Neutral Citation Number: [2022] EWHC 673 (QB)

Case No: QB-2020-000299

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2022

**Before**:

**GERAINT WEBB QC**
**(sitting as a Deputy High Court Judge)**

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**Between:**

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| **1) MR AYUSH VAKHARIA**<br>**(A Protected Party, Proceeding by his Uncle & Litigation Friend, Rohit Mehta)**<br>**2) MR SHIVAM SHAHJI**<br>**(A Protected Party, proceeding by his Father & Litigation Friend, Jitendra Kumar)**<br>**3) MR SHEHZAN MOHAMMED**<br>**4) MR BASHIR AHMED**<br>**(Dependent & Administrator of the Estate of Zahid Ahmed, Deceased)**<br>**5) MS YASMIN AHMED**<br>**6) MISS SUHILA AHMED**<br>**(A Protected Party, proceeding by her Father & Litigation Friend, Bashir Ahmed)**<br>**7) MISS SARA AHMED**<br>**(A Protected Party, proceeding by her Father & Litigation Friend, Bashir Ahmed)** | **Claimants** |
| **- and -** | |
| **1) MR WOJCIECH STANISLAW BUKOWSKI**<br>**2) POWSZECHNY ZAKLAD UBEZPIECZEN S.A.** | **Defendants/ Part 20 Claimants** |
| **-and-** | |
| **MR AYOADE ADEMONLA IGE** | **Third Party** |
| **-and-** | |
| **ZURICH INSURANCE PLC** | **Fourth Party** |

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**Benjamin Browne QC and Anna Hughes** (instructed by **Weightmans LLP**) for the **Defendants/Part 20 Claimants**
**James Todd QC** (instructed by **DAC Beachcroft Claims Ltd**) for the **Third and Fourth Party**

Hearing dates: 16, 17 February 2022

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# Approved Judgment

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

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GERAINT WEBB QC

This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 25 March 2022.

## GERAINT WEBB QC sitting as a deputy High Court Judge

## Introduction

1. These claims arise out of a tragic road traffic accident at about 3.15pm on 1 December 2019 at junction 11a of the southbound carriageway of the M1 motorway in which a Scania R450 ("**the Scania**") articulated heavy goods vehicle collided with a Sedona people carrier ("**the Kia**"). The accident caused fatal injuries to Mr Zahid Ahmed and serious injuries to Mr Ayush Vakharia, Mr Shehzan Mohammed, Mr Mohammed Bhimia, Mr Shivam Shahji, all of whom were passengers in the Kia. The driver of the Kia, Mr Ayoade Ademonla Ige, also sustained injury.

2. All six occupants of the Kia were students at the University of Middlesex and were travelling back from a pool tournament in Birmingham. The Kia belonged to the University and Mr Ige was authorised to drive it. At the time of the accident the relevant section of the M1 was being used as a so-called 'smart motorway and was operating with 'all lanes running', meaning that there was no hard shoulder. The Kia began to lose power and he noticed that an engine warning light had come on. Mr Ige was able to pull into an emergency refuge area ("**ERA**"). Approximately 22 seconds later he drove the Kia out of the ERA and joined the nearside running lane of the M1. The Kia came to a stop after approximately 145 metres with its hazard warning lights on. Three vehicles avoided the Kia by moving into the second lane before the Scania lorry hit the rear of the Kia at approximately 56mph.

3. The Scania lorry was being driven by the First Defendant, Wojciech Stanislaw Bukowski. He was subsequently prosecuted and pleaded guilty to one charge of causing death by dangerous driving and four charges of causing serious injury by dangerous driving. He was sentenced to 56 months' imprisonment.

4. Claims were brought on behalf of the estate of Mr Ahmed and by, or on behalf of, Mr Vakharia, Mr Mohammed and Mr Shahji against Mr Bukowski and the insurers of the Scania lorry, Powszechny Zaklad Ubezpieczen S.A ("**PZU**"). The Defendants have brought a claim against Mr Ige, as a Third Party, and against Zurich Insurance plc ("**Zurich**"), the insurers of Kia, as a Fourth Party, alleging negligence on the part of Mr Ige and seeking a contribution to the claims brought by the Claimants pursuant to the Civil Liability (Contribution) Act 1978. Mr Ige has counterclaimed alleging whiplash injuries and shock.

5. On 21 June 2021 Master Gidden ordered a trial on liability in respect of the main action and the Part 20 claim. Subsequently the Defendants admitted liability to the Claimants with no deduction for contributory negligence. Accordingly, this trial was limited to the issue of liability and apportionment in respect of the Part 20 claims. I refer to Mr Bukowski and PZU as the '**Part 20 Claimants'** and Mr Ige and Zurich as the '**Part 20 Defendants'**.

6. Mr Ige gave oral evidence. His evidence is that he has no recollection of entering or leaving the ERA. PC Nathan Cattley, a police forensic collision investigator, also gave oral evidence. A number of written statements were relied upon by the parties. I have also been provided with CCTV footage from two of the motorway cameras. Two experts in the field of collision investigation and reconstruction provided written

reports and gave oral evidence. Mr Simon Lane gave evidence on behalf of the Part 20 Claimants and Mr Damian Mutch on behalf of the Part 20 Defendants.

7. The Part 20 Claimants were represented by Mr Benjamin Browne QC and Ms Anna Hughes and the Part 20 Defendants by Mr James Todd QC. I am grateful to counsel for their helpful submissions, both oral and in writing.

## The issues

8. The issues for me are: (1) whether Mr Ige was negligent in driving the Kia out of the ERA before coming to a halt in a running lane of the M1; (2) if so, whether such negligence was a cause of the accident; (3) if so, whether the Part 20 Defendants should contribute to the damages claimed by the Claimants and if so, at what level?

9. The pleaded allegations of negligence advanced by the Part 20 Claimants fall into two main parts:

    i) The first is a specific allegation, pleaded at paragraph 4(f) of their Particulars of Claim, that "it is likely" that the engine warning light "continued to show that there was a fault" whilst in the ERA but that Mr Ige "unreasonably ignored this warning and made the unreasonable decision" to move from the safety of the ERA. This contention is reflected in the particulars of negligence at paragraphs (6)(b) and 6(c); it is said that Mr Ige moved off from the ERA despite the warning light being illuminated and/or when he knew or ought to have known that the fault had not been resolved.

    ii) The second is an overarching allegation, not expressly tied to the engine warning light, that Mr Ige "knew the Kia had [a] fault which was seriously reducing performance which was dangerous on a motorway and, despite having reached a place of safety (i.e. the [ERA]) decided to pull out from the same and move back onto the motorway, in circumstances where he knew that there was no hard shoulder upon which he could stop." It is said that Mr Ige should have remained in the ERA and sought assistance and/or should not have moved off when he knew or should have known that the fault had not been resolved.

10. I should also mention that paragraph 6(d) of the Particulars of Claim impliedly contends that Mr Ige may have deliberately stopped the Kia on the M1: "the Third Party was negligent in that he …brought the Kia to a stop on the motorway…"; similarly, at 6(e) "…bringing the Kia to a halt on the motorway". No such allegation was actively pursued at trial.

## The factual evidence

### Application in respect of the witness statement of Mr Ige

11. On 15 February 2022 DAC Beachcroft, solicitors for the Part 20 Defendants, made an application for permission to serve a CPR compliant statement from Mr Ige, out of time, for permission for him to give oral evidence and for relief from sanctions.

12. The supporting witness statement from Nigel Adams, a Partner at DAC Beachcroft, explains that the solicitors for the Part 20 Claimants had been informed, prior to the

exchange of witness statements, that the Part 20 Defendants would rely on the witness statement of Mr Ige given pursuant to section 9 of the Criminal Justice Act 1967 on 2 December 2019 and that Mr Ige would be called to give evidence. It had also been explained that Mr Ige had no additional recollection of the accident. Mr Adams states that when it was drawn to his attention that a CPR compliant statement needed to be served under CPR Part 32 he obtained a statement from Mr Ige immediately. He served it on the Part 20 Claimants on Friday 11 February 2022 and issued the application on Tuesday 15 February, the day before the trial commenced.

13. The single substantive paragraph of Mr Ige's new statement, dated 10 February 2022, confirms that he has been unable to recollect anything further regarding the accident and that the contents of his section 9 statement remain true to the best of his recollection.

14. The application for permission was made at the start of trial by Mr Todd QC and was not opposed by Mr Browne QC. I was satisfied that there was no prejudice to any party by the late service of the CPR compliant statement and, having considered the requirements of CPR 3.9, I granted the Part 20 Defendants relief from sanctions, permission for the service of the witness statement and permission for Mr Ige to be called.

**Mr Ige's driving experience and the University system for authorising drivers**

15. Mr Ige was 22 years old at the time of the accident and a student in his final year at Middlesex University. He had been learning to drive since he was 17 and had passed his test 11 months prior to the accident on his second attempt. He had a clean full driving licence. He had undertaken a driving assessment with the University and had been authorised to drive minibuses and people carriers. He had driven University minibuses on several previous occasions and had also had a part-time job as a delivery driver, driving a white van.

16. A witness statement was served on behalf of the Part 20 Defendants from Mel Parker, the Head of Sports & Recreation at Middlesex University which describes the University's system for authorising drivers to use its vehicles. The University owned six minibuses and the Kia and they were used by student sports clubs and groups. An individual wanting to drive a University vehicle was required to pass an assessment covering theory and practical aspects of driving. The University had a member of staff who was qualified, as a Driver Assessor Trainer, to train and assess the competence of drivers having completed a training course provided by MiDAS, the Community Transport Association's Minibus Driver Awareness Scheme.

17. Mr Ige applied to be an authorised driver on 12 September 2019 and was assessed on that day as competent to drive the vehicles by the relevant member of staff. Drivers were required to complete a vehicle checklist before driving University vehicles. Mel Parker also records being aware from personal knowledge that Mr Ige had worked as a supermarket delivery driver during holidays and was therefore considered by the University to be an experienced driver for his age when driving larger vehicles.

18. Mr Ige then drove university minibuses on various journeys over the following month. Eighteen pre-journey safety checklist forms completed by Mr Ige were attached to Mel Parker's statement. Mr Ige agreed in cross-examination that these

were local journeys. No pre-journey checklist is held by the University in relation to the relevant trip as it would have been with Mr Ige in the vehicle at the time of the accident.

## The Kia

19. The Kia was registered in 2006. It was bought by the Students Union in 2008 and acquired from the Union by the University in 2014. It is said that it was serviced regularly and Mel Parker's statement exhibited the MOT certificates. It had initially failed an MOT on 16 September 2019 due to a faulty headlamp and other issues, but was repaired and passed. The University's records show that the Kia had broken down on 12 November 2019 and that the RAC attended, identified a low coolant level, and noted that the oil warning light was on. A leak in the oil filter was subsequently identified by a local garage and repaired. I accept the evidence that it was a properly maintained vehicle.

## Mr Ige's evidence as to the accident

20. Mr Ige says that on the Thursday before the accident he picked up the Kia, which he had not previously driven, from the University at around 5am and then picked up the other five members of the pool team to drive to Birmingham. He says that he completed the University's checklist form.

21. On Sunday 1 December 2019 they left Birmingham at around 12.30pm to return to the University. Mr Ige describes the weather as sunny and dry and the visibility was clear. He says that shortly before the accident they had stopped at a motorway service station. He re-joined the motorway, heading south on the M1. A speed limit of 60mph was displayed across the gantry.

22. He recalls driving in the third lane (out of four lanes) at about 55mph in fourth gear. He tried to change into fifth gear and at that point the car slowed. He moved down to fourth, then to third, hoping to pick up acceleration. He says that everyone in the car was aware of what was going on and were panicking. He noticed "the engine light was on, it was amber solid, the symbol looked like an engine and either said 'engine' or 'check'…." He then says this:

> "My next plan was to head to the hard shoulder and so I indicated and moved over to the second lane (from the left). I couldn't tell what speed I was doing at this point, I just knew it was too slow to be on the motorway. I indicated to go over to the hard shoulder then realised it was being used as an additional lane. Bearing in mind I've now put the vehicle into second gear and the vehicle was still slowing down I put my hazard lights on. I've noticed further up there was like a little side turning or room for me to pull into off the hard shoulder and so my plan was to pull in there. But before I could make it there the vehicle came to a stop. The car came to a stop as it just continued to slow, it wasn't a sudden stop. My plan was to quickly turn the engine off and turn it back on again. Whilst I did this everyone in the car was screaming I looked in my rear view mirror and I saw a lorry coming straight at us. I tried to

> turn the engine back on by turning the key in the ignition, I don't remember if it made a noise or not as everyone was screaming. The lorry got close and when it got real close I just shut my eyes…."

23. He says that following the collision he "woke up" and someone was at the driver's door talking to him. He was taken to hospital with minor grazes and muscle pain and returned home that evening.

24. It is clear from the CCTV footage that Mr Ige's statement is inaccurate; he was able to reach the ERA, stop there for a short period, and then exit the ERA and re-join the motorway shortly before the vehicle came to a stop. Mr Ige confirmed in his statement of 10 February 2022 and in his oral evidence that he has no recollection of the accident beyond the account given in his s.9 statement. His position, therefore, is that he has no recollection of driving into, or out of, the ERA. He was not challenged on this in cross-examination.

**Other eye-witness accounts**

25. A witness statement was served on behalf of the Claimants from Emma Pither dated 15 October 2021 which exhibits a copy of the s.9 statement she gave to the Police on the day after the accident. She was not called to give evidence. It is apparent that she acted with enormous courage and selflessness in everything that she did to try to help the occupants of the Kia despite real risks to her own personal safety.

26. In summary, she passed the broken down Kia once it had come to a stop on the motorway. She says that she was looking in her review mirror and "I saw an HGV in lane 1 behind the broken down car hurtling towards it"; she shouted to her passenger "he's not going to stop… he's not going to stop!". She describes the noise of the collision as "a horrendous sound". She pulled over and stopped in the nearside lane and ran back to the accident scene to try to help, leaving her passenger, Stephen Callaghan, and her six year old son in the car. She is a trained first aider.

27. She opened the driver's door and spoke to Mr Ige; she says "He was quite confused and was asking us to call his Uni but he wasn't really making much sense". She describes the scene that confronted her and the severe injuries of the passengers. She says that she was there for at least twenty minutes with no one else stopping to help. She remained at the scene for a total of 1 hour 35 minutes. She observed that once Mr Ige had been able to get out of the car he was "crying and distraught … He kept saying 'my boys, my boys'…." She states that Mr Bukowski stayed in his cab during the time she was trying to help. She concluded her s.9 statement by saying: "The HGV driver didn't seem to slow or try to swerve out of the way. It was like he was distracted or didn't see the car stopped in the road".

28. The hearing bundle contained evidence from the criminal prosecution and a number of other witness statements. Both parties referred me to various passages from a number of statements. These included statements from Stephen Callaghan, Joanne Brush, Ella-May Brush, Arthur Slowik, Jack Lane and David Swain. There are consistent themes in the witnesses statements, including descriptions of the good visibility, the fact that the broken down Kia was clearly visible and had been avoided by other vehicles and observations to the effect that the driver of the Scania lorry

appeared not to take any action to avoid the Kia whether by braking in advance or changing lanes.

29. A statement from Stephen Callaghan, Emma Pither's passenger, describes how he assisted her in trying to give first aid. He describes the Scania as not seeming to brake at all and not trying to avoid the Kia by changing lanes; he says that it was "as if the lorry driver of the Scania had not seen the Kia at all".

30. Mr Slowik was driving a lorry which had been overtaken by the Scania lorry 4 or 5 minutes before the accident. He says he was about 200 to 250 metres behind the Scania at the time of the collision. He described the traffic as "not heavy". He realised that there had been a collision and halted about 20 meters behind the Scania. He was not aware of the Scania's brake lights coming on before the collision.

31. Mr Swain describes the traffic as "light". He was in the nearside lane and saw a car in front swerve aggressively from this lane into lane two. He then saw the Kia with its hazard warning lights on and "… 'kangarooing' slowly along the lane. By Kangarooing I mean it was jolting along the road – not in a smooth way but in a jerky motion… I would say that it was travelling no more than 5 miles per hour." He had time to move out in a "normal overtaking manner. I had plenty of time to react to the [Kia]". By the time he had caught up with the Kia it had come to a stop. He says that it was ten to twenty seconds later that he saw the lorry hit it.

32. Joanne Brush, a front seat passenger, describes the stationary Kia as follows: "As far as I'm concerned, it was a clear and visible hazard in the road…. In my mind there is no reason for the lorry not to have clearly seen the Kia … with its hazard lights on, and I believe there was enough space and time for the lorry to have pulled out into lane two to avoid the collision".

33. Mr Bukowski provided a statement on 2 December 2019. The statement records that he had been arrested and accused of causing death by dangerous driving. He states that he was suddenly aware of the stopped vehicle, was unable to swerve to overtake due to another HGV on his off-side, and was unable to stop in time. He says that he has been driving for over forty years and there was nothing he could do to avoid the collision.

34. It is clear from the CCTV footage that there was no HGV to the off-side of the Scania preventing it from moving into lane two; I was informed that this allegation was later withdrawn. PC Cattley's report of 18 June 2021 concludes that Mr Bukowski would have had a clear and unobstructed view allowing him between 8 to 10 seconds to identify and react to the presence of the Kia and that there was enough road space and time available for him to stop safety in lane 1 or to move to lane 2 to avoid the collision.

**The CCTV evidence**

35. I have been provided with views from two motorway CCTV cameras. The first is positioned above the carriageway affording a view of the rear of vehicles as they travel south. It is apparent that it was a clear day and the visibility was good. The Kia can be seen moving from the third lane, across the second lane and into the nearside

lane with its hazard lights on. The Kia pulls into an ERA which is obscured on the CCTV footage by a gantry.

36. The second camera is located just north of the ERA and again covers the refuge area as well as vehicles on the motorway moving away from the camera. It shows the Kia entering the refuge. The brake lights appear to dim briefly before the car pulls off and re-joins the nearside lane.

37. It is common ground that Mr Ige put on the hazard warning lights about 12 seconds after leaving the ERA and that the Kia came to stop in the nearside lane approximately 145m south of the refuge area.

38. The CCTV footage does not provide a clear view of the Kia as it comes to a stop on the motorway. However, the movements of other vehicles as they approach the stopped Kia can be seen on both cameras. Mr Lane observes that "two SUV type vehicles" can be seen moving out of lane 1 to lane 2 in order to avoid the Kia, followed by a Toyota Verso. The footage from the first camera shows the Scania lorry coming to a halt as it collides with the Kia.

39. Mr Mutch's reports analyses the footage in some detail and there was no real dispute about this analysis. His analysis is that the Kia entered the ERA at 15:13:43 and came to a stop at 15:13:49. The brake lights dimmed momentarily at 15:13:52. The experts agree that this is consistent with Mr Ige turning off and re-starting the vehicle. The Kia is said to have been stationary for 7.7 seconds before it moved off at 15:13:57. It joined lane one at 15:14:05. It was in the ERA for approximately 22 seconds in total. It moved from the ERA into lane one of the motorway approximately 16 seconds after stopping. The Kia's hazard lights are then turned back on at 15:14:17, about 12 seconds after re-joining the motorway.

**The evidence of PC Cattley**

40. PC Cattley, a Police Forensic Collision Investigator, provided a written statement which summarised his forensic collision investigation reports and he gave oral evidence as a witness of fact, called by the Part 20 Defendants. He attended the scene of the accident and subsequently examined the vehicles involved. Both experts relied upon aspects of his investigations and there was a large measure of agreement in relation to his findings.

41. He arranged for the on-board diagnostics of the Kia to be interrogated by a Kia qualified technician, which revealed six active engine faults. His evidence was that he had identified that three of those faults were likely to have been activated as a result of the collision (P1611, P1500, P1613). I deal with the evidence in respect of the fault codes further below.

42. He described Mr Ige's stated intention to switch off the engine and restart as "a known method for clearing an engine fault light by re-cycling the ignition". He was of the view that there was time for Mr Ige to have done this when stationary in the ERA, and that "it is possible that doing so would clear the engine fault light to the driver's satisfaction". He also notes from the CCTV footage that "having pulled out of the ERA, seemingly normally, the Kia continued slowly in lane one before it becomes obstructed from view by the gantry".

43. He reported that the tachograph from the Scania lorry shows that it had been maintaining a constant speed of 56mph, which was likely to be due to the use of cruise control or a vehicle speed limiter. There was then a very rapid deceleration in a straight line for 5 seconds, dropping to zero, indicating that the braking began at or soon after impact with the Kia. PC Cattley's report concludes that the tyre marks created by the Scania on the road surface did not start until the Scania had already hit the Kia.

44. PC Cattley notes from the CCTV that a Toyota travelling in lane one had avoided colliding with the Kia by moving into lane two and that there was an eight to ten second period of time when the Kia was the only thing ahead of the Scania. His analysis of the footage was that there was enough time and road space for the Scania to have either stopped safely in lane one behind the Kia or to have moved into lane two. He also notes that the CCTV shows other vehicles ahead of the Scania braking in response to the presence of the Kia which should also have alerted the driver of the Scania.

**The evidence of Mr Lee Colyer**

45. Mr Lee Colyer, a Police vehicle examiner, examined the Kia on 2 December 2019, the day after the accident. He produced a vehicle examination report dated 17 February 2020 and a witness statement dated 19 November 2021. He was not called to give oral evidence.

46. He was aware of Mr Ige's report of a warning light having been displayed prior to the collision. He was able to start the Kia during his examination on 2 December 2019 and he states that only the airbag warning light and the brake fluid warning light remained illuminated when the ignition was activated. He was able to establish that both of those lights were a consequence of the accident. His statement of 19 November 2021 confirms that "the ignition started as normal and ran long enough for the onboard computer to carry out its checks, putting out all warning lamps on the instrument panel. There were no warning lights illuminated on the dashboard after I started the engine". I read that statement as not referring to the airbag and brake fluid lights because he had ascertained that they were caused by the accident.

47. Mr Mutch explains in his report that when he inspected the Kia he was able to speak to Mr Colyer. He says that Mr Colyer had confirmed that he ran the Kia's engine for about thirty minutes on 2 December 2019; he had not been able to test the vehicle under load because of the extent of the damage.

48. Amongst other matters, Mr Colyer also states that the fuel from the Kia, when he decanted it, "appeared to be free from water and contamination as it was slowly poured into the container".

**Record of Inquest**

49. I was also referred to the Record of the Inquest into the death of Zahid Ahmed, which I refer to for the sake of completeness. The findings of fact made by the Coroner are consistent with the undisputed aspects of the accident. The Coroner also made a report for the prevention of future deaths pursuant to Regulation 28 of the Coroners

(Investigations) Regulations 2013 to Highways England, reporting the evidence that the absence of a hard shoulder contributed to the accident.

## The expert evidence

50. The substantive part of the experts' joint statement ran to three and a half pages and appeared not to identify any areas of disagreement between them. Mr Todd QC raised a concern by skeleton and at the outset of the trial that the Part 20 Claimants may be intending to adduce additional oral evidence from Mr Lane going beyond his written report. Mr Todd's position was that, in the absence of any dispute between the experts, there was no need for them to give oral evidence, but that, at the very least, he needed advance notice of any additional evidence that it was intended to elicit from Mr Lane.

51. Mr Browne QC submitted that the experts should give oral evidence and that there were two particular issues which were unclear from the joint statement. The first was whether it is probable that the Engine Management Light came on again immediately after the engine was re-started whilst the Kia was stationary in the ERA. The second issue was whether, if the Engine Management Light did not re-illuminate immediately after the ignition was switched on again, it is likely that it would have come back on before the Kia re-joined the M1.

52. The joint statement of the experts was very brief and it appeared to me that clarification of the position of Mr Lane on those two issues would be of assistance. I agreed with Mr Todd QC that advance notice should be provided of any new evidence which Mr Lane was intending to give on those two issues. I therefore directed that if there was to be any additional oral evidence from Mr Lane then a short report should be served from him setting out his position on those two issues by 5pm that day, in order to give Mr Todd the chance to consider that evidence overnight. A two page supplemental report from Mr Lane on the two issues was served later that day.

### Areas of agreement between the experts

53. Mr Lane is a senior consultant with the Investigations Group of TRL Limited, specialising in collision reconstruction and is recognised as an Advanced Automotive Engineer by the Institute of the Motor Industry. Mr Mutch is a Principal Associate at Hawkins specialising in Road Traffic investigation and reconstruction, having previously been a Forensic Collision Investigator with the Kent Police between 2002 and 2007. I formed the view that both experts were doing their best to assist the court on the relevant issues.

54. The experts agreed in their joint statement that Mr Ige appeared to have re-started the vehicle in the ERA and that this "is confirmed by the brake lights dimming briefly". I have seen the relevant CCTV footage and the dimming of the lights is evident. I am satisfied on the evidence that Mr Ige did turn the ignition on and off again whilst the Kia was stationary and make that finding.

55. The experts also agreed in their joint statement that:

    a. "It is not possible to determine if the engine management light returned immediately after re-starting or if restarting the vehicle had cleared the engine

warning light. Both cases are possible". The same point was also expressed as: "The engine management fault warning light might have cleared as a result of the re-start, however, that is a matter for the Court to determine."

b. "After re-starting the Kia, the engine might have appeared to have been functioning correctly, but it would not be until put under load that it would become evident that the limp home mode, or other defect, was still active". Similarly, it was stated "It would not be apparent, when the engine was idling or even when revved whilst stationary, if the problem was present until the vehicle was driven under load, i.e. likely after the Kia had rejoined the main carriageway"

56. The fault code information does not include the times at which the faults were detected and so they might pre-date or post-date the collision. Both experts (in common with PC Cattley) agreed that fault codes 1611 and 1613, which related to the immobiliser, could be excluded as related to the cause of the accident; those fault codes, if operative at the relevant time, would have prevented the vehicle from starting at all. The positions of the experts on aspects of the four potentially relevant fault codes are considered further in the discussion section below.

## The Law

### The duty of care and the standard of care

57. The relevant principles as to the nature of the duty of care owed by a driver are well known and I was not referred by either party to any particular authority on the issue. As a driver, Mr Ige owed a duty to use reasonable care to avoid causing injury to persons or damage to property; reasonable care means the care which an ordinarily skilful driver would have exercised, under all the circumstances (Charlesworth & Percy on Negligence 14th Ed at 11-199). The reasonably careful driver is deemed to be armed with common sense and experience of the way other road users are likely to behave. The standard of proof is, of course, proof on the balance of probabilities.

58. It is also helpful to set out the following summary, adopted recently by Cavanagh J in **Toby Oliver Chan v Paula Peters and Advantage Insurance Company Limited** [2021] EWHC 2004 (QB) at [16] – [17], a case which concerned a road traffic accident involving a pedestrian:

> "[16] The Defendant will be liable in negligence if she failed to attain the standard of a reasonable careful driver and if the accident was caused as a result. The burden of proof, on the balance of probabilities, rests with the Claimant.
>
> [17] A very helpful summary of the law was set out by HHJ Stephen Davies, acting as a Deputy High Court Judge, in **AB v Main** [2015] EWHC 3183 (QB), at paragraphs 8- 14, in which he said, in relevant part:
>
> "6. First, and stating the obvious, it is for the claimant to establish on the balance of probabilities that the defendant was negligent. The standard of care is that of the reasonably careful

> driver, armed with common sense and experience of the way pedestrians, particularly (in this case) children, are likely to behave: **Moore v Pointer** [1975] RTR, per Buckley LJ. If a real risk of a danger emerging would have been reasonably apparent to such a driver, then reasonable precautions must be taken; if the danger was no more than a mere possibility, which would not have occurred to such a driver, then there is no obligation to take extraordinary precautions: **Foskett v Mistry** [1984] 1 RTR 1, per May LJ. The defendant is not to be judged by the standards of an ideal driver, nor with the benefit of "20/20 hindsight": **Stewart v Glaze** [2009] EWHC 704, per Coulson J at [5].
>
> 7. Second, however, drivers must always bear in mind that a motorcar is potentially a dangerous weapon: **Lunt v Khelifa** [2002] EWCA Civ 801, per Latham LJ at [20].
>
> 8. Third, drivers are taken to know the principles of the Highway Code.
>
> ….
>
> 11. Fifth, in another decision of the Court of Appeal, **Lambert v Clayton** [2009] EWCA Civ 237, [Smith LJ] also cautioned trial judges against making findings of fact of unwarranted precision when that was not justified by the evidence, on the basis that treating what could in truth be no more than "guesstimates" as if they were secure findings of fact could easily lead to an unjust result either way [35-38]. At [39] she said this:
>
> "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."
>
> ….
>
> 14. Eighth, a further danger of which Mr Kennedy reminded me is that of approaching the question of whether or not the defendant's driving fell below the requisite standard in a vacuum, without reference to the actual circumstances of the actual collision against which the standard is to be judged: per May LJ in **Sam v Atkins** [2005] EWCA Civ 1452."

59. I also remind myself of the cautionary observation of Laws LJ in **Ahanonu v South East London & Kent Bus Company** [2008] EWCA Civ 274 at [23]**:**

> "The judge … has in effect sought to impose a counsel of perfection on the bus driver…. Such an approach I think distorts the nature of the bus driver's duty which was of course no more nor less than a duty to take reasonable care. 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."

## The Highway Code and relevant guidance

60. Pursuant to s.38(7) of the Road Traffic Act 1988, a party may rely on the failure of a person to observe a provision of the Highway Code as tending to establish or negative any liability. My attention was drawn to relevant sections of the relevant version of the Highway Code.

61. The Code has provisions dealing with breakdowns, including an instruction in rule 274 to "get your vehicle off the road if possible". There were no particular provisions dealing with so-called 'smart motorways' at the relevant time. Rule 275, headed "additional rules for motorways" contains, amongst other provisions, the following:

> "If your vehicle develops a problem, leave the motorway at the next exit or pull into a service area. If you cannot do so, you should
> - pull onto the hard shoulder and stop as far to the left as possible, with your wheels turned to the left
> - try to stop near an emergency telephone …"

62. Rule 277 states:

> "If you cannot get your vehicle onto the hard shoulder
> - do not attempt to place any warning device on the carriageway
> - switch on your hazard warning lights
> - leave your vehicle only when you can safely get clear of the carriageway…"

63. Whilst it was not referred to during the trial, I note that since the accident the Highway Code has been updated. It now contains a new Rule 278 which provides that "to rejoin the carriageway after a breakdown from …. an emergency area, you **MUST** use the emergency telephone provided and follow the operator's advice for exiting the emergency area. A lane may need to be closed so that you can rejoin the carriageway safely" (original emphasis). The code then depicts a blue "emergency area information sign" which states that drivers "MUST" use the SOS telephone "and await advice to rejoin main carriageway". There is no suggestion in this case that the ERA contained (or ought to have contained) any such sign at the relevant time.

64. In addition, I have been provided with a copy of the Government guidance entitled "How to drive on a smart motorway" as at December 2019. This does not form part of the Highway Code and Mr Browne QC was clear that he was not contending that this had come to Mr Ige's attention prior to the accident. It includes the following:

> "Quick tips
> - If the hard shoulder is being used as an extra lane, use the designated emergency areas for emergencies
> - If your vehicle experiences difficulties, eg warning light, exit the motorway immediately if you can
> - If you break down, put your hazard lights on.
>
> In an emergency or breakdown
> If your vehicle is damaged or appears to have problems, always try to exit the motorway immediately. If that's not possible, you should follow these steps:
> 1. Use an emergency area if you can reach one safely. These are marked with blue signs featuring an orange SOS telephone symbol
> 2. If you can leave your vehicle safely, contact Highways England via the roadside free emergency telephone…
> 3. If you can't get to an emergency area but your vehicle can be driven, move it to the hard shoulder (where available) or as close as possible to the nearside (left hand) verge or other nearside boundary or slip road…"
> 4. If you feel you can exit safely with any occupants, consider exiting …
> 5. Switch on your hazard warning lights and any other lights such as rear fog lights or side lights, to increase your visibility especially if it's dark or foggy. Do not put out a warning triangle…
> 6. Contact your breakdown recovery service…
>
> If it's not possible to exit your vehicle safely, there's no safe place to wait, or you feel your life is in danger, put your hazard warning lights on and stay in your vehicle with your seat belt on. If you have a mobile phone dial '999' immediately.
> Our regional control centres use CCTV cameras to monitor and manage our motorways. Once they are aware of your situation (via CCTV or the police), they can set overhead signs and close the lane to help keep traffic away from you…"

## The burden of proof

65. Mr Todd QC submitted that the burden of proof rests on the Part 20 Claimants to prove that Mr Ige was negligent in deciding to re-join the motorway from the ERA as well as proving the allegation that the Engine Maintenance Light was illuminated whilst the Kia was in the ERA. Mr Browne QC submitted that the Part 20 Defendants had the burden of proving their pleaded case that Mr Ige had satisfied himself that it was reasonably safe to return to the motorway, including the burden of proving that

the Engine Management Light was not illuminated after the engine had been restarted, insofar as this was relied upon by the Part 20 Defendants.

66. I was not referred to any particular authorities in respect of this issue. However, I consider that it is helpful to set out the following overview from Zuckerman on Civil Procedure: Principles of Practice, 4th edition at Ch 22.39, 22.40 and 22.42 (footnotes removed):

> "22.39 Given that the court cannot find facts beyond what the evidence called by the parties has proved, the law must provide answers to three essential questions: first, which party will lose if the court fails to be persuaded of the existence of a fact in issue (the burden of persuasion); second, which party has to come forward and adduce evidence in support of a fact in issue (the burden of adducing evidence); and third, what level of proof is required in order to persuade the court of the existence of a fact in issue (the standard of proof)…
>
> 22.40 The burden of persuasion, also known as the probative burden, requires the party who carries it to prove their case to the appropriate standard of proof. They must persuade the court, normally on the balance of probabilities, of the truth of the facts that they are required to establish in order to make out their case. If the party fails to discharge this burden, the court must decide against them. The party who carries the burden of persuasion may be said to carry the risk of error, or of non-persuasion, because the court would have to find against that party in the event that the case remains unproven one way or the other…
>
> …
>
> 22.42 The burden of adducing evidence (or the evidential burden) is different from the burden of persuasion and involves a different technique for allocating the risk of error. Sometimes a party who wishes to raise an issue is required to adduce some evidence capable of supporting the existence of the particular fact in issue even though the burden of persuasion in respect of that issue rests on the opponent. For example, an accused charged with murder and who wishes to raise the defence of self-defence must adduce some evidence to suggest that they acted in self-defence. They bear the burden of adducing evidence capable of supporting their claim that they acted in self-defence. The accused is not required to satisfy the court that they so acted. The burden of persuasion rests on the prosecution to disprove self-defence beyond all reasonable doubt…."

67. The relevant parts of the pleading are as follows:

i) At paragraph 4(f) of the Part 20 Claimants' Particulars of Claim it is alleged that "As the fault with the Kia had not resolved, it is likely that the engine check light on the Kia continued to show that there was a fault with the same, but that the Third Party unreasonably ignored this warning and made the unreasonable decision to move from the safety of the Emergency Refuge Area back onto the motorway".

ii) At paragraph 5(f) of the Defence it is pleaded, in response, that "the Third Party's case is that while in the refuge he satisfied himself that it was safe to return to the motorway; further, that he acted reasonably in so doing. The implied allegation of negligence in this sentence is therefore denied".

iii) By way of particulars of negligence it is pleaded at paragraph 6(a) of the Particulars of Claim that Mr Ige "knew the Kia had [a] fault which was seriously reducing performance which was dangerous on a motorway and, despite having reached a place of safety…, decided to pull out of the same…". At paragraph 6(b) it is pleaded that Mr Ige knew or ought to have known that the fault had not been resolved. At 6(c) it is pleaded that he moved off from the ERA in circumstances where the "engine check warning light" was illuminated.

iv) In response to paragraph 6(a) the Defence pleads: "Denied. When the problem with the Kia first manifested itself the Third Party correctly entered the refuge and remained there whilst he determined that it was reasonable safe to return to the motorway". In response to 6(b) the plea is "Denied. It was reasonable for the Third Party to return to the motorway when he did". In response to 6(c) it is pleaded: "Denied as set out above".

68. In summary, therefore, the Part 20 Claimants have pleaded a positive case that it is likely that the Engine Management Light remained illuminated whilst the Kia was in the ERA and have relied on that contention to found the allegation that Mr Ige unreasonably ignored this warning. The Part 20 Defendants deny the Part 20 Claimants' case that it was likely that the Engine Management Light was illuminated, deny that Mr Ige knew or should have known that the fault persisted, and deny that it was unreasonable to leave the ERA in those circumstances; the last point is also put positively as an assertion that Mr Ige satisfied himself that it was safe to return to the motorway.

69. In my judgment both the probative burden and the evidential burden remain on the Part 20 Claimants to prove the issue of fact which they allege and on which they rely, namely that "it is likely that the engine check light … continued to show that there was a fault", which issue is also expressed as the "engine check warning light … was illuminated" when Mr Ige moved off from the ERA; this positive case is advanced by the Part 20 Claimants and denied by the Part 20 Defendants. More generally, the burden rests on the Part 20 Claimants to prove that Mr Ige was negligent to leave the ERA. The fact that the Part 20 Defendants deny that Mr Ige was negligent whilst also asserting that he satisfied himself that it was safe to return to the M1 and that he acted reasonably does not, in my judgment, mean that the Part 20 Claimants are relieved of the burden of proving their pleaded case that the Engine Management Light remained illuminated.

70. As to the potential relevance of the burden of proof, I have set out the cautionary words of Smith LJ in **Lambert v Clayton** above. Mr Todd QC relied on the following statement of principle of Lord Hope in respect of the burden of proof in **Pickford v Imperial Chemicals Ltd** [1998] 1 WLR 1189 at 1200A, HL:

> "There is no doubt that in most cases the question of onus ceases to be of any importance once all the evidence is out and before the court. But in this case it was not so simple. As Lord Thankerton observed in Watt v Thomas [1947] A.C. 484, 487 the question of burden of proof as a determining factor does not arise at the end of the case except in so far as the court is ultimately unable to come to a definite conclusion on the evidence, or some part of it, and the question arises as to which party has to suffer from this. From time to time cases arise which are of that exceptional character. They include cases which depend on the assessment of complex and disputed medical evidence, where the court finds itself in difficulty in reaching a decision as to which side of the argument is the more acceptable. I think that this was such a case, and that the judge was justified in reminding himself where the onus lay as he examined the evidence…"

**The Civil Liability (Contribution Act) 1978**

71. The 1978 Act contains the following provisions:

> 1. Entitlement to contribution.
> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
> …
> 2. Assessment of contribution.
> (1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

72. I was also referred to **Downs v Chappell** [1997] 1 WLR 426, *per* Hobhouse LJ, that "It is just and equitable to take into account both the seriousness of the respective parties' faults and their causative relevance".

**Discussion**

**Mr Ige's general approach to driving vehicles belonging to the University**

73. Thirteen of the eighteen pre-journey checklists which Mr Ige completed before using University vehicles contain comments from Mr Ige in relation to the condition of the

relevant vehicle prior to departure, including reports of cracked wing mirrors, a brake light not working, and empty windscreen washer fluid. It seems to me that Mr Ige completed the forms conscientiously, notwithstanding that these were only local journeys, and paid attention to the condition and safety of the vehicles he was driving. I formed the impression that he took his responsibilities as a driver of University vehicles seriously.

**The Kia's initial reduction of power and the Engine Management Light**

74. Mr Ige was clear in his s.9 statement on the day after the accident that he noticed that the "engine light was on" and was "amber solid" when the Kia initially suffered a reduction of power. He described the symbol as looking like an engine with the word "engine" or "check". Mr Mutch notes that the Kia handbook confirms that the word "check" appears in yellow directly below the image of an engine when the Engine Management Light is illuminated. It is evident that the light described by Mr Ige is the Engine Management Light and I find that it had illuminated before the Kia reached the ERA. It is also common ground, and apparent from the CCTV footage, that Mr Ige turned on the Kia's hazard warning lights as he moved lanes towards the nearside line.

75. It is not in dispute that the Kia suffered a reduction in power prior to entering the ERA which was a result of a fault or faults which either caused the Kia to go into 'limp home mode' or caused a reduction in power which was substantially similar to the effect of 'limp home mode'. Mr Mutch's evidence (which was not disputed) was that the Kia could still have been driven whilst in 'limp home mode', but it would reduce the vehicle's performance by about 50%, resulting in the vehicle's speed being limited to 35-45mph. That would equate to a maximum speed of 58%-75% of the speed limit (60mph) for the relevant section of the M1 at the time.

**Mr Ige's lack of memory of entering the ERA**

76. It was submitted by Mr Todd QC in his skeleton argument that we cannot know why Mr Ige has no recollection of stopping in the ERA shortly before the accident, but the event was an extremely shocking one and Mr Ige's own life was in danger. It was said that any suggestion that it was a convenient or suspicious loss of memory should be rejected. Mr Ige was not challenged in cross-examination about this gap in his memory.

77. There is no doubt that the impact was one of considerable force and that that the entire event was extremely shocking. I also note that Emma Pither described Mr Ige in her statement as "quite confused" and not "really making much sense" shortly after the collision. PC Snaddon, who attended the accident, describe Mr Ige as "dazed". In addition, Mr Ige's s.9 statement refers to having woken after the impact, suggesting that he believes he temporarily lost consciousness.

78. I formed the view that Mr Ige was an honest witness who was doing his best to give a truthful account and to answer the questions put to him as accurately as possible. I accept that Mr Ige is telling the truth when he says that he has no recollection of stopping in the refuge area and that he suffered a genuine loss of memory in this regard.

## Mr Ige's restarting of the Kia in the ERA

79. The experts agreed that there was time for Mr Ige to have restarted the Kia whilst it was stationary in the ERA. They also agreed that the dimming of the brake lights of the Kia which can be seen from the CCTV is consistent with the ignition having been turned off and on again. It is also Mr Ige's evidence that it was also his intention to get to a refuge area and re-start the vehicle. PC Cattley's evidence was that this is a known way of clearing engine fault codes. As set out at [54] above, I find that Mr Ige did turn off and restart the engine when the Kia was stationary in the ERA.

## Did the Engine Management Light illuminate when the Kia was restarted?

80. As set out above, the Part 20 Claimants assert, at paragraph 4(f) of their Particulars of Claim, that "it is likely" that the Engine Management Light "continued to show that there was a fault" whilst in the ERA but that Mr Ige "unreasonably ignored this warning and made the unreasonable decision" to move from the safety of the ERA. This is repeated as a specific allegation of negligence at paragraph 6 (c) of the Particulars of Claim. It is also alleged, at paragraph 6(b), that Mr Ige was negligent in that he "moved off from the Emergency Response Area in circumstances when he knew, or ought to have known, that the fault with the Kia had not been resolved."

81. As set out at paragraph [55] above, the experts stated in their joint statement that they considered that it is not possible to determine if the Engine Management Light came on immediately after restarting or if restarting the vehicle had cleared it. They agreed that after restarting the engine might have appeared to have been functioning correctly and it would not be until put under load that any defect would become evident.

82. In order to consider this issue in more detail it is necessary to set out the evidence relating to the four possibly relevant fault codes in more detail.

83. **Fault code P2264 – water in fuel sensor circuit:** Mr Lane did not suggest in either his main report or the joint statement that he was able to identify which particular fault caused the Kia to experience its initial reduction in power, nor which fault caused it to come to a stop. However, in his short supplemental report produced on the first day of trial, he stated that the behaviour of the Kia before and after it stopped in the ERA was consistent with water in the diesel. In oral evidence he accepted that the behaviour of the Kia was consistent with fuel starvation which could have been caused by either water in the diesel or fuel pressure being outside the tolerances.

84. As to the possibility of water in the diesel (fault code P2264), it was common ground between the experts that this could not be excluded as a possible fault. Mr Colyer noted that no contamination of the fuel was observed by him on a visual examination, but PC Cattley accepted, and I accept, that that cannot exclude the possibility of water in the diesel. Similarly, I do not consider that any real weight can be put on the fuel analysis report obtained by Mr Mutch when he inspected the Kia, some 14 months after the accident, given the passage of time and the fact that storage conditions were not optimal.

85. Mr Lane explained in his supplemental report that if water in the fuel had caused "the warning light" to illuminate then he "would have expected the warning light to come back on after the engine restarted as the water detected by the sensor in the fuel filter

would not be removed simply by stopping and restarting the vehicle". In his oral evidence he explained that water above a certain level in the fuel filter would complete the circuit between probes, resulting in the warning light being illuminated. Thus, if water had accumulated in the fuel filter reservoir beyond a certain level the warning light would have come on even when the vehicle was stationary.

86. The technical information provided by Kia in relation to fault code P2264 explains that the diesel fuel filter separates water from the fuel and that a sensor will trigger a "water warning lamp" ("**the Water Warning Lamp**") if the sensor detects more than the specified volume of water stored in the filter.

87. Mr Ige did not make any mention of a separate Water Warning Lamp; the warning light he noticed was the Engine Management Light. In addition, when Mr Colyer started the Kia the day after the accident he noted that only the brake fluid warning light and airbag warning light were illuminated (see [46] above). Had either the Engine Management Light or the Water Warning Lamp been illuminated when the vehicle was started on the day after the accident then I would have expected Mr Colyer, as a Police vehicle examiner inspecting the vehicle and paying attention to the dashboard lights, to have notice and recorded them. I am satisfied that neither the Water Warning Lamp nor the Engine Management Light was illuminated when the vehicle was restarted on 2 December 2019.

88. I accept Mr Lane's evidence that if there had been excess water in the fuel filter prior to the Kia entering the ERA such as to cause the fault code to be triggered, then, having regard to the way the sensor operates, it is probable that the dedicated Water Warning Lamp would have illuminated when the engine was restarted in the ERA. However, absent good reason to the contrary, if there had been excess water in the fuel filter such as to trigger the Water Warning Lamp (or then the Engine Management Light) on 1 December 2019 then, for the same reasons, it is probable that the Water Warning Lamp (and then the Engine Management Light) would have illuminated on the restarting of the engine on 2 December 2019.

89. In those circumstances, I conclude, on the balance of probabilities, that neither the Water Warning Lamp nor the Engine Management Light was illuminated by reason of any excess water in the fuel filter when Mr Ige restarted the Kia in the ERA. Even if it could plausibly be contended that the evidence is too limited to make a finding of fact on this issue, I am satisfied that the Part 20 Claimants have not discharged the burden on them of proving that any excess water in the fuel filter caused either the Water Warning Lamp or the Engine Management Light to have illuminated when the vehicle was restarted by Mr Ige in the ERA.

90. **Fault code P1500 – vehicle speed sensor malfunction:** Mr Mutch's position was that he could not exclude the possibility that this fault code pre-dated the accident. Mr Lane's evidence was that the P1500 fault code was probably triggered by the accident, the vehicle having been shunted forward by the impact of the Scania at a time when the engine was not powering the vehicle. PC Cattley's analysis was the same. Whilst I accept that it is not possible to be certain on the point, it seems to me that it is more likely than not that the P1500 fault code was generated as a consequence of the accident, consistent with the position of Mr Lane and PC Cattley.

91. **Fault Code P1119 and P1120 - inlet metering valve control / valve circuit malfunction**: The Kia documentation explains that this valve is located in the high pressure pump and controls the rail pressure by regulating the amount of fuel which is sent to the pump. Mr Lane explained that both of these fault codes relate to inappropriate pressure within the inlet metering valve circuit.

92. The relevant evidence can be summarised as follows:

    i) It was agreed by the experts that fault code P1120 would cause the vehicle to enter "limp home mode", which would be consistent with the loss of power reported by Mr Ige and observed from the CCTV and would have illuminated the Engine Management Light.

    ii) It was agreed that fault code P1119 would not, by itself, have resulted in limp home, but could have caused a reduction in power which could have appeared to be substantially similar to limp home mode.

    iii) Mr Mutch's evidence (which was not disputed) was that the fault(s) which triggered fault code P1119 might also lead to fault code P1120 being triggered, resulting in limp home mode.

    iv) It was common ground that the type of fault(s) associated with fault code P1119 could give rise to a loss of power and/or stalling such as experienced when the Kia returned to the motorway from the ERA.

    v) The experts were agreed that they could not determine whether the Engine Management Light would have come back on after restarting the ignition in the ERA assuming that the underlying fault(s) had triggered either (or both) P1119 or P1120.

    vi) Mr Colyer's observation was that the ERA was not illuminated when he ran the engine the day after the accident. This is consistent with Engine Management Light being cleared by restarting.

    vii) There was no cogent evidence as to any good reason why the Engine Management Light might have illuminated on restart in the ERA on 1 December 2019 in circumstances in which it did not illuminate on 2 December 2019.

93. On the evidence available and summarised above, it is my judgment that the fault or faults which caused the reduction in power prior to the Kia entering the ERA and which subsequently caused the loss of power after the Kia left the ERA were related to issues with the inlet metering valve control and/or circuit and that such fault(s) triggered fault code P1119 and/or P1120. I also consider that it is more likely than not that the Engine Management Light did not illuminate when the vehicle was stationary in the ERA by reason of any fault(s) connected with fault codes P1119 and/or P1120, consistent with Mr Colyer's observations the following day.

94. Even if it could plausibly be contended that the evidence is too limited to make the above factual determinations on these two issues, I am satisfied that the Part 20 Claimants have not discharged the burden on them of proving their positively pleaded

case that the Engine Management Light was illuminated immediately after the engine was restarted by Mr Ige in the ERA.

**Did the Engine Management Light come on before the Kia left the ERA?**

95. The case advanced at trial on behalf of the Part 20 Claimants was that even if the Engine Management Light was not illuminated immediately after the Kia was re-started in the ERA, nevertheless it may have been illuminated by the time that the Kia left the ERA and, if so, then Mr Ige was negligent to have exited the ERA in such circumstances. It is therefore necessary to consider the evidence as to whether the Engine Management Light may have illuminated at some stage during the eight seconds after the Kia was re-started and before it left the ERA.

96. As set out at [90] above, I have found that the possibility of faults relating to Fault Code P1500 (vehicle speed sensor malfunction) can be discounted as likely to have arisen as a result of the accident. Accordingly, I find that this fault code did not cause the Engine Management Light to be illuminated either when Mr Ige restarted the ignition in the ERA or prior to the Kia re-joining the motorway.

97. As to fault code P2264, I have found, as set out at [89] above, that neither the dedicated Water Warning Lamp nor the Engine Management Light was illuminated by reason of excess water in the fuel filter when Mr Ige restarted the Kia in the ERA. Mr Lane's evidence, which I have accepted as correct, was that excess water in the fuel filter would have triggered the Water Warning Lamp regardless of whether the vehicle was under load. On the evidence before me, therefore, I find that neither the Water Warning Lamp nor the Engine Management Light were illuminated prior to the Kia leaving the ERA by reason of any excess water in the fuel filter.

98. **Fault Code P1119 and P1120 - Inlet metering valve control/circuit malfunction**: For the reasons set out above, I have found that, on the balance of probabilities, the Engine Management Light was not illuminated when the engine was restarted by Mr Ige in the ERA. The experts agreed in their joint statement (at paragraph 23) that "It would not be apparent, when the engine was idling or even when revved whilst stationary, if the problem was still present until the vehicle was driven under load, i.e. likely **after** the Kia had rejoined the main carriageway" (emphasis added).

99. In his supplemental statement Mr Lane stated that: "In my view, the engine would have come under load as soon as it started to move from its stationary position in the ERA. As agreed at paragraph 23 of the joint statement, it may well be that the relevant fault did not manifest itself in the form of engine malfunction at that time. However, we know that the fault was still present as the vehicle came to a stop not long after leaving the ERA (after travelling only 145m). Once the engine came under load, I would expect the pressure to fall outside the designed tolerances. In those circumstances, even if the warning light had been extinguished by the restart, in my view it is probable that the warning light would have come back on when the engine came under load and before the vehicle re-joined the motorway".

100. There is some tension between Mr Lane's supplemental statement and what he agreed in the joint statement in this respect. In cross-examination Mr Lane did not provide any proper explanation as to why he had not stated in his original report, or the joint statement, that he considered that it is was likely that the Engine Management Light

would have come on before the Kia left the ERA, despite the fact that this was the Part 20 Claimants' pleaded case. Nor could Mr Lane say at what point in time he considered that the Engine Management Light would have illuminated after the Kia began to move and prior to it exiting the ERA.

101. Mr Mutch considered that it would probably be necessary for a certain threshold of pressure to be reached before the Engine Management Light came back on and so the extent of acceleration in the layby would be relevant. He noted that the CCTV showed the Kia entering the motorway at low acceleration and that he had estimated this as being about ½m/s$^2$ from the CCTV footage, as opposed to the normal acceleration that might be expected of 1-2m/s$^2$. Mr Lane appears not to have attempted to calculate the acceleration of the Kia as it began to leave the ERA. I accept Mr Mutch's evidence that the Kia accelerated gently before it exited the ERA. This accords with my impression from reviewing the CCTV that Mr Ige appears to have travelled only a short distance in the ERA before pulling into a fairly large gap in the traffic and then accelerating whilst in the carriageway. When asked if it was probable that the Engine Management Light would have come back on in the eight second period between the Kia being re-started and joining the motorway, Mr Mutch's answer was that he could not say.

102. In my view, Mr Lane's assertion that it is more likely than not that the Engine Management Light would have come back on before the Kia exited the ERA is not grounded in any firm evidence. It is a possibility, but only a possibility. I accept Mr Mutch's position that, on the limited information available, it is not possible to say at precisely what point the vehicle came under load to a sufficient extent to cause the Engine Management Light to be come back on.

103. This is not a complex issue of disputed medical evidence of the type identified by Lord Hope in **Pickford v ICI** (see [70] above), but it is a situation in which it is appropriate to have regard to the warning of Smith LJ in **Clayton v Lambert** (see [58] above) about the dangers of making overly precise findings which are not supported by the evidence and the consequential importance of the burden of proof in such cases. For the reasons set out at [69] above, I consider that the burden rests on the Part 20 Claimants to prove their pleaded case that the Engine Management Light was illuminated before the Kia left the ERA. The Part 20 Claimants have not discharged that burden on this factual issue.

104. It is also relevant to consider what the position would have been had the Engine Management Light come back on over the short distance covered by the Kia in the ERA immediately before joining the M1. This was a difficult manoeuvre, undertaken without the benefit of the usual motorway slip road, and requiring the driver to judge the speed of oncoming vehicles carefully; a driver using reasonable care would have been focusing on checking mirrors and, possibly looking over their right shoulder, to ensure that the manoeuvre was completed safely. In my judgment, therefore, even if the Engine Management Light had re-illuminated as the vehicle began to accelerate, I do not consider that Mr Ige would have fallen below the requisite standard of care for failing to spot that the light had come back on and/or for failing to abort his manoeuvre to join the M1 as he gathered speed to complete that manoeuvre.

105. **Conclusion on the allegation of the Engine Management Light being illuminated whilst the Kia was in the ERA:** I have found, for the reasons set out above, that the

Engine Management Light was cleared by Mr Ige when he restarted the Kia in the ERA. The Part 20 Claimants have not discharged the burden on them of proving their pleaded case that the Engine Management Light came back on as the Kia accelerated relatively gently in the ERA prior to joining the M1. Further, I do not consider that Mr Ige would have been negligent for failing to notice the light and/or abort his manoeuvre to re-join the motorway if the Engine Management Light had come back on as he was in the process of leaving the ERA for the purpose of completing this manoeuvre.

**The overarching allegation of negligence**

106. The primary overarching allegation of negligence is set out in paragraph 6(a) of the Particulars of Claim. It is said that Mr Ige was negligent in that he "(a) knew the Kia had [a] fault which was seriously reducing performance which was dangerous on a motorway and, despite having reached a place of safety (i.e. the [ERA]), decided to pull out from the same and move back onto the motorway, in circumstances where he knew that there was no hard shoulder upon which he could stop." Similarly, it is said that he was negligent: for moving off when he knew, or ought to have known, that the fault had not been resolved (paragraph 6(b)); for unreasonably creating a dangerous situation in moving from the ERA and then bringing the Kia to a halt on the motorway (6(e)); and for failing to remain in the ERA and call for assistance (6(f)).

107. In my judgment, and having regard to the findings of fact set out above, Mr Ige did not fail to use reasonable care and did not fall below the standard to be expected of a reasonably careful and competent driver in relation to his decision to re-join the motorway in the relevant circumstances. This is for two primary reasons.

108. First, prior to entering the ERA Mr Ige knew that there was a reduction in the power of the vehicle and that the Engine Management Light was illuminated. On the findings that I have made, Mr Ige managed to reach the ERA and restart the car and, by doing so, cleared the Engine Management Light. PC Cattley's evidence was that re-starting an ignition is a known way to clear fault lights. Similarly, rebooting a computer is a known way to clear an error message.

109. Having successfully cleared the Engine Management Light, a driver exercising reasonable care would, in my judgment, have reasonably considered that the fault had been resolved. The experts were also agreed that "it would not be apparent, when the engine was idling or even when revved whilst stationary, if the problem was still present". There would therefore have been no other signal to warn Mr Ige that the vehicle was not behaving normally whilst the vehicle was stationary.

110. Second, I do not consider that a driver exercising reasonable care should have appreciated that, with the Engine Management Light cleared, there was a real risk that the Kia, being a modern vehicle which had been properly and professionally maintained, would suffer a complete loss of all power. To borrow from the words of warning of Laws LJ in **Ahanonu** (at [59] above), it would require a liberal and inappropriate use of hindsight, in my view, to conclude that a driver should have appreciated that there was a real risk that the vehicle might suffer a total breakdown in such circumstances.

111. Having cleared the Engine Management Light, the risk that would have been reasonably apparent to a driver exercising reasonable care would, in my judgment, have been that the car might nevertheless suffer a reduction in power and speed as before. Prior to entering the ERA the Kia was either in "limp home mode" or a condition akin to limp home mode with the Engine Management Light illuminated. The vehicle was still capable of being driven at about 50% power, up to about 35mph or 45mph and so able to travel at 58% to 75% of the maximum speed limit (60mph) for that stretch of the motorway. A driver exercising reasonable care would have been entitled to conclude that, even if this problem reoccurred, it would still be possible to drive the vehicle in reasonable safety, at reduced speed and with the hazard warning lights on, until the next opportunity to leave the carriageway (namely at the next ERA, or the next exit, or the hard shoulder once the 'all lanes running' had ended).

112. In addition to the above, it also seems to me that Mr Ige would not have been acting contrary to the Highway Code had he continued to drive in limp mode (or at an equivalent speed), with his hazard lights on in the nearside lane, with a view to coming off at the next exit, rather than pulling into the ERA immediately. Such a course would have been consistent with the primary guidance provided in the Highway Code to leave the motorway at the next exit or service area if a vehicle develops a problem and only to pull over if that is not possible. The fact that Mr Ige decided to pull over suggests to me that he was acting responsibly and with appropriate care in response to the situation he faced through no fault of his own. As stated above, having restarted the engine and cleared the fault, a driver exercising reasonable care may then have considered that it was safe to proceed.

113. As to the Government guidance on "How to drive on a smart motorway", it is not suggested by the Part 20 Claimants that this would have come to Mr Ige's attention, nor that a reasonably competent driver should be fixed with knowledge of this publication. In any event, the guidance does not take matters much further in my view. It expressly envisages that there may be breakdowns on smart motorways: "if you break down, put your hazard lights on". It also refers to smart motorways as having "technology-enabled sections" with "enhancements", including CCTV, sensors to monitor traffic volumes and electronic messages to display "red X signs" and variable speed limits. Accordingly, even if a driver had been aware of this guidance, I do not consider that they would have been failing to exercise reasonable care by acting in the manner adopted by Mr Ige in all the circumstances.

114. The Part 20 Claimants' allegations of negligence include reference to the fact that Mr Ige knew that the relevant section of the M1 had no hard shoulder. The suggestion is that a competent and careful driver should have factored the absence of the hard shoulder into their decision making when assessing the risks. Even if that premise is correct, it seems to me that the reality is that such a driver would have reasonably anticipated that there would be other ERAs at regular intervals in which to stop if the problem of reduced power reoccurred. In this regard, I note that the Government guidance on "How to drive on a smart motorway" at the relevant time refers to ERAs as being "spaced regularly", as one would reasonably expect. Further such a driver would have been aware that only limited stretches of motorway in the UK operate without a hard shoulder and so this state of affairs was unlikely to continue for many miles long and that, in any event, there would be other opportunities to exit the M1 before long.

115. Finally, I also note that there is no evidence that the ERA contained signage mandating the driver of a vehicle stopped in the ERA to call the operator for advice before re-joining the carriageway. The position may be different now as I note that the amendments to the Highway Code published on 14 September 2021 indicate that ERAs will now have a blue information sign stating that drivers "MUST" use the SOS telephone "and await advice to rejoin main carriageway". On the evidence before me, however, there was no such signage and drivers were left to exercise their own judgment as to whether to seek advice.

**The implicit contention that Mr Ige may have stopped the Kia voluntarily**

116. As noted above, paragraph 6(d) and the second part of 6(e) of the Part 20 Claimants' Particulars of Claim impliedly suggest that Mr Ige deliberately stopped the Kia on the M1. Mr Todd QC's position was that he understood any such contention to be abandoned and, in any event, no such allegation was actively pursued at trial. For the avoidance of any doubt, I accept Mr Ige's evidence, which is consistent with all of the available evidence, that the car slowed and came to stop on the M1 by itself and that Mr Ige did not bring it to a stop voluntarily.

## Conclusion

117. The allegations advanced by the Part 20 Claimants are that Mr Ige acted in breach of his duty to use reasonable care as a driver in leaving the ERA and re-joining the motorway and that his negligence caused or contributed to the tragic accident.

118. My key findings of fact are as follows:

i) The Kia suffered a fault or faults which reduced its power and illuminated the Engine Management Light. The reduction in power was consistent with the 'limp home mode' being engaged or a fault which had a substantially similar effect. The result was that the Kia was still capable of being driven at that time but was limited to approximately 50% of its power, meaning that it could be driven at 35-45mph or 58%-75% of the relevant speed limit (60mph).

ii) The initial reduction in power was probably caused by a fault or faults with the inlet metering valve control and/or valve circuit, triggering fault codes P1119 and/or P1120.

iii) Mr Ige switched on Kia's hazard warning lights and drove the Kia into an ERA. He switched the ignition off and back on. That cleared the Engine Management Light.

iv) The vehicle's engine would have appeared to function normally both when it was stationary and as it was picking up speed to exit the ERA.

v) Having joined the nearside lane of the M1 the Kia began to experience a reduction of power. Mr Ige put on the Kia's hazard warning lights approximately 12 seconds after re-joining the motorway. The Kia then lost all power and came to a standstill in lane one of the M1 about 145m beyond the ERA. The loss of all power is consistent with a fault or faults related to the P1119 fault code.

vi) Three vehicles successfully pulled out of lane one and into lane two to avoid the Kia.

vii) Mr Bukowski, the driver of the Scania lorry, took no avoiding action until he applied the brakes as, or fractionally before, the lorry collided with the Kia. The Scania was travelling at approximately 56mph at the time of impact.

viii) The impact resulted in the death of Mr Ahmed and serious injuries to Mr Vakharia, Mr Mohammed, Mr Bhimia and Mr Shahji, all of whom were passengers in the Kia. Mr Ige was also injured.

119. I reject the Part 20 Claimants' claim that it is likely that the Engine Management Light continued to show that there was a fault with the Kia whilst it was in the ERA and that Mr Ige unreasonably ignored this warning and was negligent in moving off from the ERA with the light illuminated. As to this:

i) I have found that the re-cycling of the ignition cleared the Engine Management Light and it did not come back on whilst the Kia was stationary. Mr Ige therefore did not unreasonably ignore the Engine Management Light whilst the vehicle was stationary as there was no such light.

ii) On the evidence before the court it is not possible to determine whether the Engine Management Light came back on whilst the Kia began gently to gather speed within the ERA or only once it was on the M1. The Part 20 Claimants bear the burden of proving, on the balance of probabilities, their positive case that the Engine Management Light came back on whilst the Kia was being driven out of the ERA; they do not discharge that burden.

iii) In any event, even if the Engine Management Light came on as the Kia was gaining speed over the short distance in the ERA, Mr Ige would not have been negligent, in my judgment, in either failing to notice the light and/or in failing to respond to it by successfully aborting the manoeuvre to join the M1. This was a difficult manoeuvre, undertaken without the benefit of the usual motorway slip road, and requiring the driver to judge the speed of oncoming vehicles carefully; a driver using reasonable care would have been focusing on checking mirrors and ensuring that the manoeuvre was completed safely.

120. As to the overarching allegation that Mr Ige was negligent to move out of the ERA even if the Engine Management Light had been cleared by restarting the vehicle and did not come back on whilst in the ERA, I again find that Mr Ige was not negligent:

i) A driver exercising reasonable care would, in my view, have considered that with the Engine Management Light cleared and the vehicle apparently performing normally, the fault or faults had been resolved.

ii) Further, in such circumstances the risk reasonably apparent to such a driver would have been of a reoccurrence of the previous issue, namely the vehicle suffering reduced power whilst still being capable of being driven at approximately 58% to 60% of the relevant speed limit.

iii) It would have been reasonably apparent to such a driver that had the previous issue reoccurred then the vehicle could have been driven safely to the next ERA, or the next motorway exit, or onto the hard shoulder once the "all lanes running" section had come to an end. I do not consider that the reasonably careful and competent driver would have anticipated that, with the Engine Management Light extinguished, there was a real risk that the Kia, being a modern vehicle that was properly and professionally maintained, would suffer a complete loss of all power.

121. I have no doubt that Mr Ige wishes that he had decided to remain in the ERA and called for assistance, but in my view the decision he took in the circumstances then prevailing did not fall below the relevant standard of care. As Coulson J emphasised in **Stewart v Glaze** [2009] EWHC 704, at [5], a defendant is not to be judged by the standards of an ideal driver, nor with the benefit of "20/20 hindsight".

122. Once Mr Ige had committed to re-joining the M1 there was nothing that he could do when the Kia subsequently began to lose power, save for putting on the Kia's hazard warning lights. There was no hard shoulder and there was a fixed barrier preventing vehicles from pulling off the carriageway. He put on the hazard warning lights approximately 12 seconds after leaving the ERA. He could not have done more.

123. The negligence which caused this tragic accident was the negligence of Mr Bukowski in failing to take any action to avoid the Kia once it had broken down. He pleaded guilty to the charge of causing death by dangerous driving and to four counts of causing serious injury by dangerous driving; he was sentenced to 56 months imprisonment as a result.

124. In light of my findings, the issues of causation and apportionment do not arise. Had I found Mr Ige to be negligent and that such negligence caused or contributed to the accident then I would have agreed with Mr Todd QC that the negligence of Mr Bukowski "eclipses" any error of judgment on the part of Mr Ige; in my view this is a case in which, at most, a 10%-15% contribution from the Part 20 Defendants might potentially have been recoverable.