Neutral Citation Number: [2024] EWHC 92 (KB)

Case No: J91LS516

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
LEEDS DISTRICT REGISTRY

The Combined Court Centre, Oxford Row, Leeds

Date: 30/01/2024

Before :

HIS HONOUR JUDGE GOSNELL SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

MOHAMMED MASHUK MIAH **BY HIS LITIGATION FRIEND MOHAMMED HELAL UDDIN**	**Claimant**
- and –	
DOCTOR HAYLEY JONES (1) **AVIVA INSURANCE LIMITED (2)**	**Defendants**

- -

Mr William Waldron KC and Mr Pankaj Madan (instructed by Mewies Solicitors) for the Claimant
Mr Christopher Kennedy KC (instructed by DWF Law LLP) for the Defendants

Hearing dates: 15th -16th January 2024
References to the trial bundle are in square brackets [D 298]

- -

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.

.....

HIS HONOUR JUDGE GOSNELL SITTING AS A JUDGE OF THE HIGH COURT

His Honour Judge Gosnell:

1. **Introduction** This claim is brought by Mr Mohammed Mashuk Miah ("the Claimant") against Dr Hayley Elizabeth Jones ("the First Defendant") and her insurers Aviva Insurance UK

Limited ("the Second Defendant"). It arises as a consequence of a road traffic accident which occurred at about 9.40pm on 17th September 2018 on the A487 near Garndolbenmaen, North Wales. The Claimant was a pedestrian crossing the A 487 near to the Madiha Tandoori Restaurant when he was struck by a car being driven by the First Defendant. Dr Jones was driving her BMW Mini motor vehicle from Bangor towards her home in Porthmadog in an Easterly direction. The Claimant had alighted from a bus directly opposite the Madiha Restaurant and was crossing the road from the South side to the North side with a view to visiting the restaurant. A photograph of the accident scene taken by Mr Smalley the Claimant's Accident Reconstruction Expert appears below:

2. The collision took place somewhere in the Northern half of the carriageway adjacent to the first of the two entrances/ exits seen on the photograph for the restaurant. Dr Jones was travelling in an easterly direction, away from the photographer in this photograph. It is accepted that it was dark at the time of the accident and that this is a rural road which is straight in both directions and that the National Speed Limit (60 mph) applied. It is also accepted that the Claimant had been on a bus travelling in a Westerly direction and had alighted from the bus which had stopped directly opposite the restaurant , even though this was not in fact a bus stop. It would appear that the Claimant waited for the bus to depart and then walked across the road from right to left on the photograph when he was struck by the First Defendant's vehicle.

3. The Claimant has alleged: that the First Defendant was travelling too fast; that she failed to anticipate that the bus might have been dropping off passengers who may have wished to cross the road to the restaurant; that she should have braked; kept a proper look out; and used her main beam rather than dipped headlights. The Defendants' case is that the First Defendant was driving at a reasonable speed for the location, the bus

was stationary in a place other than a bus stop, it would not be reasonable for her to anticipate that someone would attempt to cross the road from behind the bus, and that she reacted as soon as it was reasonably possible to do so given the circumstances.

4. The Claimant suffered a significant head injury (in addition to orthopaedic injuries) as a result of the accident and as a consequence is now a protected party. He has little or recollection of the collision and was not in a position to give evidence at the trial. The trial has been listed to deal with the issue of liability only and consisted of some lay evidence called by the Defendants and expert evidence from Accident Reconstruction Experts called by both parties.

5. **The Law**

The Highway Code (October 2017) was in force at the time of the relevant accident. According to the Claimant the following provisions are relevant to this claim:

> Rule 125 Warns drivers that: *"The speed limit is the absolute maximum and does not mean it is safe to drive at that speed irrespective of conditions. Driving at speeds too fast for the road and traffic conditions is dangerous. You should always reduce your speed when:*
>
> - *the road layout or condition presents hazards, such as bends*
> - *sharing the road with pedestrians, cyclists and horse riders, particularly children, and motorcyclists*
> - *weather conditions make it safer to do so*
> - *driving at night as it is more difficult to see other road users".*
>
> Rule 154 warned drivers to: *"take extra care on country roads and reduce your speed at approaches to bends , which can be sharper than they appear, and at junctions and turnings , which may be partially hidden. Be prepared for pedestrians, horse riders , cyclists, slow moving farm vehicles or mud on the road surface. Make sure you can stop within the distance you can see to be clear. You should also reduce your speed where country roads enter villages."*
>
> Rule 223 warned drivers to: *"look out for people getting off a bus or tram and crossing the road."*

6. There have, of course, been many previous cases where a road traffic accident has occurred between a motor vehicle and a pedestrian. Both counsel have referred me to a number of cases which are relevant examples of this kind of case. I will limit myself at this stage however to cases which involve a summary of the relevant legal principles involved. In *Chan v Peters and Advantage Insurance Company Limited* [2021] EWHC 2004 (QB) Mr Justice Cavanagh summarised the relevant law in the following way:

"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."*
>
> *12. Sixth, trial judges should also exercise caution in relation to the evidence of accident reconstruction experts. Lambert itself was a case in which the trial judge had relied heavily on the evidence of accident reconstruction experts and the calculations which they had produced. In Stewart v Glaze (ante) Coulson J, in §2.2 of his judgment at [8-10], warned of the danger of: (i) such experts giving opinions on matters beyond their expertise and acting as advocates seeking to usurp the role of the judge; (ii) elevating their admissible evidence about reaction times, stopping distances and the like into a "fixed framework or formula, against which the defendant's actions are then to be rigidly judged with a mathematical precision". These are dangers of which I should remind myself in this case, where both parties have relied upon such evidence.*
> *....*
>
> *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."*

7. Whilst Counsel for the Defendants agrees with this general summary of the law he also wishes to raise a legal argument which is particularly relevant to causation and the issue of "avoidance potential" as espoused by Mr Smalley in his expert evidence. Mr Smalley opines that if the Claimant had less than a second longer to cross the road a modest reduction in the average approach speed from the First Defendant's vehicle could have produced that additional time , thus enabling the Claimant to pass without incident. Mr Kennedy KC relies on the decision of the Court of Appeal in *Whittle v Bennett* [2006] EWCA Civ 1538 where the court had to deal with a similar argument about what would have happened one of the colliding vehicles had been travelling more slowly to allow more distance between it and the vehicle in front. As Lord Justice Leveson said :

> *"Mr Redfern counters this submission by seeking to graft back into the equation the presence of Mr Taylor's Nova and submits that if Mr Bennett had been further back in the road, maintaining a proper distance, he would have had adequate room to stop. I agree with Mr Turner's submission that this*

> *falls into the trap or fallacy of the coincidence of location. What is important is that when Mr Whittle commenced his U-turn, the following Nova was in fact 30 metres away. Many circumstances could have altered that coincidence of fact. He might have been delayed at traffic lights so that he was further back; Mr Whittle might have stopped entirely to check the map or make a telephone call, then the accident would have been avoided. None of these possibilities make any difference. The two cars were where they were when Mr Whittle commenced his turn, at a time when, had he been paying proper attention, he should and would never have done so. In the circumstances the argument to apportionment simply do not arise."*

8. In *Gray v Botwright* [2014] EWCA 1201 Lord Justice Jackson helpfully explained what the phrase " *the coincidence of location fallacy*" meant:

> *"The coincidence of location fallacy may be illustrated by the following hypothetical facts, which are not this case. A defendant acts negligently and, as a result of that negligence, he is in a position where an accident of some sort occurs, but the occurrence of that accident was not within the scope of the duty of care which the defendant breached when acting negligently. Suppose, for example, a motorist drives at excessive speed between point A and point B. The motorist then slows down to a proper speed and is involved in a collision which is not his fault. The motorist would not have been at the point of impact if he had not driven too fast on an earlier occasion, but that earlier negligence of driving too fast is not causative of the collision. This is because once the motorist had passed point B, he was at a location where the impact would not be within the scope of any duty of care which the defendant had breached. That, as I say, is the point of interest in this case and is the reason why permission to appeal was granted."*

9. On the facts of that case Lord Justice Jackson found that the coincidence of location fallacy did not apply because the Defendant's negligence in driving through a red traffic light about 50 metres from the collision was, at least partly, causative of the accident. As he prosaically pointed out:

> *"The blunt fact is that the defendant should not have been where he was at the moment of impact. Unlike the judge and the district judge, I do not think that the claimant's case rests on the "coincidence of location" argument. This case is essentially different from Whittle v Bennett."*

10. **The lay witness evidence**

The First Defendant was interviewed by the police following the accident and made a statement under section 9 Criminal Justice Act 1967 on 11th March 2019. At the time of the accident she had been employed as a GP Trainee at a hospital in Bangor, North Wales and used to travel there daily from her home in Porthmadog which would take

her past the accident scene on the A487. On Monday 17th September 2018 she worked a full shift from 8.00 am until 8.45pm which was usual at that time. She left work and commenced the usual 28 mile journey back to her home. She is familiar with the road as a consequence and is aware that the road outside the Madiha Tandoori Restaurant is a straight rural road with one carriageway in each direction where the National Speed Limit applies. It was dark at the time and there are no street lights in this area and the road is bordered by grass verges. There is no bus stop in the vicinity. She recalls that there were lights on in the restaurant at the time but there were no other lights and it is very dark in this area due to the lack of light pollution.

11. As she approached the restaurant to her left she could recall no traffic in front or behind her. She recalled having applied a dipped headlight beam as she passed two vehicles

further back in her journey and could not recall whether she had returned the lights to full beam before the accident. She says that she saw a shape or the form of something moving from the offside of her vehicle out of the darkness. It was moving quickly across the front of the car. She said that she screamed and hit the brakes but the pedestrian hit the front nearside of her vehicle. The impact occurred when her vehicle was approximately in line with the first entrance to the car park of the restaurant. There was no skidding or screeching of tyres. At the time of the collision she was travelling in sixth gear. She does recall a red rucksack hitting the windscreen and the windscreen shattering. Her car eventually stopped with the rear end of her car near to the end of the second entrance to the car park. She believed that the pedestrian was in the middle to the nearside of her lane at impact.

12. She attempted to call her partner immediately after the accident but could not connect and she then went into the restaurant to ask them to call an ambulance. She found the Claimant at the bottom of the forecourt behind her vehicle and he was not conscious. She performed a jaw thrust to keep his airway open and assessed and maintained his vital signs. She eventually got through to her partner Emily who was also a medical professional specialising in trauma care. Emily took over care of the Claimant and the ambulance arrived at the same time. Emily accompanied the Claimant to the hospital with the paramedics. The police arrived at the accident scene and the Claimant gave a road side account of what had occurred to the officer concerned. She did not mention the presence of a bus in her statement but in a subsequent statement for the purposes of this litigation she said that there are no bus stops on this stretch of road and she would never expect a bus to stop outside the Madiha Tandoori Restaurant.

13. It was suggested to her in cross-examination that she would be tired after a 12 ¾ hour shift and she replied that she was not excessively tired and that the level of fatigue would be normal as this was her regular shift length. She confirmed that she had pulled into a lay-by about ten minutes before the accident to plug in her phone to listen to *The Archers* but not because she needed to for any reason. She confirmed that there is a bus stop just before the brow of the hill on the Caernarfon bound side which is well lit in a lay by. She knew that there was no bus stop opposite the Madiha Restaurant and she had never seen a bus stop or indeed any pedestrian at that location previously.

14. She was asked about the presence of the bus opposite the restaurant and confirmed that she has no recollection of seeing a bus. She was asked about the Highway Code

and she said she knows that it warns about being alert for pedestrians crossing after getting off a bus. She agreed that if she had seen a bus parked opposite the restaurant it could be seen as a hazard. She said she would also be considering a potential hazard from vehicles leaving the restaurant. She had told the police officer shortly after the collision that she was doing " about sixty" and she said she believes that she was driving within the speed limit. She accepted that the correct order of events was: her sensing a shape and movement from her right, there was a bang, she braked, she screamed , got out of the vehicle and went to the restaurant for help. Although she told the people in the restaurant she had hit a man she could not now remember what persuaded her it was a man rather than a woman.

15. Mr Guto Jones happened to be stood outside the Madiha Restaurant at about 9.30pm on 17th September 2018. He had been inside to order his food and was stood outside with his friend Sion Bryn having a smoke. They were facing the road and, although it

was dark, there were lights from the restaurant enabling them to see the road. He noticed a single decker bus approach from the Porthmadog direction (from his left). The bus stopped and a male passenger alighted from the bus. The bus started to pull away in the direction of Caernarfon (to his right). The owner of the restaurant had evidently told him that a friend of his was going to visit him that evening as he was going to give him a lift to Manchester. Mr Jones saw the man appear from behind the bus and walk straight out to cross the road. As he walked forwards he did not look to his left and did not run. He saw the pedestrian reach the centre of the road and then he, Mr Jones, looked away for a split second. When he looked back he saw a car hitting the pedestrian and the car had travelled from the Caernarfon direction. He recalled seeing the man and his bag flying up into the air and he came to rest in the second car park entrance nearest to Porthmadog.

16. He said he did not see the car prior to impact as his view to the right was obscured by some bushes. He could not say what speed the car was travelling but he did not think it was travelling too fast. He said the pedestrian appeared to cross the road without looking and was either on the phone or listening to music through his headphones.

17. He gave evidence at the trial remotely and this aspect did produce some communication difficulties. It was pointed out to him that in one statement it said he was collecting a take-away meal and in another he appeared to be dining with a group of friends in the restaurant. He did not appear to have a clear recollection as to which of these versions was correct. He accepted that his view may have been obscured by a horse trailer but he said he did actually see the accident happen and the statement he gave to the police about three months after the accident was likely to be more accurate.

18. Mr Sion Bryn confirmed that he was outside the restaurant smoking with his friend Guto Jones on the night in question. He saw the bus approach from their left and it stopped opposite the car park entrance nearest to Caernarfon. He saw the bus pull away and he then saw the pedestrian who appeared not to look and walked straight across the road. As he crossed the road he was hit by a car coming from the direction of Caernarfon and thrown up into the air , coming to rest in the entrance to the restaurant nearest Porthmadog.

19. He said he was unable to see the car before it hit the pedestrian due to the presence of bushes to his right. He did not know how fast the car was going but said he did not think it was going too fast.

20. It was suggested in cross-examination that he was likely facing his friend Guto when chatting rather than watching the road but he said he did see the bus arrive and saw a man walk towards the back of the bus and then go out of view when he reached the rear seats. He then saw the bus pull away and the man walk across the road until the point when he was hit by the car.

21. Evidence from other witnesses was read. Mr William Jones was a friend of both Guto Jones and Sion Bryn but he was inside the restaurant when the accident happened. He was able to give evidence as to the aftermath of the accident which is undisputed. Police Constable Alun Jones arrived at the scene about 20-30 minutes after the accident by which time an ambulance was already present. He spoke with the First Defendant to obtain an initial account from her and completed the collision report. He seized her

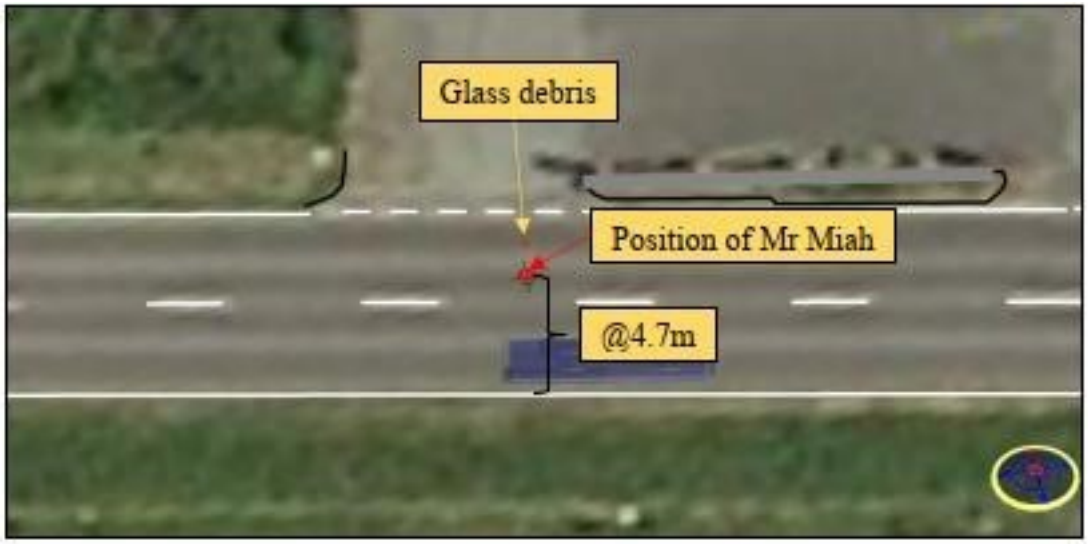
mobile phone and subsequently was able to confirm that she was not using it at the time of the accident. He subsequently confirmed that the First Defendant was not prosecuted for any offence arising from the accident as his investigations confirmed that a collision with the Claimant was unavoidable. William Saynor was a Civilian Investigation Officer although he was in fact a retired policeman. He prepared a scale plan and recorded some glass shards at the end of the first entrance to the restaurant. He recorded the final resting place of the First Defendant's vehicle and carried out some skid testing. He found no relevant defects with her vehicle other than accident related damage and took a number of photographs. All this evidence was referred to and taken into account by the parties' Accident Reconstruction Experts.

22. **The Accident Reconstruction Evidence**

Both parties instructed Accident Reconstruction Experts with the permission of the court. The Claimant relies on the evidence of Mr Michael Smalley and the Defendants rely on the evidence of Mr Peter Jennings. Both of them prepared very detailed and comprehensive reports relying on the evidence preserved by police officers at the scene and data captured by the CCTV cameras attached to the bus that the Claimant alighted from. They then had a discussion after disclosure of their reports and produced a very helpful joint statement which records the issues on which they agree and disagree [D 298].

23. Both experts agree that it was dark at the time of the collision and that there was no street lighting other than the ambient lighting from the restaurant and five globe lights positioned on a low wall close to the eastbound verge. They also agree that this is a straight road from the West where the First Defendant approached from. Mr Jennings assessed the visibility from a hill crest to the West at 360 metres whilst Mr Smalley assessed it as being 370-390 metres. Mr Smalley has taken a photograph from the area of the crest of the hill facing towards the accident scene:

24. Both experts agree that the primary damage to the First Defendant's vehicle is to the front and nearside which would position the Claimant's torso approximately midway between the centre line of the Mini and the nearside headlight at impact. The precise location of the impact is not known but both experts rely on the first shards of glass recorded by Mr Saynor in determining where the impact is likely to have occurred. Mr Jennings asserts that the impact was about 5 metres from the westbound kerb and Mr Smalley about 6 metres from the westbound kerb. Mr Smalley produced a very helpful plan annotated to show the debris and likely route of the Claimant with the stationary position of the bus shaded in purple:



25. The experts agree from their examination of the CCTV data that the sequence of events is as follows:

    a) *"The bus indicates to the left, the interior light comes on and it stops opposite the western entrance to the Madiha restaurant car park. At about the same time the Mini headlights (dipped beam) are observed coming into view over the crest ahead;*

b) The bus remains stationary for about 4.5 seconds. In that time Mr Miah is observed getting off the bus through the door at the front nearside and is stood on the grass verge. The right-hand indicator illuminates as the bus starts to move off. It flashes 4 times over a period of about 3.5 seconds;

c) Mr Miah remains in the same position for about 1.5 seconds after the bus starts to move forward and is then lost to sight as the interior light is switched off;

d) About 7.5 seconds after moving off, the Mini and the Bus begin to pass each other;

e) About 12.5 seconds after coming into view the Mini passes a nearside brown tourist information sign;

f) About 2 seconds later, there is an increased intensity in the lights observed in the rear facing offside camera of the bus , it is agreed that

this would be consistent with the activation of the brake lights of the mini."

26. Both of the experts considered the speed of the Mini at impact. Mr Smalley calculates a range of between 43 mph and 52 mph using accepted research into Pedestrian and Rider Throw based on a throw distance of 39 metres. Mr Jennings using different methodology has calculated a speed range between 52 mph and 58 mph. Both experts also considered what the average speed of the Mini was from the point at which it came over the crest of the hill at the West until it approached the Mediha Tandoori Restaurant. Mr Smalley has calculated average speeds between 60 mph to 64 mph and Mr Jennings has calculated an average speed of 57 mph. The difference in these latter figures is explained by the fact that the experts had different measurements for the start point (the crest of the hill) and used different end points, with Mr Smalley using the tourist information sign and Mr Jennings where the Mini passed the bus.

27. Both experts agreed that the Claimant appears to have waited on the grass verge until the bus departed and then walked across the road perpendicular to it. The experts agree that walking between 1.2 m/s and 1.8 m/s he would have been in the road for between 3 and 5 seconds to reach a point between 5 and 6 metres from the nearside kerb of the West bound lane.

28. The experts agree that it is probable that the First Defendant only applied her brakes after the impact. They also agree that the presence and movement of the bus, its headlights and the resultant glare, the likely movement of the Claimant from behind the bus when he started to cross the road, together with the limited ambient lighting in the vicinity of the collision, influenced the ability for the First Defendant to identify and respond to the presence of the Claimant . Specifically it was recorded:

"*It is agreed that in the circumstances which existed and the speed of approach of Dr Jones, that she was unlikely to have been able to identify the presence of Mr Miah in time to apply her brakes before impact."*

29. The experts also considered what would have been required for the accident to be avoided. Mr Smalley opined that, dependant on his walking speed, if the Claimant had between 0.55 seconds and 0.83 seconds longer walking in the road he would have moved beyond the nearside position of the Mini and the collision would have been avoided. He calculated that if the First Defendant had approached the accident scene from the crest of the hill at 57 mph rather than the 60-64mph that he had calculated this would have allowed the Claimant enough time to clear the accident scene sufficiently.

30. Mr Jennings accepts this arithmetic in theory but points out that the First Defendant could not see the Claimant for some time due to the presence of the bus. He considered the speed required to avoid a collision by stopping prior to impact , based upon a hypothetical " detection distance" of 20 -25 metres for the First Defendant to first perceive the Claimant , would require a reduction in speed to between 24 mph and 36 mph.

31. At trial Mr Smalley was a careful and measured witness. He accepted that the First Defendant found herself in a dynamic situation and that the Claimant was a challenging

object to identify. He confirmed his measurement of 370-390 metres from the accident scene to the crest of the hill to the west was taken with a surveyor's measuring wheel. He confirmed he did re-visit the accident scene at night but did not refer to this in his report. He also accepted that there was probably a car travelling some distance behind the bus but this was not referred to in his report. He agrees that at the speed she was travelling the First Defendant did not have time to react to the presence of the Claimant and apply her brakes before the impact. He stood by his Pedestrian Throw calculation of a potential speed at impact of 43-52mph but said the upper end of the bracket is probably more reliable. He accepted that when compared with his average speed calculation of 60-64 mph from the crest of the hill to the tourist sign this meant that she must have slowed down at some stage although she doesn't remember doing so.

32. Mr Smalley was taken through the sequence of events as revealed by the CCTV footage from the bus and it was clear that there was a large measure of agreement between himself and Mr Jennings for the Defendants. On the issue of avoidance potential he said he had tried to offer a range of figures depending on the speed the Claimant walked across the road and the speed that the First Defendant was travelling at. If she had travelled at an average speed of 57 mph from the brow of the hill rather than the 60-64 mph figure he had calculated this would have allowed the Claimant to just pass the nearside of her vehicle walking at average speed this avoiding the collision. He agreed that he had not said that she should have reduced her speed at a particular point in time or what speed she should have been driving at as these were matters for the court.

33. Mr Jennings was also a careful and measured witness. He measured the distance from the accident scene to the crest of the hill in a moving vehicle so he agreed his measurement should be considered as an approximation. He agreed that the Claimant had travelled between five and six metres across the road when the collision happened. He also agreed that the bus and car were technically visible to each other for about 12 ½ seconds before they crossed. He also agreed that the First Defendant

probably braked only after impact and she approached the collision site at just less than 60 mph. He had opined that the impact speed was 52-58 mph in his report but had narrowed this figure to 55-58 mph at paragraph 9.22 [D 257]. He accepted at that speed, by the time she saw the Claimant it was too late to avoid a collision. Although he could not say that she did not slow at all he could confirm that she did not brake as the brake lights were not illuminated until just after the collision. He confirmed that if Mr Smalley was right and her average speed up to the tourist information sign was 60-64 mph she would have to brake to reduce her speed to 52 mph before the collision and there was no evidence she did so.

34. He accepted that the bus was there to be seen and that it indicated both before stopping and after leaving for a few seconds. He accepted that the service board would contain the destination of the bus and may have been illuminated. The indicators are, however, quite close to the headlights and if a car is behind the bus might be more difficult to see. It was clear that Mr Jennings accepted that Mr Smalley had produced a range of figures which were scientifically justifiable, as had he, and that it was impossible to be categoric about many of the figures which should be treated as estimates provided for the benefit of the court.

35. **The parties' submissions**

Claimant

A helpful summary of the Claimant's case appears in the skeleton argument drafted by Mr Madan which states as follows:

> *"35. The main thrust of C's case is simple. A reasonably competent and careful driver, seeing what D saw on the approach to the scene, would have contemplated the real risk (C would say probability) that someone had got off the bus to cross the road to the restaurant – the only buildings on that road for miles - and slowed down until she was content that no real danger existed. Some reduction in speed on approach would have avoided the catastrophic consequences of the accident. C would have made it over the road. Given the likely consequences of hitting a pedestrian at speed, the simple step of slowing down by lifting your foot off the pedal and perhaps modest braking is a comparatively tiny inconvenience for a driver. If C establishes that D was negligent to some extent in this regard, he wins. If the court believes that to have been a counsel of perfection, he loses."*

36. This case was further developed by Mr Waldron KC in oral submissions. He compared the situation which the First Defendant faced as akin to seeing children on the pavement unsupervised, or a football bounding into the highway. The Claimant submits that the First Defendant had a view of the bus for about 12 ½ seconds during which time there was a left indication from the bus for three seconds and a later right indication for three seconds involving four flashes. The passenger was dropped off directly opposite the only building on that part of the road and it was therefore

foreseeable that this was his destination. It is submitted that a reasonably prudent driver would at some point slow down to allow the view ahead of them to open up once the bus had passed to see what was behind it. Mr Waldron was not able to specify a precise location when this should have occurred but perhaps some 150 metres before the vehicles crossed. One way of doing this would be to apply the full beamed headlights at that point. The Claimant submits that the bus was clearly visible and its service plate would be illuminated with the route number and / or the destination.

37. On the issue of whether the coincidence of location fallacy applied the Claimant submits that it does not. In *Whittle v Bennett* the operative cause of the accident was the sudden decision of the Claimant to perform a wholly unexpected U-turn rather than the speed of the other vehicle involved. In *Gray v Botwright* the court found that one of the two causes of the accident was the Defendant driving through a red light. The Claimant submits that here the duty of care started when the Claimant emerged over the brow of the hill and the bus came into view. It then lasted all the way to the impact.

38. The Claimant submits that the case of *Jackson v Murray and another* [2015] UKSC 5 is comparable with the present case. In this case a school minibus stopped on a country road and two children got off. The accident occurred at about 4.30 pm in January. It was 40 minutes after sunset and light was fading. The Defendant could see the stationary bus for about 200 metres and was travelling at about 50 mph. He did not slow down as he did not regard the risk of children running out unexpectedly as relevant as it would not be his fault if they did. The Pursuer, who was 13 years old, emerged from behind the bus into the road and was struck by the car driven by the Defendant. The Defendant was found partly responsible for the collision as it was held that he ought to have identified the bus as a school bus from which children were likely to alight and that there was a risk that one of those children might , however foolishly, attempt to cross the road. It was found that if he had reduced his speed to somewhere between 3040mph the accident would not have occurred. At first instance the Judge found the pedestrian 90% responsible. On appeal this was reduced to 70% and the Supreme Court reduced it further to 50%. The reasoning behind this decision is not relevant to this claim.

39. The Claimant criticises the First Defendant for seemingly being oblivious to the bus and concentrating only on her own carriageway. She had accepted in evidence that if she had been aware of a stationary bus that it could be a potential hazard. The Claimant was also critical of the two independent witnesses, Mr Jones and Mr Bryn in terms of their recollection so long after the accident. In terms of the expert evidence whilst not disavowing the evidence of Mr Smalley, Mr Waldron submitted that the impact speed at collision was close to 60 mph. Whilst the Claimant accepts that at the speed that the First Defendant was travelling, by the time she saw the Claimant, she could not avoid a collision, this was because she had squandered the opportunity, before she crossed with the bus, to reduce her speed to give herself a better view of what was happening behind the bus. Mr Waldron realistically accepted that a finding of contributory negligence against the Claimant was inevitable, he commended the apportionment in *Jackson v Murray* to the court but also accepted that a higher finding against the Claimant of say, 70% would not be surprising.

40. **The Defendant**

Mr Kennedy KC for the Defendants commends to the court the account of the First Defendant which was first given to the police officer at the scene minutes after the accident:

> *I was driving home from work on my usual route. I come over the brow before the Indian restaurant and out of the black from the right hand direction came a man directly in front of my car. He had nothing bright or reflecting on, just all in black. There wasn't even a moment to think or brake. I couldn't do anything to avoid him. His rucksack appeared to come through the windscreen. He then rolled off my car. I slammed on ….. brakes screaming. Got out of the car, looked about and couldn't see anyone. I ran into the Indian restaurant. I screamed 'I think I hit a person. Please someone ring an ambulance.' Everyone ran out to look but we couldn't see anyone. We could see shoes or a shoe in the road. We could see the man lying in a puddle further down the road….*
>
> *Q How fast were you travelling?*
>
> *A About 60 I think…*

41. This was a route which familiar to her as she travelled on it every working day. She knew where the bus stops were and there was no bus stop opposite the restaurant. It was a rural road and it was fully dark with no ambient lighting. She was aware that there was a restaurant in the vicinity and she was alive to the possibility of cars emerging from the car park. She did not recall seeing a bus parked across the road from the restaurant and she cannot recall ever seeing a pedestrian there either. Mr Kennedy concedes that the Highway Code gives generic advice about looking out for people getting off a bus or tram and crossing the road but questions whether this advice applies where a bus is not at a bus stop.

42. Mr Kennedy cautions the court against making unwarrantedly precise findings of fact. He relies on the dicta of Lady Justice Smith said in *Lambert v Clayton* [2009] EWCA Civ 237 which is reproduced in paragraph six, above, of this judgment.

43. Mr Kennedy submitted that the expert evidence of Mr Jennings was likely to be more accurate than Mr Smalley. He commended it in particular because it was more "of a piece" with the lay evidence. This is the correct approach in his submission as reflected by Mr Justice Coulson (as he then was) in *Stewart v Glaze* [2009] EWHC 704

> *"…it is the primary factual evidence which is of the greatest importance in a case of this kind. The expert evidence comprises a useful way in which that factual evidence, and the inferences to be drawn from it, can be tested. It is however very important to ensure that the expert evidence is not elevated into a fixed framework or formula, against which the Defendant's actions are then to be judged with mathematical precision."*

44. Whilst Mr Kennedy adopts the agreement between experts that at the speed she was travelling, the First Defendant had no realistic opportunity to avoid a collision, he does not necessarily accept the evidence of Mr Smalley of the additional time it would have taken the Claimant to clear her path. The Defendants point out that there is no evidence about when the Claimant says that the First Defendant should have reduced her speed, to what amount, and what difference that would have made. The only evidence is what would have happened if she had changed her speed from the brow of the hill which, the Defendants contend, is like saying if she had left work later the accident would not have happened.

45. The Defendants submit that it was not negligent of the First Defendant to recognise that a bus was stationary for a few seconds outside the restaurant. The left hand indication stopped when she was still ten seconds away and the right hand indicators stopped when she was still five seconds away. The Defendants suggest that it was a counsel of perfection to say that she should have known that the vehicle coming in the opposite direction was a bus which had dropped off a passenger at a location which was not a bus stop, and furthermore , that the said passenger would cross the road when it was clearly unsafe to do so.

Whilst the Defendants accept that there are other decisions of the higher courts involving passengers who have alighted from buses, the facts are different. For example, *FLR v Chandran* [2023] EWHC 1671 involved an accident in the morning, on the school run in an urban setting. Mr Kennedy contended very firmly that the fault for this accident law wholly with the Claimant but if the court disagreed he contended in the alternative for a finding that the First Defendant was only 30% responsible.

46. **Findings of Fact**

This is a rather unusual case in that there were only three lay witnesses and two expert witnesses and the evidence was completed comfortably on the first day of the trial. I suspect that this is because the factual disputes between the parties are quite narrow. I will however review the lay and expert evidence and, where I can, make appropriate findings of fact.

47. I can say first of all that the First Defendant was an impressive witness. She answered all of the questions put to her in a straightforward and measured way. It might be said that she was a little defensive on occasions but this is hardly surprising when she is accused of being responsible for the Claimant's admittedly life changing injuries. I find that she completed her normal shift on the day of the accident and accept her evidence that it was not particularly challenging and that she had both breaks and refreshment throughout the day. I find that she was not particularly fatigued and was following her normal route home. Her decision to stop in a layby to switch on a recording of *The Archers* was not suspicious in any way and was just a way to pass the time. It had no relevance to the accident.

48. I find that she was familiar with the accident location and was aware of both the location of the restaurant and the nearby bus stops. As she approached the restaurant her evidence was that she was doing "about 60 mph", by which she meant less than the National Speed Limit. I accept that this is her honest recollection although she was not constantly checking her speed at the time. She had no recollection of either seeing a stationary bus or passing a bus coming in the opposite direction although she did

recall passing a couple of vehicles before the accident. I accept her evidence that she would not have expected a bus to stop opposite the restaurant. Whilst I accept it is possible that she did see the bus prior to the accident (and is likely to have done so) I accept her evidence that she has no recollection of passing a bus shortly before the collision. Whilst her evidence shortly after the accident was that she saw a shape coming from her right , she screamed and braked and then there was a bang, I accept she may be mistaken about the order of events and she may have braked very shortly after the collision. She accepted in her oral evidence that this was likely to be accurate. I find as a fact that by the time she saw the Claimant in her field of vision it was too late for her to avoid hitting him. Her summary of what happened after the accident is also broadly accurate.

49. Counsel for the Claimant were broadly critical of the evidence of Mr Guto Jones and Mr Sion Bryn. I accept that there were some inconsistencies in their written statements over time about whether they were collecting a take-away or eating in the restaurant and whether in fact the Claimant walked along the back of the bus before crossing the road. Overall however I find that they were honest witnesses with no interest other than assisting the court. I find that both of them saw the Claimant walking across the road , without appearing to look to his left and him being struck by the First Defendant's vehicle within the nearest carriageway. In so far as they chose to comment on the speed of the First Defendant's vehicle or who bore the fault for the accident I can safely ignore their evidence as these are matters for the court to decide.

50. I was impressed by both of the expert witnesses. Their reports were comprehensive and supported wherever possible by measurements and timings from the contemporaneous CCTV footage from the bus. I believe it is no co-incidence that they are effectively agreed about most of the issues in the case and there were only a limited number of points of dispute. It was notable that even in relation to these points of dispute they accepted that the other expert had approached the problem in a different but scientifically understandable way.

51. I will comment on these limited points of dispute but am reluctant to make firm findings of fact based on them for the reasons set out by Lady Justice Smith in *Lambert v Clayton.* The first dispute is the distance between the hill crest to the West of the scene and the accident locus. Mr Jennings assessed this at about 360 metres and Mr Smalley assessed it as being between 370 metres and 390 metres. I suspect that Mr Smalley's estimate is more likely to be accurate as he measured the distance on foot using a surveyor's wheel whereas Mr Jennings did his measurements from a moving vehicle. It was clear during the trial that neither expert thought this distinction was significant and, on reflection, neither do I.

52. The next issue is the speed of the First Defendant's Mini both at impact and on average from the brow of the hill. Mr Smalley's view, using Throw Distance calculations is that the speed on impact is between 43-52 mph. This is contrasted with his view of the average speed from the brow of the hill to the brown tourist sign which is between 6064 mph. The distance between the brown tourist sign and the collision is 27.7 metres. I find it difficult to accept that this level of deceleration is likely to have occurred in such a short distance without the driver actively braking. I am aware that the First Defendant has not given evidence that she braked before the collision and that Mr Jennings confirmed in evidence that it would not be possible to reduce the vehicle's speed by that amount in such a short distance without braking. Mr Jennings

also confirmed that the brake lights seem to first come on very shortly after the collision. On this issue I

therefore prefer the approach of Mr Jennings who opines that the speed at impact is in a range 52-58 mph and the average speed up to the point where the car crosses with the bus is 55-58 mph [D 257] . I accept in the joint statement that he seems to narrow this bracket further to "about 57 mph" but I am satisfied that the bracket of 55-58 mph represents a broadly accurate estimate of the First Defendant's speed approaching the accident scene. It also accords with her own evidence which I have accepted as honest.

53. The next issue is more controversial. Mr Smalley suggests that if the Claimant was given just less than a second longer to cross the road he may have avoided contact with the First Defendant's vehicle. This could have been achieved on his evidence, if she had reduced her average speed to about 57 mph or less from the brow of the hill to the tourist information sign. This figure is clearly produced in comparison to the average speed of 60-64 mph which Mr Smalley had calculated and , given that I have rejected it , is not particularly helpful. I also feel that it has the potential to lead me into making unwarrantedly precise findings of fact of the type deprecated in *Lambert v Clayton.* I therefore do not make a finding of fact on this basis but take into account Mr Smalley's view as his arithmetic at least is accepted by Mr Jennings.

54. I can place in a similar category perhaps, Mr Jenning's opinion that the speed required to avoid a collision by stopping prior to impact depending on recognition distance, response time and deceleration rate , would require approach speeds between 24 mph

and 36 mph. Again , I record that this is his opinion based on a number of variables , but cannot and do not make a finding of fact to that effect.

55. I accept , in general terms, the sequence of events which are set out above in paragraph 25 above representing the experts agreed analysis of the CCTV evidence.

56. **Analysis**

It is agreed by all counsel that the First Defendant owed a duty of care to other road users, including the Claimant. The standard of care was that of the reasonably competent and prudent driver. The burden of proving this breach lies on the Claimant and the standard of proof is on balance of probability. Both sides appear to accept that one of the causes of the accident was the Claimant's own negligence, in failing to look to his left before crossing the road. The main issue for the court, therefore is whether the Claimant has proved that the First Defendant was negligent, and if he has, whether the proven negligence caused the accident, and what proportion of blame, if any, the First Defendant should bear.

57. It is probably most convenient to analyse the First Defendant's conduct in chronological order. I have already found that she was not unduly fatigued and was fit to drive. When she reached the brow of the hill to the west of the accident scene she was approximately 370-390 metres away from the accident scene. She was probably travelling at between 55 mph and 58 mph on a long straight stretch of road in a rural area, at night , with no ambient lighting or street lighting. The first question is whether it was negligent to drive at just less than the National Speed Limit at night on this stretch of highway. I find that it was not. The road has been assessed as suitable for

the National Speed Limit and the First Defendant says that the speed limit reduces as the road approaches villages and she complied with those restrictions. The only complication at that point was that it was dark and there were no street lights. There were no street lights because this was a rural area between communities, there was therefore much less likelihood of pedestrian traffic, the road was straight for some considerable distance with only a slight decline. Visibility was otherwise good and so I find that driving at just less than 60 mph per se was not negligent.

58. The Claimant's case is however firmly based on the presence of the stationary bus directly opposite a restaurant. The First Defendant has no recollection of seeing the stationary bus so the relevant questions are at what point in time the First Defendant should have seen and recognised the vehicle as a bus and what she should have done about it as a competent and prudent driver. The first opportunity according to the Claimant for the First Defendant to see the bus and assess the situation is when she drives over the brow of the hill and the restaurant is in view. Both experts agree that the First Defendant comes into view at about the same time as the bus stops opposite the restaurant. It would appear that the driver turns off the left indicator at about the same time as it stops [D179]. It is then stationary for 4.5 seconds to allow the Claimant to get off during which time the interior lights are switched on. The driver then applies the offside indicator , the interior lights go off and he sets off slowly accelerating in the direction of the First Defendant.

59. When the bus stops the First Defendant is roughly 370-390 metres away from it. It will take her approximately 14.5 seconds at just under 60 mph to reach the point where the

bus stopped and the Claimant alighted. An indication of what this looks like in daylight appears in the report of Mr Smalley [D160]:

The arrow is showing an entrance to a nearby property but it is clear that the restaurant is not clearly in view at this point.

60. Whilst I accept that in theory there is line of sight between the First Defendant at the top of the crest of the hill and the bus, which at this point is stationary opposite the

restaurant I do not accept that a reasonably prudent motorist could identify a vehicle 370-390 metres away as a bus. In rural areas without any lighting or light pollution a vehicle driver is only likely to initially see the headlights of oncoming traffic. Even though the interior of the bus is briefly illuminated for 4 ½ seconds I am not convinced on the balance of probability that a driver in the position of the First Defendant should be able to identify a stationary bus from so far away. I also accept that it is likely that the destination board of the bus was illuminated and showing either the route number and / or destination but I am not convinced on balance that this should register with a prudent driver until he or she is much nearer in distance to the bus. More importantly the Claimant is wearing predominantly dark clothing and I find that the First Defendant would have no opportunity to see him alight from the bus , even taking into account the distance she would have covered in the next 4 ½ seconds , which is about 115 metres. She is still about 265 metres away from the accident scene.

61. I accept that as the First Defendant progresses , she and the bus are getting closer to each other and the opportunity for identifying the oncoming vehicle as a bus increases. According to Mr Jennings the car and the bus passed each other between 7.08 and 7.92 seconds after the bus set off. The closer the First Defendant gets to the bus the better opportunity she has of identifying the oncoming vehicle as a bus , rather than another car or a HGV. Mr Waldron KC for the Claimant submitted that the First Defendant should have taken action by decreasing her speed at about 150 metres before she crossed paths with the bus. I would accept that by that time a reasonably prudent motorist would be able to recognise that the oncoming vehicle was a bus because she would be able to read the illuminated destination sign and have some broad indication of the size of the vehicle. Whether she should then have reduced her speed would depend on whether she

had realised that the bus she was about to pass had just stopped to let off a passenger. It is at about this point that the offside indicators of the bus are switched off. I have concluded on the balance of probabilities that from the distance she was at she would not be able to see a passenger getting off the bus , particularly one like the Claimant wearing predominantly dark clothes.

62. In my judgment this provides a credible explanation why the First Defendant does not remember seeing a bus prior to the collision. I think it likely that she saw a bus as they passed in opposite directions but had not realised it had stopped outside the restaurant as she had not expected a bus to stop there and had been too far away to recognise a stationary bus as she came over the brow of the hill. The bus had no relevance to the accident as far as she was aware at the time as she had no idea where the Claimant had come from.

63. No doubt Mr Waldron would say that the Claimant should have been able to see a

stationary vehicle from some distance away and when she later realised it was a bus she should have inferred that the bus had stopped to drop off a passenger who was now lurking in the dark to her offside , about to cross the road in the direction of the restaurant. As I have indicated I remain unconvinced on balance that a prudent motorist would identify a vehicle almost 400 metres away , at night , as stationary and I think she would have to get much closer to the vehicle to see something like indicators. They had of course been switched off albeit when she was some five

seconds away from crossing the path of the bus (and 150 metres away according to Mr Jennings [D271]). As Mr Jennings opined, whilst looking at the other carriageway she was likely also to have been able to see the headlights of a vehicle that was following some distance behind the bus the glare from which may have made it more difficult to detect the bus's offside indicator [D271]. I have accepted that the vehicle would be identifiable as a bus, at this stage but the indicators have just been switched off and I consider it too much to expect her to infer from what she was able to see that a passenger has just been dropped off at a location which is not a bus stop.

64. I have concluded that in expecting the First Defendant to recognise the presence of a stationary bus , some 370-390 metres away ,which then started moving 265 metres away at night represents a counsel of perfection and ignores the reality of the situation which is that the First Defendant is travelling along a straight road , within the speed limit and there appear to be no hazards in her path. It would be understandable, in my view, if she paid more attention to potential hazards in her own carriageway, like a vehicle emerging from the restaurant car park, than potential hazards on the opposite carriageway, unless they were obviously likely to affect her progress.

65. By the time the First Defendant gets close enough to the headlights of the bus to see the destination plate she has no reason to regard it as a hazard because she has not seen it stop to drop off a passenger. Had I found that she actually witnessed the bus dropping off a passenger opposite the restaurant this would provide a different factual matrix but she did not recall seeing this and I think if she had seen it , in the context of the accident which happened shortly afterwards she would have remembered it and connected the two events.

66. Even if I had found that the First Defendant had noticed a stationary bus and had seen one adult passenger get off I would have been reluctant to find that she should have to

reduce her speed to a rate where she could have avoided a collision with a pedestrian who chose to stride out into the road without looking. This would effectively mean that any time a prudent driver passed a stationary bus he or she should slow down to such a speed where they can bring their vehicle to a halt to avoid a collision with a negligent pedestrian. One can only imagine how long it would take to traverse a busy city or town centre in these circumstances. According to Mr Jennings in the current claim this would entail the First Defendant reducing her speed to between 24 and 36 mph. The issue is whether there is a real risk of the passenger in question emerging into the driver's path or whether it was no more than a "mere possibility" which would not have occurred to a reasonable driver. I take the view that bus passengers stepping into the path of oncoming vehicles is unexpected in the sense that the vast majority of pedestrians choose to look and take care before crossing the road. To expect all road users to slow down and take precautions every time they pass a stationary bus is going beyond the standard of the reasonably prudent motorist and much nearer the 20 /20 hindsight or counsel of perfection standard.

67. It is noticeable that the majority of cases relied on by the Claimant in this claim are claims involving minor children. This is because it is accepted that children can be unpredictable, imprudent and are highly vulnerable; therefore, caution must be exercised when they are in the vicinity of the road, and drivers should drive with children in mind and anticipate how they might behave (Moore v Pointer [1975] RTR 127, per Buckley LJ). The current claim does not involve a child and only a single

passenger being dropped off at a location which is not a recognised bus stop. This is the main distinction between this case and the one relied on by the Claimant as comparable , *Jackson v Murray.* There were, in addition, other distinctions: the driver of the car had seen the School Bus which was clearly marked as such on the date of the accident and had seen it on the same road before; it was 4.30 pm which was a normal time for school drop off; it was after sunset but not fully dark; although the driver saw the school bus he regarded the risk of children running out unexpectedly as irrelevant. On causation the Judge at first instance found that if the driver had been travelling at a reasonable speed the pursuer would have made it safely past the line of the car's travel before the car arrived at the point of impact. Against this background, the court's decision appears understandable.

68. The First Defendant is also criticised by the Claimant for failing to activate her "full beam" once she had passed the bus. This would have given her an earlier opportunity to identify the Claimant it is alleged. According to Mr Smalley if she had done this once level with the front of the bus this would be between 1.3 and 1.9 seconds before impact. Given her speed at this point I believe it unlikely that even if she had seen the Claimant a little earlier she could have avoided a collision. In any event both experts agree that it was likely that there was another vehicle a few hundred metres behind the bus which can be seen on the CCTV footage. Whilst I accept that some drivers might choose to apply full beam immediately after they cleared the bus and then re- apply dipped beam when they considered that it might adversely affect the oncoming vehicle at least an equal number of drivers would merely leave the dipped beam applied until the oncoming carriageway was clear of traffic. It would certainly not be negligent to remain on dipped headlights in these circumstances.

69. In summary, I find as a fact that when the First Defendant drove over the brow of the hill she did not fall below the standard of the reasonably prudent driver by failing to identify the presence of a stationary bus about 380 metres away. I also find that at that distance , with the Claimant wearing dark clothing, she had no real opportunity to see him get off the bus. As she neared the bus and the two vehicles started to approach each other a prudent motorist would recognise the oncoming vehicle as a bus because they would be able to see the destination board which is the only distinguishing feature in pitch dark conditions. It is difficult to be categoric at what point the prudent motorist should be able to categorically recognise the oncoming vehicle as a bus , but certainly at 150 metres away it should be possible. According to the information provided by the CCTV footage as interpreted by the experts this was at about the time that the offside indicators of the bus were extinguished. Given the glare of the headlights from the bus I find that it was not negligent of the First Defendant to fail to notice the offside indicators earlier and conclude that the bus had been recently stationary. Even if she had, it would not be negligent to fail to assume that the bus had recently dropped off a passenger opposite the restaurant when she knew that was not a bus stop. There are, of course, other reasons why a bus may stop not at a bus stop, for example for the driver to make a phone call, to check a potential defect with the vehicle or deal with an unruly passenger.

70. Once the First Defendant has passed the bus I find it was not negligent for her leave her headlights dipped for the reasons I have outlined earlier. In the two seconds or so from crossing the path of the bus until the impact with the Claimant, at the speed she was travelling, I find that she was unlikely to have been able to identify the presence of the Claimant in time to apply her brakes before impact. Both experts agree with

this finding. Her speed throughout these events remained at around 55-58 mph which is lower that the National Speed Limit which applied to this stretch of road. I find that it was not negligent for her to fail to reduce her speed for the reasons I have outlined above.

71. These findings are based on my finding of fact that the First Defendant did not remember that she had passed a bus because she had not realised that it had stopped opposite the restaurant at all. The reason she did not remember passing the bus is because she had no reason to think at the time that it had any relevance to the shocking accident she had just become involved in. I have explained why she was not negligent in failing to realise or infer that a passenger had been dropped off and was waiting to cross the road in the darkness. No prudent motorist is likely to be able to identify the last vehicle they passed before a frightening and memorable event unless it has some relevance to the happening of the event in their minds.

72. In the alternative, even if I am wrong about my previous finding, and I had decided that , for the reasons the Clamant submits, the First Defendant could and should have noticed or inferred that the bus had been stationary to drop off a passenger opposite the restaurant I still conclude that she was not negligent in failing to reduce her speed to a level where she could have stopped in time to avoid a collision with the Claimant pedestrian.

73. In the light of these findings I do not need to resolve conclusively the interesting arguments raised by both counsel about what Mr Smalley refers to as the "avoidance potential". Mr Smalley's calculations in this respect could only be relevant if the court found that the First Defendant did not meet the standard of the reasonably prudent driver as soon as she crossed the brow of the hill. If I had found that she breached her duty of care somewhat later in the journey this would have meant that Mr Smalley's evidence

    in this respect fell into the trap of the " coincidence of location fallacy". In any event, there are probably too many other imponderables to base any reliable findings on these calculations which are now otiose, given my findings of fact.

74. As a consequence of these findings I must reluctantly dismiss the Claimant's claim.

75. I would like to pay tribute to the detailed and careful submissions made to the court by all three counsel involved in this case. I would also echo their unanimous view that this was a disastrous and life-changing experience for the Claimant and a terrifying and profoundly upsetting experience for the First Defendant. Her conduct , and the conduct of her partner Emily after the collision does them both enormous credit to both themselves and their chosen profession.