundle which show the general conditions clearly: the police photographs which were taken very shortly after the accident when the road was still taped off [690-720]; and the photographs taken by the second defendant's ARE, Mr Sorton at [536-544]. Mr Sorton has also produced a video of a vehicle driving the first defendant's route-albeit at an appropriate speed.

31. The photographs and the video show that, including the parking bays, Bulwer Street is only wide enough for 3 cars. Given the presence of parked vehicles care is needed when meeting oncoming traffic in the two-way section between Caxton Road and Arline Street. On his "drive-through" Mr Sorton was faced with a car coming straight towards him as each were passing vehicles parked to their nearsides. Mr Sorton had to wait until the oncoming car had passed the parked vehicle and pulled over into the parking bay to its nearside, freeing the centre of the carriageway for him to proceed.

32. The police photograph at [694] shows a pair of headphones on the roof of a VW Sharan parked in the if northern parking bay just to the west of the junction with Arline Street. The headphone lead can be seen just east of the rear offside wheel of a Seat parked in the southern parking area further west on Bulwer Street. There is no direct evidence to show whether these were the claimant's headphones or whether he was wearing them at the time of the accident. I consider these questions further later in the judgment.

(6) The issues

33. Mr Rose has identified eight questions which he invites the Court to address in order to reach its conclusion. I adopt the first five issues which are as follows:

    (i) What was the appropriate speed to drive along Bulwer Street;

    (ii) At what speed did the first defendant drive along Bulwer Street;

    (iii) At what speed did the Focus strike the claimant;

    (iv) How far across Bulwer Street was the claimant when he was struck by the Focus;

    (v) How long had the claimant been in the carriageway before he was struck.

34. Mr Rose QC suggests that the next question should be:

    (vi) Can the second defendant prove on the balance of probabilities any of the factual allegations contained in sub paragraphs 7(a) to (h) of the Defence.

35. Mr Horlock QC argues that this would be to adopt an overly technical approach to the pleadings in what is a running-down claim, albeit one in which the most severe injuries have resulted. He suggested that the next question should be:

    Has the second defendant satisfied the court, on balance of probability (the burden being on it to do so), that the claimant was at fault.

36. I prefer Mr Horlock QC's approach on this issue as the second defendant was not seeking to rely on each of the pleaded allegations but to argue that the claimant was negligent in failing to keep a proper look out in the sense that:

    36.1 he failed to look to his right as he approached the edge of the pavement and/or failed to appreciate the speed at which the Ford Focus was travelling;

36.2 he failed to look to his right before stepping off the pavement to cross the road and/or failed to appreciate the speed at which the Ford Focus was travelling;

36.3 having started to cross the road, he failed to keep an eye on the Ford Focus as it approached.

37. Counsel agreed that the next issue for me to determine was whether any such fault on the part of the claimant had contributed to the accident or his injuries. The second defendant's case is that had the claimant seen or properly appreciated the speed of the Ford Focus before setting off he should not have crossed the road; whilst, even if he had set off, he could have quickened his pace and reached safety if he had kept an eye on the Focus as he was crossing.

38. Counsel also agreed that the final issue was whether it is just and equitable to reduce the claimant's compensation as a result of any such negligence on the part of the claimant and, if so, to what extent the court should do so.

(7) What was the appropriate speed to drive along Bulwer Street

39. The parties accepted that the speed limit of 20mph on Bulmer Street represented the maximum speed at which a driver should travel and that it did not mean that it was safe to drive at that speed in all conditions. Speed limits are not a target and a driver must adapt to the prevailing conditions.

40. Bulwer Street is in a residential area and is close to main roads and the Westfield shopping centre. As this was a Saturday afternoon a driver should expect there to be a number of pedestrians out and about, including children. It was not unlikely that there would be traffic coming in the opposite direction on the two-way stretch of Bulmer Street and that one of the drivers would have to give way to let the other pass.

41. PC Grogan was asked to drive the route at a similar time of day on Saturday 19th December 2015. Having done so he expressed the view that the appropriate speed at which to drive down Bulwer Street was “20mph or less” given the parked vehicles and the risk that other cars might emerge from the junction with Aldine Street or other concealed entrances.

42. Analysis of the CCTV footage from the camera in the BPP University building enabled Mr Baker (who analysed the footage on behalf of the claimant) to calculate that two other vehicles driving along the street about a minute before the first defendant were travelling at about 15 mph.

43. Mr Blackwood dealt with this issue in his report at [98] where he acknowledged that this was ultimately a matter for the court but suggested that it would "*be reasonable to consider speed in the region of 15 mph as a more appropriate speed, given the locus topography. Such a synopsis is supported by the vehicles proceeding the Ford and the general opinion proffered by Constable Grogan*".

44. I do not consider that PC Grogan's opinion provides quite the degree of support for a finding that 15 mph was the maximum safe speed on this road for which Mr Blackwood and Mr Rose QC contend. In reality, PC Grogan's statement says little

more than that vehicles should travel at or below the speed limit-which is really not contentious and which I accept.

45. However, looking at all the circumstances, I consider that the reasonably safe speed to drive along Bulwer Street would have been less than 20mph and the speed adopted by the two other drivers to pass the CCTV camera around the time of the accident provide as good a guide as any to the speed at which a reasonable driver could be expected to travel. Therefore, on balance, I accept that 15mph was the reasonable speed at which to travel along the road.

(8) Issues 2 and 3: The first defendant's speed

46. There is limited eye-witness evidence about the first defendant's speed before the accident. Mr Bendehina, a delivery driver, saw the Focus set off in Caxton Road said that it "*shot down the next left hand side road at speed. I say at speed because it was faster than other cars go".*

47. Mr Jones saw the Focus on Bulwer Street. He was parked on the southern side of Bulwer Street outside "Defector's Weld". These premises are not shown on the scale plan or in the photographs. However, Mr Jones makes clear that he was parked west of the junction with Aldine Street and, given his evidence about the Focus swerving about 10 car lengths behind him, it is likely that he was about 10 car lengths west of the point of impact. Mr Jones was sitting in his car with his three children waiting to drop-off his 10 year old daughter, Mia, at her ballet lesson. He checked his wing mirror because his daughter wanted to get out of the car. On doing so, Mr Jones saw the Focus coming from Caxton Road and "travelling fast" towards him. Because of the way the car was being driven he continued to observe it in his mirror until it reached him from which point he followed its passage along Bulwer Street through the windows of his car.

48. Although, Mr Jones described the Focus swerving to the left when it was about 10 car lengths behind him he did not notice the claimant or that he had been knocked down until after the first defendant had turned onto Wood Lane at which point Mr Jones looked back and saw the claimant lying in the road. Mr Jones's statement is undated but it was probably made at the scene or with a few weeks of the accident. I am satisfied that Mr Jones was doing his best to describe events which were fresh or fairly fresh in his mind. I accept that he kept his eye on the Focus because of the remarkable way which was being driven and that he could hear the vehicle as it was travelling towards him.

49. Mr Jones mistakenly thought the speed limit was 30 mph but reckoned that the Focus was going at least 40 mph "*due to hearing the engine/acceleration and the car looking as though it was going as quick but i thought he was being chased by the police*." Estimating the speed of a vehicle that you can only see approaching in your wing mirror is widely recognised to be very difficult. It is to be noted that Mr Jones' estimate agrees with the calculations of the ARE.

50. There were three pedestrians on Bulwer Street at the time of the accident, Harrison Howarth and his girlfriend Amelia Firth who lived together at No 38 and Ms Firth's sister, Leigh Hawkins, who was staying with them for the weekend. They had walked up Bulwer Street from its junction with Caxton Road, using the pavement on the

southern (left) side of the carriageway until they reached Nos 28/30 which are near to the junction with Aldine Street. Dr Howarth (who was then a medical student but has now qualified) crossed to the northern pavement at that point, slightly ahead of Ms Firth and Ms Hawkins. None of the three witnesses noticed any cars coming as they crossed the road. According to his contemporaneous police statement, Dr Howarth had reached No 34, directly opposite BPP's premises, when he heard sounds of tyres screeching, followed by a huge crash and something hitting a car. On turning round, Dr Howarth saw the claimant "*at least 2 m in the air*". The claimant fell and landed on Dr Howarth's Kawasaki motorcycle which was parked at right angles to the pavement and knocked it into the rear of the Audi parked next to it. Dr Howarth then heard the sound of the car engine accelerating and estimated its speed as being at least 60 mph. He justified this estimate on the basis that he had been driving for six years and riding a motorcycle four years. He also said that he had experience of sitting in traffic on a 40 mph road whilst vehicles in the opposite lane moved freely and in his experience the Focus was travelling much "quicker than that". He concluded, "*I have never seen other cars travelling that fast along Bulwer Street*". As a trainee doctor, Dr Howard then concentrated upon trying to assist the claimant.

51. Ms Firth does not appear to have made a statement to the police. Her witness statement is dated January 2020, over 4 years after the accident. Ms First was not aware of the Focus before the collision. She said that she first became aware of the incident when she heard a very loud noise behind her "*which was like a car crashing*". As she turned round she heard "*the sound of a car driving away from us at speed*" and saw "*what I now know to be Saboor's backpack and his body fly into the air*". Ms Firth described the Focus as being driven "*significantly faster than any car I have ever seen travelling down Bulwer Street or any residential street for that matter*".

52. Leigh Hawkins made her statement to the police on 19 November 2015. Her evidence was that she was almost at No 38 when she heard a "*loud screech followed by a bang and more screeching*" and turned round and heard Ms Firth scream "Oh my God, Oh my God". She recalls seeing the claimant "*falling from the sky*" from a height above the parked car. She did not see the Focus.

53. It follows that the only witness to have seen the Focus immediately before the accident was Mr Jones.

54. As noted above, Mr Jones' assessment chimes well with the calculations of the ARE. The experts have calculated the minimum speed of the Focus using the distance over which the claimant's body was projected. From these measurements they agree that the impact speed would have been not less than 35 mph. Both experts agree that this calculation underestimates the impact speed because the distance travelled by the claimant was reduced by his collision with the motorcycle. Adjusting for that factor, the experts agree that the impact speed was likely to have been about 40 mph.

55. The experts also agree that the first defendant probably braked before the collision. This is consistent with Dr Howarth's evidence that he heard a "*loud screech followed by a bang*" and with Ms Hawkins police statement that she heard "*a loud screech followed by a bang and more screeching*".

56. It follows that the Focus must have been travelling towards the claimant at a speed greater than 40 mph. It is not disputed that for every 0.5 of a second of breaking a vehicle loses about 7.5 mph. Mr Rose QC argued that the speed of the Focus before the brakes were applied must have been in the region of 45 mph. In my judgment this is a reasonable assessment and I accept that this represents the likely approach speed before the brakes were applied.

57. The immediate post-impact speed of the Focus has been calculated at around 35 mph using the CCTV footage from the BPP building. This calculation broadly supports the ARE's conclusions.

58. Therefore, I find that:

58.1 the vehicle's approach speed was about 45 mph;

58.2 the speed at the point of impact was about 40 mph;

58.3 the immediate post-impact speed, following further breaking and the slowing due to the impact itself, was about 35 mph;

58.4 after the impact the first defendant accelerated away down Bulwer Street towards the junction with Wood Lane. I think it likely that he reached speeds of 40-45mph after the accident and prefer Mr Jones' assessment which proved to be more or less accurate in relation to the pre-accident speed that Dr Howarth's somewhat faster estimate.

(9) Issues 4 and 5: The claimant's movement across Bulwer Street

59. In the absence of eyewitness evidence about the claimant's approach to the junction or about where and at what speed he attempted to cross the road the court must rely upon the conclusions of the ARE and draw such inferences as are appropriate.

60. The police photographs show debris scattered across the road over a distance of just less than about 25 m. Mr Sorton explains that as a general rule debris released from a motor vehicle at impact will be projected along the vehicles direction of travel: §178 at [517]. How far such debris is projected depends on the speed of the vehicle, the weight and size of the debris in the height from which it is released. Mr Sorton concludes that, "… *although it is probable that some of the fragments of glass would have come to rest very close to the point of impact, none of that material would have been displaced in an easterly direction and therefore, the point of impact would have been located immediately to the east of the beginning of the glass debris field.*": §180 at [518]. Mr Blackwood (for the claimant) considered that the point of impact was coincidental with or just east of (i.e. just before) the start of the debris. The experts accept that the distinction between them makes no material difference and I find that the point of impact was at the start of the debris field.

61. Mr Sorton has prepared a scale plan: [547A]. A red line running north-south across Bulwer Street is marked as "Reference Point" shows the point of impact which is about 5.85m west of the centre of the junction with Aldine Street. Mr Rose QC adopted this in his submissions and Mr Horlock QC accepted that it was appropriate

to do. I find that this marks the route taken by the claimant on the point of impact. It is not surprising that the crossing point is where the carriageway is at its narrowest.

62. There is a disagreement between the experts as to how far the claimant had travelled from the kerb before the collision. However, the difference is only 30cm with Mr Blackwood calculating that the claimant had travelled 3.2m and Mr Sorton 3.5m. The experts agree that this difference can be explained by minor differences in their respective measurements of the width of the carriageway and in the precise point of impact on the Focus, which is agreed to be to the front offside. The experts do not consider these differences in view are material and both agree the claimant would have taken about 2.1 seconds to travel to the point of impact.

63. Given the position of the scuff marks on the front bumper of the Ford Focus, the claimant would have needed to travel only 30cm further to have successfully cleared the path of the car.

64. The experts agree that the claimant's momentum would have carried his upper body clear of the front windscreen if he had been running at the point of impact. Given the damage to the front windscreen, the experts conclude that the claimant was probably walking at the point of impact. It is worth noting that this is consistent with the self-serving statement provided by the first defendant when interviewed by the police in which he described that claimant as "stepping off" the kerb rather than running across the road-although I attribute little weight to that statement. I accept that the experts' conclusions.

65. The experts have assumed a walking speed of 1.69 m/s-the 50th percentile walking speed for adult males. On this basis it would have taken the claimant 0.18 second to cover the 30cm distance which would have taken him out of the path of the car. If the claimant had increased his speed then, on balance of probability, he would have avoided the impact.

66. There was some dispute between counsel about the position of the Focus when the claimant started to cross the road. Mr Horlock QC suggested that the Focus would have been approximately level with the front of the Volvo estate parked on the northern side of the street as shown in the photograph at [542]. Using the scale plan, Mr Rose QC argued that the Focus would have been a little further away from the claimant when he crossed. Given an approach speed of 45mph Mr Rose QC argued that the vehicle must have been about 42 m away when the claimant began crossing. This would put the Focus about level with the western edge of the first parking bay on the southern side of the road: see [547A]. On reflection, Mr Horlock QC accepted this proposition. Using a reference point on the plan, which is more easily identified in the photographs, this places the Focus just to the east of the small tree on the northern footway. This tree can be seen in the photograph at [542] between the Volvo estate and the silver Vauxhall parked in front of it. The position of the tree can be seen more clearly in the photograph at [537] which gives the view which would have been available to the first defendant. The driver's view can be seen as Mr Sorton approaches this position between about 1:34 and 1:38 on his video recording.

67. Mr Sorton has produced photographs showing the view available to a pedestrian at 6m and 2m back from the edge of the kerb: see [540 and 541]. Mr Sorton's photographs show a silver people carrier in the parking bay to the south-east of the

junction which restricts the pedestrians view of approaching cars. The police photographs show that, at the time of the accident, there was a Fiat 500 parked immediately to the south-east of the junction. The Fiat is nearer the junction than the people-carrier. In my judgment, it is unlikely that the claimant would have been able to see the Focus if he had looked to his right when 6m back from the kerb. Looking at the photograph at [541] I consider that the Fiat 500 would have obscured the claimant's view of the Focus at 2m back from the kerb and that it is unlikely that he would have been able to see any more than the front offside corner of the vehicle. However, his view would have then improved as he approached the kerb by which stage the view was clear.

68. This is a useful point at which to deal with the first defendant's ability to stop when he saw (or should have seen) the claimant. The experts agree that the accident would not have occurred if the first defendant had been travelling at 20mph because the claimant would have been able to cross to safety before the Focus reached him. Equally the first defendant would have been able to stop well before the point of impact if he had been travelling at 20mph and braked when the claimant left the kerb.

69. In order to give these figures some context Mr Rose QC points out the following calculations which are not challenged:

    69.1 If the first defendant had been driving at the safe speed of 15mph when the claimant crossed the claimant would have been able to cross from the southern kerb to the northern parking bay in 2.87 seconds, about 3.3 seconds before the Focus reached the point of impact. Therefore he would have made it to the opposite pavement in good time;

    69.2 The claimant would have made it to safety if the Focus had been travelling at 25mph and would probably have done so if it had been travelling at 30mph.

Was the claimant was at fault

70. I consider first whether the claimant was negligent in failing to observe the Ford Focus on his approach to the kerb edge.

71. There is no direct evidence about whether the claimant looked to his right as he was walking up to the crossing point. However, most people walking towards the edge of a pavement on their way to crossing a road will look to their right before reaching the edge of the kerb. The claimant had taken this route on many occasions and his father trusted him to make the journey on his own. Further, although there is no direct evidence on the issue, at the age of 13 and as a pupil in Y9 I think it likely, and find on balance, that the claimant was used to being out and about on his own and crossing the road. Therefore, on balance, I think it likely he would have taken the natural step of looking to his right on his way towards the pavement edge.

72. As set out above, the photographs show that the claimant would not have been able to see the vehicle when he was 6m away from his crossing point. Any view of the Ford Focus when he was 2m away from the junction would have been (at least partially) obscured by the presence of the Fiat 500. I do not consider that any pedestrian, still less a 13 year old, could be criticised for failing to make an accurate assessment of the vehicle's speed at that point.

73. Further, I do not consider that it would be negligent on the part of an adult pedestrian, still less a 13-year-old pedestrian, to fail to look to their right before reaching the kerb. Failing to do so is not negligent provided that the pedestrian makes a proper check to their right before stepping off from the kerb.

74. Therefore, I do not consider that the second defendant has made out its first allegation of fault.

75. I then turn to look at the position immediately before the claimant crossed the road. Again, there is no direct evidence about what the claimant actually did. However, in my judgment, it would be surprising if the claimant crossed the road without looking at all. For the reasons set out in paragraph 71 above, I find that the claimant looked to his right to check for traffic before setting off across carriageway. The defendant has failed to prove, on balance, that the claimant failed to do so.

76. When the claimant looked to his right he will have had a clear view of the Focus which (at the time he set off) would have been between the front of the Volvo and the rear of the Vauxhall on the photograph [542], slightly east of the small tree.

77. There is an issue as to whether the sound of the Focus's approach should have alerted the claimant to the speed at which it was travelling. The witnesses Howarth, Hawkins and Firth do not seem to have been aware of the vehicle approaching until they heard the screech immediately before the collision. On the other hand, Mr Jones who had been watching the Focus, said that he could hear "the acceleration of the car and the engine" even though he was in his car which was parked to the west of the junction. The evidence shows that the Ford Focus was accelerating hard and I find it is likely to have been revving hard in a low (numbered) gear. It was a fine, dry day and there is no reason why the sound of the vehicle should not have carried to a pedestrian on the western corner of the junction with Aldine Street. Therefore, in the absence of some other explanation, I would have expected an adult in the claimant's position to have heard the Focus and realised that it was being driven in an unusual manner.

78. However, the evidence suggests that the claimant did not hear the first defendant's approach. If the claimant had heard the Focus approaching when he was crossing the road I would have expected him to turn and look at it and then to have accelerated in such a way that he travelled the extra 30cm to safety.

79. The claimant had suffered an injury to his left ear when playing rugby. On 8 October 2015 he visited his GP and complained of difficulties hearing in his left ear after being struck by another player's arm. On examination the GP diagnosed a perforated tympanic membrane (eardrum) and advised a review in two weeks. I accept that this injury probably affected the claimant's hearing but I find it unlikely that it would have prevented him from hearing the approach of the Focus which was coming from his right.

80. There is no direct evidence that the headphones found on top of the VW Sharan, together with the lead found behind the Seat motorcar, belonged to the claimant. However, the headphones appear in good condition. It is unlikely that they had been in the street for very long. It would be an extraordinary coincidence if some other person had happened to lose their headphones and lead in the very place where debris

from the claimant's accident was found. I reject that possibility and, on balance, I am satisfied that these were the claimant's headphones.

81. There is no direct evidence that the claimant was wearing these headphones as he crossed the road. Mr Rose QC suggested that they might have been in the claimant's backpack-that backpack being identified in Ms Firth's statement. I do not find Ms Firth's evidence particularly persuasive on this issue given that she did not make her statement until 2020 and given that there is no reference to a backpack in the other statements or the police photographs. Whether the claimant had a backpack or not I consider it more likely than not that the claimant was wearing his headphones and that they prevented him from hearing the approach of the Focus. In my judgment this is the most likely explanation for the claimant's surprising failure to be aware of the car's approach as he made his way over the carriageway and break into a run.

82. Mr Horlock QC did not argue that the claimant was negligent in wearing headphones. In my judgment this was a sensible concession. A random glance around a group of pedestrians on any street shows that a considerable proportion of the younger pedestrians (and some older ones) are wearing headphones. However, when a person who is wearing headphones attempts to cross a road it becomes more important for them to take a careful look at the traffic because they cannot rely upon their hearing to warn them of danger.

83. The central question is whether, given his clear view of the Focus when it was about 42m away, the claimant should have appreciated that it represented a potential danger to him if he crossed.

84. Mr Rose QC points out that, when he appeared before the Crown Court for sentence, the first defendant accepted that he was wholly to blame for the accident. Whilst this is obviously helpful for the claimant it is not determinative. The admission must be placed in context. The first defendant was seeking to express remorse for his conduct in the hope of a more lenient sentence. An allegation that the claimant was partially to blame was unlikely to help him. His comment at the sentencing hearing can be contrasted with the self-serving statement presented in interview where he sought to deflect blame by saying "*I admit that I did knock the young lad down but this was an accident. I was not driving dangerously. The pedestrian stepped off the path in front of me"*. Ultimately, the first defendant's views are not persuasive and I must apply my own judgment to the facts.

85. Mr Rose QC referred me to the decision of HH Judge Freedman in **Craven v Davies** [2018] EW HC 1240 (QB). The principal issue in that case was the claimant's dependency upon her deceased husband who was killed in a collision which occurred when he was crossing the A45 in Coventry. However, the judge also had to consider the question of contributory negligence. The Audi vehicle which struck Mr Craven was travelling at 86 mph where the speed limit was 40 mph. The accident occurred at 1am. The deceased had started crossing when the Audi was over 200m away. If the Audi had been travelling within the speed limit the deceased would have had about 12 seconds to cross the southbound dual carriageway to the central reservation. At normal walking pace that journey should have taken the deceased about 6.5 seconds. The learned judge held that it was not unreasonable for the deceased to set off in those circumstances. Further the judge held that the deceased should not be criticised for his failure to avoid the oncoming vehicle once he had started crossing as there would

have been insufficient time for him to reach a point of safety once the speed of the vehicle became apparent. Mr Rose QC argued that the claimant was even less culpable than Mr Craven as: (i) the Audi was travelling at just over twice the safe speed for the A45 whilst the Ford Focus was travelling at about three times the safe speed for Bulwer Street; and (ii) Mr Craven's actions had to be judged against the standard of a reasonable adult whilst the claimant's decision must be judged against the standard of a reasonable 13 year old.

86. Mr Rose QC also referred to the decision of Yip J in **Ellis v Kelly** [2018] EWHC 2031 (QB). The claimant, Caine, was 8 years 8 months old. Caine's mother had allowed him to go to the local park provided that he was accompanied by one of his two older cousins. At some point Caine set out on his own to join his older cousin at a skatepark, despite being warned by his other cousin not to do so. Caine managed to make his way to the skatepark successfully crossing a local road on a zebra crossing. On making his way back from the skatepark Caine saw the defendant's car approaching the zebra crossing. The car was travelling at about 40 mph despite the 30 mph speed limit. Although Caine saw the car, he ran diagonally towards the zebra crossing. Caine left the pavement before the crossing and the impact occurred when he was between the studs which marked the outer point of the crossing and the zebra crossing itself. The accident reconstruction evidence showed that the defendant could have reacted and stopped before his vehicle struck the Caine, albeit that doing so would have required heavy braking. Yip J held that the safe speed for travelling along this section of road was no more than 20 mph and that the defendant was therefore travelling at twice the safe speed. The learned judge stated that:

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> …I find that (the defendant) was travelling in a manner that was outside Caine's experience and anticipation… Caine looked straight at the car but carried on running. The inference is that he misjudged the car's speed and/or distance. The fact that Caine was crossing in the vicinity of a crossing is also an important distinction [from the claimant in the case of AB v Main where a child of 8 years 10 months was found to have been contributorily negligent].
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> …
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> Therefore, the only reasonable inference is that he believed the car would stop at the crossing for him. That involved misjudging the car's capacity to stop in time. The Green Cross Code confirms that "Many children cannot judge how fast vehicles are going or how far away they are". It seems to me that it is even more difficult for a child of 8 to judge the stopping distance for a car so as to understand that while the car should stop at the crossing it may be travelling at such a speed that it is unable to do so in time.
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> I find that this was a case of momentary misjudgment on Caine's part balanced against reckless conduct on the part of the defendant, whose driving was outside Caine's expectation based on his understanding and experience. In my judgment it would not be just and equitable to make a finding of contributory negligence in the circumstances and I decline to do so."

87. Mr Rose QC argues that this case is on all fours with **Ellis** in that: (i) the speed of the Focus in this case was equally outside the claimant's expectation and experience being three times the safe speed; (ii) any error on the claimant's part was a momentary misjudgment which must be balanced against the reckless conduct of the defendant who was fleeing from the police; and (iii) in the circumstances it would not be just and equitable to make a finding of contributory negligence.

88. However, in my judgment, both **Craven** and **Ellis** can and should be distinguished. Firstly all such cases are fact specific. In **Craven**, the deceased had to assess the speed of the Audi at night when it was 200m away. In my judgment it is much easier to assess the speed of an oncoming vehicle which is only about 42m away in daylight and which was clearly visible. Further, HH Judge Freedman found that there was insufficient time for the deceased to reach safety once he should have appreciated the speed of the vehicle whilst in this case the additional difference that the claimant had to travel was very short. Further, in my judgment, the degree of road sense that might be expected of the 8 year old in **Ellis** is very different from that which might be expected of a 13 year old. Further, it is significant in **Ellis** that the claimant was heading towards a zebra crossing.

89. The witnesses who saw the Focus comment upon how badly and how fast it was being driven. In my judgment that should have been apparent to a reasonable adult who had made an appropriate assessment of the dangers he faced in crossing the road. I then have to consider whether a reasonable 13 year old with the claimant's experience should be expected to have made the same judgment. I accept that many children cannot judge how fast vehicles are going or how far away they are. However, at 13, I consider it likely that the claimant would have experience of crossing roads on his own, even roads where traffic might be going at 40mph. It would be wholly wrong to expect the claimant to have been able to estimate the precise speed of the Focus. However, in my judgment a reasonable 13 year old making a careful assessment would have realised that the Focus was being driven much faster than usual. Further, although the claimant did not have far to go, I consider that a reasonable 13 year old would have considered that the Focus represented a source of potential danger and would have waited for the Focus to pass. Further, even if a reasonable 13 year old had set off, I consider that they would have kept the Ford Focus under observation so that, if necessary, they could hurry across the very short distance.

90. Mr Rose QC argues that expecting the claimant to keep the Focus under observation is a counsel of perfection and unreasonable given that the claimant had also to check whether any vehicles were approaching from Aldine Street.

91. I do not consider it realistic to argue that the claimant would have been checking for vehicles coming from Aldine Street. Any vehicle from Aldine Street that was likely to affect the claimant's decision to cross would have been drawing up alongside him before he set-off from the kerb. Further, in order to check whether there was any relevant traffic on Allen Street the claimant would have had to look to his right over his right shoulder which should have brought the Focus into view. I do not accept that the claimant was distracted from the Ford Focus by the need to check the position on Allen Street.

92. As part of his submissions on this issue Mr Rose QC invited me to watch the video footage of Mr Sorton's drive through and in particular the footage from about 1:35 to 1:45 which shows a young woman, who appears to be an adult, crossing the road from the eastern side of the junction with Aldine Street-therefore closer to the traffic coming from Caxton Road than the crossing position adopted by the claimant. The woman emerges at about 1:36/37 when Mr Sorton's car was alongside the parked Toyota the front of which marks the position of the Focus when the claimant set off. The woman does not look to her right as she is crossing and is walking west on the northern pavement by the time Mr Sorton reaches her. Mr Rose QC argues that this woman's conduct should be taken as an indication of the standard of behaviour to be expected of a reasonable adult. Therefore, given that she was crossing from a point nearer the oncoming traffic, it should not be considered negligent for the 13 year old claimant to have failed to keep the Focus under observation.

93. However, the crucial differences between the position of the claimant and the young woman in the video are that:

    93.1 At the time the young woman set off Mr Sorton was moving very slowly because his route ahead was blocked by an oncoming vehicle;

    93.2 When the claimant set off there was nothing between him and the Focus which was travelling at about 45mph and which he should have realised was travelling unusually fast.

94. In those circumstances I do not regard is as a counsel of perfection to expect the claimant to have kept his eye on the Focus. A pedestrian is expected to keep looking and listening for traffic whilst crossing. If the claimant elected to cross given that he should have realised the Focus was approaching unusually quickly then I consider it reasonable to expect him to have kept it under observation, even taking into account his age.

95. This deals with both the second and third scenarios put forward by Mr Horlock QC. I conclude that a reasonably careful 13 year old would and should have waited for the Focus to pass. Further, even if they did sent off, I consider that a reasonable 13 year old, realising that the Focus was travelling unusually quickly, would and should have kept his eye on it as he crossed.

96. In my judgment the claimant should have waited for the vehicle to pass. Further, if he elected to cross he should have kept his eye on the vehicle as he did so. If the claimant had adopted either of these courses the accident would have been avoided either because he would have remained on the southern pavement or because, having

started to cross, he would have been able to accelerate and reach safety as the Focus approached.

What if any reduction should be made?

97. In determining what reduction it is just and equitable to make on account of the claimant's contributory negligence, it is necessary to evaluate the relative degree of blameworthiness and causative effect of the acts and omissions which constitute negligence on the part of the claimant and the first defendant respectively.

98. It is generally expected that a court will impose a high burden on drivers of cars to reflect the fact that a car is potentially a dangerous weapon. The first defendant's driving in this case was particularly egregious. His speed excessive, the risk of injury obvious and his motivation the desire to avoid arrest. Insofar as the claimant could see the defendant so too the defendant could see the claimant and could and should have slowed down. It would not have taken much adjustment on the part of the defendant to allow the claimant to complete that final 30cm across the road. The causative potency of all these factors is extremely high and must weigh heavily against the first defendant.

99. Mr Rose QC argues that even if the claimant's conduct was culpable the first defendant's conduct was so extreme that it is not just and equitable to make any reduction in the claimant's compensation. Mr Horlock QC suggested a reduction of 25% in his skeleton argument. However, in his oral submissions he accepted that such a deduction was too great on the facts of this case and suggested that the appropriate bracket was in the region of 10% to 20%.

100. Whilst deeply sympathetic to the claimant, I do not think his culpable misjudgment can be wholly ignored. However, when balanced against the conduct of the first defendant it falls very much at the lowest end of the scale suggested by the second defendant. I consider that the just and equitable reduction in all the circumstances of this case is 10%.

Conclusion

101. As a result of my judgment, liability for the accident will be apportioned 90:10.

11th December 2020

HH Judge Mark Gargan