Neutral Citation Number: [2022] EWHC 889 (QB)

QB-2021-002185

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th April 2022

Before:

MR JUSTICE RITCHIE

- -

BETWEEN

STEPHEN PARRY

Claimant

- and -
STEPHEN JOHNSON (1)
NFU MUTUAL (2)

Defendants

(Giles Mooney QC instructed by Slater & Gordon) for the Claimant
(Roger Harris instructed by DWF Law LLP) for the Defendants

Hearing dates: 7th and 8th April 2022

- -

Mr Justice Ritchie:

The Parties

[1] The Claimant is a member of the public now aged 63.

[2] The 1st Defendant is a farmer who, with his family, owned a farm and operated a caravan site in Llangollen. The 2nd Defendant is the 1st Defendant's insurer.

Bundles

[3] For the hearing I was provided with four paper bundles lettered A-D and a digital bundle.

The trial

[4] This was the trial of the issues relating to liability. The claim related to a road traffic accident which occurred on 13th August 2019 at around 9:00 PM in Llandyn Hall Lane, Llangollen. The Claimant was a pedestrian and the 1st Defendant was driving a tractor towing an unlit seeding machine. The 1st Defendant approached the Claimant from behind as the Claimant and his wife were walking down the lane towards their campsite. The Claimant and his wife stepped onto the grass verge to the offside of the tractor as it approached and the seeding machine hit the Claimant and his wife as it passed.

Pleadings and chronology of the action

[5] By his amended Particulars of Claim dated November 2021 the Claimant pleaded that he and his wife were walking southwards along Landin Hall Lane in Llangollen. He heard a tractor driving towards him and stepped onto the grassy verge. The 1st Defendant failed to slow down and the seeding machine being towed by the 1st Defendant, which had a 30 centimetre overhang over the grass verge on either side, knocked him down. The Claimant alleged that the 1st Defendant was driving too fast, failed to heed the Claimant's presence, failed to avoid hitting the Claimant, had inadequate lighting on the front of the tractor and on the seeding machine and failed to heed the overhang. The Claimant also asserted Res Ipsa Loquitur (the facts prove the claim). The Claimant relied on the 1st Defendant's response to police questioning provided one hour after the accident in which the 1st Defendant stated, "*I suppose it could be my fault but if they were hiding in the hedge without bright clothes how are you supposed to see them?*" … "*I looked and they were not there.*" The Claimant pleaded that he had suffered a depressed occipital skull fracture and bleeding in his brain and had to undergo a craniotomy. Medical reports were served with the Particulars of Claim. In the Schedule attached to the Particulars of Claim the Claimant sought pain, suffering and loss of amenity of £160,000, asserting not only the injuries set out in the Particulars of Claim but also a fractured left clavicle and fractured left scapula. The Claimant asserted serious continuing sequellae from the injuries including loss of visual field, loss of hearing, reduced balance, reduced short term memory and processing, increased temper and reduced tolerance.

[6] In the Amended Defence served in late November 2021 the Defendants admitted the collision and asserted that the tractor was 2.4 meters wide and the seeding machine towed by the tractor was 2.99 meters wide. The Defendants defended on the basis that the tractor's lights were on (they did not specify which- main or dipped) and that the 1st Defendant was keeping a proper look out but did not see the Claimant before impact. The Defendants asserted that the Claimant was probably obscured by hedges and was wearing dark clothing. They asserted that he drove at a reasonable speed in the middle of the lane and he denied being negligent. They asserted there were no other steps that he could have taken. In addition the Defendants asserted that the Claimant contributed by his own negligence to the accident by being inconspicuous and by failing to face the tractor and by wearing dark clothing.

[7] Various orders and directions were made in this claim between July 2021 and March 2022. The direction for the trial of the preliminary issue on liability was made by Mr Justice Cotter in November 2021 at which time permission was granted to both parties to rely on expert accident reconstruction evidence. In March 2022 permission was given to the Defendants to rely on the evidence of a professional photographer.

Issues

[8] There were three issues in this trial.

(A) The first issue related to the visibility and conspicuity both of the Claimant and his wife. The sub-issues within that main issue related to the precise time of the accident; the ambient lighting; the weather; the state of the hedgerow; the Claimant and his wife's position on the verge and position of the impact of the seeding machine on the Claimant.

(B) The second issue related to the 1st Defendant's driving. The sub-issues were the speed; the headlights (dipped or main beam) and whether the 1st Defendant was keeping a proper look out.

(C) The third issue related to the Claimant's behaviour and the sub-issues related to the Claimant and his wife's clothing and the Claimant's movements on the verge.

The Evidence

[9] I heard evidence from the following witnesses:

(1) Mrs Parry;
(2) The 1st Defendant;
(3) Mr Sorton;
(4) Miss Eyers;
(5) The evidence of Mr Paul Holden was admitted in writing because it was agreed.

[10] Karen Parry was injured in the accident because the offside edge of the seeding machine hit her mid back as she stood on the verge. Over the three months between the accident and mid November 2019 the police contacted her by phone and put together her witness statement which she signed on 20th November 2019. In that witness statement she gave

her earliest recollection of the accident. She had not given a statement to the police on the evening of the accident because she herself was injured. She described that the road surface was dry, visibility was good and clear and it was light enough. She recalled specifically seeing blood run from her husband's nose after the accident. She considered that the hedge was overgrown. She stated that on the evening of the accident she visited the Sun Inn in the village of Trevor. She and her husband were on holiday. They ate there and she had one glass of wine. She was wearing black jeans and a purple fleece. Her husband, the Claimant, was wearing a light shirt, a green fleece, light beige shorts and white trainers. After the dinner they walked along the canal towpath and then came up over a stile into the lane where the accident occurred. They were walking southwards towards the main road on the right hand side of the lane. Stephen, the Claimant, warned her about the approach of a vehicle from behind. They turned and faced the vehicle. Then they moved as far as possible to the right hand side and stopped to let it pass. They were "single file". She asserted there was no reason why the driver would not have been able to see them. She recalled an amber beacon but did not recall headlights. She commented that there was no change in the speed of the tractor as it approached them and she had expected it to slow down or stop. She stated they both turned to face the main road as the tractor passed but something hit them. She and her husband ended up on the ground. The tractor stopped just further down the road. Her husband was lying "in front of her" with his head in the hedge. He was on his back and his lower legs were on the road with his body across the verge. She stated he was 5 foot 6 inches tall. She stated that as she came around the driver was on the phone to the emergency services. The driver apologised and said he did not see them. She was in a back brace for five weeks and suffered orthopaedic injuries and psychiatric injuries.

[11] In December 2021 Mrs Parry gave a witness statement for the civil action. I take that into account. In her evidence Mrs Parry was less able to recall the details because 2 and a half years had passed since the accident. She clearly recalled an impact on her back around her mid shoulder blades and she thought that her husband and she were standing on the verge for around a couple of seconds. She explained that what she said directly after the accident, which was recorded on the transcript of the emergency services call, was said while she was horrified at the possible life threatening injuries and potentially imminent death of her husband. In cross examination she accepted that her estimate of the time of the accident, namely 8:40 PM, was only an estimate given a few months after the accident. She could not dispute that the accident may have occurred after 9:00 PM. She did not recall rain before the accident. She clearly recalled blood running from her husband's face and maintained that visibility was sufficiently light for her to distinguish it. She did not think that the hedges were so overgrown that she and her husband were obscured. She had no recollection of seeing headlights on the tractor. She asserted that when standing on the verge she was not tangled in the bushes and she was not pushed up against the hedges. At the end of her evidence she said, "*we got onto the verge where I consider we should have been safe*".

[12] Peter Sorton is an accident reconstruction expert who gave evidence to the court. His report was dated 27th January 2022. The conclusions in his report were that the seeding machine was pulled behind the tractor and could swivel as a result of the way it was attached. The off side of the seeding machine hit the Claimant's left shoulder and head and also hit the Claimant's wife. He concluded that the impact probably displaced the Claimant and his wife South Eastwards down the lane. He noted that the 1st Defendant had admitted that he had not seen the Claimant and his wife before impact. He noted that the 1st Defendant had asserted in his police interview that the Claimant and his wife were "*hidden"* in the hedges. Physically, Mr Sorton gave his opinion that this could not have been so for if they were sufficiently into the hedges to be hidden they would not have been hit by the overhang which was at its maximum only 30 centimetres. Having inspected the scene Mr Sorton noted that the verge was narrow and on its far side away from the road sloped downwards into the bushes. Mr Sorton considered that the Claimant and his wife were probably standing in the middle of the verge approximately 25 centimetres from the side of the lane. In relation to visibility and how conspicuous the Claimant and his wife would have been to a reasonable driver, Mr Sorton pointed out that the Claimant had naked legs and beige shorts, naked hands and face and silver grey hair. He also gave the opinion that it would be impossible for the Claimant and his wife to see the dark seeding machine being towed by the 1st Defendant for it was unlit and it would have been behind the tractor which had its headlights on. He measured the width of the lane at the accident scene as 2.65 meters. He took photographs of the accident scene when he was there but his visit was made a year after the accident, therefore the state of the bushes in his photographs does not assist this court. He noted that the police reconstruction expert, Mr Davies, measured the carriage way at the point of impact as 2.5 meters wide. He noted that the 1st Defendant's engineer measured the tractor width at 2.4 meters wide at the rear without the equipment. He noted that the 1st Defendant told the police that the 1st Defendant was driving at a speed of 25 to 30 kilometres per hour which equates to 15.5 to 18.64 mph. He concluded that, to have been hit, the Claimant and his wife would have had to be positioned on the verge within 30 centimetres of the edge of the lane. As a result of his assessment of the lighting conditions he considered that the Claimant and his wife would have been visible to a driver approaching in a tractor. Mr Sorton did not consider there was any reason why the 1st Defendant should not have seen the Claimant and his wife standing on the verge as he approached. I have carefully looked at Mr Sorton's photographs and the prints of them.

[13] In his live evidence Mr Sorton was asked about the difference between visibility an conspicuity. He accepted that these two concepts are different. He accepted that conspicuity is the assessment of the attention grabbing value of something which is visible. He stated that on the day of the accident sunset was at 8:44 PM and that the 1st Defendant's emergency services call was made at 9:06 PM therefore the accident occurred between those times. He accepted that in law the accident occurred around 20 minutes after the law required vehicles to show their side lights but about 10 minutes before the law required vehicles to put on their headlights. He was unable to be certain

about the cloud cover on the day of the accident because he had not been present. He accepted that the post-accident photographs showed a slightly damp road around the tractor but dry tarmac under the wheels of the tractor indicating that if it was raining at the time of the accident it was minimal rain. In cross examination he gave evidence that dipped headlights illuminate the road but not the verges, in fact they make the verges darker. His photographs and those of the other accident reconstruction expert showed that as the 1st Defendant progressed from the bridge the 1st Defendant would have gone underneath overhanging trees, a darker area and then out into the lane covering 60 or 70 meters to the point of impact. In the lane there was considerably more light because there were no trees. He had used automatic light settings on his camera to avoid, in his experience, being accused of manipulating the light settings for the photographic evidence. He accepted that automatic settings would adjust the light so that the prints would be lighter than the reality. He had acknowledged this in the joint statement as well. He noted from the post-accident police photographs taken on the day after the accident, that the growth of the hedgerow did not extend over the tarmac carriageway. He gave evidence that the resting position of the Claimant after the accident showed that the Claimant could not have been in the hedgerow before the accident. Mr Sorton stated that in his expert opinion the Claimant could not possibly have ended up where he did after the accident had he been pressed back into the bushes before the impact. The seeding machine overhung the verge only by a maximum of 30cm. When asked about Ms Eyers theory of how the accident occurred, to which I will come below, Mr Sorton stated that in his opinion it was very unlikely. He described it as unrealistic to suggest that the Claimant and his wife stood so far back into the bushed that they were invisible and then, just as the tractor passed, they both stepped back towards the middle of the verge, so that they could have been hit by the seeding machine.

[14] At bundle page 685 is a useful photograph taken by Mr Sorton of the verge at the scene of the accident with the descent down a bank going into the hedge.

[15] The 1st Defendant gave evidence. He was asked by defence counsel, to confirm the truth of the contents of the witness statements he had signed for the civil claim which were dated 17th December 2021, 13th January 2022 and 28th January 2022. He was not asked to confirm the contents of the interview that he gave to the police and the handwritten witness statement which he signed which were the immediate record of the post-accident interview gathered one hour after the accident. Therefore I asked him to confirm the truth of the contents of that first account. He did so.

[16] Turning to the first account there are two copies in the bundle, the first is handwritten by the police officer and each page was signed by the 1st Defendant. This statement was provided after the police officer gave the normal warning *"you do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence*" to which the 1st Defendant replied "yes". The police officer also recorded

in the standard wording at the top of the witness statement *"I also have to tell you that you are not under arrest and you are free to leave if you wish to"* to which the 1st Defendant replied "yes". The police officer also offered the 1st Defendant the right to get independent legal advice in which case the interview would be delayed. The 1st Defendant declined that offer.

[17] PC Liam then asked the 1st Defendant questions and the responses given were in summary as follows. The 1st Defendant remembered checking his mirrors as he crossed the narrow bridge because the seeding machine overhangs the tractor and is wider than the tractor. He passed a car on the side of the lane after the bridge and then accelerated down the straight lane where a couple were standing in the hedge and he did not see them and the machine, which was wider than the tractor, caught them. As he looked in his mirror something caught his attention and he felt a wobble. He was going home for his tea and he had been working since 7:00 o'clock in the morning. He had had some time off in the afternoon for a haircut. He had good vision and did not require glasses. The farm at the end of the road belonged to his family and he drove that lane daily. It was a tarmacked lane with overgrown hedges and grass verges and he asserted that his tractor touched the sides of the lane as he drove down it. He accepted that any person could be on the lane because of the walk from the towpath on the canal. As to weather and visibility, he asserted that the road was empty except for a single parked car which he had already passed and the conditions were "*OK*" but it was just starting to rain and visibility was *"good it was just around dusk it wasn't dark but I had all the lights on the tractor."* I note that he did not say which lights – dipped or main.

[18] He asserted he was in the centre of the road and going at a speed around 25 to 30 kilometres per hour. After the accident he moved around 30 meters down the lane and then stopped and he looked in his mirror and his back window and he saw Mrs Parry on the ground.

[19] I have compared that initial statement with the statements he made subsequently. He was prosecuted and provided a proof of evidence to his criminal solicitors. He estimated that he drove over the bridge taking care for his own equipment at 5 to 7 kilometres per hour. Once he passed the car parked on his left hand side and a pothole on his right hand side he looked down the lane and then he increased the speed of the tractor over the next 40 to 50 meters. In this statement he asserted that he was only going 20 to 25 kilometres per hour. Therefore, by this time, having instructed solicitors, he was seeking to reduce his speed range by 5 kilometres per hour lower than his evidence to the police.

[20] The 1st Defendant signed a witness statement for the civil claim on the 17th of December 2021. In this witness statement he asserted that he finished seeding a field at 9:00 pm, called his wife and then set off home towards the bridge. He accepted his tractor lights were on dipped beam and his flashing beacon was on. In paragraph 43 he

asserted that there were *two* parked cars on the left hand side after the bridge. Therefore, he had changed his evidence in his favour, to increase the number of parked cars blocking his vision path down the lane. He also stuck to the lower speed which he had set out in the witness statement provided to his criminal solicitors.

[21] In his next witness statement dated 13th January 2022 the 1st Defendant asserted that there were no phone records from his mobile phone. This was in answer to request from the Claimant's solicitors for his mobile phone records which arose out of his previous witness statement. The 1st Defendant signed a further witness statement on 28th January 2022 which disclosed that he had now found his mobile phone records, or they had been provided to him. Those disclosed that he had called his wife at 8:43 PM, a minute before sunset and that she had called him at 8.51 pm. What was unclear to me was whether he took the last of the calls whilst he was driving or whilst stationary, in the filed or on the road. He asserted in his witness statement that he did so when he was stationary in the field. I note that the 1st Defendant has a previous conviction for using a mobile phone whilst driving. This was 18 months before relevant accident.

[22] In his evidence the 1st Defendant could not explain why he had increased the number of parked cars from one to two. He did explain why he had decreased his speed from 25 to 30 kilometres per hour to 20 to 25 kilometres per hour. He stated it was because he had driven that lane subsequently and thought that his estimate to the police was too high. I find this unimpressive. Before the accident he had driven that lane many times per week and many times with the seeding machine as well.

[23] He accepted in his evidence that he could see red blood coming from the Claimant's nose and could distinguish it from mud. Thus it was light enough to do so. As to the time which passed between the impact and the call, there were these events; the 1st Defendant noticing the wobble; slowing down and stopping; getting out of his left hand side door because the right hand side door was obstructed; walking around the front of the tractor; going along the grass verge; squeezing around the 30 centimetre overhang over the verge; then seeing the Claimant and his wife on the ground; and then making the call. The 1st Defendant gave no direct evidence about precisely how long that took. (Defence counsel asserted only one minute in submissions.) The 1st Defendant did not see the Claimant move before the paramedics arrived.

[24] In cross examination the 1st Defendant accepted he had given different accounts of his speed and of the number of parked cars. He accepted that his immediate post-accident account would have been when events were freshest in his mind. He accepted that he knew full well that pedestrians or cyclists could have been using that lane at that time of night and indeed his own family farm was hosting quite a few caravans with occupants that week. He stated that usually the Council cut the hedges on that lane annually but that that year they had failed to do so. He asserted that the hedges took up all of the verges as a result of their overgrown state (I do not accept that below). He accepted he knew the hedges were overgrown and he knew pedestrians could be on the

lane. He asked counsel during cross examination "*what precautions could I have taken?*" He asserted in cross examination that he accelerated to between 20 and 30 kilometres per hour which he asserted was the normal speed because it was lighter in that part of the lane and that he could see the tarmac.

[25] Stopping there. If the lighting was as dark as the 1st Defendant was suggesting through Miss Eyers in his case, then in my judgement his failure to use his full beam was at odds with that. He was asked this question. The 1st Defendant's response was that he did not know why he did not use the main beam. He accepted that had he used full beam it would have illuminated far more of the verge. So by his answers he was answering his own previous question to counsel.

[26] The 1st Defendant also accepted that he was involved in the reconstruction of the accident by the Defendants' accident reconstruction expert and she asked him to drive "normally" for the purposes of the video. He drove at between 3 and 6 mph from the bridge to the point of impact. It would appear that neither he nor Miss Eyers wanted to reconstruct the accident using the speed of driving he himself had used on the night. I am not surprised because Miss Eyers was standing on the verge. It could have been very dangerous in my judgement.

[27] Miss Eyres is an accident reconstruction engineer who reported for the Defendants. She took two videos both of which involved the 1st Defendant driving the tractor with the seeding machine down the lane at twilight whilst she stood on the verge. The first was taken in August 2019 and the second in August 2021. She confirmed the contents of her report. The conclusions in her report focused on her trying to explain physically how events came to occur on the basis that the court finds that the 1st Defendant *was* paying attention. This was stated clearly in her verbal evidence. So the contents of her report did not give any consideration to the Claimant's version of events but focused solely on a physical explanation for how the 1st Defendant, on the basis that he was keeping a reasonable and proper look out, could have come to have failed to see the the Claimant and his wife on the road and on the verge before impact.

[28] Miss Eyers constructed her theory in the report and repeated it in evidence. It had various parts.

- The first part was that as the tractor came over the bridge driving very slowly to avoid the seeding equipment smashing into the sides of the bridge, with its warning light flashing on top, the Claimant and his wife would have seen it and moved off the lane onto the verge into the bushes. By that assumption the 1st Defendant was relieved of being able to see the Claimant and his wife because the 1st Defendant was too far away and they had cleared the lane.
- The second assumption in Miss Eyers' theory was that whilst the 1st Defendant was negotiating the parked cars on his left hand side after the

bridge and the pothole in the lane on the right hand side after the cars, he would have been looking to his side mirrors and therefore not looking forward and therefore it would not have been reasonable for him to see the Claimant and his wife either in the lane or on the verge.

- The third part of Miss Eyers' theory was that when the 1st Defendant accelerated down the road the Claimant and his wife would have been inconspicuous because they would have been so far to the side of the verge into the bushes that the overgrown bushes would have been hiding them. That part included a further assumption that the Claimant's wife was standing blocking any view of the Claimant by her dark top and dark trousers, therefore the Claimant's white hair, face, hands, light shorts and bare legs would have been invisible. No explanation was given by Miss Eyres as to how the Claimants wife's face and hands would have been invisible.
- The fourth part of Miss Eyers' theory involved the tractor's dipped beams only showing up the road and a little bit of the verge and the use of dipped beams being reasonable. This part also included the assumption that the speed of the tractor driven by the 1st Defendant was between 20 and 25 kilometres per hour (not 25-30 kph) and that the court would find that speed reasonable.
- The 5th part of Miss Eyers' theory involved the Claimant and his wife choosing, just as the tractor passed, to step out from their hiding place in the bushes to within 25 centimetres of the edge of the lane such that they came within the overhang of the seeding machine and were hit.

[29] Miss Eyers saw no conflict between her focus on her constructing this theory and her general duty to advise the court objectively on the issues in the case. Miss Eyers accepted that she did not pass any opinion on the need for main beam in the lighting conditions or for any reduced speed. She chose to remain silent on those matters.

[30] Miss Eyers noted that sunset occurred at 8:44 PM and twilight ended at 9:23 PM therefore the accident occurred between the two.

[31] Miss Eyers visited the accident scene a mere week after the accident and there were still road markings on the road. She measured the distance between the dots marking where the Claimant had fallen and the resting position of the tractor as 14.6 meters. She suggested that the accident was likely to have occurred one minute before the call was made to the emergency services. She tried to reconstruct the lighting conditions using a GoPro camera and internal dash cam camera in the tractor. The stills taken from the videos which were printed in her report on pages 733 and 734 of the trial bundle and were very dark, but even they showed the pedestrians standing on the verge as the tractor approached, using only a dipped beam.

[32] In her report Miss Eyres went through the factors associated with what she advised makes pedestrians conspicuous to drivers which included: Contrast; Anticipation; Pattern; Lighting; Eccentricity; Time of exposure and Size. She called this list CAPLETS. I noted that the list did not include movement.

[33] At bundle page 760 Miss Eyers measured the width of the verge top where a pedestrian could stand to be 0.5 meters wide at the impact spot. At other spots it was between 0.5 meters and 0.8 meters wide maximum.

[34] She suggested in her conclusions that *"if the pedestrians had remained within the carriage way until the tractor was much closer to them Mr. Johnson would have had a far greater opportunity to see them and respond appropriately to them."* She also concluded that it may have been *"very difficult for Mr. Johnson to identify and recognise the pedestrians once they were standing on the verge (if indeed they were on the verge"*. For the reasons set out below I found those opinions unpersuasive.

[35] In a joint statement the experts highlighted the 1st Defendant's changed position in relation to his speed; agreed that the Claimant must have been not more than 30 centimetres from the edge of the carriage way to have been hit and disagreed on conspicuity. They both accepted that it was difficult to replicate on photos or video the actual lighting conditions on the evening. They accepted the Claimant's and his wife's face, hands and shorts would be their most visible parts. They disagreed on the Miss Eyers' theory of how the accident may have occurred without the 1st Defendant's negligence. Mr Sorton maintained that the 1st Defendant should have been able to see the Claimant and his wife on his approach and Miss Eyers maintained that the Claimant and his wife may have been obscured in particular the Claimant's wife may have obscured him because of her dark clothing. Miss Eyers persisted with her assertion that the Claimant and his wife should have stood in the middle of the road as the tractor approached and Mr Sorton suggested the 1st Defendant should have steered to the left hand side or braked or should have been going slower.

[36] In cross examination Miss Eyers accepted that the prints of the photographs in her report or some of them were too dark to be a fair representation of the lighting on the night. She accepted that she did not ask the 1st Defendant during her reconstructions whether the videos that she had taken were a fair representation of the light on the night. She could not explain why she did not do so. When the account made by the 1st Defendant to the police of the lighting conditions on the night was pointed out to her Miss Eyers did not explain why she had not taken that into account. I found that approach unsatisfactory. Mrs Eyers accepted that she did not take any video with the tractor lights on full beam. Her explanation for not doing so was that that would not be representative of what the 1st Defendant had done. This, it seems to me, is indicative of her focus on exculpating the 1st Defendant rather than assisting the court in an objective way on all relevant matters. Miss Eyers accepted that when she carried out both of her video reconstructions the 1st Defendant was driving at speeds approximately of 4-5 or 6 mph.

(That means less than 10 kilometres per hour.) She did not ask the 1st Defendant to drive at the same speed that he was driving on the night of the accident. She did not think that there was anything wrong with that approach. It was not much of a reconstruction because the speed of the vehicle involved was ignored. On the other hand, few rational persons would have stood on that verge knowing that an unlit 8 ton seeding machine was coming down the lane with a 20-30 cm overhang and pointed metal crenelations, towed by a tractor at 25-30 kph, merely hoping the 1st Defendant would stop in time before impact.

[37] It was Miss Eyers' evidence that at a speed of between 20 and 25 kilometres per hour the 1st Defendant would have had between 4.3 and 5.4 seconds driving along the lane in which to view the pedestrians. At a speed of 15 to 20 kilometres per hour he would have had between 5.4 and 7.2 seconds.

[38] She had carried out no calculation for how long the 1st Defendant would have had to view the verges for pedestrians if the 1st Defendant had been travelling at the speeds shown on her video, namely between 5 and 10 kilometres per hour, but on a linear calculation it would make sense that the time available to the 1st Defendant would have been over 10 seconds of viewing at 10 kph.

[39] I have carefully looked at the two videos, one from August 2019 and one from August 2021. It is apparent from looking at both, in which the tractor is driven with dipped beam at less than 10 kilometres per hour, that the two pedestrians can be seen on the grass verge. In addition, as I set out below, it seems to me that one factor that Miss Eyers fails to take into account when considering how conspicuous pedestrians are, is movement.

[40] Mr Holden provided some professional photographs and an opinion showing that the prints from Mr Sorton's camera would have been slightly lighter than they would have been, had he not used the automatic feature.

Findings of fact

[41] On the evidence before me and on the balance of probabilities I make the following findings of fact.

[42] On 13th August at just before 9:0 PM Mr and Mrs Parry were walking down the lane on the tarmac from the stile at the bridge towards the campsite. They were sober and peaceful and happy. It was twilight but not yet dark.

[43] The 1st Defendant approached the bridge and drove at a slow speed over the bridge and then passed a single parked car carefully. As he did so he had his dipped front beams on but he did not display his full main beams. He did not look far forward down the lane as he went over the bridge or at all past the car, for he was concentrating on the bridge and the car and subsequently he was concentrating on the pothole on the off side

of the tractor under the tree coverage. If the 1st Defendant did look forwards he only looked in the few meters in front of the tractor not down the lane.

[44] Once the 1st Defendant got past the pothole the 1st Defendant looked up and accelerated from 5 to 7 kilometres per hour up to between 25 and 30 kilometres per hour. He did this over the course of between 40 and 60 meters because the lane was straight, he knew it well, it was light enough for him to be able to see that the tarmac was clear and he took no account of the potential presence of pedestrians on the grass verges. He was keen to get home for his "tea".

[45] From his considerable daily experience of driving up and down this lane the 1st Defendant was well aware that pedestrians walked along it and not only during daylight but also at night. He was also well aware from his regular driving of the tractor since he had purchased it and his regular use of the seeding machine (since the government had part funded the supply of this machine to his farm), that the seeding machine overhung the grass verge on this lane by between 20 and 30cm on each side depending on the tractor's precise position in the lane.

[46] The 1st Defendant admits and I find that the 1st Defendant did not see the Claimant or his wife before the seeding machine hit them. He did not see them as he approached them. He did not see them as he passed them.

[47] I find that the Claimant and his wife first heard and then saw the tractor coming towards them at some speed. They stepped onto the verge and they expected him to slow down, but the tractor did not slow down. At some time, as the tractor approached, they shuffled about on the verge in the way that most pedestrians would on what is not a flat pavement. The verge being only half a meter wide, a man or woman of the size of Mr and Mrs Parry, being between 45 and 50 centimetres wide, (shoulder to shoulder) would take up more than half of the verge. Even if they were standing diagonally or sideways on they would still take up a substantial amount of the verge.

[48] I find as a fact that if Mr and Mrs Parry had stepped beyond the relatively flat top surface (being about half a meter wide) they would have slipped down the descent into the bushes, but they did not do so. I find that they stayed on the flattish verge top throughout.

[49] I find as a fact that they were moving or turning on the verge as the tractor approached.

[50] I was impressed by Mrs Parry's evidence and I accept her evidence. Her post accident account, carefully constructed with the assistance of the police, is the basis of my findings of fact. In particular, in the witness box, I was impressed by the way that she refused to embellish and refused to change her evidence and where she could not remember she said so plainly and clearly.

[51] In relation to Mr Johnson's evidence I was struck by how he was prepared, witness statement by witness statement, to try to improve his case by altering his evidence. He exculpated himself further and further from the responsibility he had wisely accepted at the end of his police interview on the day of the accident.

[52] In relation to the experts' evidence I accept the evidence of Mr Sorton in relation to the likelihood of the Claimant and his wife being sufficiently conspicuous for a reasonable driver to have seen them in the circumstances and on the findings of fact I have made above.

[53] In relation to the evidence of Miss Eyres I reject her theory with its various convoluted stages as inherently unlikely.

[54] In relation to the level of lighting I make the following findings. It was twilight, between sunset and night time. There was sufficient lighting for the 1st Defendant to see pedestrians standing on the verge if the 1st Defendant had approached at a safe speed and looked carefully. The 1st Defendant knew that pedestrians were liable to walk up and down that road. I find that the visibility was likely to have been a little darker than the lighter video provided by Miss Eyers and a little lighter than the darker video provided by her. I make no precise findings of fact in relation to the lightness or darkness, for it is not necessary. What is necessary is dealt with below under standard of care and breach.

[55] The photos which I find most helpful are the post-accident police photographs taken on the morning after which show the state of the hedges. It is clear from those photographs taken on 14th August (albeit they are dated 13th August) that there is a dark area just after a vehicle drives over the bridge at about the place where the parked car was. Then the lane then runs straight to the main road and the campsite and it is much lighter, for it is not bounded by trees. The lane is straight but the impact occurred at its narrowest point. There are little yellow markers on the road surface showing the scene of the impact and at that point there are overgrown bushes on both sides of the road but they only overgrow so far. They reach out over the ditch between the fence and the verge. They do not impinge on a substantial part of the verge. Therefore any pedestrian standing on the verge would be sufficiently visible for any driver keeping a proper look out and driving South.

The Law

Contributory Negligence

[56] Before 1945 contributory negligence was a complete defence and apportionment was irrelevant. Since the passing of the *Law Reform (Contributory Negligence) Act 1945* apportionment has been required. S.1(1) states:

> "*S.1 Apportionment of liability in case of contributory negligence*

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

[57] **The Highway Code** includes rules for pedestrians. General guidance is given on page 5 which states that pavements should be used if provided. In addition guidance is given which states that if there is no pavement pedestrians should keep to the right hand side of the road so that they can see oncoming traffic. Pedestrians should take extra care and be prepared to walk in single file especially on narrow roads or in poor light and should keep close to the side of the road. In addition pedestrians are advised to help other road users see them. They should wear or carry something light coloured bright or fluorescent in poor daylight conditions. When it is dark they should use reflective materials e.g. armbands sashes waistcoats jackets and footwear which can be seen by drivers using headlights up to three times as far away as non-reflective materials.

[58] By section 38 (7) of the *Road Traffic Act 1988:*

"A *failure on the part of a person to observe a provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal) be relied upon by any party to the proceedings as tending to establish or two negative any liability which is in question in those proceedings.*"

[59] In *Goad v Butcher* 2011 EWCA civ 158, Moore-Bick LJ ruled:

"*20. A breach of the Highway Code does not give rise to a presumption of negligence or constitute a breach of statutory duty. It is, however, a relevant circumstance, which the court should take into account when determining whether the driver was negligent: see Powell v Phillips [1972] 3 All ER 864.*"

[60] The Defendants asserts that the Claimant failed to take reasonable care for his own safety. In the circumstances and on the facts set out above I have found that the Claimant himself heard the approach of the tractor, turned around with with his wife and saw the approach of the tractor and chose to step off the lane onto the verge. He and his wife stood on the verge with some moving around including turning away from the tractor. They were looking down the road in the direction in which they intended to walk from the safety of the verge when they were hit.

[61] The Defendants assert that the Claimant and his wife should have stayed in the road and done so for such period of time until they were sure that the 1st Defendant had seen them. I see no merit in that assertion. In my judgement that would have been a dangerous thing to do and I do not consider that the vast majority of members of the public would have thought it wise to step into the road and stay in the road in the path

of an oncoming tractor during twilight hours in the hope that the tractor would see them. I reject that assertion.

[62] I do not think any of the movements that the Claimant and his wife carried out on the verge could amount to negligence. The surface will not have been easy to stand on, it was not paved or tarmacked and they needed to keep their balance to stay safe from falling in front of the tractor. They had no idea that the tractor was towing an unlit and dangerous seeding machine which overhung the verge.

[63] **Clothing** As to the assertion that the Claimant and his wife should have worn brighter clothing, there are photographs of them both taken during the day which show their clothing; that they are both Caucasian; that the Claimant had grey hair and that their faces and hands would have been light coloured and visible. In addition the Claimant was wearing khaki shorts which are light brown and had bare legs and white trainers. All of those matters would have made him visible. I also note of course that no case is not made against the Claimant's wife who is not a party to the action. It was not pleaded in the defence that the Claimant was responsible for the way his wife dressed. In the real world that would not be an assertion which I would wish to support in the vast majority case cases or in some cases even think possible. It might be said that the opposite would apply in many cases. In addition I do not consider that the purple top that Mrs Parry wore is anywhere near as dark as black. I do not consider that the Claimant's clothing amounted to negligent attire. I also of course take into account that they were not walking back after nightfall they were walking back during the evening and at twilight.

[64] **Driver's duty of care** Guidance on speed and a driver's duties to pedestrians has been provided by the ruling of Latham LJ in *Lunt v Khelifa* [2002] EWCA Civ 801. The driver ran down a pedestrian who was drunk. When considering the relative blameworthiness of the parties Latham LJ ruled as follows:

> "*15. We have indeed been referred to one authority which is of some relevance, Liddell v Middleton (1996) PIQR P36 . In that case the Court of Appeal had to consider an accident in which a husband and wife had been crossing a road on which there was traffic. The wife, appreciating that there was danger from the traffic, ran across. The husband stood in the middle of the road for a time and then went forward, but was unfortunately struck by a vehicle and injured. It was clear that he was significantly affected by alcohol, and evidence had been led at the trial indicating the effect of alcohol on accident statistics, particularly relating to men. The judge concluded that the husband was 25 per cent to blame for the accident. This court (consisting of Stuart-Smith, Peter Gibson and Hutchison LJJ) allowed the appeal and increased the responsibility of the husband to 50 per cent. 16. In the course of his judgment, Stuart-Smith LJ considered the correct approach to the fact that the husband had been affected by alcohol in the context of the issue of apportionment. He said at page 40, in relation to a submission which sought to equate the approach to a drunken driver to the situation of a drunken pedestrian, as follows:*

"That may be so in the case of a driver who puts himself in the control of an object which is capable of great damage if it is not properly controlled, but I am not persuaded that it makes a significant difference in this case in the case of a pedestrian. It seems to me that the pedestrian's conduct has to be judged by what he did rather than the explanation as to why he did it."

17. Then at a later stage, at page 43, having referred to the statistical information which had been before the judge, he said:

"The result of that statistical survey is no doubt a matter of expert knowledge not available to a layman. But whether it is of any material assistance in this case is another matter. It is not the fact that a plaintiff has consumed too much alcohol that matters, it is what he does. If he steps in front of a car travelling at 30 mph at a time when the driver has no opportunity to avoid an accident, that is a very dangerous and unwise thing to do. The explanation of his conduct may be that he was drunk: but the fact of drunkenness does not, in my judgment, make the conduct any more or less dangerous and it does not in these circumstances increase the blameworthiness of it."

18. It seems to me that those passages from Stuart-Smith LJ are apt to the circumstances of this case. It seems to me, as I have already indicated, that the fact that the appellant had taken drink was of undoubted significance if one was looking for some reason why he might have behaved in the way he did. But for the purposes of determining apportionment, the important question is what he did.

19. Returning then to the issue before this court. The question therefore is whether or not the judge can properly be criticised for concluding that the appellant should be held one-third to blame. This court has repeatedly said that it will only interfere with the apportionment of blameworthiness in cases such as this where it is clear that the judge has gone plainly wrong.

20. It seems to me that it may well be that the judge in this case was generous in his approach to the liability of the appellant; for it seems to me that the appellant undoubtedly must bear a substantial burden for this accident. He was the one who created the dangerous situation by stepping out as he did into the carriageway when the respondent's vehicle was so close. But nonetheless, bearing in mind the fact that this court has consistently imposed on the drivers of cars a high burden to reflect the fact that a car is potentially a dangerous weapon, I find it difficult to see how I could properly categorise the judge's apportionment in this case as plainly wrong."

[65] I apply this guidance on the duty of care placed on the 1st Defendant in the circumstances of this case. I rule that in law persons driving cars and other mechanically propelled vehicles like tractors owe a duty of care to pedestrians around them who are on the road surface when the car is on the road. In relation to drivers driving vehicles towing dangerous, unlit equipment, which overhangs pavements and grassy verges, that duty is owed to all pedestrians nearby on pavements and grassy verges who may foreseeably be affected by the overhang.

[66] I rule that the duty extends geographically beyond the road ahead and extends over the pavements and grassy verges beside the vehicle when the driver is towing a large object

which is wider than the vehicle and particularly so when the equipment has dangerous crenelations on it.

[67] **Speed** The starting point when assessing whether a driver's speed was reasonable in the circumstances is to look at the Highway Code. Rule 124 of the Highway Code states that a driver must not exceed the maximum speed limit for the road and for the driver's vehicle. The maximum speed limit for this road was 60 mph.

[68] However rule 125 of the Highway Code states that the speed limit is an absolute maximum and does not mean it is safe to drive at that speed irrespective of the conditions. Driving at speeds too fast for the road and the traffic conditions is dangerous. Drivers should always reduce their speed when: -

- the road layout or condition presents hazards such as bends;
- sharing the road with pedestrians cyclists and horse riders...;
- weather conditions make it safer to do so;
- driving at night as it is more difficult to see other road users.

[69] I would add to that list that when driving a vehicle with a hidden death trap on the rear drivers should take that into account when deciding on their speed in the circumstances.

[70] **Keeping a proper look out** In relation the necessary and proper awareness of potential hazards created to those ahead and beside the driver's vehicle, the driver's speed can often be critical in determining whether a driver fell below the level of reasonable care expected when keeping a proper look out. The slower the vehicle is driven the more time the driver has to evaluate and see what is visible and the more time he has to distinguish what may be less conspicuous on the verge or the pavement. If the driver does not give himself enough time to evaluate the road ahead and the dangers he poses to other because he is driving too fast, he has himself to blame. However, the less time the driver is given (by the actions of others) to evaluate the dangers, the less likely it is the the courts will hold the driver to account for failing to react.

[71] This speed/time/look out issue was apparent in *Leslie Buck v Jane Ainslie* [2017] CSOH 73, in which Lady Carmichael dismissed a claim by a pedestrian who was run down after midnight by a car with full beam headlights travelling at around 50 mph, having stepped out into the road at the last minute as the car passed. The pedestrian was drowsy and suspected to have been on drugs earlier in the day. He had injured himself by "jumping out" in front of a car in the previous week and doctors had suspected he was suicidal but he denied that and it was unproven.

[72] I also take into account that courts must be astute not to place too much reliance on the minutiae of expert evidence poured over after the event as highlighted by Coulson J in *Stewart v Glaze* [2009] EWHC 704, at paragraphs 5-7:

> "*5. I have to apply to Mr Glaze's actions the standard of the reasonable driver. It is important to ensure that the court does not unwittingly replace that test with the standard of the ideal driver. It is also important to ensure, particularly in a case with accident reconstruction experts, that the court is not guided by what is sometimes referred to as '20–20 hindsight'. In Ahanonu v South East London & Kent Bus Company Limited [2008] EWCA Civ 274, Laws LJ 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.*"

Applying the law to the facts

[73] In my judgement in circumstances where the 1st Defendant was driving a vehicle towing a piece of equipment that was wider than the vehicle and overhung the grass verge by between 20 and 30 centimetres on each side, and where the road was narrow the verges very close to the edge of the road, it was incumbent on the 1st Defendant to drive at a speed which would permit the 1st Defendant a reasonable opportunity to react to the presence of any pedestrians on the grassy verges of the road on either side.

[74] It was also incumbent on the 1st Defendant to assess the conditions, in particular the low level of light and the overgrown bushes on either side off the lane, and to put in place whatever measures he had available to him in vehicle to afford him the best visibility.

[75] Taking into account the 1st Defendant's own evidence and the evidence of Mrs Parry, the photographs and the videos, and the experts evidence in my judgement the 1st Defendant should have been driving at a much lower speed than 25 and 30 kilometres per hour as he went down the lane. I consider that he should have been driving at between 5 and 10 kilometres per hour as he left the pothole and should have stayed at that speed as he headed down the lane towards the main road. That would have granted him considerably more time to see who was standing on the grassy verges on both sides of the lane. His failure to drive at that speed and his choice to accelerate to between 25 and 30 kilometres per hour was in my judgement careless.

[76] In addition, I consider that because it was dusk and because there were hedges which were approximately head high on both sides of the lane I consider that the 1st Defendant should have flicked on his main beam headlights. I find as a fact that the dipped beam headlights lit the road surface well but did not light the grass verges particularly well. I find as a fact that had he put on his main beam headlights they would have illuminated considerably more of the grass verges and would have assisted him in identifying the presence of the Claimant and his wife.

[77] In my judgement even without the main beam headlights the Claimant and his wife were visible, conspicuous and discernible to any reasonably prudent driver. However

at the speed at which the 1st Defendant was travelling he gave himself less time than he should have to see them and then to brake and/or steer to the left hand side when he should have seen the Claimant and his wife. Had he been travelling at a reasonable speed for the circumstances he would have been able to pull up without the seeding machine reaching them (as he did in the videos). In addition, had the 1st Defendant been displaying his main beam, he would have had considerably more time to discern the presence of the Claimant and his wife.

[78] I also find as a fact that the 1st Defendant failed to keep a proper look out as he drove down the lane eager to get home to have his "tea" and for that reason as well he failed to see them.

Conclusions

[79] I enter Judgment for the Claimant. I dismiss the assertion of contributory negligence.

[80] Consequential orders are dealt with in the Order attached herewith.