Neutral Citation Number: [2023] EWCA Civ 224

Case No: CA-2022-001243

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
KING'S BENCH DIVISION
HIS HONOUR JUDGE SHETTY
(sitting as a Judge of the High Court)
QB-2018-004684

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 March 2023

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE ANDREWS

- -

Between :

SANDRA ZANATTA	**Appellant**
- and -	
METROLINE TRAVEL LIMITED	**Respondent**

- -
- -

Andrew Roy (instructed by **Anthony Gold Solicitors**) for the **Appellant**
Anastasia Karseras (instructed by **Keoghs LLP**) for the **Respondent**

Hearing date : 2 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 3 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Nicola Davies:

1. On 17 November 2015 the claimant, a Brazilian national who had arrived in the United Kingdom shortly before her accident, was living at 238 Chamberlayne Road, London, NW11. At around 07:30 the claimant left her home intending to take a bus to work. The defendant's employee, Mr Abdulla ("the driver"), was driving a double-decker bus in a northerly direction along Chamberlayne Road. This is a residential area; the speed limit at that time was 30 mph. The claimant was intending to cross from the west side of the north corner of the junction of Chamberlayne Road with Phillimore Gardens to the east. At around 07:42 she stepped into the northbound carriageway and into the path of the bus. Prior to doing so, the claimant had not looked in the direction of the bus's approach. The driver braked and swerved to the right in an attempt to avoid the claimant but the bus collided with a traffic island and with the claimant. As result of the collision the claimant sustained injury.

2. The police attended and interviewed the driver and some bus passengers. No forensic collision investigation was carried out, therefore there is no forensic evidence to assist in the investigation and reconstruction of the accident. The telematics system on the bus was not functioning, no CCTV footage from the bus was recoverable.

The High Court trial

3. At the liability only trial before HHJ Shetty ("the judge") sitting as a judge of the High Court, no witnesses of fact gave evidence. The claimant had no recollection of the collision and by the date of trial the driver had died. Written evidence from passengers on the bus was before the court. Experts assisting on the issue of reconstruction, Mr Rusted for the claimant and Mr White for the defendant, gave evidence. In essence the claimant's case was that the driver, having seen the claimant and identified her as a potential hazard some 90 metres before the collision, should have placed himself in the position to take effective action if she stepped into the road i.e. to stop in time, in particular by slowing down, and/or sounding his horn. The defence case was that the driver did not identify the claimant as a hazard; he noted her presence on his approach. The claimant only became a hazard when she stepped into the road. That was at such a point and at such a time that it gave the driver insufficient time and space to avoid a collision at the speed at which he was travelling. It was denied that the use of a horn on the approach was reasonable or necessary, and that there was anything which should have caused a reasonable bus driver to slow down sooner.

4. The judge dismissed the claim. Had he found for the claimant, the judge would have assessed contributory negligence at 70%.

The evidence of the claimant and the driver

5. The claimant had been living at 238 Chamberlayne Road for just over a week prior to the accident. Each day she took a bus from the opposite side of the road to her work. On the day of the accident she remembered leaving the house, walking onto the pavement and closing the gate behind her. The claimant had no further recollection of the events.

6. Before the court was the initial account given by the driver at 08:15 on the morning of the incident. It included the following:

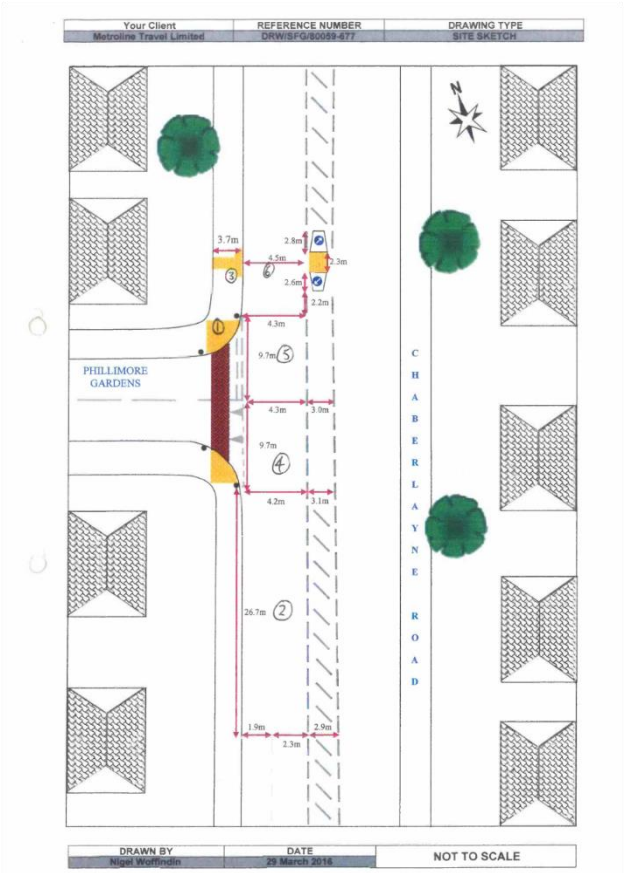
> "As I was coming along Chamberlain [sic] Road, I saw a female stood on the pavement in front of a set of iron gates outside 238 Chamberlain Road. She was wearing a coat with her hood up. I did not think she was going to cross the road. As I came closer and closer she ran in front of my bus in order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

7. In a witness statement dated 25 July 2016, the driver described driving north along Chamberlayne Road. He was conscious of maintenance works being carried out on the pavements on both sides of the road. There were groups of plastic barriers at intervals along the pavement. They did not cause him any problems and were quite low such that they did not obstruct his vision of pedestrians on the pavement. He was travelling at about 20 to 25 mph in the 30 mph speed limit zone. The traffic was not too heavy, there were no vehicles immediately in front of the driver prior to the collision. His statement continued:

> "17. It was as I was going past a junction to my left (Egerton Gardens) that I first noticed somebody on the pavement ahead at the next junction on the left (Phillimore Gardens). This person was standing on the north side of the pavement at the corner of the junction between Phillimore Gardens and Chamberlayne Road. I later found out that this was a woman. She was wearing a dark hooded top which I think was grey. She had the hood up over her head. She was looking away from me so I could only see the back of her head. At this point she appeared to be standing or dawdling. I think she was moving a bit. My perception was that she might be lost or that she was looking further down the road for somebody. I kept an eye on her but at this point I did not think there was any sign that she was planning to cross.
>
> 18. I continued to keep an eye on her as I approached. My speed was certainly no more than 20-25mph.
>
> 19. Whilst the woman was dawdling she appeared to have moved slightly further up Chamberlayne Road and close to an area opposite a traffic island in the middle of the road. She was still not looking in my direction or giving any obvious signals that she might try to cross the road. However, because she was closer to the road I took my foot off the accelerator and hovered over the brake. This meant that the bus started to slow down a little bit.
>
> 20. At this point I had still not reached the junction with Phillimore Gardens. It was only as the front of my bus became

> level with the entrance to the junction to Phillimore Gardens that the woman, still looking in the opposite direction, suddenly moved to her right. I began to brake. As soon as I realised she was coming out in to the road I braked hard. She still did not look round and seemed to take a further step.
>
> 21. It was clear that there was insufficient time to stop the bus so I swerved to the right purposely heading towards the traffic island. If I had not done this I would have hit her with the middle of the bus. I think she was only about 10 metres in front of the bus when it became clear that she was intending to continue across the road.
>
> 22. The lower offside front corner of the bus hit the raised traffic island. This helped to slow the bus down more. At the same time, the nearside front corner of the bus came in to contact with the woman. Because I had been able to swerve to the right it was more of a glancing blow. By this stage she was probably close to the centre of the northbound lane.
>
> 23. After hitting the traffic island, the momentum of the bus continued forwards and bounced back towards the nearside slightly before the front of the bus came to a rest just past the traffic island."

8. Attached to the witness statement was a plan of the area which includes what are described as the approximate locations of: (1) where the driver first saw the claimant; (2) where he began to hover his foot over the brake; (3) where the claimant was before she stepped off the pavement; (4) where the driver first started to positively brake; (5) where he began to brake hard; (6) the approximate point of impact with the claimant. Below is the plan.



9. Witness statements from passengers on the bus were included in the police collision report which were consistent with the driver's evidence that he was driving at a reasonable speed and that when the claimant stepped into the road he braked sharply. No witness heard a horn being sounded. Before the court was a witness statement from Grace Burfield who was sitting on the lower deck of the bus towards the front and on the driver's side. Ms Burfield stated that as they were travelling along Chamberlayne Road, she heard the driver say something like "No! No! Oh my God!", then the bus braked sharply and the witness saw a woman being hit by the bus with the front nearside corner and screen. The witness felt that the bus was travelling within the speed limit of 30mph, and stated that she had felt comfortable with the driving throughout the journey.

10. A considerable amount of court time was taken up with the evidence of the reconstruction experts. At [14] of his judgment, the judge observed that both experts, in particular the expert for the claimant, appeared too readily to take on the role of advocate.

11. Extrapolating from the lengthy evidence given by the reconstruction experts the judge recorded a measure of agreement between them at [45] which included the following:

    (i) if the claimant was standing back from the kerb, the view between the bus driver and the claimant would initially extend to around 90 metres due to a post box and a small tree south of the crossing point, but would extend to around 180 metres when the claimant reached the kerb edge;

    (ii) the vehicle had been slowed to between around 13 and 17 mph by impact and it would initially have been travelling in the region of 25 to 30 mph when the driver recalled he commenced to apply braking;

    (iii) prior to the collision there would appear to have been some braking on the part of the driver over some distance, but there was no data or evidence to determine the rate at which the vehicle was braking;

    (iv) the claimant had been in the road for around 2 seconds prior to impact.

12. The judge was sensitive to the fact that the expert evidence in the case could only take his determination so far. At [64(b)] the judge observed that there was an:

> "…. obvious danger in using a description of Mr Abdulla as to events, timings and locations and relying on that as gospel when judging what happened and his actions. The reality is that this would have been a fast moving incident. It is unlikely in the experience of the court, that a driver would be able to pinpoint by reference to passing road junctions, when exactly he remembered first seeing the Claimant, when exactly he would have first started to brake and when exactly he first became aware of the Claimant entering the road. This means that there is a limit as to just how useful references to PRT [perception response time] and stopping distances/times are. That is further complicated when a bus driver has to take into account the safety

> and welfare of passengers in addition to pedestrians when applying his brakes."

13. At [65] the judge found that the claimant had come out of her house intending to cross the road and catch a bus on the other side of the road. He was unable to make a specific finding as to what she was doing when she was outside her house or for how long she was out there. He found that the claimant did not go in one motion from door/gate to the side of the road.

14. The following findings of fact by the judge represent the core of his factual judgment:

> "66. I find as a matter of fact Mr Abdulla did see the Claimant as she had most likely left the front entrance to her address or an adjoining address. That is why his first perception of her was doing something close to some iron gates rather than at road side. However, I do not think that it is an established fact that Mr Abdulla must have seen her 90 metres before the location of the accident. This was the potential visibility. Whilst Mr Abdulla did mention a vantage point in his witness statement, my impression from the evidence is that this cannot be relied upon with any real accuracy. Furthermore, I comment that even if he did see her at 90 metres, it is unlikely Mr Abdulla would have been close enough to see the direction of the Claimant's head (looking away from the bus), or what she was doing. At this distance, a very general observation is possible with a possible sense of movement. There were barriers from the road works that would have most likely obstructed some view of the Claimant and there are additional possible factors of a post box, a tree (mentioned by Mr White), and also a parked van in which Mr Baker was sat although the van's exact location is not known.
>
> 67. I find as a matter of fact that Mr Abdulla was driving at around 25-30 mph as he approached the traffic island although once again I emphasise that this must be approximate in light of the state of the evidence.
>
> 68. I find as a matter of fact, that Mr Abdulla did notice the Claimant moving towards the kerb at around the time when he was getting nearer to the accident location. As a matter of fact, his state of mind was not belief that she would cross the road as opposed to this development raising awareness of a potential hazard. This is likely to have been when his bus was in the vicinity of the Phillimore Gardens junction but once again, I do not think any real precision can be put on exactly where the bus was when he saw this movement. I say this for the same reasons identified above. There is a huge danger in artificial reconstruction by witnesses when trying to forensically describe a fast moving and sudden incident that too much heed can be given to precise locations as opposed to a more thematic description of events. As I have said, the court should endeavour

to come to a finding of fact when there is a conflict of evidence rather than hide behind the burden of proof. However, there still has to be reliable evidence to base a finding of fact on. I am not prepared to say artificially that the front of the bus would have been exactly 24.3 metres from the position of the Claimant when he first saw her moving towards the road. That is artificial. Bearing in mind the dimensions of Phillimore Gardens, the bus could have been around 9.7 metres closer to the traffic island when the Claimant was seen moving towards the traffic island (that is half the width of the junction). It might have been slightly further away but I cannot put any kind of precision on it. I note that the information about approach was not present in the first account to the police.

69. I find as a matter of fact that Mr Abdulla had eased off the accelerator and had covered his brakes and then depressed his brakes slightly when approaching the traffic island in reaction to seeing the Claimant move towards the pavement (albeit not at the pavement edge). However, I am unable to say when exactly that was or how heavy the brake depression was. It is sufficient for me to say that it was as he got relatively close to the traffic island and a few seconds before the Claimant made the fateful decision to step out into the road.

70. I find as a matter of fact that the Claimant stepped out into the road without looking to her right. At this point she was at a close distance to the bus. I will not go so far as to say that this was on balance 10 metres or up to 20 metres but it was the kind of close proximity within that range of distances that provoked Mr Abdulla's oral reaction of seeing the Claimant step off into the road at a distance where he feared a collision was probable/inevitable.

71. I find as a matter of fact that when Mr Abdulla saw the Claimant step into the road, he applied hard braking and tried to steer to the right to avoid the Claimant. At a maximum, the Claimant was in the road for around 2 seconds but could have been in the road for a little less than that time.

72. It cannot be said when Mr Abdulla first noticed the Claimant in the road just prior to collision. He may well have not had his eyes glued to the Claimant because he would have been looking at the road, his mirrors, the traffic island and the road works barriers (which were very slightly into the road).

73. As the experts agreed in the joint statement, the speed at impact was between 13-18mph.

> 74. I find as a matter of fact that the bus had travelled beyond impact by around 4 metres as agreed in the joint statement."

15. The judge addressed each of the Particulars of Negligence. At [77], the issue of failing to sound a horn, the judge found that the driver had no cause to sound his horn when he first saw the claimant at a distance. He stated that a "reasonable driver would not consider an ordinary pedestrian a hazard when there was no indication that the Claimant at that point was about to step in the road moments later without warning." The judge accepted that the claimant did move towards the kerb edge but was unable to state exactly where she was and determined that a "reasonable motorist cannot be expected to sound their horn whenever there is some potential that in a few seconds, a pedestrian might be in the road. A reasonable motorist would be on some form of precautionary alert to think about and adjust their speed and path but use of a horn is not within a very short time frame, something that should be expected of the standard of a reasonable motorist." The judge did not find this allegation proven on the balance of probabilities.

16. On the issue of emergency or sufficient braking, the judge did not find this to be proven on the balance of probabilities. At [78], he found that the driver did brake, he slowed down by engine braking to begin with, followed shortly by braking lightly upon seeing the potential danger when the claimant was fairly close and moving towards the pavement; and then much harder when he saw the pedestrian move into the road. The judge found that the driver's words just prior to the collision could indicate that he did see the claimant step out into the road, a fact which he described as "fortified" by steering the bus into the traffic island just prior to and almost simultaneously with the time of collision with the claimant. He noted that a bus driver has the safety of his unsecured passengers to contend with: "driving a heavy passenger vehicle is not like driving a car." The judge found that the driver was driving at or around 25-30mph when he became aware of the claimant moving towards the kerb. He described this as not an excessive speed for the approach of the bus in the circumstances. It was not outside the actions of a reasonable driver. There was no identifiable hazard on the lead up to the traffic island. The situation of the claimant moving towards the pavement edge and then crossing the road without looking developed quickly. The judge stated that the driver "…did react to the Claimant's movement in applying some braking. This was reasonable and demonstrated anticipation but the overall picture here is that this happened at fairly close proximity in time and space to the accident location."

17. At [79] the judge found the allegation of failing to heed the presence of the claimant was unproven. In considering this issue the judge stated:

> "… Driving a vehicle and awareness of surroundings and people and vehicles cannot be categorised into all of these things being a threat (or hazard). It is a matter of awareness. There is no evidence on the papers that Mr Abdulla perceived the Claimant as a hazard as opposed to noting her presence. I doubt if he maintained his view of her throughout the whole passage of time from first seeing her. The description of 'keeping an eye on her' is not to be taken, in my judgment as a fixed and unyielding view as opposed to keeping tabs on her position and movements as the situation develops. Any driver and in particular a driver of a large passenger vehicle has several things going on which includes constant checking of mirrors and spatial awareness of surrounds

> to the road boundaries and checking for the presence of other vehicles and pedestrians."

18. In addressing the alleged failure to avoid driving into the claimant despite having an opportunity to do so the judge found the allegation unproven on the balance of probabilities and stated at [80] that:

> "….it is important not to judge liability with the benefit of hindsight and with an arithmetic precision that does not apply to drivers of vehicles in a dynamic situation. Mr Abdulla did drive and act in such a way as to observe the Claimant and heed her presence. I do not consider it reasonable for Mr Abdulla to consider that the Claimant was a hazard when he first saw her. Having seen her and clocked her presence, this was simply part of a driver's general perception expected of a reasonable driver. Her presence in the area of the pavement was not a factor that would lead to a reasonable driver reducing their speed to below 25mph or 20mph in anticipation that there might be a problem. I completely agree with the concept of anticipation and a driver having to anticipate problems as part of his/her responsibilities to other road users. However, the reality is that no motorist would proceed anywhere in reasonable time if the presence of every pedestrian on a pavement caused them to reduce their speed. There was nothing about the Claimant or her behaviour that should have put the driver on alert when she was pavement side to begin with and the evidence is scant and imprecise as to what she was doing and where she was moving (if she was moving). Upon approach to the accident location, he most likely did notice her moving towards the roadside but at this point, he might well have been quite close in time and space to the impact. He might have been as close as 10-20 metres which a bus can travel in 0.5 seconds to 1 second at 22 miles per hour. Taking a step back, with the Claimant being in the road for a maximum of 2 seconds, this is a very short period of time for a bus driver to react, brake hard, steer with the presence of the traffic island and avoid impact."

19. At [82] the judge did not accept that the accident location was a designated crossing point. He accepted that it could be used as a pedestrian crossing point but it was not necessarily a place in the road that would put a reasonable driver on extra notice that it is a likely place into which a pedestrian would unexpectedly step.

Grounds of appeal

20. The grounds of appeal are:

(1) It was common ground that the driver (a) had a clear and unobstructed view of the claimant on his approach; (b) he first observed her about 90 metres from the point of impact before she began to move towards the kerb; (c) he reacted to the claimant's presence by taking the precautionary measures of (i) keeping the claimant under observation; (ii) shortly thereafter taking his foot from the

accelerator to cover the brake, therefore slightly reducing his speed. The judge disregarded this common ground. He held that (a) the driver's view was obstructed and there were competing demands for his attention; (b) the driver first registered the claimant as a potential hazard and reacted to her presence about 15 – 25 metres from the point of impact when she moved towards the kerb into the path of the bus; (c) the claimant therefore failed to prove her case.

This rendered his decision unjust because of serious procedural irregularities and in any event wrong.

(2) The judge was wrong in failing to find that the driver, having identified that the claimant was a potential hazard and that precautionary measures were required, should have taken effective precautionary measures, namely slowing down to a speed which would have enabled him to stop in time if the hazard of the claimant stepping into the road eventuated.

(3) The judge was wrong to find 70% contributory negligence.

21. Permission to appeal was granted by Bean LJ on 3 August 2022. In granting permission Bean LJ stated: "I do not accept the submission that the trial judge's judgment is incoherent – on the contrary, I think the Claimant will have some difficulty in overturning his findings of fact in this court. However, I am just persuaded that the Claimant's case is sufficiently arguable to justify the grant of permission to appeal."

The submissions of the appellant/claimant

Ground 1

22. In submissions which were not reflected in his skeleton argument, counsel for the claimant contended that it was common ground that there were three stages in this incident:

(i) Stage 1 – the driver observed the claimant for the first time, 90 metres away;

(ii) Stage 2 – the driver observed the claimant move away from the gate towards the stopping point on the pavement, the driver eased off the accelerator and covered his brake;

(iii) Stage 3 – the driver saw the claimant step off the kerb into the bus's path at which point the driver applied hard braking.

23. The claimant contends that the findings of the judge at [68], as to the distance between the driver and the claimant are wrong, and they led to the illogical conclusion that stage 2 began when the appellant was at a closer distance to the point of impact than when stage 3 commenced. On the correct findings of distance, the judge should have found that there was sufficient time and space at stage 3 for the driver to brake sufficiently to avoid the collision. It is the claimant's case that the precautions taken by the driver were not sufficiently effective.

Ground 2

24. The essence of the claimant's case is that the driver should have taken reasonable steps to take effective precautions, namely slowing down to a safe speed. Para 146 of the Highway Code states that the driver should anticipate what pedestrians and cyclists might do including those who are not looking at the driver, as they may step out into the road without seeing the driver. In the Driver and Vehicle Standards Agency ("DVSA") Guide to Driving Buses and Coaches, essential skills include anticipating events and allowing for the ignorance of other road users. Other skills include awareness and anticipation. The appellant contends that the judge's conclusions did not reflect this Guidance. Further, a high standard is expected of the reasonable professional bus driver. By stage 2 the claimant's actions in stepping into the road were foreseeable and foreseen. The driver had already taken precautions but they were insufficient and it follows that he did not meet the reasonable standard of care.

Ground 3

25. On the issue of contributory negligence, the claimant accepted that the question of apportionment is one for the court. It was also accepted that any reliance on authorities was limited as they are fact sensitive. However, the judge's conclusions were based on his assessment of the evidence. If the claimant was right on Ground 1, the necessary adjustments to the judge's fact-findings on distances would not only have an impact on his assessment of whether there was a breach of the duty of care, but would also have an impact on his assessment of the extent to which each of the parties were to blame for the accident, by increasing the blameworthiness of the driver and decreasing the blameworthiness of the claimant.

The submissions of the respondent/defendant

26. The defendant takes issue with the three stages identified by the claimant (para 22 above). It is contended that there is a stage 2.5. The driver had seen the claimant move along the pavement, covered his brakes and began to slow down. The front of the bus then became level with the entrance to the junction to Phillimore Gardens and that is when the driver began to brake. This is stage 2.5. This stage is reflected in the judge's findings at [68] and [69] of the judgment. The findings at [68] reflect para 19 of the driver's witness statement, the findings at [69] reflect paras 19 and 20 of the statement.

27. There were no agreed facts as to distances and no figure was agreed between the experts as to how near or far away from the claimant the bus would have been when the claimant was at the kerb edge. Further, and critically, the evidence of the claimant's expert was that at the speed at which the bus was then travelling, the accident was unavoidable ([60] and [61] of the judgment).

28. There was no "third man" theory (i.e. a theory introduced by the judge which the claimant had no opportunity to address) in this case; the judge was interpreting the evidence as it was open to him to do. At trial, the claimant had challenged the evidence of the driver on the basis that he had given various different accounts of the incident, therefore it was wrong to suggest now that any aspect of that evidence was common ground. The time at which the claimant became a potential hazard was never common ground. The judge made unassailable findings of fact based on the evidence, and he rejected the claimant's case on the balance of probabilities. He did not resort to the burden of proof.

Ground 2

29. At [13] of his judgment the judge cited the authority of *Ahanonu v South East London & Kent Bus Co Ltd* [2008] EWCA Civ 274 per Laws LJ who stated:

> "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 can look more like a guarantee of the claimant's safety than a duty to take reasonable care."

30. The judge correctly found that the legal test is whether the established facts do or do not fall below the standard to be expected of a reasonable road user. The standard is that of a reasonable not a perfect driver.

Discussion

31. The fact finding exercise which the judge undertook was made the more difficult given the absence of forensic evidence, the absence of CCTV footage and the dearth of live evidence from witnesses. Further, the approach of the reconstruction experts in straying into the realm of advocacy did not materially assist the court.

32. At [9] of his judgment the judge recognised the danger in being "overly analytical and scientific when trying to reconstruct the facts of an accident." In *Clayton v Lambert* [2009] EWCA Civ 237 Smith LJ at paras 35 to 39 recognised the difficulty for a judge in finding facts when there is paucity of eye-witness evidence. It was recognised that a judge may have to draw inferences and may rely on reconstruction experts and their calculations, but the danger in such a process is that the judge may be led into making findings of fact of unwarranted precision. At para 39 Smith LJ stated that: "…there is a danger of doing injustice if judges make unwarrantedly precise findings of fact… if there are inherent uncertainties about the facts, as there were here, it is dangerous to make precise findings."

33. At [11] the judge noted that the observations of Smith LJ were particularly pertinent due to the circumstances and the absence of certain pieces of evidence including a paucity of eye-witness evidence which could be tested by the court. As the judge noted, there was no evidence from the claimant, nor from the driver, nor any other witness of fact. He observed at [12] that "… it does mean inevitably that many of the "facts" relied upon by the experts are not hard facts as opposed to potential staging posts upon which they have done their best to use as a framework for their opinions and reconstructions. The only hard facts that can be known are the point of collision, the finishing point of the bus after collision, and the damage to the bus caused by the collision with the Claimant/traffic island in the middle of the road."

34. In my view the judge was right to sound this note of caution at the outset of the judgment, it is a caution which he demonstrated in arriving at findings of fact. Notwithstanding the submissions made to the court on behalf of the appellant/claimant in this appeal, the closing submissions made on behalf of the claimant at trial were that her counsel was not inviting the court to make artificially precise findings of fact.

35. An appellate court will only interfere with a trial judge's finding of fact where it properly determines that the "finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached": *Haringey LBC v Ahmed & Ahmed* [2017] EWCA Civ 1861 at [31]. The judge was careful not to make precise findings as to distance. In so doing he followed the approach identified in *Clayton* above. It is of note that throughout the joint statement of points of agreement and disagreement between the experts, the caveat is expressed that any agreement between the experts is ".. ultimately a matter for the court..". The actions of the driver were recognised by both experts as being "…ultimately matters for the court to consider." It follows that there were no facts agreed between the experts which were, or could be, binding upon the court.

36. Ground 1 of the grounds of appeal identifies facts which are described as "common ground". They include:

(a) The driver had a clear and unobstructed view of the claimant on his approach.

At [66] the judge noted that there were barriers from the road works that would have most likely obstructed **some view** (emphasis added) of the claimant and identified additional possible factors of obstruction namely a post box, a tree and a parked van in which a witness was sitting. The judge did not state that the obstruction obliterated the view of the claimant, it restricted it. In the joint statement of experts, it was acknowledged that when first seen the claimant would have been standing back from the kerb, the view of the driver would initially extend to around 90 metres due to a post-box and a small tree south of the crossing point but would extend to around 180 metres when the claimant reached the kerb edge. Given these observations, I am satisfied that the findings of the judge as to the driver's initially restricted view of the claimant were reasonable.

(b) The driver first observed the claimant about 90 metres from the point of impact before she began to move towards the kerb.

In his statement, the driver did not quantify the distance as between the bus and the claimant when he first saw her. In any event, this point has no force because it was conceded by the appellant that this observation occurred at stage 1 when the claimant would not have been viewed as a potential hazard by the driver. The finding by the judge that he did not consider it an established fact that the driver must have seen the claimant about 90 metres before the location of the accident is based on the evidence of the driver. It was a finding, or rather an absence of a specific finding, which the judge was entitled to make and properly reflects the guidance in *Clayton*.

(c) It is accepted that the driver reacted to the presence of the claimant by taking precautionary measures. Critically, at [79] the judge accepted that when the driver first noted the presence of the claimant, he did not perceive her as a hazard. As to the measure of keeping the claimant under observation, the judge reasonably and realistically took account of the fact that when the driver first saw the claimant there was no indication that she was intending to cross the road and further that as a driver of a bus he had to be aware of, and keep under observation other identified matters ([79]).

37. I do not accept the description of the facts set out in ground 1 as "common ground". There was evidence, or a lack of it, before the court on each of the alleged issues set out above. What the judge did was to consider the evidence, such as it was, and make findings or deliberately step back from making precise findings. The contention that the judge "disregarded … common ground" does not fairly or accurately describe the exercise which the judge carried out.

38. Further, I accept that there were no agreed facts as to distances. When the judge found at [68] that the driver saw the claimant moving towards the kerb and raising an awareness of a potential hazard, the bus was "in the vicinity of Phillimore Gardens junction", this reflects the evidence contained in para 20 of the driver's witness statement. The judge did not put a precise distance on where this was, as he recognised and identified the danger in artificial reconstruction by witnesses when trying to forensically describe a fast moving and sudden incident. The judge was not prepared to say exactly where the front of the bus would have been in respect of the distance from the claimant when he first saw her moving towards the road. What the judge was attempting to identify was the sense of proximity in what was a fast moving incident.

39. At [70] the judge would not make a precise finding of fact as to the distance between the bus and the claimant when she stepped into the road. He described it as a "close distance to the bus" stating that it was "the kind of close proximity" within the range of distances of 10 to 20 metres that provoked the driver's oral reaction of seeing her step into the road when he feared a collision was probable/inevitable. The closeness of the proximity is demonstrated by the fact that the claimant was in the road for no more than 2 seconds when the collision occurred. This again reflects the caution and the sense of the judge in deliberately refraining from making precise findings of distance in a fast moving incident when no assistance can be derived from forensic evidence or that of witnesses giving oral evidence in court.

40. Given the approach of the judge, I am of the view that the oral submissions of the claimant (summarised at paras 22 and 23 above) do not fairly reflect the fact that the judge deliberately did not determine precise distances as to when the driver saw the claimant and the different points at which he took precautionary measures.

41. Further, even if the judge made incorrect findings of fact, which I do not accept, this ground of appeal would fail because of the evidence of the claimant's expert ([60] and [61] of the judgment) to the effect that where the initial vehicle speed of the bus was 25 mph or over, that was within the parameters of a collision being unavoidable.

Ground 2

42. At [13] the judge referred to the authority of *Ahanonu* (para 29 above). In this case, the vehicle involved in the collision with the pedestrian claimant was a double-decker bus driven by the defendants' employed driver. At para 23 Laws LJ stated:

> "… The judge, as my Lord as has said, has in effect sought to impose a counsel of perfection on the bus driver Mr Votier. Such an approach I think distorts the nature of the bus driver's duty which was of course no more nor less than a duty to take reasonable care. There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed

> by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care."

43. The judge, in following *Ahanonu*, identified the correct standard to be applied to the driver of the bus namely that of reasonable care.

44. At [46] the judge included reference to the DVSA Guide in particular in respect of anticipation, awareness and the approach of professional drivers. At [79] the judge considered the issue of the driver's awareness. At [80] the judge considered the issue of anticipation and stated:

> "… Mr Abdulla did drive and act in such a way as to observe the Claimant and heed her presence. I do not consider it reasonable for Mr Abdulla to consider that the Claimant was a hazard when he first saw her. Having seen her and clocked her presence, this was simply part of a driver's general perception expected of a reasonable driver. Her presence in the area of the pavement was not a factor that would lead to a reasonable driver reducing their speed to below 25mph or 20mph in anticipation that there might be a problem. I completely agree with the concept of anticipation and a driver having to anticipate problems as part of his/her responsibilities to other road users. However, the reality is that no motorist would proceed anywhere in reasonable time if the presence of every pedestrian on a pavement caused them to reduce their speed. There was nothing about the Claimant or her behaviour that should have put the driver on alert when she was pavement side to begin with and the evidence is scant and imprecise as to what she was doing and where she was moving (if she was moving). Upon approach to the accident location, he most likely did notice her moving towards the roadside but at this point, he might well have been quite close in time and space to the impact. He might have been as close as 10-20 metres which a bus can travel in 0.5 seconds to 1 second at 22 miles per hour. Taking a step back, with the Claimant being in the road for a maximum of 2 seconds, this is a very short period of time for a bus driver to react, brake hard, steer with the presence of the traffic island and avoid impact."

45. The judge's reasoning reflects the reality of this fast moving incident and what could and should be expected of a driver exercising reasonable care.

46. The judge applied the correct legal test to the facts as he found them. The facts were based upon the evidence before the court. The judge did not resort to the burden of proof in the absence of findings of fact, still less did he embark upon a third man theory.

47. For the reasons given, the second ground of appeal does not succeed.

Ground 3

48. Given my findings upon Grounds 1 and 2, Ground 3 does not fall to be considered.

Conclusion

49. For the reasons given and subject to the views of Moylan LJ and Andrews LJ, I would dismiss this appeal.

Lady Justice Andrews:

50. I agree. This was not an example of a judge adopting an inquisitorial approach, developing his own case theory without giving the parties an opportunity to consider it, or making findings inconsistent with matters that were common ground. As my Lady, Lady Justice Nicola Davies, has demonstrated by quoting passages from the judgment, this was a judge conscientiously going about the task of assessing whether, in the circumstances that evolved so swiftly, the driver fell below the standard of a bus driver exercising reasonable care. The judge plainly had well in mind the difficulties of gauging distances with any precision, and sensibly avoided trying to do so – the very approach he was encouraged to adopt in the claimant's written closing submissions at trial.

51. Permission to appeal was granted in this case on the basis of the serious allegation that the judge disregarded matters of common ground and made findings that were not open to him, rendering the decision "unjust because of serious procedural irregularities" and "in any event wrong". However, as counsel for the defendant demonstrated in her clear and cogent oral submissions, the Grounds of Appeal mistakenly characterised certain matters as being "common ground" and the judge was fully entitled to make the findings that he did. Crucially, the point at which the claimant became a potential hazard and the driver reacted to her as such was very much in issue, an issue which the judge resolved in the defendant's favour. Counsel for the defendant is also to be commended for the helpful way in which she was able to adapt her submissions to meet the shift in focus from her opponent's skeleton argument to the matters which gained prominence in his oral submissions.

52. The fact that the claimant did not serve a Reply did not mean that it could be assumed by the defendant, let alone the judge, that the version of events pleaded in the Defence was accepted. In fact, the bus driver's evidence was criticised at trial as being unreliable, because of variations in his accounts over time, and the judge was urged to treat it with caution. The claimant was fully entitled to make those submissions, but she would not have been if the version of the facts pleaded in the Defence (based on the driver's witness statement) had been common ground. Despite this criticism, the claimant sought to rely on selective parts of that evidence as a foundation for her case, as the judge recorded at [64](c) of the judgment. By so doing, the claimant was doing no more than urging the judge to make certain fact findings. He was not obliged to do so.

53. Likewise the "agreed expert evidence" was not "common ground". Expert witnesses often make factual assumptions. Indeed, they may be unable to assist the court unless they have at least a hypothetical factual foundation on which to base their opinions. However, even if both parties' experts make the same factual assumptions or draw the

same factual inferences from the information provided to them, and even if they are instructed to make those assumptions, those matters do not thereby become common ground. Still less do matters upon which the experts agree in their joint statement. As it happens, Mr Rusted's table, containing his calculations of various distances, including stopping distances, which the judge set out at [60] of the judgment, was not agreed, and in any event it was an expression of that expert's opinions, not a compilation of factual information. As the experts expressly recognised, fact-findings are ultimately a matter for the judge.

54. Once it became clear that (a) on any view it did not matter how far away the claimant was when the bus driver first saw her, or whether his view of her was obstructed, because she did not present a potential hazard at that point, and (b) the claimant's analysis had missed out the critical "stage 2.5" at which the driver first applied his brakes, it was obvious that the criticism of the judge which underpinned Ground 1 was unsustainable. Ground 2 amounted to no more than a disagreement with the judge's evaluation of whether there was a breach of the duty of care. Given that there was no basis for disturbing the judge's finding that the bus driver was not at fault, Ground 3 did not arise. For those reasons, in addition to those expressed by my Lady, I would dismiss this appeal.

Lord Justice Moylan:

55. I agree with the judgments of Nicola Davies LJ and Andrews LJ.