



Neutral Citation Number: [2022] EWHC 1411 (QB)

Case No: QB-2018-004684

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th June 2022

Before:

HHJ SHETTY
(sitting as a judge of the High Court)

Between:

SANDRA ZANATTA
- and -
METROLINE TRAVEL LTD

Claimant

Defendant

Mr Andrew Roy (instructed by **Anthony Gold**) for the **Claimant**
Ms Anastasia Karseras (instructed by **BLM**) for the **Defendant**

Hearing dates: 23rd, 24th, 25th and 27th May 2022

Approved Judgment

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

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 8 June 2022.

HHJ Shetty:

INTRODUCTION

1. This case concerns a claim for damages made by the Claimant against the Defendant arising from a road traffic accident that occurred on 17th November 2015 at around 0740. The trial before me has concerned the issue of liability only. I have heard evidence from two experts in accident reconstruction instructed by the Claimant and Defendant respectively but there has been no live evidence from any eye witnesses to the accident.
2. The Claimant is a Brazilian national who had only arrived in the UK a few weeks prior to the accident. She was living at 238 Chamberlayne Road, Kensal Rise, London, NW10 which is situated close to the corner of Phillimore Gardens. At the accident location, Chamberlayne Road, runs in a roughly north westerly direction. It is not disputed that the Claimant was intending to cross from the west side on the north corner of the junction of Chamberlayne Road with Phillimore Gardens to the east so as to take a bus to the train station for the purpose of work. At the time of the accident there were some utility works going on which meant that a number of areas on the pavement had excavations and barriers around them.
3. The Defendant's employee, Mr Abdulla (sadly now deceased), was driving a number 6 double decker bus in a northerly direction along Chamberlayne Road. This was a route he was familiar with. The accident location was in a built up residential area where the speed limit at that time was 30mph. He had around 12-30 passengers on the bus.
4. At around 0742, the Claimant entered the northbound carriageway and stepped into the bus's path. She had not looked in the direction of the bus's approach.
5. Mr Abdulla braked and swerved to the right colliding with a traffic island and with the Claimant almost simultaneously. As a result of the collision, the Claimant sustained severe injury.
6. There was no forensic collision investigation by the police beyond them attending, interviewing Mr Abdulla and taking some accounts from witnesses. As a consequence there is no forensic evidence as one would sometimes find in road traffic accidents from skid marks, throw distance of the Claimant or other physical evidence. Although there was a telematics system on the bus, it would appear that this was not functioning, and similarly no CCTV footage from the bus was recoverable as it appears that the collision might have affected the hard drive. All of these factors have made the job of accident reconstruction and fact finding much more difficult for the experts and the court.

THE ALLEGATIONS OF NEGLIGENCE AND THE ISSUES

7. In written closing submissions, Mr Roy, Counsel for the Claimant, has summarised the Claimant's case into the following paragraph (Page 1, paragraph 5):

"the Defendant's driver Mr Abdulla, having identified her as a potential hazard some 90 metres away, should have placed himself in a position to take effective action if she

stepped into the road (i.e. should have placed himself in position to stop in time) and/or sounded his horn.”

8. The defence case is quite simply the contrary. They aver that the Defendant’s driver did not identify the Claimant as a hazard as opposed to noting her presence on approach. Further, the Claimant only became a hazard/potential hazard when she stepped out into the road at such a point and time that it gave Mr Abdulla insufficient time and space to avoid a collision at the speed he was going. The Defendant specifically denies that the use of a horn on approach was reasonable or necessary. Such an expectation would imbue any driver with the need to sound the horn whenever there was any pedestrian within range who could walk into a road unexpectedly.

THE PRINCIPLES OF LAW AND THE COURT’S APPROACH

9. It is worth remembering that there is always a danger in being overly analytical and scientific when trying to reconstruct the facts of an accident.
10. In *Clayton v Lambert* [2009] EWCA Civ 237, Smith LJ made some important observations about fact finding:

“[35] Before leaving this case, however, I wish to add a few words about the process of fact-finding which the judge adopted. It is always difficult for a judge to find facts when there is a paucity of eye-witness evidence as there was here. In such circumstances, the judge may have to draw inferences and may also wish to rely on reconstruction experts and the calculations which they encourage. However, there is a danger in such a process that the judge may be led into making findings of fact of unwarranted precision. Here, for example, the judge made a finding that the motorcycle was approaching at 80mph. He did not find that the speed was in a range of say, something between 75mph and 90mph. He plumped for a specific speed, based on very limited material from which he was able to draw inferences....

[36] My concern is that this degree of precision was not warranted by the evidence. The evidence relating to the speed of the motorcyclist was very limited; eye witnesses described him driving very fast.

[37] These “guesstimates” treated as secure findings of fact could easily lead to an unjust result either way...

[39] The only point I wish to make is that there is a danger of doing injustice if judges make unwarrantedly precise findings of fact. Of course, if the evidence warrants a precise finding of fact (on the balance of probabilities) that makes the judge’s judgment easier. If there are inherent uncertainties about the facts, as there were here, it is dangerous to make precise findings. This may well mean that the party who bears the burden of proof is in difficulties. But that is one of the purposes behind a burden of

proof; that if the case cannot be demonstrated on the balance of probabilities, it will fail.”

11. These observations by Smith LJ are particularly pertinent in this case due to the circumstances and the absence of certain pieces of evidence which I have alluded to. There is undoubtedly a paucity of eye witness evidence that can be tested in court.

12. In the context of this case, I would also add the following things. In a serious injury case, it is not unusual for there to be no evidence from the Claimant as to what happened. However, in this case, there is a further component missing from the evidential pool and that is live evidence from Mr Abdulla and/or any other witness of fact. Whilst Mr Abdulla has given various accounts in the past, his evidence has not been tested because of his death. It does mean inevitably that many of the ‘facts’ relied upon by the experts are not hard facts as opposed to potential staging posts upon which they have done their best to use as a framework for their opinions and reconstructions. The only hard facts that can be known are the point of collision, the finishing point of the bus after collision, and the damage to the bus caused by the collision with the Claimant/traffic island in the middle of the road.

The Standard of the Reasonable Driver

13. In relation to the legal test to be applied, the key test is whether the established facts do or do not fell below the standard to be expected of a reasonable road user. A reasonable road user is not an ideal road user: *Ahanonu v South East London & Kent Bus Company Ltd* [2008] EWCA Civ 274 per Laws LJ where although not giving the main judgment of the court, he said:

“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.”

Accident Reconstruction Evidence

14. The court has had the benefit of hearing Mr Rusted for the Claimant and Mr White for the Defendant. I have no doubt that the experts were able to furnish me with some useful evidence that is beyond the general knowledge of the court when it comes to the concept of Perception Response Time (PRT), a computer programme designed to calculate a range of PRT called Interactive Driver Response Research (IDRR) , and also Newtonian calculations as to speeds and effect of braking. However, I should also say that both experts, and in particular Mr Rusted, appeared to take on the role of advocate too readily. Both in his reports and when giving evidence, Mr Rusted did not hesitate in going into opining what Mr Abdulla should have done in relation to seeing the Claimant and adjusting his speed accordingly when he was likely to be going past her. He also averred that the Defendant driver should have sounded his horn. In my view, this is precisely the kind of thing that Stuart-Smith LJ warned against in *Liddell v Middleton* [1996] PIQR P36 when he said (P42) that:

“In such cases the function of the expert is to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence of the marks on the road, the damage or whatever it may be. What he is not entitled to do is to say in effect 'I have considered the statements and/or evidence of the eye-witnesses in this case and I conclude from their evidence that the Defendant was going at a certain speed, or that he could have seen the Plaintiff at a certain point'. These are facts for the trial judge to find based on the evidence that he accepts and such inferences that he draws from the primary facts found. Still less is the expert entitled to say that in his opinion the Defendant should have sounded his horn, seen the Plaintiff before he did or taken avoiding action and that in taking some action or failing to take some other action, a party was guilty of negligence. These are matters for the court, on which the expert's opinion is wholly irrelevant and therefore inadmissible We do not have trial by expert in this country; we have trial by Judge. In my judgment, the expert witnesses contributed nothing to the trial in this case except expense. For the reasons that I have indicated, their evidence was largely if not wholly irrelevant and inadmissible. Counsel on each side at the trial succumbed to the temptation of cross-examining them on their opinions, thereby lengthening and complicating a simple case In road traffic accidents it is the exception rather than the rule that expert witnesses are required.”

15. As will be seen, Mr Rusted appeared to fall into some of the traps identified above, in that he opined as to the sounding of the horn and what he thought was the correct speed of the approach of the bus and what he described as ‘preparation’ before arriving at the accident location. That is in addition to giving technical evidence which was within his remit to give as an expert to the court.

‘Missing Evidence’

16. The court heard further submissions on the so called ‘fair wind’ principle relating to missing evidence. In summary the Claimant submits that because Mr Abdulla did not log into the telematics system fitted for the bus, the absence of that evidence may have prejudiced the Claimant’s case, and an inference should be drawn against the Defendant and/or it should mean that the Claimant’s case is looked at more favourably and the Defence case less favourably. This submission is opposed by the Defendant although they recognise that in some instances the Court can act accordingly and also accept that the principle is not limited to cases where a defendant is proven to be in breach of statutory duty.
17. I have been taken through a number of authorities on the point and indeed the court reconvened when it became apparent that the Claimant wanted to expand on submissions made on Day 3 of the trial. The first authority relied upon was *Keefe v Isle of Man Steam Packet Co Ltd* [2010] EWCA Civ 683. This concerned a noise induced hearing loss claim where the defendant had not taken any noise measurements in breach of statutory duty. The trial judge had dismissed the claim. The Court of Appeal noted that difficulty of proof had been caused by the defendant’s breach of duty and no weight was given to that by the trial judge. The appeal was allowed on a number of bases which included the breach of statutory duty point. This line of reasoning could be traced back to *British Railways Board v Herrington* [1972] AC 877 and *Armory v Delmairie* (1721) 1 Strange 505. Other cases relied on were *Sarpd Oil International Limited v Addax Energy SA & ANR* [2016] EWCA Civ 120 (deliberate reticence on the part of party to

give information to the court that could be used to justify an order for security for costs); *Evans v Virgin Atlantic Airways* [2011] EWHC 1805 (first instance decision where the judge held that a defendant who challenged a pension calculation but put forward no alternative despite having the necessary information: its challenge was rejected); *Assante v Guy's and St Thomas' NHS Foundation* [2018] EWHC 2570 (QB) (first instance decision where missing or incomplete notes which should have been retained the Defendant meant that the Defendant should not have the benefit of that deficiency); and *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863 (a Supreme Court decision in which it was held inter alia that a tribunal should be free to draw or to decline to draw inferences from the facts and from the absence of evidence with the first step to identify the precise inference which allegedly should be drawn).

18. The evidence as to the 'missing' telematics is dealt with very briefly in the witness statement of Mr Ray Webb, dated 20th February 2017. I am told and accept that this statement was made for the purpose of a disclosure request concerning CCTV and telematics. In relation to the telematics, Mr Webb states:

“[9.] I have been asked to locate the telematics data for the time of the incident. We have been able to recover data prior to the incident, September and after the incident in December but not for the time and date of the index incident. We are not absolutely certain as to the reason but it does seem that the driver was not logged into the system at the time of collision.”

19. This does not identify with any particularity the real reason for the absence of telematics. I cannot say that Mr Abdulla is at fault as not enough is known about the logging in procedure, whether or not such logging in was required and what the reason is for the loss of data at other times. I do not, with respect, see how the principles of an adverse inference or more favourable consideration can be given to the Claimant's case in those circumstances. All of the cases cited are distinguishable. Moreover, one can see the rationale behind the decisions very clearly. A party cannot obfuscate a court and its evidential findings by hiding behind the burden of proof with their arms proverbially folded after they have acted in bad faith or malignly denied access to information which could have shed light on the matter and assisted the court in determining the issue. In this case, there is no such bad faith or blameworthy activity in breach of duty that arises. Whilst I accept that the absence of telematics information is unfortunate, there is no good evidence in front of me that this was deliberate or in breach of any duty or responsibility. I should also add that telematics by itself would not assist the court in knowing when it was that the driver perceived the threat of collision with the Claimant (a key issue) as opposed to his stopping and braking distances taken in abstract. In those circumstances I will not form an adverse inference against the Defendant as suggested and nor will I look at the Claimant's case more favourably and/or the Defendant's case less favourably in coming to a judgment.

THE EVIDENCE

20. The court has heard no live evidence at all from witnesses of fact. Mr Abdulla is deceased. The Claimant has no detailed recollection of the event. There were some

other witnesses who gave information to the police and witness statements which I will summarise below.

21. First I will summarise the police investigation side of things which I have extracted from the disclosure documents. Mr Abdulla's initial account [P88] was given on the morning of the incident at 0815 (around 30 mins after the accident) to Police Officer Hopper who completed the collision report booklet, and recorded:

“As I was coming along Chamberlain [sic] Road, I saw a female stood on the pavement in front of a set of iron gates outside 238 Chamberlain Road. She was wearing a coat with her hood up. I did not think she was going to cross the road. As I came closer and closer she ran in front of my bus in order to cross the road to catch another bus coming in the opposite direction. I tried to brake in order to avoid her and move the bus over to the right but hit the central reservation. At this point her head hit my windscreen. At the point of impact I was doing no more than 20mph. I had more than 30 passengers on the bus and was concerned that any harder braking would cause my passengers to become unstable on the bus. She was laying on the floor and I called Code Red on my radio. Other passengers on the bus called 999.”

22. There are some other observations in the collision book [P91] where it is recorded that there were no marks on the road and CCTV could not be recovered.

23. The next account from Mr Abdulla is recorded in a collision/incident information form [P98] and dated 3rd December 2015 (around a week after the incident). It is noted that the traffic was light, the weather was fine, road conditions were dry and visibility was clear. Mr Abdulla describes his speed at 20-25mph. His fuller explanation is as follows:

“I was driving a route 6 bus up Chamberlayne Road at around 07.40 hours....I had arrived at the junction with Phillimore Gardens and there were traffic islands ahead in the middle of the road. Then from my left on the kerb I noticed a person in dark clothing, about 10 mtrs or so, as I approached nearer she started to walk into the road without looking in the direction of the bus, in fact she was looking in the opposite direction. I tried to steer away from the person but the traffic island did not allow me to move too far right and I collided with them. At about the same time contact was made with the person. I saw that the front nearside windscreen had shattered where the contact was made. The lady was knocked to the ground away from the front of the bus....”

24. A sketch plan is attached to this account which sets out roughly the same thing and includes the detail of a bus stop on the other side of the road. It describes the bus' first position as the front of the bus being roughly in line with the centre of Phillimore Gardens. There is also written in a rectangular drawing, a No 6 bus passing in the opposite direction.

25. In the collision report booklet, there are other short accounts. One person has declined to give personal details and states [P113]:

“wasn't obvious. it wasn't driver's fault. Driving at reasonable speed. She came out of nowhere: he braked before he hit her. heard bus driver say something before he hit her (witness was downstairs of bus).”

26. There is a further account from another witness who declined to give personal details [P114]:
- “upstairs bus passenger. didn’t see it happen. He/the driver braked before he hit her. driver was not going fast. Driver shouted out as he hit her.”
27. There is a further collision/incident report form from an undisclosed witness [P115] which states in the section of conversation between the witness and the driver that:
- “he was very shaken up and distressed by having hit the pedestrian. He said “I’ve been driving for over 30 years and not had (a problem/accident). “I can’t believe it”. “Is she ok? I hope she’s ok”. “She came from nowhere. I don’t understand”.
28. Then in the body of the document the description is:
- “The bus was travelling along Chamberlayne Road in between stops. I was sat on an aisle seat on the lowerdeck, I step up from the priority seats on the driver’s side of the bus. I had just checked my phone and was looking out of the window. I did not notice the pedestrian on the pavement prior to the collision. As it happened, I heard the driver say something aloud. I am not 100% sure of the wording but something like “oh my god, no” as he braked sharply. This is when the bus then hit the pedestrian. I saw her hit the windscreen and land on the floor (road) in front of the bus. When she hit the bus there was a loud bang and then I felt a bump. This caused me to move forwards on my seat...”
29. There is a collision report account from Tony Barker [P12] which states:
- “driver said he was doing 20. I think it was a bit quicker than that. Driver swerved and just the girl come out the [illegible- fronts?].”
30. In the collision/incident information form [P123], Mr Barker elaborates that he was situated behind the accident and was parked in a van some 100 yards behind bus by the kerbside. The plan he provides suggests the van was positioned just prior to the junction with Phillimore Gardens. He describes:
- “Sitting in van. Bus passed making me look up about 100 mtrs later the bus hit centre reservation stopped. I see lady in road...”
31. There is a mention in the transport safety manager investigation at P143 that:
- “..It has been questioned as to why the horn was not used as a warning.”
32. The weight I can give to these individual chunks of evidence in the absence of them giving live evidence is small. Notwithstanding this, I agree that Mr Abdulla’s accounts can be an important comparator on the issue of consistency or inconsistency as well as more general points that the initial description may well be the best recollection without the benefit of hindsight and reconstruction of events.
33. The Claimant’s witness evidence is to her own admission not good because of her injuries (paragraph 8 of her witness statement at P151). It appears to be uncontroversial that she was working as a cleaner at the time of the accident. She was living at 238

Chamberlayne Road for a week and 2 days before the accident. She had started working as a cleaner and each day took the bus from across the street to Kensal Rise Station. She describes that she was not in a rush. She states:

“[8]..I remember leaving home and closing the door. It was a sliding door. I slid the door shut and walked out onto the pavement, closing the gate behind me. That is the last thing I remember.

[9] There were road works on the pavement outside number 238 at the time of my accident with barriers up and signs marking out where you should walk. Chamberlain Road is a long straight road. There are pedestrian islands all along the road for people to cross. I did not have far to go as one of the designated crossing points is almost directly in front of number 238 Chamberlain Road. I used it on each journey and on the day of the accident. The pedestrian crossing had an island in the middle. I believe I was crossing to the island when I was hit by the bus coming from my right...

[10] I believe I would have looked in both directions crossing as is my habit.

34. It is accepted by Mr Roy that there is no way in which the above assertion at paragraph 10 can stand in the circumstances.
35. The court witness statement of Mr Sathak Abdulla is dated 25th July 2016 (around 8 months post-accident). His description of events is as follows [P176]:

“[14] I continued north along Chamberlayne Road. I was conscious that maintenance was being carried out on the pavements on both sides of the road. I am not sure what they were doing but there were regular groups of plastic barriers at intervals along the pavement. I think they had been there for a couple of weeks at this stage. I was aware of them. They did not cause me any problems. I did not have to change my route. The barriers are quite low so they did not obstruct my vision of pedestrians on the pavement.

[15] I was travelling at about 20-25mph in a 30mph speed limit zone.

[16] The traffic was not too heavy. There were no other vehicles immediately in front of me at this stage.

[17] It was as I was going past a junction to my left (Egerton Gardens) that I first noticed somebody on the pavement ahead at the next junction on the left (Phillimore Gardens). This person was standing on the north side of the pavement at the corner of the junction between Phillimore Gardens and Chamberlayne Road. I later found that this was a woman. She was wearing a dark hooded top which I think was grey. She had the hood over her head. She was looking away from me so I could only see the back of her head. At this point she appeared to be standing or dawdling. I think she was moving a bit. My perception was that she might be lost or that she was looking further down the road for somebody. I kept an eye on her but at this point I did not think there was any sign that she was planning to cross.

[18] I continued to keep an eye on her as I approached. My speed was certainly no more than 20-25mph.

[19] Whilst the woman was dawdling she appeared to have moved slightly further up Chamberlayne Road and close to an area opposite a traffic island in the middle of the road. She was still not looking in my direction or giving any obvious signals that she might try to cross the road. However, because she was closer to the road I took my foot off the accelerator and hovered over the brake. This meant that the bus started to slow down a little bit.

[20] At this point I had still not reached the junction with Phillimore Gardens. It was only as the front of my bus became level with the entrance to the junction to Phillimore Gardens that the woman, still looking in the opposite direction, suddenly moved to her right. I began to brake. As soon as I realised she was coming out in to the road I braked hard. She still did not look round and seemed to take a further step.

[21] It was clear that there was insufficient time to stop the bus so I swerved to the right purposely heading towards the traffic island. If I had not done this I would have hit her with the middle of the bus. I think she was only about 10 metres in front of the bus when it became clear that she was intending to continue across the road.

[22] The lower offside front corner of the bus hit the raised traffic island. This helped to slow the bus down more. At the same time, the nearside front corner of the bus came in to contact with the woman. Because I had been able to swerve to the right it was more of a glancing blow. By this stage she was probably close to the centre of the northbound lane.

[23] After hitting the traffic island, the momentum of the bus continued forwards and bounced back towards the nearside slightly before the front of the bus came to a rest just past the traffic island.

[24] Attached as exhibit "SA1" is a plan of the area. This includes the approximate locations of where I first saw the woman standing (1), where I began to hover my foot over the brake (2) where the woman was before she stepped off the pavement (3), where I first started to positively brake (4), where I began to brake hard (5) and the approximate point of impact with the woman (6)."

36. Unfortunately, in the sketch plan (which I have inserted below), position (1) does not show where Mr Abdulla was when he first saw the Claimant. However, position 2 is shown to be around 24.3 metres from the point of collision (assuming the front of the bus to be just before Phillimore Gardens).
37. Exhibited to the witness statement is also a further witness statement dated 19th November 2015. In this document the explanation of events is as follows:

“[5] I had travelled as far as Kensal Rise up Chamberlayne Road, which is a fairly wide and busy road although residential. I was now heading towards the All Souls Road stop at the top of the road for about 07.30 hrs. My speed at this time I’d estimate at about 20-25 mph within a 30 mph speed limit area.

[6] It was then that I first noticed a person in dark clothing standing by herself on the left hand kerb side ahead, maybe about 10 metres. Although it was damp on the road from overnight rain and grey, visibility was good as it was getting lighter with the day.

[7] I approached nearer to her position then she started to walk across the road without looking to the right, the direction from which I was coming. In fact she was looking in the opposite direction up the road, maybe to see if a bus was coming. This is an area with traffic islands or tower kerbs which are in position to slow traffic and not designed for crossing. However pedestrians do use them to try to cross the road in places.

[8] I then immediately began to brake reducing my speed to below 20 mph as I was not expecting her to walk out into the road without looking. I realised that she was not going to look in my direction so I applied the brakes even harder as I got close to her. I also tried to steer the bus to the right way from her and to avoid making contact with her but could not.

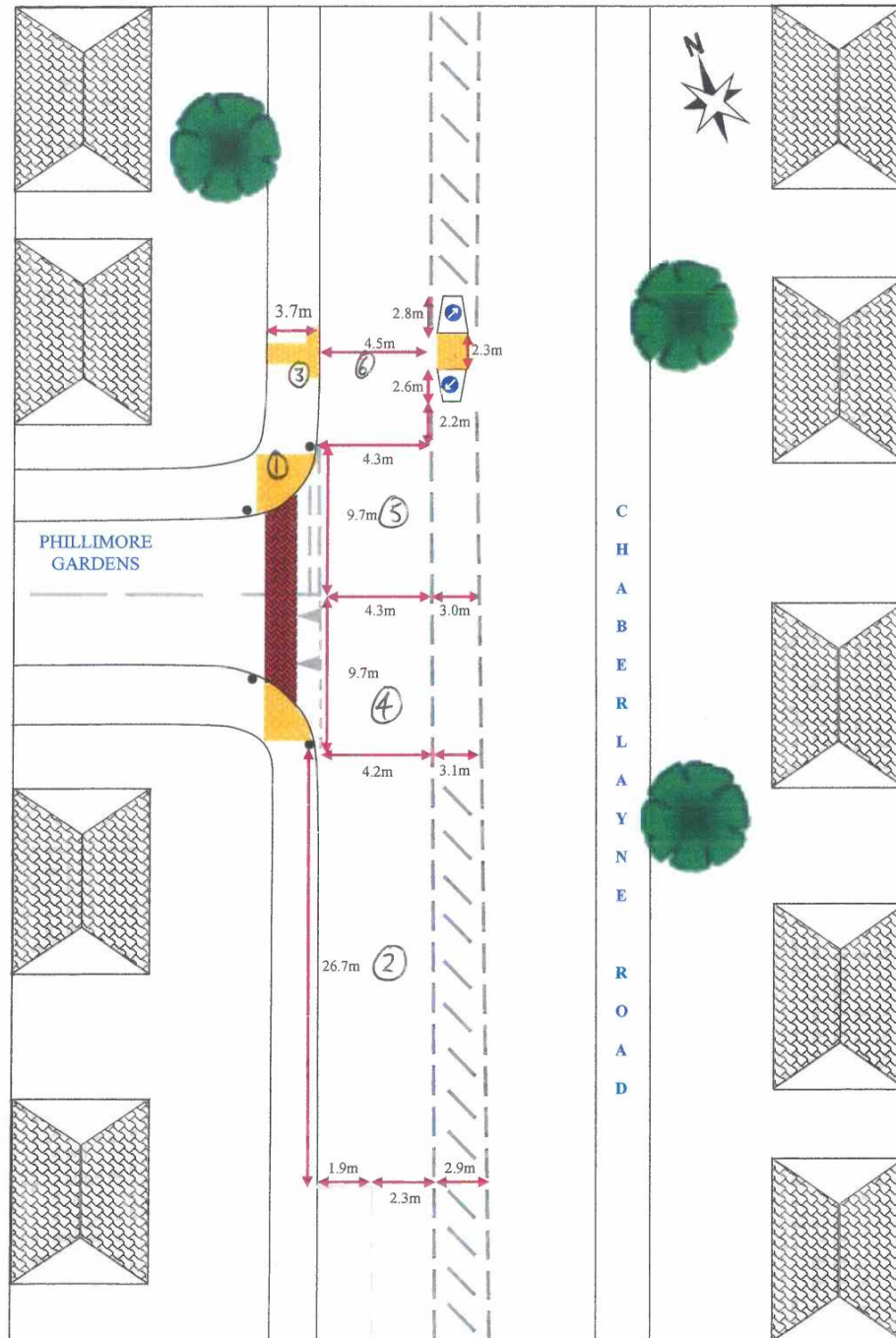
[9] In trying to avoid her I actually struck the island or tower kerb in the centre of the road just past Phillimore Gardens which was on my left- the direction from which she seem to come from.

[10] I made contact with the young lady with the front nearside windscreen which shattered. Had I not swerved I might have hit her in a more central part of the bus. She fell to the ground in the road ahead of the bus having bounced off the screen”.

38. Mr Abdulla chose to clarify the “10 metres” by saying in his witness statement for the court that:

“Paragraph six could be interpreted to suggest that I did not even see the woman until my bus was only about 10 metres away. This is not the case. I have detailed within this statement above the detailed sequence within which I first saw her. I think the 10 metre estimate referred to in the previous statement should have been my description of the approximate distance within which I was having to emergency brake.”

Your Client Metroline Travel Limited	REFERENCE NUMBER DRW/SFG/80059-677	DRAWING TYPE SITE SKETCH
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39. A hearsay notice has been served to rely on the witness statement of Mr Abdulla.
40. There is witness evidence from Mr Ray Webb [P195], dated 20th February 2017. He describes that CCTV could not be recovered from the bus because it seems the hard drive was damaged by the jolt to the bus.
41. The final piece of witness evidence is from Ms Grace Burfield [P197], dated 4th January 2020. She stated as follows:
- “[9] I was seated on the lower deck of the bus just after the steps in an aisle seat. I was 1 step up from the priority seats on the driver’s side of the bus.
- [10] From my seat I could see the windscreen and also, through the nearside windows, the kerb and parked cars on the left. I would therefore say that my line of vision was fairly good.
- [11] I had just checked my phone and was looking out of the window.
- [12] We were going along Chamberlayne Road when I heard the driver say something like “No! No! Oh my God!”. Then the bus braked sharply and I saw a woman being hit by the bus with the front nearside corner and screen.
- ...
- [17] The speed of the bus throughout the journey and at the point of the incident did not seem fast to me and I felt that we were well always travelling within the speed limit. I believe that the area is a 30mph zone.
- [18] I had felt comfortable with the driving throughout the journey.
- [19] We were not travelling at a high speed when Mrs Zanatta was hit as we had just left the last stop and the bus [sic] by the bus was accelerating to come back up to speed.
- [20] We were in between two bus stops at the time.
- [21] On impact I estimate that the speed of the [bus] was no more than approximately 20mph. The brakes were suddenly applied and I remember that my lunch box flew off my seat.
- [22] I did not see Mrs Zanatta on the pavement before the collision and I did not, therefore see her step out.
- [23] I have no recollection of the horn being sounded and there was very little or no time to give any warning or to even react.
- [24] When Mrs Zanatta hit the windscreen there was a loud bang and I felt a weird bump, but I’m not sure if this was the traffic island on the right or the impact with the claimant. This caused me to move forwards in my seat.
- [25] It would be difficult for me to allocate blame for the incident or how it could have been avoided. However I do think that the driver did all that he could by braking sharply and his speed was not, [in] my opinion, too fast at any time.

[26] The claimant seemed to come from nowhere.”

Expert Evidence.

42. The Claimant’s expert witness is Mr John Rusted. His first report is dated 7th July 2021. His findings are set out as below:

(a) The impact with the Claimant occurred when she was positioned in an area of road adjacent to the pedestrian refuge.

(b) This impact took place some 4-4.13 metres prior to the vehicle coming to a halt.

(c) The Claimant was around 2-2.4 metres into the road when impact occurred.

(d) Perception Response Time (PRT) is the process whereby a driver reacts to an unforeseen event. In daylight conditions this is generally attributed a range of between 1-2 seconds. This could mean the driver travelling between 8.94-17.88 metres (at 20mph); between 11.18 and 22.36 metres at 25mph and between 13.41 and 26.82 metres at 30mph prior to the driver applying any physical response such as braking or steering in response to the hazard created by Ms Zanatta either entering or moving towards the carriageway. Mr Rusted would have expected the PRT to be towards the lower end of this scale given the attention paid to the Claimant prior to impact and the PRT may have been very much shorter than 1 second if he was already braking.

(e) Mr Rusted used a braking co-efficient range of between 0.4-0.53. That could provide a stopping distance (separate from PRT) from speeds of 20, 25 and 30 mph to be in the range of 76.9 to 22.91 metres depending on the initial speed and co-efficient of friction applied.

(f) The total distance (braking distance plus distance travelled in reaction time) for the bus to be brought to a halt if the speed was between 20 and 25 mph could be between 16.63 and 38.29 metres.

(g) Taking into consideration all of the available evidence it was more likely than not that the bus was far enough from the Claimant when she entered the road to have been stopped or slowed to a much reduced speed at impact.

(h) The likely time the bus took to be braked to a halt (excluding reaction time) ranges from 1.72 to 2.85 seconds. The collision appeared to have occurred around 2.1 seconds after the Claimant entered the road.

(i) Mr Abdullah had the Claimant in view for some considerable amount of time. In order to eliminate indecisiveness, and in order to draw the Claimant’s attention to the approaching bus, the use of an audible horn may well have alerted the Claimant and the “Court may consider that as a professional driver, operating with urban environments, Mr Abdullah should have recognised the potential hazard and sounded his horn to attract the attention of the Claimant [P250].”

(j) If the court accepts that the vehicle was just 10 metres from the impact area when the Claimant stepped out into the road then it is unlikely that a collision would be avoided.

(k) The Court may consider that had the driver been better prepared and reduced speed earlier (or attracted the attention of the Claimant), that a collision was entirely avoidable.

43. Mr Rusted's evidence on PRT did change (as did Mr White's) when the matter moved to a joint statement and a response to Part 35 questions. An email from the Claimant's solicitor to the Defendant's solicitor on 21 July 2021 made this reference: "Having discussed this point with Mr Rusted our case (and what we understand will be his evidence) is that the reasonable PRT in these circumstances would be 0.5 seconds". Mr Rusted did explain that he did not have a licence to use the Muttart calculation software at the time of his first report. It was after being trained on the software that he came up with a revised PRT figure.
44. Mr White, instructed by the Defendant, prepared a report dated 7th July 2021. He used a software package to simulate the accident which I viewed in open court. However I should say that I did not find the simulation that helpful. There was an understandable limit on the ability of the graphics to simulate the real world. The display of the laptop screen cannot imitate real world factors in respect of size, visibility and the high demands of the program also meant that the display of events was most likely not in real time. Mr White's key findings were as follows:
- (a) The distance moved into the road by the Claimant at the moment of collision was around 2.6 metres. At an average walking speed of 3mph, the Claimant pedestrian would only take around 1.95 seconds to cover that distance and 1.16 seconds at 5mph.
- (b) The speed of the bus at impact was in the region of 16.7-14.7mph. This is based on the deceleration rate achieved of between 0.45 and 0.35 g (4.4 to 3.4 m/s²).
- (c) It was possible that the driver perceived the Claimant as a hazard somewhere between 1 metre from the kerb and the kerb itself even though Dr Muttart's research suggests that the point when the pedestrian passes the kerb edge is when the hazard is perceived. Using an IDRR program, the average perception time to an incident of this kind would be 1.3 seconds, leaving the average driver something in the region of 0.7 to 1.2 seconds of available time to brake. A vehicle decelerating at 4 m/s² could lose between 6.25 and 10.75 mph in that timescale. Under the circumstances, the average driver would have needed to be travelling at a speed of less than 6.25 to 10.76 mph to stop before the crossing point. The driver appears to have had some anticipation of a possible hazard and applied gentle braking when the Claimant entered the road.
- (d) On reconstruction, the highest speed for the bus was around 27mph before the incident developed but could have been as low as 23 mph. The average driver would have a perception and response time to this kind of hazard of 1.3 seconds leaving very little time for any form of evasive action. The bus would have been 22.63 metres from the collision point when the pedestrian was at the kerb edge travelling at 3 mph.

- (e) The incident could have been avoided if the bus was being driven at 20mph or less.
- (f) This was a difficult case to reconstruct because of the absence of forensic evidence.
- (g) In the anguish of the moment, a driver has little opportunity to use a horn as the driver would inevitably be concentrating on taking evasive action to avoid a collision.
45. The expert evidence proceeded to deal with quite lengthy Part 35 questions and then went to a joint statement. There was a measure of agreement between the experts [P429]:
- (i) The experts agree that the bus came to a halt approximately 4 metres beyond the likely area in which the collision occurred.
- (ii) The road conditions may well have been damp or wet but there is no evidence of unfavourable road and weather conditions.
- (iii) If the Claimant was standing back from the kerb, the view between the bus driver and the Claimant would initially extend to around 90 metres due to a post box and a small tree south of the crossing point, but would extend to around 180 metres when the Claimant reached the kerb edge.
- (iv) the vehicle had been slowed to between c13 and 17mph by impact and that it would initially be travelling in the region of 25 to 30mph when Mr Abdulla recalls he commenced to apply braking. The experts could not determine the precise rate at which the braking occurred.
- (v) The impact between the bus and pedestrian was coincident with or very shortly after the vehicle collided with and was deflected by the containment kerb. That might have resulted in around 1-2 mph reduction of velocity at the commencement of the impact phase.
- (vi) Prior to collision there would appear to be have been some braking on the part of Mr Abdulla over some distance before the collision with the containment kerb at the pedestrian refuge. In the absence of telematics data or physical evidence at the scene, there was nothing to determine the rate at which the vehicle was braked. Taking into account Mr Abdulla's own assessment of the initial speed of the vehicle, the speed of the bus was around 25-30mph (11.18 to 13.41 m/s) before the brakes were applied.
- (vii) The Claimant had been in the road for around 2 seconds prior to impact.
46. Mr Rusted expressed his view beyond technical expertise at paragraph 4.5 of the joint statement [P432] where he said:
- “Mr Abdulla appears to recall that when he realises Ms Zanatta was going to enter the path of his vehicle, the bus was about 10 metres from the collision. If this had been the case, then given the difference between the likely initial speed of the bus and the impact speed, there appears to have been very little decisive action on Mr Abdulla's part in

preparation for the possibility that Ms Zanatta would emerge into his vehicle's path. Without any acknowledgement from Ms Zanatta of the approach of the bus (eye contact etc), the closer the bus was to Ms Zanatta and the crossing point, the more forcefully Mr Abdulla would have to try and brake to avoid a collision. To eliminate the situation Mr Abdulla would need to moderate that braking, taking into account the distance available to stop should Ms Zanatta remain unaware of the bus and enter the road, his vehicles speed and the safety and comfort of his passengers.

[4.6] "When considering his passengers and his duty of care for their safety, in light of his accounts and the likely approach speed, Mr Abdulla appears ill prepared for a potential emergence situation and the likely need for him to have to brake sufficient so as to stop his vehicle in the distance available."

Mr Rusted cited the Driving Standards Agency guide for professional drivers driving buses and coaches at 4.7 which states that 'You should drive at all times with anticipation and awareness. By driving defensively, you lessen the risk of being involved in a road traffic incident...Professional drivers adopt a positive approach to driving. This means 1. Looking after yourself, your vehicle and your passengers, 2. Planning well ahead, 3. Practising good observation, 4. Keeping in control, 5. Anticipating events. Professional driving also means making allowances. You must always consider the safety and comfort of passengers. Sometimes you'll have to allow for the ignorance of other road users. In most cases, they'll have very little idea of the problems a bus or coach driver faces when driving such a large vehicle. It's essential that your vehicle is under control at all times. You must drive it skilfully and plan ahead so that your bus is always travelling at the correct speed and ready for your next manoeuvre. You should never have to do anything at the last minute. If you get caught out, you've got it wrong'.

[4.8] In this case Mr Abdulla describes events over several seconds which point towards him having had concerns regarding Ms Zanatta and during which he has had sufficient time to prepare appropriately. That might amount to him slowing the vehicle to a safer speed from which he could react and avoid a collision until he had attracted the attention of Ms Zanatta and been allowed to pass in safety.

47. Mr White also opined on the driver's actions which went beyond mere technical opinion (although he had not descended to this in his original report save for some comments about use of the horn) and said:

"[4.11] Whilst a matter for the Court, Mr White is of the opinion that the statements of Mr Abdulla imply that he took pre-emptive action on seeing Ms Zanatta on the pavement and some distance from the kerb edge. In this respect he was behaving in the same way as a careful driver would when approaching a parent with a young child on the pavement. In that scenario the careful driver should cover the brakes and possibly apply gentle brake pressure; just in case the child made a sudden move towards the road.

[4.12] From his statements, Mr White is of the opinion that Mr Abdulla saw Ms Zanatta on the pavement and something about her behaviour stimulated him to take some precautionary actions by applying light braking and moving the bus towards the centre of the road. In this respect there would be insufficient time for the driver to make his

meaningful swerve once Ms Zanatta stepped into the road. It must predate the application of heavy braking.

[4.13] If Mr White's understanding is correct then Mr Abdulla was acting in accordance with the Driving Standards Agency's warnings to drivers but there was simply insufficient time to avoid a collision when Ms Zanatta committed herself to the crossing at the kerb rather than stopping, especially if she entered the road when the bus was in close proximity."

48. There is then disagreement about the use of a horn with Mr Rusted repeating his previous opinion about the use of the horn. Mr White disagreed and opined the use of a horn would only become viable when the intentions of the pedestrian were perceived and recognised, however by that stage it would be too late to affect the outcome in the majority of cases.
49. The next area of disagreement concerned perception and response time. Both experts referenced Dr Muttart's IDRR program. The program requires the user to input data and set parameters. The difference between the experts was whether they should have set it as 'more information' or 'less information'. Mr Rusted considered there was more information available because there was a side road, a central reservation and a pedestrian close to the kerb edge. These features would alert the driver and reduce the time necessary for him to perceive and respond. He has worked on the basis that Mr Abdulla is already watching the Claimant and covering the vehicles brakes in the early stage of movement. If there had been no preparation, awareness and expectation, the Muttart research would point to an average response time to an intrusion within the range of 0.6 to 1.7. seconds with the driver's foot hovering over the brake pedal. In the case of a response to a pedestrian then the average response time would be 0.9 seconds. However the average response time could reduce to 0.3 seconds given the proximity of the junction and complexity of the hazards. The transition and movement times normally associated with an unforeseen event and response are no longer present.
50. Mr White considered that there was less information because the chances of a pedestrian stepping out became less as the bus driver got closer. After pre-emptive action, the driver starts to relax as the bus gets closer to the passing point. He also took the view that the traffic island was a secondary hazard. Both experts agreed that there is no independent information to determine exactly how Mr Abdulla responded when the Claimant was on the pavement or when she committed herself to crossing the road.
51. Both experts agreed that the Claimant would be likely to have been in the road for around 2 seconds. If the Court accepted a shortened response time is applicable then had Mr Abdulla been driving between 20 and 25 mph (8.94 – 11.18 m/s) at this stage the bus would be positioned between 17.35 to 21.04 metres from the likely impact area and not the 10 metres alluded to by Mr Abdulla. Braking at the equivalent of a friction coefficient range between 0.4 and 0.5 the bus could be stopped in 12.74 to 15.94 metres. Including a distance travelled in a shortened response time of 0.3 seconds the total distance required to stop would be 15.42 to 19.29 metres or short of the impact area. In this case, Mr Abdulla reports commencing his braking some 24 metres from the impact area (that is the beginning of the mouth of the junction with Phillimore Gardens). Had the shortened response time been as long as 0.5 seconds then in most cases the vehicle could still be stopped except for the case where the vehicle's initial speed would be 25

mph and the low friction value applied. In that case the vehicle would require an additional 3.35 metres to stop but would arrive at the impact area travelling at a much reduced speed. If Mr Abdulla only commenced to respond fully to the Claimant when the vehicle was just 10 metres from her, then there was insufficient time and space in which to implement any effective collision avoidance measures.

52. In respect of oral evidence, there was a huge amount of evidence given by the experts and detailed cross examination on the topic of PRT. I must say that I did not find it all that helpful because it deals with an abstract situation where we no longer have the driver available to give evidence and the evidence he has provided is subject to the possibility of over analysis, unreliable recollection and possibly reconstructed memory and inevitably estimations provided by Mr Abdulla as to certain key events. I would tend to agree with Mr Roy when he said in closing submissions that it may be that the PRT information and data might shed more heat than light.
53. One of the issues was whether PRT in this case should be governed by the drop down option in the software of ‘more information’ or ‘less information’. I do not think there is a perfect answer to this in the confines of the IDRR program. The more information might be appropriate for an intersection or a curve in the road. An intersection is an American terminology for a junction of one of more roads. In this case there was a junction (with Phillimore Gardens) but it was prior to the actual accident location and was not signal controlled. The IDRR user guide does not tell the user that this factor means it would be more information. At the same time the road was straight which might put it in the realm of less information. The document titled “Brief overview of input, output areas and background explanations for use” states at P700 that:

“Topography

Overall, topography has been shown to be a driver’s expectancy term in that when there was more information available in the environment that increased the probability of a particular hazard type, drivers responded faster than where there was less information available. Such an outcome is not surprising in that Information Theory (Claude Shannon, 1948) showed that observers respond faster when the probability of occurrence is greatest, and slower as the probability of occurrence decreased.

Generally, there is more information at a traffic controlled urban intersection, than on a stark rural highway. Hence drivers, have responded much faster to immediate hazards within an intersection, than to hazards on straight roads and highways (Muttart, 2003). Thus, when drivers received more information that increased the likelihood of a hazard ahead, they were cued and responded faster. A busy signalized urban intersection ahead might be an area where drivers are more likely to expect a vehicle or a pedestrian to intrude into their paths, thus intersections have been shown to be cued locations. Comparatively, when offered less information, or information that was not related to the specific hazard ahead, drivers responded slower and were not as cued.

In general, when there was impoverished information, such as a straight road with little or no probability of side road traffic, drivers have responded slower than when the environment was changing or required more cognitive processing. Drivers have responded faster when coming over a brow in the road immediately before being presented with the stimulus (Olson & Sivak, 1986). Also, drivers responded similarly

fast when responding to an immediate hazard at traffic controlled intersections (Hankey et al, Mazzae et al.). Conversely, when all else is equal, drivers' response times on straight road segments have been significantly longer (Barrett et al., Broen et al, 1996; Lerner, 1996; Eubanks et al, 1999). After a mathematical analysis of all available research, drivers' response times have been 0.5 to 0.7 seconds longer on straight road segments when compared to locations where the driver had more information to process (Muttart, 2003, 2004, 2005).

One might be led to believe that negotiating a curve creates a greater mental workload for the driver, and thus a longer response time. Apparently because there is a greater perceived workload, drivers apparently maintain greater vigilance. For instance, while many drivers might complain about negotiating roundabouts, they are associated with a decrease in crash rate of 40% and injury-related crashes by 80% when used in place of stop signs (IIHS, 2011). This greater vigilance comes at a cost. If a driver is expending greater attention at one task, it might be at the expense of other tasks. An example of this might be a driver who is negotiating a sharp curve or roundabout and texting. In general, more information is better than less information until a driver has to process too much information, and such might be the case when drivers are texting."

54. The above extract reveals the difficulty of using the program. More information and less information represent a binary choice. The reality of roads is that they have features of both. Mr Roy very properly picked up on that in cross examination of Mr White who agreed with that proposition. In any event, a summary of calculations provided after the live evidence demonstrates that PRT could be as high as 2.3 seconds with no foot hovering over the brake (less information) to 0.3 seconds with hovering a brake (more information). Those extremes are on the 85th centile which is a standard deviation from the 50th centile of response times.
55. On PRT, Mr Rusted was reminded that he had never previously mentioned a time of 0.2, 0.3 or 0.5 seconds but previously used a range of between 1-2 seconds in his first report. The revised lower figures appeared to be mentioned for the first time in correspondence by his instructing solicitor. He appeared to say that the revised time of 0.2-0.5 seconds would represent a PRT for just a change in braking to reflect Mr Abdulla's account that he was already in the act of braking when the Claimant stepped into the road. As I have mentioned, Mr Rusted did explain that he was not licenced to use the IDRR program at the time of his first report but had got accreditation for it later.
56. Along with the PRT, there is the brake system latency (distinct from the act of braking but the system reacting to the brake pedal being depressed). On this Mr White said the brake latency would be 0.6 seconds. Mr Rusted expected it to be 0.3 to 0.4 seconds. There was not an awful lot between them.
57. Mr Rusted was asked about distances and timing. He used the start of Phillimore Gardens as a point that was some 26/24m from the actual impact area using the Claimant being in the road for 2 seconds. Mr Rusted says this is what Mr Abdulla identifies as the position to brake. It was notable that Mr Rusted was fairly fixated on this distance point as if it must be accepted fact. He was cross examined further about stepping into the road as being the time that the PRT clock starts. It was at this point in cross examination that Mr Rusted repeated his assertions made in his report and the joint report about preparation on the part of the bus driver, recognising the Claimant as

a potential hazard, and expecting the driver to brake to a measurable point if the situation develops of the pedestrian crossing the road. Mr Rusted repeated that this is a suburban road where a person is funnelled towards a pedestrian crossing by roadworks and barriers. He also criticised Mr Abdulla for not recognising that this is a crossing point.

58. Mr White was also closely cross examined about speeds and PRT. He was at pains to point out that many calculations were premised on that of witness evidence which can be flawed. He stated that there was no suggestion in the evidence that when the bus driver first saw the Claimant that she was at the kerb edge. She could have been closer or further to the kerb edge but we simply don't know. There was the danger of being too precise when lay witnesses are notoriously bad about this. Mr White explained that there were a number of different processes potentially involved in the bus driver's actions. At 22 miles per hour, the bus at just short of 10 metres per second could cover 10 metres in one second or 20 metres in around 2 seconds. The pedestrian Claimant could be in the road for a maximum of 2 seconds on the basis of average walking speed. That time would be shorter if she was walking at a quicker pace or in a hurry. By the point of impact, the bus slowed down to 13-18 mph. Mr White also made what I consider to be an important point when he said that with the absence of CCTV in this case, it is not possible to say when the bus driver did start to brake and when he applied emergency braking. CCTV would show the proximity to the Claimant and with reference to a timer, the use of braking would show on camera with the view of the bus dipping as brakes were applied. That would provide detail to calculate PRT.
59. Mr White opined that brake lag of 0.3 seconds was standard in an ordinary saloon. A bus cannot do it faster because of air brakes and it would be 0.4-0.6 seconds.
60. Mr Rusted did prepare a helpful table based on numerous scenarios/findings of PRT and speed and braking which I have inserted below:

PART 35 QUESTIONS - CALCULATIONS PERFORMED ON INSTRUCTION BY MR RUSTED									
DISTANCE BASED ANALYSIS									
a. LEVEL OF APPLIED BRAKING (Expressed as friction coefficient μ)	b. DISTANCE TRAVELLED UNDER BRAKING (Metres)	c. DISTANCE TRAVELLED DURING PRT PHASE (Metres)				d. TOTAL DISTANCE REQUIRED TO STOP (Metres)	e. DISTANCE AVAILABLE (22.63m Mr White to 24m Mr Abdulla)	f. COULD BUS STOP ON A DISTANCE AVAILABLE BASIS	NOTES
		0.5 Ssecs PRT (1)	0.75 secs PRT (2)	1.0 secs PRT (3)	1.3secs PRT (4)				
A. - FROM INITIAL VEHICLE SPEED AT 15mph or 6.70m/s									
Moderated ^d - 0.4	5.72m	3.35m	5.02m	6.70m	8.71m	9.07m to 14.43m	22.63 to 24.00m	All scenarios would result in stop before impact area reached	
Hard ^d - 0.5	4.58m	3.35m	5.02m	6.70m	8.71m	7.93m to 13.29m			
Emergency - 0.6	3.81m	3.35m	5.02m	6.70m	8.71m	7.16m to 12.52m			
B. - FROM INITIAL VEHICLE SPEED AT 20mph or 8.94m/s									
Moderated ^d - 0.4	10.18m	4.47m	6.70m	8.94m	11.62m	14.65m to 21.80m	22.63 to 24.00m	All scenarios would result in stop before impact area reached	
Hard ^d - 0.5	8.15m	4.47m	6.70m	8.94m	11.62m	12.62m to 19.77m			
Emergency - 0.6	6.79m	4.47m	6.70m	8.94m	11.62m	11.26m to 18.41m			
C. - FROM INITIAL VEHICLE SPEED AT 25mph or 11.18m/s									
Moderated ^d - 0.4	15.93m	5.59m	8.38m	11.18m	14.53m	21.52m to 30.46m	22.63 to 24.00m	Possible if low PRT	
Hard ^d - 0.5	12.74m	5.59m	8.38m	11.18m	14.53m	18.33m to 27.27m			Possible if PRT 1sec or less
Emergency - 0.6	10.62m	5.59m	8.38m	11.18m	14.53m	16.21m to 25.15m			Possible if PRT 1sec or less
D. - FROM INITIAL VEHICLE SPEED AT 27mph or 12.01m/s									
Moderated ^d - 0.4	18.38m	6.00m	9.01m	12.01m	15.61m	24.38m to 34.41m	22.63 to 24.00m	Unlikely but low arrival speed	
Hard ^d - 0.5	14.70m	6.00m	9.01m	12.01m	15.61m	20.70m to 30.31m			Possible if low PRT value but
Emergency - 0.6	12.25m	6.00m	9.01m	12.01m	15.61m	18.25m to 27.86m			also low arrival speed

NB. The Part 35 Question are best addressed in two sections. The first, based on the likely distance available in which the vehicle can be stopped and the second dealing with the time available and the likely time the vehicle would arrive at the impact area. The distances shown in column e are based on Mr Whites modelling of the incident as shown at 6.9 and 7.6 of his report and the position at which Mr Abdulla reports braking of the bus likely commenced. To calculate individual stopping distances using the PRT times, add the relevant braking distance from column b to the specific PRT value required in column c (c1, c2, c3, or c4). The upper and lower limits for each level of applied braking are shown in column d to compare against the possible available distance within which to stop as show in column e. If the driver PRT values were as shown by the red figures, then the bus would not stop before reaching the impact area, however the arrival may be delayed sufficiently for the pedestrian to complete a crossing.

61. All figures in red show a scenario where the collision was unavoidable and the usefulness of the table emerged in cross examination when it showed that in all scenarios where the initial vehicle speed was 25mph or over, that was within the parameters of a collision being unavoidable based on a distance of 22.63 metres to 24 metres from the bus to the Claimant when Mr Abdulla first describes braking the bus.
62. I add that I have not taken anything from the back and forth between the solicitors and the experts that appears to have come about during the Part 35 question and joint statement phase. I can understand why Mr White reacted in a certain way to being asked to incorporate answers to Part 35 questions into the Joint Statement albeit I do not think there was any ill intent by the Claimant's solicitor. Agendas drawn up for the parties can be useful for the purpose of focussing the joint statement meetings/conclusions. At the same time, the Part 35 questions are a distinct stage of expert evidence away from the joint statement phase.
63. Ultimately in respect of the expert evidence, as I have alluded to, both experts provides some useful learning on distance, time and PRT. However, as I have also said, the usefulness of all of this in the context of this case is limited because the only hard facts known are the point of impact and the distance it took after that for the bus to stop. The Claimant's actions and positioning preceding the impact are not known with any sufficient precision to understand the state of Mr Abdulla's awareness/perception of the Claimant as a hazard. Mr White did seem to acknowledge that the lack of forensic evidence was a problem and similarly relying too heavily on witness accounts was fraught with danger of unreliability. I also took the view more generally that Mr White was less inclined to get involved in going beyond his remit of expertise whereas Mr Rusted was very much inclined to do that and give evidence about what he thought a reasonable driver should have done.

FINDINGS OF FACT

64. Whilst I have in mind the comments in previous cases that the Court should endeavour to positively find facts rather than shy away from that by recourse to the burden of proof, it is important that I observe the following things:
 - (a) The lack of measurements and CCTV prevents a detailed analysis of exactly what happened where, which has caused both experts have to rely on anecdotal evidence and have to perform some element of guesswork.
 - (b) There is an obvious danger in using a description of Mr Abdulla as to events, timings and locations and relying on that as gospel when judging what happened and his actions. The reality is that this would have been a fast moving incident. It is unlikely in the experience of the court, that a driver would be able to pinpoint by reference to passing road junctions, when exactly he remembered first seeing the Claimant, when exactly he would have first started to brake and when exactly he first became aware of the Claimant entering the road. This means that there is a limit as to just how useful references to PRT and stopping distances/times are. That is further complicated when

a bus driver has to take into account the safety and welfare of passengers in addition to pedestrians when applying his brakes.

(c) I have noted what are said to be inconsistencies between various accounts given by Mr Abdulla. These have been outlined in table form by Mr Roy in his opening and closing skeleton arguments. Mr Roy sensibly agreed that inconsistencies are not unusual when it comes to recollection. Furthermore he suggests that there is always a danger in an accident scenario that involves a relatively short and intense moment of time that an individual may try to reconstruct facts artificially. I agree with this proposition especially when a witness may try and justify their actions or conduct under scrutiny. But I also add that when a participant in a shocking accident such as this one is asked at the scene what happened, he or she might also miss things out in the heat or shock of the moment. The general account given by Mr Abdulla is not inconsistent from statement to statement even if the detail given is uneven. There is a curious paradox in this case that although the Claimant has pressed upon the court consideration of these inconsistencies, they still seek to rely quite heavily on certain parts of his recollection as a foundation for their case.

65. I find as a matter of fact that the Claimant had come out of her house intending to cross the road and catch a bus on the other side of the road. I cannot come to a specific finding as to what the Claimant was doing when she was outside her house or for how long she was out there. The description of her “dawdling” by Mr Abdulla is a difficult thing to understand without elaboration which sadly is not possible. However, I do conclude that it is consistent with her not going in one motion from door/gate to the side of the road which would take no more than a few seconds. That would be consistent with Mr Abdulla seeing her in the run up to the accident and not just before the moment of collision. I do note that photographs taken 4 months after the event incorporated into Mr White’s report do show iron gates that would be congruent with Mr Abdulla’s description of events [P336]. Previously it looks like there was a hard fence wall in that area [P230]. The significance of this is that at number 238, there is a driveway that is slightly further up the road than the traffic island. If the Claimant had left that driveway she would be walking back towards the bus if she was intending on using the traffic island as a crossing point. This would mean that inevitably she would have looked towards the bus before crossing. If she was coming out of the iron gates, then that might be consistent with not looking ‘down’ the road towards the bus as the traffic island was roughly in line with where the gates are. I appreciate that this is a small point in the evidence.
66. I find as a matter of fact Mr Abdulla did see the Claimant as she had most likely left the front entrance to her address or an adjoining address. That is why his first perception of her was doing something close to some iron gates rather than at road side. However, I do not think that it is an established fact that Mr Abdulla must have seen her 90 metres before the location of the accident. This was the potential visibility. Whilst Mr Abdulla did mention a vantage point in his witness statement, my impression from the evidence is that this cannot be relied upon with any real accuracy. Furthermore, I comment that even if he did see her at 90 metres, it is unlikely Mr Abdulla would have been close enough to see the direction of the Claimant’s head (looking away from the bus), or what she was doing. At this distance, a very general observation is possible with a possible sense of movement. There were barriers from the road works that would have most likely obstructed some view of the Claimant and there are additional possible factors of

a post box, a tree (mentioned by Mr White), and also a parked van in which Mr Baker was sat although the van's exact location is not known.

67. I find as a matter of fact that Mr Abdulla was driving at around 25-30 mph as he approached the traffic island although once again I emphasise that this must be approximate in light of the state of the evidence.
68. I find as a matter of fact, that Mr Abdulla did notice the Claimant moving towards the kerb at around the time when he was getting nearer to the accident location. As a matter of fact, his state of mind was not belief that she would cross the road as opposed to this development raising awareness of a potential hazard. This is likely to have been when his bus was in the vicinity of the Phillimore Gardens junction but once again, I do not think any real precision can be put on exactly where the bus was when he saw this movement. I say this for the same reasons identified above. There is a huge danger in artificial reconstruction by witnesses when trying to forensically describe a fast moving and sudden incident that too much heed can be given to precise locations as opposed to a more thematic description of events. As I have said, the court should endeavour to come to a finding of fact when there is a conflict of evidence rather than hide behind the burden of proof. However, there still has to be reliable evidence to base a finding of fact on. I am not prepared to say artificially that the front of the bus would have been exactly 24.3 metres from the position of the Claimant when he first saw her moving towards the road. That is artificial. Bearing in mind the dimensions of Phillimore Gardens, the bus could have been around 9.7 metres closer to the traffic island when the Claimant was seen moving towards the traffic island (that is half the width of the junction). It might have been slightly further away but I cannot put any kind of precision on it. I note that the information about approach was not present in the first account to the police.
69. I find as a matter of fact that Mr Abdulla had eased off the accelerator and had covered his brakes and then depressed his brakes slightly when approaching the traffic island in reaction to seeing the Claimant move towards the pavement (albeit not at the pavement edge). However, I am unable to say when exactly that was or how heavy the brake depression was. It is sufficient for me to say that it was as he got relatively close to the traffic island and a few seconds before the Claimant made the fateful decision to step out into the road.
70. I find as a matter of fact that the Claimant stepped out into the road without looking to her right. At this point she was at a close distance to the bus. I will not go so far as to say that this was on balance 10 metres or up to 20 metres but it was the kind of close proximity within that range of distances that provoked Mr Abdulla's oral reaction of seeing the Claimant step off into the road at a distance where he feared a collision was probable/inevitable.
71. I find as a matter of fact that when Mr Abdulla saw the Claimant step into the road, he applied hard braking and tried to steer to the right to avoid the Claimant. At a maximum, the Claimant was in the road for around 2 seconds but could have been in the road for a little less than that time.
72. It cannot be said when Mr Abdulla first noticed the Claimant in the road just prior to collision. He may well have not had his eyes glued to the Claimant because he would

have been looking at the road, his mirrors, the traffic island and the road works barriers (which were very slightly into the road).

73. As the experts agreed in the joint statement, the speed at impact was between 13-18mph.
74. I find as a matter of fact that the bus had travelled beyond impact by around 4 metres as agreed in the joint statement.

PRIMARY LIABILITY

75. The particulars of negligence are dealt with in turn:
- (a) Failure to sound the horn
 - (b) Failed to apply emergency braking or sufficient braking
 - (c) Failed to heed the presence of the Claimant
 - (d) Failed to avoid driving into the Claimant despite having an opportunity to do so
 - (e) Failing to mitigate the severity of the collision despite having opportunity to do so
76. Many of these particulars overlap and I appreciate Mr Roy has more concisely developed the Claimant's case in his closing skeleton argument.
77. On the issue of failing to sound a horn, I do not find this proven on the balance of probabilities as reasonable. As I have alluded to, Mr Rusted appeared to play the role of advocate when advancing this theory. According to my findings of fact Mr Abdulla had no cause to sound his horn when he saw the Claimant at a distance. A reasonable driver would not consider an ordinary pedestrian a hazard when there was no indication that the Claimant at that point was about to step in the road moments later without warning. In respect of the more immediate approach to the Claimant's crossing point, in my judgment, at that point, Mr Abdulla still did not know the intention of the Claimant. She was most likely moving towards the kerb edge but as to where exactly she was, I cannot say and there is no good evidence of where exactly she was. A reasonable motorist cannot be expected to sound their horn whenever there is some potential that in a few seconds, a pedestrian might be in the road. A reasonable motorist would be on some form of precautionary alert to think about and adjust their speed and path but use of a horn is not within a very short time frame, something that should be expected of the standard of a reasonable motorist.
78. On the issue of emergency or sufficient braking, I do not find this to be proven on the balance of probabilities. Mr Abdulla did brake. He slowed down by engine braking to begin with, followed shortly by braking lightly upon seeing the potential danger when the Claimant was fairly close and moving towards the pavement; and then much harder when he saw the pedestrian move into the road. The PRT can only be a guide. The original Krause paper suggesting a 1-2 second PRT then has the added layers of a brake system lag time and the stopping distance. The IDRR range of calculations cannot be

conclusive in this case because of the uncertainty as to whether this is a less information or more information which significantly affects PRT calculation (seemingly by 0.6 – 0.8 seconds in all scenarios). The binary choice between the scenarios means in my judgment that the use of this tool is not a panacea to determine whether someone's response time would always be inadequate if it was not within the parameters of the programme's calculation. Furthermore, and significantly, when a response time outside the calculation might indicate the driver was distracted, there is nothing to indicate here that the driver was in fact distracted. In fact, by managing to say "oh no, no..", or words to that effect just prior to collision, it could indicate he did see the Claimant step out into the road. This is fortified by steering the bus into the traffic island just prior and almost simultaneously with the time of collision with the Claimant. It is further important to remember that a bus driver has the safety of his unsecured passengers to contend with. Driving a heavy passenger vehicle is not like driving a car. An emergency brake which can be coupled with a loss of wheel traction is a last resort and can lead to injury to passengers being displaced. The braking was certainly heavy (as vividly seen by a passenger's lunch flying off of her lap). I find that the PRT, coupled with brake system operational time and braking distance is within the realms of what a reasonable driver was capable of. The table provided by Mr Rusted is useful in this regard in covering numerous scenarios indeed I find the driver was driving in or around 25-30mph when he became aware of the Claimant moving towards the kerb. This was not an excessive speed for the approach of the bus in the circumstances. That is not because any speed at or under the appropriate governing speed limit is safe. It depends on the circumstances and in my judgment an approach of around 25mph-30mph (which the experts agree is roughly the speed of the bus) was not outside the actions of a reasonable driver. I reject Mr Rusted's opinion that there should have been greater preparation for going past the traffic island at a lesser speed than 20mph. As I have alluded to, this was advocacy rather than expertise but in any event there was no identifiable hazard on the lead up to the traffic island. The situation of the Claimant moving towards the pavement edge and then crossing the road without looking developed quickly. Mr Abdulla did react to the Claimant's movement in applying some braking. This was reasonable and demonstrated anticipation but the overall picture here is that this happened at fairly close proximity in time and space to the accident location.

79. I find that the allegation of failing to heed the presence of the Claimant is unproven. I have found as a matter of fact that the driver did see the Claimant first at some distance but also saw her when closer to the accident location as she was moving in the direction of the kerb and then when she stepped out into the road. Mr Rusted says at paragraph 6.2.2 "On the available evidence Mr Abdulla had already perceived a threat and was reacting but not to Mrs Zanatta emerging into the path of the bus." I disagree with this analysis which is any event beyond the parameters of accident reconstruction expertise. Driving a vehicle and awareness of surroundings and people and vehicles cannot be categorised into all of these things being a threat (or hazard). It is a matter of awareness. There is no evidence on the papers that Mr Abdulla perceived the Claimant as a hazard as opposed to noting her presence. I doubt if he maintained his view of her throughout the whole passage of time from first seeing her. The description of 'keeping an eye on her' is not to be taken, in my judgment as a fixed and unyielding view as opposed to keeping tabs on her position and movements as the situation develops. Any driver and in particular a driver of a large passenger vehicle has several things going on which includes constant checking of mirrors and spatial awareness of surrounds to the road boundaries and checking for the presence of other vehicles and pedestrians.

80. I find the allegation in (d) unproven on the balance of probabilities. On this point, as previous case law referred to reminds the court, it is important not to judge liability with the benefit of hindsight and with an arithmetic precision that does not apply to drivers of vehicles in a dynamic situation. Mr Abdulla did drive and act in such a way as to observe the Claimant and heed her presence. I do not consider it reasonable for Mr Abdulla to consider that the Claimant was a hazard when he first saw her. Having seen her and clocked her presence, this was simply part of a driver's general perception expected of a reasonable driver. Her presence in the area of the pavement was not a factor that would lead to a reasonable driver reducing their speed to below 25mph or 20mph in anticipation that there might be a problem. I completely agree with the concept of anticipation and a driver having to anticipate problems as part of his/her responsibilities to other road users. However, the reality is that no motorist would proceed anywhere in reasonable time if the presence of every pedestrian on a pavement caused them to reduce their speed. There was nothing about the Claimant or her behaviour that should have put the driver on alert when she was pavement side to begin with and the evidence is scant and imprecise as to what she was doing and where she was moving (if she was moving). Upon approach to the accident location, he most likely did notice her moving towards the roadside but at this point, he might well have been quite close in time and space to the impact. He might have been as close as 10-20 metres which a bus can travel in 0.5 seconds to 1 second at 22 miles per hour. Taking a step back, with the Claimant being in the road for a maximum of 2 seconds, this is a very short period of time for a bus driver to react, brake hard, steer with the presence of the traffic island and avoid impact.
81. I find allegation (e) unproven for the same reasons. I should also add that as a matter of causation there is no evidence to suggest that the head injury would have been avoided at a lesser speed and understandably no figures have been advanced as to what a safe speed of impact with a heavy vehicle would have been to avoid the head injury suffered in this case.
82. I should also add some other observations about the evidence. Mr Rusted was very keen to describe the accident location as a crossing point which he would expect Mr Abdulla to be aware of and the funnelling effect of the roadworks. First, this is not a designated crossing point such as a zebra or pelican crossing. I accept that it can be used a pedestrian crossing point (which the Highway Code recognised) and indeed the presence of tactile paving and the raised kerb would create that refuge for pedestrians but it is not necessarily a place in the road that would put a reasonable driver on extra notice that it is a likely place where a pedestrian would unexpectedly step out into. Second, the road works barriers are not from kerb to wall with one outlet. Instead they have an exit point kerbside as well as wall side. That can be seen in the photographs in the trial bundle. As one comes out of the Claimant's residence, she can turn left or right or go forward. To describe it as a funnel point for pedestrians is putting it too highly.
83. On the point made by Mr Roy that London is home to many foreign nationals who might expect traffic to come from their left as opposed to their right, I cannot see how this helps the Claimant's case. Whilst I recognise that Mr White accepted the point, and indeed it provides a sensible explanation of why the Claimant acted as she did, this cannot, in my judgment create an added layer of reasonable care that a driver in London owes to pedestrians. It would lead to a situation where a driver would have to drive at cautious speeds wherever there was a presence ahead or around of someone who might

unexpectedly walk into the road. The duty is to take reasonable care and the standard is of a reasonable driver not an utmost careful driver who has to do everything to avoid an accident.

84. I do not accept that Ms Burfield's failure to describe softer braking before the harder braking signifies that Mr Abdulla failed to anticipate and brake in advance of the harder braking. I would not expect as a matter of realism for a passenger to notice or remember soft braking in such an instance.
85. I also finish my conclusions on liability by stepping back a little from the mathematics and concepts of PRT. There will inevitably be accidents caused when a person unexpectedly steps out in front of a vehicle. There are many such cases that have been reported upon and that have been determined by this court. It is well known that a driver has to anticipate and take in the circumstances of the road and should be on the look out for things that might develop unexpectedly. However, it is sometimes too close to a counsel of perfection to expect a driver to drive so cautiously and safely in such a way that he/she has to deal with every possible pedestrian as a hazard. In this case, things developed and happened quickly. The impact point of the Claimant's head with the glass of the bus was on the nearside. That was helpful in the experts determining that the Claimant could have only have reached a few metres into the road at the time of collision and could not have been in the road for more than around 2 seconds at the point of collision. Two seconds is a very short period of time to react and brake to bring a large passenger vehicle to a halt to avoid collision unless the speed was very modest. The fact that the bus stopped 4 metres or so beyond the impact point does not reveal as a matter of common sense, a bus that was going that fast at impact but one that was rapidly slowing down from an initial speed. In addition the quick and reactive steering to the right into an obstruction is not a sign of a slow reacting driver. The exclamation of "oh god no, no", or words to that effect would tend to indicate a driver seeing the hazard but at such proximity that the moment was upon him very quickly as he saw it unfolding. I do think that the Claimant's submissions which have gone into extensive multiple scenarios of varying distances, varying PRT's and a wide variety of calculations have lapsed into the kind of overly precise arithmetical analysis which the Court of Appeal have suggested is inappropriate in cases where the forensic evidence is lacking. This is a tragic accident which I appreciate has had a profound effect on the Claimant but an accident nonetheless when it is unreasonable to blame Mr Abdulla.

Contributory Negligence

86. Although I find for the Defendant on the issue of primary liability, I will deal briefly with the issue of contributory negligence. I agree that if the Claimant had succeeded, there would be a very high level of contributory negligence. The settled law and the principle in *Eagle v Chambers* [2003] EWCA Civ 1107 is that it would be rare for a pedestrian to be found to be more responsible than a motorist unless the pedestrian had suddenly moved into the path of the oncoming vehicle. This is such a case. In the circumstances, if the Claimant had succeeded, I would have found her proportion of responsibility to the accident to be 70%.

CONCLUSION

87. I dismiss the Claimant's claim for the reasons described above.

HHJ SHETTY

6th June 2022