



Neutral Citation Number: [2021] EWHC 792 (QB)

Case No: HQ18P00393

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/03/2021

Before :

**RICHARD HERMER QC**  
**(Sitting as a Deputy High Court Judge)**

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Between :

<b>MASTER FELIX BARROW (By his Litigation Friend and Grandfather Mr Hugh Barrow)</b>	<b><u>Claimant</u></b>
<b>STUART BARROW</b>	<b><u>Second Claimant</u></b>
<b>-and-</b>	
<b>VANESSA BARROW</b>	<b><u>Third Claimant</u></b>
<b>- and -</b>	
<b>ROSEMARY MERRETT</b>	<b><u>First Defendant</u></b>
<b>-and-</b>	
<b>LIVERPOOL VICTORIA INSURANCE COMPANY LIMITED</b>	<b><u>Second Defendant</u></b>

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**Susan Rodway QC and James Burton** (instructed by **Moore Barlow LLP**) for the **Claimants**  
**Derek O'Sullivan QC** (instructed BLM, Southampton) for the **First and Second Defendant**

Hearing dates: 1-5 March 2021  
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## **Approved Judgment**

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

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 31 March 2021.*

## **Richard Hermer QC:**

### **1. Introduction**

1. This is a claim is a claim for damages brought on behalf of a child, Felix Barrow ('Felix'), who on 7 October 2015 sustained severe injuries when he was involved in a collision with a car driven by the First Defendant, Mrs Rosemary Merrett<sup>1</sup>. The accident occurred when Felix was crossing the road outside his home on the way to school. Although the parties cannot agree who bears legal responsibility for the accident, there is no dispute that what occurred was a tragedy with lasting impact on many involved but above all for Felix who sustained life changing injuries.
2. The trial was of liability alone. The task for the Court is to determine whether the Defendant was at fault for the collision and, if so, whether Felix can also be said to have contributed to the accident in a legally relevant way.
3. Although the Court was presented with a considerable amount of expert evidence it soon became apparent that the core dispute really turned upon two closely related core questions of fact namely:
  - (i) Was Felix running or walking across the road immediately prior to the collision?
  - (ii) What was Felix's likely body position at the time of impact?
4. The parties agree that the answers to these two factual questions are capable of unlocking the dispute about who was responsible.
5. The Claimant's answer to these questions is that Felix was walking across the road when he slipped backwards in the middle of the carriageway. The case is that it took at least several seconds for him to start getting to his feet and it was whilst he was in the process of doing so that he was struck by the Defendant's car. The Defendant accepted at trial that if this version of events is correct then the Claimant is bound to succeed because Mrs Merrett would have had reasonable time to observe Felix's presence in the road and take evasive action. Indeed, the Defendant acknowledges that even if Felix ran rather than walked out into the road and slipped backwards but still took several seconds to attempt to get back to his feet, his presence in the road should still have been obvious and a reasonable driver would have avoided the collision.
6. The Defendant's answers to the core questions are that Felix was running across the road at the time of his accident. They contend that whilst running he likely slipped forward and moments later was struck by the car. Mirroring the Defendant's concession, the Claimant accepts that if these facts are established the claim must fail because Mrs Merrett would not have seen Felix until it was too late to take evasive action.

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<sup>1</sup> I will refer to children by their first name and adults by their surname. For ease of reference, where I deal with the submissions of the parties I will refer simply to Claimant and Defendant although, as described in Part 3, there are in fact three claimants and two defendants.

7. Before turning to the substance of the judgment I set a general observation about the evidential difficulties faced by Courts and litigants in civil proceedings which revolve around the reconstruction of fast moving and traumatic events such as this road traffic accident.
8. There are many claims arising out of accidents, be they on the road, in the home or in the workplace, in which it is simply not possible to conclude with absolute precision what occurred. The law does not require the Court to do so. The task for the Court is not to reach a conclusion based on ‘certainty’ as to what occurred but rather to come to a reasoned view as to the most probable explanation. In many accidents there will be a range of confounding factors which render the task of *precise* reconstruction of events impossible. This case exemplifies many of these factors. The trial concerns an event that from beginning to end lasted no more than a few seconds. It was not recorded on CCTV or a ‘dashcam’ and the few eye-witnesses to the collision all viewed events from different positions in the road and pavement. There was little ‘hard evidence’ such as extensive damage to the car that would enable ready reconstruction. Felix’s physical injuries in themselves do not provide clear answers to the core questions, nor (as explained later) does the evidence from the accident reconstruction experts.
9. A Court attempts to reconstruct the most probable answers to the core questions by applying established forensic tools to such evidence as is available. It looks at the evidence in its totality, it seeks to understand the relevant layout of the scene, identify any objective facts that might act as lodestars by which more subjective opinion and recollection can be tested, scrutinises carefully the accounts of witnesses of fact and experts, both in the witness box and in earlier written statements – and it applies to all of this a fair dose of common sense.
10. All of this will strike those well used to litigation as a statement of the obvious. It is nevertheless important to spell out the evidential task, and the legal standard applied, so that others, not least the parties themselves, can well understand the basis on which I have proceeded to analyse this case.
11. The remainder of this judgment is divided into the following parts. In Part 2 I set out the factual background. In Part 3, I describe the relevant procedural history before turning, in Part 4, to the limited law bearing on the assessment of liability in road traffic accidents. In Part 5 I address the analytical approach to evidence. In Parts 6 and 7 I set out the relevant lay and expert evidence received by the Court. Part 8 contains my findings and conclusion.

## **2. Factual Background**

12. Shortly before 8 o’clock on the morning of 7 October 2015 Felix, then aged 11, set off from home to walk to school with his friend Nicholas Stannard. Felix had recently started secondary school and was now allowed to walk to school with his friends, his parents having instilled in him a need to always take great care when crossing roads.
13. Felix lived on a long single carriageway road. Although the name of the road changed in places, the stretch next to his home is called Hill Pound Road and is located in Swanmore, Hampshire. The stretch of Hill Pound Road adjoining Felix’s house only has a pavement on the far side of the road, meaning that in order to get to

it pedestrians leaving the house need to cross the road immediately by the driveway. The speed limit on this stretch of the road is 30mph and is clearly marked on signs not too far from Felix's house warning drivers approaching from the south that the limit is reducing from 40mph.

14. On the morning of the accident Nicholas had been dropped off at Felix's house and they set off together for school by crossing the road outside the drive. Having reached the pavement Felix told Nicholas that he had forgotten his rugby boots and needed to return home to retrieve them. He crossed the road back to his home whilst Nicholas remained on the pavement waiting for his return.
15. As Felix was returning so Mrs Merrett was driving north along the road in the direction of his home. The pavement was on the nearside (left) of her car. As she drove closer, she noted the presence of a child (Nicholas) to her left. She also noticed traffic approaching her in the opposite direction. The precise circumstances of what happened next form the heart of this dispute but it is agreed that at about the point she drew up to where Nicholas was standing her vehicle hit Felix to the left side of his body at a point over the centre line of the road i.e. just on Mrs Merrett's side of the road.
16. The impact of the collision caused Felix to be thrown a distance of about 8 metres in a northerly direction (the direction of travel of Mrs Merrett's car) and about 3 metres away from the offside of the car.
17. Felix's mother and father then endured what must be the nightmare of every parent. Nicholas knocked on their door and told them that Felix had been run over. Mr Barrow rushed out to find Felix unconscious on the road. He initially thought he was dead. He cradled his son's head whilst Mrs Burrows called the emergency services.
18. The emergency services arrived. The police closed the road and began an initial roadside investigation led by PC Giles. The ambulance service arranged for Felix to be evacuated by air ambulance to Southampton General Hospital. His parents were informed that Felix might die and the next 72 hours were likely to be critical.
19. As this was a trial of liability alone, it is not necessary to set out the various medical procedures that Felix endured, nor the detail of his present condition and prognosis. Neither party suggested that any of Felix's long-term injuries are capable of throwing any light on the circumstances of the accident itself. I deal with the injuries in so far as they are relevant to liability in Part 7 below. Suffice it to say, Felix thankfully, survived the accident but has been left with the lifelong consequences of the severe physiological and neurological injuries he sustained.
20. Mrs Merrett's car sustained relatively little damage. The cause of some of the minor damage was the subject of dispute at trial. There were only three areas of minor damage to the front offside of the car. A small black scuff mark below the grille, a small fracture to a section of skirting below it, and an area of scuffing above the grille. To the offside there was some scuffing and the displacement of a section of material around the wheel hub. The relatively minor damage is exemplified by Figure 1<sup>2</sup>

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<sup>2</sup> These are not how the images were labelled in the trial bundle rather I am applying bespoke classification for ease of reference

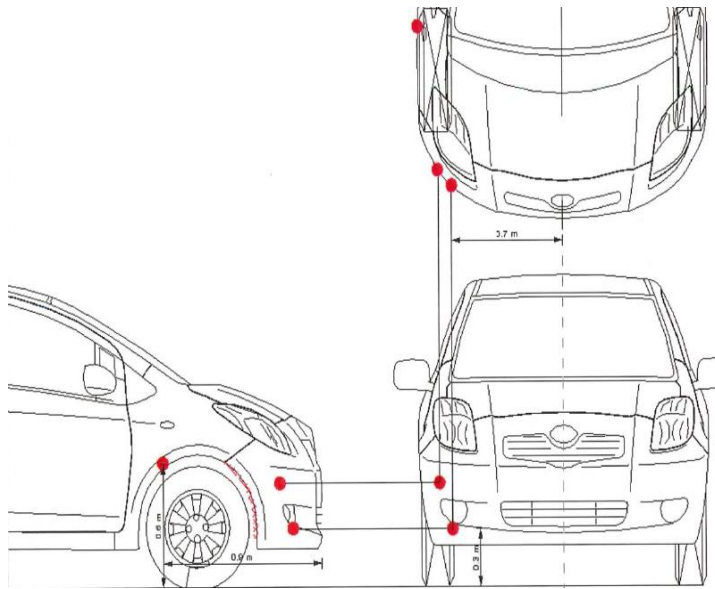
which shows the scuff mark below the front offside grille and Figure 2 which shows the damage for the offside of the car. Figure 3 is a diagram drawn by Mr Johnston, the Defendant's reconstruction expert, illustrating the location of the areas of damage on the car.

**Figure 1**



**Figure 2**



**Figure 3**

### 3. Procedural background

21. The Claim Form in this case was issued on 31 January 2018. It named Felix as First Claimant and his father and mother as Second and Third Claimant respectively. The claim brought by Mr and Mrs Barrow is for the psychiatric injuries they sustained as a result of what they witnessed at the roadside and the events that followed. Mr and Mrs Barrow's claims give rise to a discrete legal argument about the circumstances in which certain classes of persons can recover damages for psychiatric injuries and is entirely parasitic on whether Felix's claim succeeds. On 13 December 2018 Master Davison ordered that these claims be adjourned until after a decision had been reached on liability in Felix's claim. The order also provided for a 'split trial' in Felix's claim whereby liability would be considered first and only if it was established would the parties return to court to argue about the amount of compensation.
22. The Claim Form also named Mrs Merrett's car insurer as Second Defendant pursuant to Regulation 3 of the European Communities (Rights against Insurers) Regulations 2002. There was no material factual or legal distinction between the First and Second Defendant in the defence of a case funded by an insurer and I refer to them as the 'Defendant' in the singular throughout.
23. The Particulars of Claim is dated 27 April 2018. The core of the claim set out in the document is that as Felix walked across the road towards Nicholas he slipped and was struck by the car as he was in the process of getting back up to his feet. The allegations of negligence against Mrs Merrett are expressed in various ways but boil down to an assertion that Felix's position in the road should have been obvious such that a reasonable driver would have seen him in time to avoid a collision.
24. The Defence is dated 15 June 2018. It denies liability and asserts that a reasonable driver could not have avoided a collision because Felix ran out into the road at a time during which Mrs Merrett's vision was largely obscured by oncoming traffic, giving

insufficient time to brake. The Defence also pleaded that even if the Defendant did bear primary legal responsibility, the extent of damages should nevertheless be reduced because Felix contributed to the accident by running out into the road without proper regard for the oncoming traffic.

25. The trial took place over 5 days. Although Covid restrictions remained in force, at the request of the parties I sat in the Royal Courts of Justice with legal teams present. Some live witnesses gave their evidence at Court, others through remote video access.
26. I was greatly assisted throughout the trial by Ms Rodway QC and Mr Burton appearing on behalf of the Claimant and Mr O’Sullivan QC who represented the Defendant.

#### **4. Road Traffic Accidents – The Law**

27. In the vast majority of cases the assessment of liability in road traffic accidents turns on an assessment of facts. The key legal question is simply whether the established facts do, or do not, fall below the standard to be expected of a reasonable road user. This is not therefore an area rich in legal learning. Two well known cases do however illustrate how the Court calibrates what the standard of a reasonable driver is.
28. A helpful starting point is the observations of Latham LJ in *Lunt v Khelifa* [2002] EWCA Civ 801 that a car is “*potentially a dangerous weapon*”. This means that those driving cars owe clear duties of care to those around them. Compliance with speed limits and proper awareness of potential hazards can often be critical in determining whether a driver fell below the level of reasonable care expected of them.
29. The standard is however of a reasonable driver not the ideal driver. This was a point made by Laws LJ in *Ahanonu v South East London & Kent Bus Company Ltd* [2008] EWCA Civ 274:

*“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.”*

30. These two authorities helpfully illustrate the boundaries of the assessment of the reasonableness of the driving said to have caused the accident. Important as it is to keep this standard in mind, it is of less practical application in this case where the parties are essentially agreed that dependent upon the findings I reach in respect of the two core questions, the driving was either reasonable or unreasonable.

#### **5. Evidence – the analytical framework**

31. In opening written submissions and in her closing address Ms Rodway took the Court to the celebrated judgment of Mr Justice Leggatt in *Gestmin SGPS (SA) v Credit Suisse (UK) Ltd & Anr* [2013] EWHC 3560 (Comm). In *Gestmin* the Court observed

that in complex commercial claims, the existence of substantial amounts of contemporaneous documentation will often provide a more reliable source of evidence than the recollection of witnesses proffered in a courtroom many years later.

32. Ms Rodway suggested in opening submissions, that *Gestmin* could be taken as applying by analogy in this case. It was submitted that the fragility of human memory was such that the witness evidence in this case should be treated a secondary source because a far more objective source, what she described in opening as the ‘harder’ evidence, was provided by the evidence of the expert witnesses. I took Ms Rodway to be suggesting that the Court should adopt the same approach as recommended in *Gestmin* and ‘*place little if any reliance at all on witnesses’ recollection...*’ (at §20) in seeking to decide the case primarily by regard to the experts, in particular the experts in accident reconstruction.
33. In so far as Ms Rodway’s submission was addressed to the observation that the objective evidence is always an extremely helpful source both in itself, and as a guide to calibrating the recollection of witnesses, she is plainly right. I do not consider however that any wider submission that seeks to extend the principles of *Gestmin* to a case such as this, has much traction. This is for at least two reasons.
34. Firstly, *Gestmin* was not setting down a fixed rule of interpretation applicable to all commercial cases, let alone all cases in which there is a dispute of fact. Each case remains to be determined in its particular context on its particular facts. One can well imagine how the observations serve as an essential guide to the approach to be adopted in a commercial case in which there is a substantial amount of documentation, an ‘electronic footprint’, detailing contemporaneously what the parties said and thought in meetings about the relevant transactions. This is plainly not such a case. Neither the small amount of documentation generated in the immediate aftermath of the accident, nor the ‘objective’ evidence such as damage to the car, debris, injury etc provide any form of forensic heuristic entitling the Court to overlook the importance of eyewitness evidence. The evidence of eyewitnesses to a single event such as a collision is almost always likely to be highly relevant to the assessment of what occurred, and certainly is here.
35. Secondly, and critically, in this particular case the evidence of the experts in so far as it is intended to express opinions as to the likely cause of the collision, is itself almost entirely dependent on the veracity of the recollection of witnesses. I deal with this in a little more detail in Part 7 but the key point is that the expert analysis in this case does not provide a truly autonomous or objective source for what is likely to have occurred that is capable of being neatly divorced from the witness evidence. The unlocking of this particular dispute turns very much on the evidence of the witnesses rather than the experts.
36. Whilst I do not consider that *Gestmin* is of direct application to the approach I should adopt to the evidence, Leggatt J’s insightful reflections on the fragility of human memory do serve as a beacon to any court seeking to navigate through a trial in which conflicting accounts are given of the same event by witnesses. Leggatt J’s observations are set out between §§15 and 22 of his judgment and their wisdom is



reflected by the frequency in which they are cited and the range of cases in which they are invoked. Of particular relevance to this claim are the following observations:

- i. People generally lack insight into just how unreliable memory can be. Two common errors giving rise to this lack of insight are that people wrongly believe that the more vivid a sense of recollection is, or the more strongly expressed, the more likely it is to be right (§16);
  - ii. Memories are fluid and malleable. Memory does not operate like a camera but rather can be dramatically influenced by external information (§17);
  - iii. The process of civil litigation itself subjects memory to powerful biases. A desire to assist a party, or not to prejudice them as well as a desire to give a good impression can be powerful but subtle factors impacting on the reliability of memory (§19);
  - iv. The effect of giving evidence can also materially impact on memory. Witnesses are asked to recount events on numerous occasions and to be exposed to the competing contentions of the parties. As noted at §20 the *“effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness’s memory of events to be based increasingly on this material and later interpretations of it rather than the original experience of the events.”*
37. These observations reflect what courts have long known including that accounts given at the time of an event, tend to be more accurate than those provided later – it is a truism that memory will rarely improve over time. Leggatt J’s insights also reflect that even honest witnesses are able to give wholly inaccurate evidence because their memory may have been subconsciously degraded not just by time but a range of biases – see for example the observations of Lord Pearce in *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 relied upon by both parties.
38. These valuable insights serve to underline the caution that should be attached to evidence given in the witness box, or in statements generated for the purpose of litigation, as to events which occurred a number of years beforehand – all the more so, when the events were highly traumatic and last only a few seconds. *Gestmin* serves to remind the Court that often (but not always) accounts given at the scene will be more reliable than versions given some time later as part of litigation. This has some particular relevance to the approach I have adopted to the assessment of the evidence, including the evidence of Nicholas Stannard, the only witness to the accident itself called by the Claimant.
- 6. The lay evidence at trial**
39. Only three witnesses called at trial actually observed the collision between Felix and the car. Felix himself has no recollection of the accident at all and was not called to give evidence. Nicholas gave evidence in support of the claim. The Defendant called two witnesses, Mrs Merrett and also Mr Alexander Gent who was a neighbour of the Barrow family.

40. In addition to the evidence of Nicholas, his mother, Jane Stannard was called. The Defendant agreed the contents of witness statements from Mr and Mrs Barrow dealing with the immediate aftermath of the accident as well as a statement from Caroline Angold, a local resident, and Mr David James who was working nearby. None of these statements bore upon the question of how the accident occurred. In addition, statements were served, and their contents accepted, from Mr Paul French and Mr Rowan Johnston who were responsible for filming a video in which Nicholas demonstrated how he recalled Felix fell and attempted to get up.
41. In addition to Mr Gent, the Defendant called PC Robert Giles and PC Stephanie Wheeler. PC Giles was the officer in charge of the investigation at the scene and he was assisted by, amongst others, PC Wheeler.

*Nicholas Stannard*

42. As stated, Nicholas was the only witness called by the Claimant who saw the accident. It is accepted by the Claimant that if critical elements of Nicholas' evidence are found to be unreliable then the claim must inevitably fail. Equally, if core aspects of his evidence about Felix's fall and attempts to recover are held to be probable, then the Defendant accepts the claim succeeds. The centrality of Nicholas' account is accordingly obvious.
43. Nicholas is recorded as giving at least five accounts of what occurred.
44. The first account in time is that recorded by PC Giles in his Incident Log on the morning of the accident. PC Giles explained to the Court that he made the entries in the log contemporaneously to his conversation with Nicholas and his mother. The relevant excerpts of what he said Nicholas told him at 9.06 on the morning of the accident are as follows:

*W Nicholas STANNARD*

*Jane STANNARD*

*Left Denver Maru [Felix's home] with Felix. Crossed road. He forgot something so came to back to H/A. Came back to road. Nicholas said "WAIT THERE'S A CAR". Then ran across road. Slipped and hit car.*

45. The accuracy of this record was a significant issue at trial. The suggestion that Felix ran across the road notwithstanding a warning, that he slipped and then hit the car is difficult to fully reconcile with the Claimant's pleaded case.
46. Nicholas' second account, albeit in second-hand hearsay form, is recorded in computer records disclosed during the course of the trial but which reflect evidence already given by PC Giles in his witness statement. These record that on 30 November 2015, Felix's grandfather, Hugh Barrow, contacted PC Giles and stated that he had spoken to Jane Stannard and that Nicholas now wished to say that Felix was walking across the road and that he was getting up before he was hit by the vehicle. PC Giles recorded in the notes that he considered this was a 'stark contrast' to the version that Nicholas had previously provided him. He also noted that Mr

Hugh Barrow informed him that the family were considering a civil claim which if successful would help pay for Felix's care.

47. Nicholas' third account is contained in the first statement that he provided in these civil proceedings. It is dated 26 November 2018, i.e. just over three years after the accident. In this statement Nicholas described how Felix came to the edge of the road having returned home to collect his rugby boots. Nicholas stated how Felix stopped at the edge of the road, checked both ways and after letting two cars pass from his right, began walking across the road at normal pace. As Felix approached a shiny patch of the road around the centre line he slipped falling back onto his bottom. As he attempted to get up, he was struck by the car.
48. Nicholas gave a supplemental statement dated 24 February 2020 (his fourth account) in which he addressed a suggestion made by the Defendant's accident reconstruction expert, that Felix was falling forward at the time of impact with the car. Nicholas stated he was certain that Felix did not fall forward but was getting up when hit. In order to illustrate Felix's movements, Nicholas demonstrated them on film.
49. Nicholas attended the trial and was cross-examined, thereby providing his fifth account. He was asked about what, if anything, he said to PC Giles shortly after the accident. Nicholas strongly disputed that he had told PC Giles anything other than his name and address, certainly not any details of the accident. He accepted that some of the information contained in PC Giles logbook attributed to him were correct, namely that Felix had gone back home, returned to the road and that he had warned him about cars. He denied that he had told PC Giles that Felix ran, slipped and hit the car.
50. The remainder of Nicholas' evidence was broadly consistent with the version provided in his November 2018 statement.

*Mrs Stannard*

51. His mother, Jane Stannard, gave evidence and was cross examined.
52. In her witness statement, dated 10 October 2018, she described how she arrived at the scene shortly after the accident having been called by Nicholas. On arriving Nicholas told her about what had happened. She recalled that he told her that Felix was not running. Nicholas did not speak to PC Giles before she was present. PC Giles asked Nicholas whether Felix had been running and he stated he had not. The conversation was short and he was not asked to describe what had happened.
53. Mrs Stannard's evidence in cross examination was broadly consistent with her written account although she stated she had told PC Giles some of what Nicholas had recounted to her namely that Felix slipped and fell as he was walking back from his home. She suggested that in so far as this information is recorded in the log book then she might be the source rather than Nicholas. She strongly refuted the suggestion she had told PC Giles that her son had said Felix was running, slipped and hit the car. She stated that Nicholas had always been consistent in his account of what had happened.
54. In the course of cross-examination, she was asked why her statement had not included the fact that Nicholas had warned Felix about traffic before he crossed the road (per PC Giles note and repeated by Nicholas in cross examination). Mrs Stannard replied

*“I don’t think you quite understand how traumatic that day was for all of us and how hard it has been to recreate it on so many occasions.”*

*PC Giles*

55. PC Giles was the first witness called by the Defendant and it is in any event convenient to address his evidence next because it is directly relevant to that given by both Nicholas and his mother.
56. PC Giles provided a statement in these proceedings dated 3 November 2016. He also provided relevant sections of his logbook entries generated at the scene as well as a computer record in which further steps in the subsequent investigation were contemporaneously recorded.
57. PC Giles arrived at the scene within approximately 30 minutes of the accident. He was the principal investigating officer at the scene responsible for managing all the police officers and coordination with other emergency services. He joined the police service in 2000 and has been attached to road/traffic departments since 2004. On arrival at the scene PC Giles started taking photographs but as soon as he learnt of the extent of Felix’s injuries created a scene log in case it emerged that criminal offences may have been committed. He spoke first to Mrs Merrett, who told him that Felix had run directly into her car without warning. Shortly after 9am he states he spoke to Nicholas and his mother which led to the entry in the incident log.
58. PC Giles was extensively cross-examined on the accuracy of his logbook entry recording his conversation with Nicholas and Mrs Stannard. The amount of time spent on these few lines may be thought a reflection of their potential materiality to the core dispute.
59. On behalf of the Claimant, Mr Burton suggested to PC Giles that the record referring to Felix running was never in fact uttered by either Nicholas or his mother. A range of possible reasons for inaccuracy were put to PC Giles. It was suggested to him that it may have been an artefact of a misplaced assumption that PC Giles had already formed about the likely cause of the accident at the time he wrote the note, and/or influenced by a sense of sympathy with the plight of Mrs Merrett. It was also suggested to PC Giles that inaccuracy might be explained because he was upset by the trauma of the roadside scene and/or by and the various competing demands on his time.
60. PC Giles was having none of it. His evidence was that he is trained to deal as objectively as possible with his job no matter how traumatic the scene of an accident. He categorically denied that he would have prompted Nicholas towards certain answers, or used closed questions to elicit certain answers. He was clear that his task was one of neutral fact finding and he would never prompt a witness nor provide them with information gleaned from other witnesses. He stated that the scene was far more straightforward than many he had to deal with. He maintained that the account given by Nicholas of Felix running into the road and slipping was very clear, and to his mind, very relevant.

*PC Wheeler*

61. PC Wheeler was also called to give evidence. She had provided a short statement, dated 20 November 2018, in which she described how she spoke to Mrs Merrett shortly after her arrival at the scene. Her statement exhibited the relevant entries from her notebook in which she recorded Mrs Merrett's description of driving along the road when "...from nowhere boy appeared from behind dark car running to otherside of road from o/s". She was asked very few questions in cross-examination by Mr Burton but was clear that the road surface was 'slightly damp' and also confirmed that Mrs Merrett was very upset at the time she was spoken to.

*Mrs Merrett*

62. Mrs Merrett, the Defendant, was called to give evidence over the video link. Mrs Merrett had previously provided a statement dated 1 July 2018. The statement recorded how she was driving along the road at approximately 30 mph when she noticed a child standing on the pavement to her nearside. This would have been Nicholas. She described how as she drove towards the child another vehicle was driving towards her in the opposite direction. She stated that as she drew level with the rear of that car a child ran from her right into her car. She stated that she assumed he was running because he was in a crouched position. She stated she was given no opportunity to avoid the collision.
63. Mrs Merrett was cross examined. She was clear in what she was able to recall but also made plain that there were aspects that she could not accurately remember. She explained her approach along the road to the point of collision which was a stretch she knew very well. She was asked about her focus on Nicholas and whether his presence should have alerted her to the possibility of children on the other side of the road, or even to Nicholas himself stepping out without warning into the road. Mrs Merrett explained that there was nothing unusual in children waiting on the pavement for other friends to arrive. It was also suggested that her attention was so closely drawn to Nicholas on the pavement that she failed to see Felix crossing the road and then falling down. In any event, it was put to Mrs Merrett in clear terms that had she been properly focussing on the road ahead then she would have seen Felix in plenty of time to avoid the collision.
64. Mrs Merrett was very clear in her recollection that she was concentrating on the road ahead and that she only saw Felix a split second before the collision. She stated that when she saw him he was leaning forward, as if he was running. She denied that she was transfixed on Nicholas or was in any other way driving without reasonable care and attention.

*Mr Gent*

65. The final witness called by the Defendant was Alexander Gent. Mr Gent provided a statement in these proceedings on 24 March 2016. Also placed in the trial bundle was a statement that he provided to the police the day after the accident (his 'police statement'), the contents of which he was questioned about in cross examination.

66. Mr Gent was driving to college on the day of the accident. He had joined Pound Hill Road from the junction a short distance to the north of Felix's House. He was travelling south i.e. towards Mrs Merrett in the opposite direction.
67. In his police statement he described how very shortly after entering the road and whilst he was accelerating, he noticed a boy standing on the pavement to his right. This was Nicholas. He stated that after a grey car ahead of him passed a driveway a boy ran from his left towards the middle of the road where he was hit by the car driven by Mrs Merrett. His police statement said "*The boy ran straight out into the path of the red car. There was nothing the red car could have done to avoid hitting him.*"
68. Mr Gent's statement in these proceedings was somewhat shorter than his police statement but consistent with it.
69. Mr Gent was cross examined in some detail by Ms Rodway. Mr Gent dismissed a suggestion that 'there was no love lost' between his family and the Barrow family. He explained that many years ago there had been a disagreement between his parents and the Barrows' over some trees but that was the only dispute he knew of. No further questions of this nature were asked and it was not subsequently suggested that Mr Gent was anything other than an independent witness.
70. It was put to Mr Gent that his recollection of the road ahead of him being clear (i.e. that Felix was not visible walking across the road, thereafter slipping and attempting to get up) was the result of his 'memory playing tricks'. I understood this to be a suggestion that either Mr Gent's attention was focused on something else (causing him to miss what would have been Felix's obvious presence in the road) or that his experience of observing the traumatic collision has caused some form of degradation in his ability to accurately recall the seconds before the collision. It was also suggested that his recollection of seeing Felix run across the road was his 'mind filling in the gaps' and convincing him he saw something which in fact he did not. Either way, Mr Gent maintained under cross examination that he saw Felix run out from his drive, immediately behind the car in front and into the oncoming car driven by Mrs Merrett.

*Mr Hardaker*

71. A statement was also put into evidence, as hearsay pursuant to CPR 35.4, of Mr Matthew Hardaker dated 17 January 2019. Mr Hardaker had been due to give evidence on behalf of the Defendant but during the course of the hearing Mr O'Sullivan indicated he no longer intended to call him as a witness. By consent it was agreed his statement be taken into evidence as hearsay. Mr Hardaker was driving north two cars behind Mrs Merrett. He noticed a dark coloured car travelling in the opposite direction flash its headlights. He did not know whether it would have passed Mrs Merrett at this point.

**7. Expert Evidence at trial**

*(i) Medical Evidence*

72. I can deal with the medical evidence fairly briefly. This is because there was considerable consensus both as to the nature of the injuries that Felix sustained and the very limited extent to which conclusions could be drawn on body position at the time of impact including whether he was running, walking, slipping or in the process of getting up.
73. The Court received two reports from Dr Hulse, a Consultant in Accident & Emergency Medicine instructed on behalf the Claimant. Dr Hulse attended the trial and gave evidence. Although the trial bundle contained reports from Dr Fletcher, a consultant instructed on behalf of the Defendant, he was not called to give evidence and accordingly little weight, if any, is to be given to their contents. I did though receive into evidence memoranda of two joint meetings held by the experts, the contents of which were confirmed by Dr Hulse to be accurate.
74. The experts agreed that Felix sustained traumatic orthopaedic injuries predominately to the left hand side of his body. This included a fracture of the left jaw, a mid-shaft fracture of the left femur, a fracture dislocation of the elbow, and fractures to the left distal tibia and fibula above the ankle. He also sustained a right frontal (almost midline) skull fracture and other traumatic brain injuries.
75. It might strike the neutral reader of the medical reports that the authors were seeking to proffer firm opinions on Felix’s body position at the point of impact and to derive from them conclusions as to whether he was running, slipping forward or getting up. It soon became apparent from the cross examination of Dr Hulse that whatever the impression given in the reports, this was not the case. Whilst Dr Hulse was clear that the injuries were inconsistent with Felix either standing up straight, or lying on the ground, beyond this he could not really go. He stated:

*“I can’t be prescriptive about Felix’s absolute position. All I can say is that he must have been low enough down not to go up over the bonnet, high enough up not to go underneath the car, and that it must have been a smooth flat surface that made contact with the side of his head. That is all I can say.”*

...

*I cannot say from his injuries what his body movement was at the time, whether he was stationary, falling, getting up, there’s nothing in terms of the injuries that would help.*

....

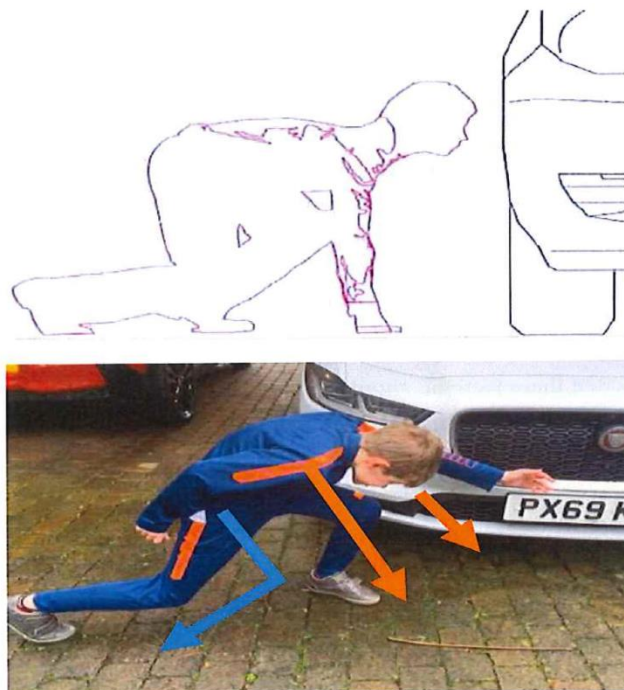
*Felix could have been stationary, he could have been moving, at the point that he was hit and there is nothing about his injuries that he sustained that actually help us in reaching an opinion as to how – the exact movement at that point in time.*

...

*All we can say is that he must have been in front of the car.  
That's all we can say."*

76. He was taken to a set of images contained in the second joint report of his meeting with Dr Fletcher. This is set out below as Figure 4. The top image is taken from Dr Hulse's first report (which he made clear was not to scale) showing the height of Felix's head relative to the car. The bottom image is one created by Mr Sorton, the Claimant's reconstruction expert, based on modelling his understanding of a possible body position postulated by Dr Fletcher. As it happens, Dr Fletcher later disavowed this description but the two images nevertheless remained material because they were used in evidence to exemplify (but not define) the range of positions that Felix might have been at the time of the impact.

Figure 4



77. Of his own image, Dr Hulse made plain that it was not intended to demonstrate the precise position of Felix's limbs at the point of impact but rather simply the likely level of his head and torso relative to the front of the car. It was not, he explained, designed to show how far across the car Felix was when hit. Dr Hulse explained that in respect of the position of the head and torso, there was little difference between the top and bottom image. Felix's actual body position could have been somewhat closer to one image rather than another, or different to both, and he was at pains to point out that it was not possible to tell.



78. At the conclusion of Dr Hulse's evidence, and in light of it, Mr O'Sullivan elected not to call his own expert.

**(ii) Accident Reconstruction Experts**

79. The Court received evidence from Mr Sorton on behalf of the Claimant and Mr Johnston on behalf the Defendant. They both produced two reports apiece and two joint statements.
80. In his first report of 7 October 2015, Mr Sorton expressed the opinion that the evidence of damage to the lower aspects of Mrs Merrett's car, taken with Felix's injuries and damaged clothing, supported Nicholas' account of Felix being hit whilst in the process of returning to his feet. The focus of his analysis at this juncture was founded in the main on Nicholas' evidence and upon this basis Mr Sorton considered that Mrs Merrett would have been afforded sufficient time to observe Felix in the road and taken action to avoid the collision.
81. Mr Sorton's second report (8 January 2020) addresses a 'new' suggestion being advanced on behalf of the Defendant that Felix might have been falling forward at the time of impact. Mr Sorton modelled this suggestion by taking photographs of his son, one of which is at Figure 4. Mr Sorton's view was that Felix could not have been in this position at the time of impact irrespective of whether he was running or walking. If Felix was stationary in this position, he would have been swept under the car, conversely if he was running at the point of impact Mr Sorton opined that his momentum would have pushed him towards the nearside of the car not the offside where he in fact ended up.
82. Mr Johnston's first report (8 March 2019), did not consider the possibility that Felix slipped forward. Rather the focus of his first report was to model the amount of time available to Mrs Merrett to observe and then avoid Felix applying a range of assumptions but essentially assuming he was either running or walking. It provided a range of possible outcomes dependent to a large degree on the speed at which Felix was walking and the speed at which Mrs Merrett was driving. Some of his conclusions were exculpatory of Mrs Merrett, others inculpatory.
83. In his second report (7 February 2020) Mr Johnston responded to Mr Sorton's contention that Felix could not have been running at the time of impact because had he been then his momentum would have pushed him to the other side of the road. In order to illustrate his disagreement with Mr Sorton's argument, Mr Johnston provided images from a simulation programme known as 'PC-Crash' demonstrating, it was said, that Felix's actual position in the road after the accident was consistent with him running. Mr Johnston also relied on the modelling to show that the position in the road in which Felix ended up was inconsistent with him having been stationary at the time of impact.
84. The experts held two joint meetings. The first was held on 20 June 2019. The experts agreed that there were scuff marks on the car from about 70cm from the midline of the bonnet which continued along the front offside of the vehicle. They also agreed that there were marks on the offside wing of the vehicle. They stated "*We agree that*

*the scuffmarks on the offside of the Defendant's vehicle indicate that there was a sliding contact between the Claimant and the offside of the vehicle."*

85. At this meeting Mr Johnston gave voice to the possibility not simply that Felix was running but that he may have slipped immediately before the collision. He noted the view that the witness evidence marshalled by the Defendant was consistent with Felix *"falling immediately before the collision and into contact with the front offside, including the headlamp, and the offside as demonstrated by the damage and contact evidence on Mrs Merrett's car"*.
86. The second expert meeting was held on 27 February 2020. The experts considered the PC Crash modelling conducted by Mr Johnston and whether it undermined Mr Sorton's suggestion that Felix could not have been running at the time of impact. The experts agreed that the modelling depended upon a number of assumptions, indeed it would be *'crucially dependent'* upon the *"extent to which the bulk of the pedestrian's mass was positioned across the front of the vehicle and the precise posture of the pedestrian."* In other words, if Felix made contact with a central part of the front of Mrs Merrett's car then he would have been unlikely to end up where he did, whereas if it was on the offside then the modelling is more likely to be accurate.
87. Both experts gave evidence at trial.
88. Mr Sorton's evidence began in a most unsatisfactory manner. He gave evidence on the third day of trial but had attended at that juncture throughout. Without any pre-warning during the course of evidence in chief he introduced a significant change of opinion. Whereas he had previously agreed with Mr Johnston that a scuff mark to the offside of the car reflected direct contact with Felix, he now stated that he had recently seen digital images of the damage and he was no longer convinced. When asked when this point had occurred to him, he stated at the start of the trial i.e. two days previously. No reason, certainly no adequate reason, was given as to why the Defendant was not given notification of this change of evidence. Mr Sorton acknowledged that he should have given notice of this change of view long before stepping into the witness box, not least so that it could be properly considered by his opposite number and the Defendant's legal team. I will deal with the impact of his change of evidence below but it merits emphasis that where experts change their views as a result of consideration, or reconsideration, of materials prior to trial, it is incumbent on them and the party's legal team to communicate the change as soon as possible to the other side. A failure to do so risks unfairness and the wasting of time and expense. Needless to say, examination in chief should never be the first notification that the other party receives of a material change of view. As it was, Mr O'Sullivan was able to nimbly cater for the new evidence and no real harm arose beyond a short adjournment required to allow him to take instructions from Mr Johnston. Mr Sorton, an experienced expert, also plainly realised his oversight and apologised for it.
89. Mr Sorton's new evidence was that a mark to the offside which he had previously agreed was a scuff caused by contact with Felix, was on closer inspection an unconnected scratch. Mr Sorton attempted to explain this by stating that on close focus the image showed that there was a 'lip' on the edge of the mark more consistent with a scratch than a scuff. The relevant images were explored in Mr Sorton's evidence and subsequently in Mr Johnston's. Although, as set out below, it is not

necessary to determine the precise provenance of the mark, close examination did not to my mind support Mr Sorton's change of view.

90. Mr Sorton also sought to clarify his previous opinion that a black mark on the front offside of the car, above the grille, was caused by impact with Felix. Mr Sorton now suggested that the imperfection shown on the photograph was in fact pre-existing 'touch-up' paint. It became apparent when Mr Johnston gave evidence that the relevant contact marks was not the paint but a patch of scuff immediately next to it. Although not visible from every angle, close up imagery of this section of the car plainly showed the area identified by Mr Johnston as suggestive of recent contact with a body. Mr Sorton it appeared had firstly wrongly identified the actual mark of contact on his copy of the photographs (mistakenly believing them to be the touch up paint) and then subsequently failed to identify the actual area of contact on the digital imagery when he came to revise his opinion.
91. During the course of his cross-examination Mr Sorton was asked about his opinion as to whether Felix was running across the road at the point of impact. He accepted (consistent with the view adopted by both experts at their second meeting) that this would depend on where the car first made contact with Felix. Mr Sorton stated that if contact was towards the centre of the car then Felix could not have ended up where he did. If, by contrast, contact was with the front off-side then he agreed that Felix could have been running. He also agreed that in these circumstances it would mean that his change of evidence about Felix not making substantial contact with the offside of the car (save perhaps for a flailing arm) was likely misplaced. Mr Sorton made reference to the contact needing to be to the 'extreme' front offside of the car in order to explain consistency between Felix running and the actual point at which he came to rest. Mr Sorton did not define precisely what he meant by this but Mr Johnston later explained that the scuffing below and above the grille on the front offside would be described as being positioned to the 'extreme' front offside. This was consistent with answers given by Mr Sorton in cross examination by reference to photographs and imagery including that set out below.
92. There was a degree of unreality to this aspect of the evidence because as Mr Sorton acknowledged there was no hard evidence actually capable of proving to where the first point of contact actually was, for example obvious damage to the car such as the imprint of a body.
93. Mr O'Sullivan put the following proposition to Mr Sorton:
- Q. So what you are telling my Lord is that if the court finds that Felix Burrow was in the position indicated at [Figure 4] and Dr Hulse was at pains to say there not trying to be prescriptive, but was in something of that sort of position, and there was contact with the front off-side wing, as you previously conceded, then the conservation and momentum argument which has been put forward by Ms Rodway and which you trace, fails?*

A. Yes

*Q. So he could have been displaced into the southbound lane as he was?*

A. Yes.

Q. Yes

*But as you know, having made that concession, I am not sure that I am convinced that [Figure 4] represents my impression of how someone falls forward, But that – but ..... it's a matter from the court on the basis of the court's experience.*

94. As Mr Sorton appeared to acknowledge, from his perspective the root of the dispute was less a question as to whether Felix was running or walking but rather whether it was credible that either of the images realistically represented what a fall forward from a run might look like in the 'real world', or indeed whether it was what Mrs Merrett was describing. Although Mr Sorton acknowledged that he could not provide expertise on 'how people fall' his scepticism of the Defendant's account of slipping forward and the likelihood of doing so in a 'crouching position' was clear.
95. Mr Sorton summarised his position in answers to me towards the conclusion of his evidence. Mr Sorton stated that to his mind the issue was less whether Felix was running or walking but really turned on "how he fell" not least because that determined the extent to which Mrs Merrett could reasonably have avoided the accident. He stated:
- "... if he runs across the road and falls forward and he's hit falling forwards, there is no prospect of Mrs Merrett taking action let alone avoiding action... .... The impact will occur before she's got her foot on the brake or at about the same time. If he walks across the road and falls forward and she is able to see him set out walking then she can avoid him. If he walks or runs across the road in the manner described by Nicholas Stannard .... and therefore he's in the road having fallen for at least a couple of seconds."*
96. Mr Johnston gave evidence after Mr Sorton. He began by confirming his earlier view that the damage to the offside of the car had been caused by direct contact with Felix and that he did not agree with the reasons given by Mr Sorton for his change of view.
97. It was put to Mr Johnston that his approach to the case revealed him to be partisan. He was taken through the development of his reports and it was said that the suggestion that Felix might have fallen forward whilst running was never initially considered by him and that it was an attempt to provide solutions for the Defendant's benefit rather than an objective assessment. Similarly, although the Claimant ultimately did not dispute the integrity of the PC-Crash system, it was suggested that the way that Mr Johnston sought to use the model was an attempt to 'reverse engineer' any result consistent with the Defendant's case, and led to the creation of a new 'wrap-around' theory to explain damage to the car.
98. Mr Johnston accepted that his initial reports had not explicitly addressed the possibility of a slip forward but he considered that it flowed naturally from the evidence served by the parties – there was no 'lightbulb moment' but rather something that emerged from discussion and thought. He denied that the assumptions used to model various scenarios on PC Crash were designed to 'reverse engineer' a desired

outcome but rather were primarily used to show that Mr Sorton's analysis that Felix could not have been running was wrong. He denied that there was really any 'new' wrap around theory but rather this was all consistent with what he and Mr Sorton had previously agreed namely that Felix body, having been hit by the front offside of the car, would have been rotated so as to also made contact with the offside itself.

99. There are no doubt many cases in which the expertise of specialists in accident reconstruction provides the Court with very great assistance. I intend no disrespect to the experts when I state that this was not one of them. The respective reports supplied helpful relevant data on stopping distances and also useful plans and photographs. Beyond these materials I found the opinion of the experts to be of limited assistance. That is because their analysis of the incident was dependent on a range of unverifiable assumptions (e.g. where on the car Felix was first struck) and was also dependent in large measure of the competing narratives emerging from the witness evidence (e.g. was he slipping forward or getting up?). There was nothing in the evidence of either expert that demonstrated that the contentions of one side, or the core evidence of a given witness, was uncontrovertibly wrong. To be fair to the experts there was very little for them to go on. There were very few marks to the car, and those that were present were relatively minor, certainly not a nature that permitted firm conclusions to be drawn as to precisely where on the car Felix was struck, or precisely how his body was projected by the force of the blows. Equally, the equivocal nature of the medical evidence, whilst assisting in identifying Felix's likely head and torso position at the time of impact, does not permit an expert assessment as to whether it is consistent only with a slip forward whilst running, or a return to the feet from a fall to the bottom, or some other mechanism. There is no independent objective evidence truly autonomous of the witness evidence, that is capable of demonstrating that Nicholas' account of what occurred must be wrong, or that Felix could not have run into the road and slipped forward a moment before impact.
100. The position I have reached on this evidence is similar to that which presented itself to Coulson J (as he then was) in *Stewart v Glaze* [2009] EWHC 704 where at §10 he observed:

*"In my judgment, 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 of formula, against which the defendant's actions are then to be rigidly judged with a mathematical precision."*

## **8. Findings and Conclusion**

101. I conclude that the most probable series of events is that Felix ran across the road back towards Nicholas into the path of oncoming traffic. He did so after a vehicle had just passed him from his left thereby obscuring him from Mrs Merrett's vision. Felix probably slipped and his body fell into the path of Mrs Merrett's car. She was afforded no realistic opportunity of avoiding the collision.

102. In reaching this finding I have relied primarily on my assessment of the lay witness evidence examined in the context of the road layout. The reasons for this conclusion are explained below.
103. Whilst certainly possible, I consider it unlikely that Mrs Merrett would have driven along the stretch of Hill Pound Road, which afforded good vision of the road ahead, without seeing Felix in the middle of the road if he had walked across the road, or even if he had run, fallen and tried to get back to his feet in the manner described by Nicholas. In closing, Ms Rodway estimated, by reference to the time it took for Nicholas demonstrate Felix's motion on the video, that it would have taken about 10 seconds to get up from the floor to the point of impact. Even if that time had in fact been considerably less, he would still have presented as an obvious obstacle long before he would have been obscured to Mrs Merrett by the car in front of Mr Gent approaching her from the opposite direction.
104. I accept of course that it is possible that Mrs Merrett could have been distracted or simply driving in a dangerous manner without proper regard for the road ahead. Had the only evidence from the Defendant been that of Mrs Merrett the findings of fact in this case would have been much more difficult to reach. However, the key reason why I consider Nicholas' account unreliable is the corroboration provided by Mr Gent. For Nicholas to be right about Felix taking several seconds to get up off the ground, then Mr Gent also must also simultaneously have overlooked an obvious obstruction on the road in front of him whilst driving in the opposite carriageway. He must also have imagined that he saw Felix running out of the drive. I consider it improbable that Felix could have been on the ground in the centre of the road for several seconds without either Mrs Merrett or Mr Gent noticing his presence. I also consider it improbable, in the circumstances of the case, that Mr Gent was mistaken in his recollection, provided to the police the day after the accident, of seeing Felix run into the road. As set out below, this recollection is also consistent with that given to the police by Nicholas on the day of the accident itself. This is a case, like many before it, in which the evidence given immediately after the event tends to be a more reliable source than those created subsequently, particularly when litigation is in contemplation.
105. Mr Gent was not simply an independent witness but he was an impressive witness. He was clear in what he could remember and also acknowledged (credibly) matters that he could no longer be sure of. His evidence was broadly consistent with the account given to the police the very day after the accident. He clearly had an excellent angle in which to observe both Felix running into the road and the collision with Mrs Merrett.
106. It is of course right to note that not every aspect of Mr Gent's evidence is accurate, or comprehensive. He did not recall Felix slipping and his description of the mechanism of how his body hit the bonnet, might not fit precisely with the damage or injuries identified by the experts. These are though hardly fatal flaws in the credibility of a witness to a split second collision. It is entirely plausible that he would not have seen a momentary slip, it is also entirely plausible that he would not be able to accurately recall precisely how Felix's body was propelled in a collision lasting only fractions of a second.

107. I consider that support for this conclusion can also be derived from the account that PC Giles recorded Nicholas gave to him immediately after the accident. Whether that account was given direct by Nicholas, or by his mother recounting in his presence what he had just told her, is ultimately immaterial. The source of the information could only have been Nicholas. I conclude that Nicholas (either directly or through his mother in his presence) told PC Giles that he warned Felix about the cars, that Felix ran into the road and slipped before being hit. This account did not include any description about falling to his bottom and being hit whilst trying to get back to his feet. I accept of course that some caution has to be exercised over an initial account provided by an eleven year old child who has just witnessed a horrifying incident but the clear evidence of PC Giles satisfied me that the record he made was accurate and was not tainted by any of the criticisms of it levelled by the Claimant.
108. I am of course aware not only that Nicholas and his mother disputed the accuracy of part of PC Giles note but that Nicholas subsequently provided a significantly different account of what he recalled. This included, by the end of November 2015, Mrs Stannard indicating to Felix's family that her son's recollection was that rather than running, Felix was walking across the road and was hit whilst trying to get up. This was the message conveyed to PC Giles by Felix's grandfather. That evidence is also broadly consistent with the contents of his statement in these proceedings and his evidence at trial. I am satisfied however that the evidence is mistaken in so far as it relates to Felix walking rather than running, and also in so far as it depicts Felix slipping as described (be it on a wet/oily patch or otherwise) and falling onto (or towards) his bottom and then attempting to get up over a number of seconds. The evidence is inconsistent with that of Mr Gent, Mrs Merrett and with his initial account, which I find to be more reliable sources.
109. This conclusion does not, as Ms Rodway suggested, require me to find that Nicholas was deliberately intending to give a false history of what occurred. Nicholas struck me as an articulate and intelligent young man seeking to do his best to recall what would have been a truly harrowing experience. His evidence to the Court would have been one of very many occasions in which he was asked to recount what occurred and he would have been under no doubt of the significance of it to Felix's case. I consider that the disparity between what occurred and what he later recalled is best explained by many of the factors identified in *Gestmin* as capable of degrading the quality of recall. Similarly, whilst I found his mother, Mrs Stannard to be an entirely honest witness, I consider that her recollection of the key events in particular what Nicholas is likely to have told her immediately afterwards is less likely to be correct than the record made by PC Giles at the time. This is a case, like very many, in which various witnesses can all give honest but nevertheless conflicting accounts of a given event.
110. There are a number of additional factors that in my judgment make Nicholas' recollection less reliable than that advanced on behalf of the Defendant. One is that the mechanism of the fall described by Nicholas, namely of one of Felix's legs violently slipping forward causing him to fall towards (or onto) his bottom, does not ring true, or is at least less likely than slipping forward whilst running. Although in his statement Nicholas referred to a slippery patch in the middle of the road, none was identified by the police who attended and examined the scene, nor are any visible in the photographs. The unchallenged evidence of PC Wheeler was that the road surface

was damp but drying. In these circumstances it seems difficult to understand why a person walking across the road would slip in the manner described by Nicholas. A person to my mind is much more likely to slip, or fall, or stumble when running and/or when appreciating in a split second that they are in danger of colliding with an oncoming car.

111. I also do not consider it likely that if Felix was in the road for more than a few seconds that Nicholas would have failed to warn him, or the approaching traffic, as to the risk of an impending collision. I am of course mindful that Nicholas was only aged 11 at the time and that the events lasted no more than a small number of seconds. Nevertheless, Nicholas evidence was that at the point at which Felix fell he was already aware of Mrs Merrett's car approaching him. If Felix was in the road and struggling to regain his stance in the following seconds, I consider it likely that Nicholas would have taken steps to either warn Felix or to have taken some steps to warn the approaching cars of his presence in the road.
112. I have not overlooked an argument advanced with vigour by the Claimant namely that Felix's likely body position at the time of impact was simply incompatible with a slip or momentary fall forward and was equally irreconcilable with Mrs Merrett's position of him being 'crouched'. Furthermore, it was said that the inherent improbability of this as a satisfactory explanation is reflected by the fact that it was advanced relatively late in the day by the Defendant.
113. I do not consider that these points negate a slip or fall forward in the split second before impact. Firstly, save that for the fact that Felix's head and torso were likely in a forward position as shown by both images above, Dr Hulse was at pains to point out that medical science could not determine whether he was falling forwards, or trying to stand up at the time of impact. Felix's actual body position would fall into a range of movement broadly consistent with either image. I do not consider that there is anything inherently anatomically unusual let alone improbable in a person momentarily slipping forward whilst running and passing into a position very broadly consistent with that shown in the figures. The body would momentarily pass through a myriad of different forms as it slips and perhaps tries to correct itself - I do not consider that a slip forward into this form of position is any more, or less, likely than the position contended for by the Claimant. I also do not think that much if anything is to be gained by focus on Mrs Merrett's impression of Felix being in a 'crouched' position. In her evidence to the Court, Mrs Merrett was clear that what she was seeking to convey by the description of 'crouched' was that Felix was leaning forward as if he was running. In any event, as her view of Felix was only for a split second, her impression of his body shape is hardly determinative of the issue. Equally, there is little forensic weight in the fact that the possibility of Felix falling forward was only raised relatively late in the proceedings. At the outset the Defendant would have had little means of assessing the precise dynamics of the collision other than from the statements taken by the police in which Mr Gent and others stated simply that Felix had ran into the path of the car. The possibility of a forward slip moments before the fall did not become apparent until at least the experts had identified the likely height of Felix's head and torso on impact. At that juncture it was reasonable for the Defendant to deduce that rather than running upright into the car, Felix upper body was likely leaning forward.



114. As set out above, I have been able to reach these primary findings without direct assistance of the evidence of the reconstruction experts. I do note however that my conclusions fall within the bounds of what both experts considered possible. Mr Sorton accepted that, dependent on which part of the car first impacted with Felix (which he could not positively identify), then he could have been running at the time and that the question of body position would primarily be derived from whether the Court thought the position he was in was anatomically consistent with a slip forward. Whilst Mr Sorton clearly thought the range of likely positions consistent with Felix's injuries were unlikely to be explained by a forward slip, and he did not think it fitted with Mrs Merrett's explanation of a 'crouch' he accepted this was not a matter calling for expert analysis. Mr Johnston was unsurprisingly more forthright still in his support for Felix having slipped forward whilst running at time of impact.
115. It is therefore not necessary to determine which of the analysis of the experts I prefer because neither contend that the conclusions that I have drawn from the lay evidence and primary facts would be incompatible with (to use the phrase in its most general sense) 'the science'. I should record however that I found the analysis of Mr Johnston generally more helpful than that of Mr Sorton. I put aside the criticism of Mr Sorton's late disclosure of a change of view which he rightly did not seek to excuse. I also put to one side the surprising fact that he waited until trial to examine digital copies of the damage to the car, notwithstanding the obvious importance of close examination to his analysis over the course of the previous two years. More fundamentally, he did not convincingly explain the basis for his change of view. The unconvincing nature of his new explanation for the damage was somewhat troubling in light of the fact that his previous concession was plainly more favourable to the case advanced by the Defendant. This is because it was consistent with Felix being struck by the edge of the front offside of the car and then propelled around to slide along the offside. Equally, I found Mr Sorton's focus on the Defendant's case as somehow fixed to Mrs Merrett's description of a 'crouch' unrealistic and unhelpful. By contrast I found Mr Johnston's evidence to be broadly helpful and consistent. For example, his explanation and modelling of first impact towards the front offside of the car is consistent with the markings below the grille that both parties accept was caused by contact with Felix and this in turn seems consistent with him being propelled towards the offside itself thus causing the markings that he and Mr Sorton had previously agreed was caused by a sliding motion. I do not accept the criticisms levelled at him that he displayed partisan tendencies by introducing theories late in the day. It is unremarkable that his first report did not posit Felix falling forward because at that juncture the medical evidence was less advanced and he was given less to go on. He had however considered the possibility by the time of the first expert meeting at the latest and for the reasons given above I do not consider it was an unreasonable inference for him to have drawn from the evidence. Similarly, I found the images on PC Crash of some use in better understanding the general mechanics of the collision and as a means of illustrating the range of possible scenarios. Its utility was reflected in part by Mr Sorton's acceptance that if Felix was struck by the front offside of the car then the PC Crash model demonstrated that his theory that Felix was not running would be wrong. These are just broad examples of why I generally preferred the analysis of Mr Johnston over Mr Sorton. It is not necessary to descend into further details because ultimately the dispute between them is not determinative of these claims.

## **Conclusion**

116. For the reasons I have set out above the Claimant has failed to establish that Mrs Merrett is legally responsible for accident and the claim is accordingly dismissed. It follows from this conclusion that the claims brought by Mr and Mrs Barrow also fall to be dismissed because, as set out above, they were entirely dependent upon liability being established in Felix's claim.