



Neutral Citation Number: [2024] EWHC 2292 (KB)

Case No: QB-2022-001820

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/09/2024

Before :

His Honour Judge Martin Picton sitting as a Deputy High Court Judge

Between :

Louise Jane Palmer (Widow of Simon Fraser Palmer (Deceased)	<u>Claimant</u>
- and -	
Mr Russell Timms	<u>(1) Defendant</u>
Bluestone Transport Limited	<u>(2) Defendant</u>
Zurich Insurance Plc	<u>(3) Defendant</u>

Andrew Roy KC (instructed by **Irwin Mitchell LLP**) for the **Claimant**
James Todd KC (instructed by **Keoghs LLP**) for the **Defendants**

Hearing dates: 17 & 18 July 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 9 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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His Honour Judge Martin Picton sitting as a Deputy High Court Judge:

Introduction

1. At about 08:35 on Thursday the 20th of June 2019 the deceased, Simon Palmer, rode his Honda motorcycle southeast along Holloway Road in London. He was making his way to work. Also travelling along Holloway Road was the first defendant, Russell Timms, driving his employer's DAF LGV motor lorry. At the same time another motorcyclist was travelling in the same direction, Dominic Molyneux. The rush hour traffic was heavy on what is a main arterial road.
2. Mr Palmer was travelling more quickly than Mr Timms. The lorry was being driven at about 18 mph whereas the Honda motorcycle was travelling at about 25 to 26 mph. This section of road is subject to a 30 mph limit. The progress of the vehicles is comprehensively recorded on video footage obtained from street CCTV, footage recorded by Mr Molyneux's headcam, and also the cameras fitted to the lorry. Accordingly, there is a very clear and largely non-controversial factual foundation for what occurred.
3. Mr Palmer was filtering through the slower-moving traffic by way of undertaking. Mr Molyneux was essentially doing the same but by way of overtaking. When Mr Palmer caught up with the DAF he began passing on its nearside. As Mr Palmer was in the process of passing the lorry Mr Timms caused the vehicle to move left thus reducing the space available for Mr Palmer to try to complete the manoeuvre.
4. The top box of the motorcycle came into contact with a camera mounted in a forward position on the nearside of the lorry. That had the effect of initiating instability, resulting in Mr Palmer losing control of the motorcycle. He fell sideways, falling to his left and onto the pavement. Having done so but whilst still travelling with some significant velocity, his body collided with a metal bollard positioned a little in from the kerb.
5. Mr Palmer died as a result of the injuries he sustained. Damages have been agreed subject to liability.

The Claimant's contentions

6. The claim is brought by the widow of Simon Palmer. The Particulars of Claim, and also the claimant's skeleton argument, identify both a 'primary' case and an 'alternative' case. The primary case for which the claimant contends alleges that Mr Timms executed the movement to the left in order to block Mr Palmer's progress along his nearside. It is suggested that this was either a deliberate or at least reckless action on the part of Mr Timms that may have been motivated by a degree of annoyance on his part, perhaps due to the fact that a motorcycle was 'undertaking' in circumstances where Mr Timms did not consider they should. On that basis it is suggested by the Claimant that this amounted to a trespass to the person for which the defendant should be held liable.
7. The alternative case is that Mr Timms was negligent in moving to his nearside without checking whether it was safe so to do, and in circumstances where it was unsafe and did cause the accident.

The Defendants' contentions

8. On behalf of Mr Timms it is argued that there is a complete absence of evidence to support the primary case. It is also submitted that as to negligence none should be found to attach to the actions of Mr Timms in steering and braking his lorry in the circumstances in which he executed that manoeuvre. Alternatively, it is suggested that

if Mr Timms was negligent in the manner of his driving, then there should be a substantial finding of contributory negligence on the part of Mr Palmer. The defence suggests the level of contributory negligence should be assessed as being 75%. The Claimant's position on this issue is that there was no element of contributory negligence on the part of Mr Palmer but, if there was, it should be limited to a maximum of 20%.

The evidence

9. This case is perhaps unusual for the level of agreement as to the events that took place. Neither of the accident reconstruction experts has been required to attend and give evidence. The parties were agreed that the principal factual issue is why Mr Timms chose to move the vehicle to the nearside, which had the effect of closing the gap available to Mr Palmer as he was attempting to pass on the nearside, and whether the action was intentional and/or negligent. In the event of a finding of negligence then, as mentioned above, the issue of whether and if so to what extent Mr Palmer contributed to the accident also falls to be addressed.
10. The only live witness has been the defendant driver Mr Timms. Other eyewitness evidence contained in the agreed bundle, and which is relied upon by the defendant, consists of a witness statement from Elisca Renwick, for whom the claimant had no questions, and some evidence from Dominic Molyneux, introduced by way of a Civil Evidence Act notice.
11. The statement of Ms Renwick, the driver of a Nissan Micra that was immediately behind the DAF but a few car lengths back, related how she was travelling at about 20 mph. She referred to being aware of Mr Palmer's motorcycle, which she described as travelling very close to the nearside pavement. She thought the motorcyclist was looking to undertake the lorry. She described seeing the motorcyclist "move towards the narrow gap between the lorry and the pavement" and that he "appeared to lose control of his motorcycle, either as a result of clipping the pedestrian or the lorry as he moved past". Whilst the witness's suggested mechanics of the accident are not relied upon by the defence, the account is suggested to provide helpful impressionistic input as to the narrowness of the gap and the level of hazard engendered in the undertaking exercise.
12. In a handwritten account that Mr Molyneux provided to the police on the 14th of July 2019 he related, by reference to the headcam footage that he had clearly reviewed to prepare this account, how he observed Mr Palmer undertake first a lorry and then a car (the Nissan Micra). He then saw Mr Palmer begin to undertake the DAF. He stated: "I thought at the time that there was not a great deal of room on the inside of that van. At 0834.33 I was aware that the van had drifted to the left slightly, towards that motorbike. I was behind that van. I saw the brake lights come on. That is clear from my CCTV footage. I was behind that van when the brake lights came on. I was not overtaking that van. When I saw the brake lights come on (0834.33) I said "Fuck me" because I knew there wasn't much space when the motorbike went inside the van and then when the van drifted to the left and braked suddenly I assumed he had hit the bike."
13. The sound of Mr Molyneux exclaiming "Oh fuck" is captured on his headcam footage. It did coincide with the move of the DAF to the left and appears to fractionally precede the brake lights coming on. At or about that point it is possible also to hear the sound the bike made as it lost control. Whilst it is probably academic the impression given is that the movement of the van to its nearside may have been

- the trigger for the exclamation, although the defence suggests that it could have been the noise or even a combination of the two.
14. Mr Molyneux related how he stopped to render assistance and that he had not expected the injuries to be as severe as they turned out to be, commenting that Mr Palmer was not travelling “particularly fast”.
 15. Mr Molyneux was subject to an interview under caution but declined to answer questions. He also declined to be involved as a witness in these proceedings.
 16. In his witness statement Mr Timms outlined his experience as a driver and referred to his good driving record. At the time of these events, he was employed as a full-time professional driver and had been driving the lorry in question as part of his work pattern during the preceding 18 months. He described how he had slept well the night before the accident and that he had set off from the depot where the lorry was parked at 06.00 heading for Commercial Road in Spitalfields, Central London.
 17. He said that he knew the route well and drove it on a regular basis. He stated that at the point of the accident he was on time and had no need to hurry. He described the weather as being good and the traffic heavy but flowing. He said it was typical for that time of day. He said he was travelling with his window fully open and the passenger door window halfway down. He thought his radio may have been on.
 18. He said that he was driving at what he believed to be 15 to 20 miles an hour along the single-carriageway road. He described the road in this particular area as being busy with shops, various junctions, bus routes and all forms of transport.
 19. He related how his journey took him along Archway Road and then onto Holloway Road. That part of his journey is captured on the CCTV footage and by way of observation there is a marked cycle path at that junction which does not extend far into Holloway Road. Mr Timms passed that section of designated cycle lane on his nearside.
 20. Mr Timms stated that as he entered Holloway Road, he was not expecting any motorcycle or cycles to undertake his lorry as that section of the road is, according to him, “very narrow”. He related that prior to that particular section of road there is more potential for motorcyclists and cyclists to undertake as it is a lot wider. He referred to a pedestrian crossing towards which he was proceeding, commenting that there were pedestrians standing nearby.
 21. Mr Timms stated that he was aware of traffic behind him, and in particular three motorbikes. He said that he saw them in his mirrors as he approached the pedestrian crossing. He stated that as he reached the zigzag lines he checked his nearside class ii and class iv mirrors and then turned to his offside to check his class ii and finally offside class iv mirror. He stated that he was aware of a motorcycle with illuminated headlights on his nearside, adjacent to or slightly behind a Nissan Micra that was travelling immediately behind himself. He said the car was about four or five car lengths back. He also referred to a motorcycle travelling on his offside. He stated that he was aware of a third motorcycle but was not sure where it had gone. He said he could see the nearside of the Micra in his nearside mirror. He described the motorcycle on his offside as being further back than the motorcycle on his nearside, around two car lengths behind the Micra.
 22. He described how as he got closer to the pedestrian crossing he heard a motorcycle accelerating very loudly and said this attracted his attention. He described himself as “instinctively” looking into his offside class ii mirror and seeing a motorcycle approaching rapidly on that side. He said it was on or just over the central broken white line and was overtaking the Micra. He described it as being level or slightly past the Micra when he saw it in his offside mirrors.

23. He related looking back at the road ahead and said he noticed a white van travelling in the opposite direction. He suggested the gap between himself and the white van was “closing rapidly”. He said he intended to allow some extra space for the motorcycle to overtake on his offside. He described his actions at that point in these terms: “I moved slightly to my left and braked. I moved the steering wheel about half an inch to an inch. As I did this manoeuvre I looked to my nearside class ii mirror and that is when I saw the motorcycle top box clip the front corner of my lorry. I saw the motorcycle in the bottom left corner of my windscreen. All I saw was the rider’s helmet and top box. It all happened very quickly. As I made the slight movement to the left, I didn't expect the motorcycle coming up the nearside of my lorry in the manner it did. My main focus was the overtaking motorcycle on my offside and the narrowing gap between him and the oncoming white van. He was accelerating with the intent to overtake me and did overtake me at the time the other motorcycle (which I now know to be ridden by Mr Palmer) moved to undertake the lorry.”
24. Mr Timms recorded that upon contact with the motorcycle he corrected what he described as his “slight move to the left” and steered the lorry back to the right, braking hard to bring it to a complete stop.
25. Mr Timms commenced his live evidence by reporting that he had temporarily ceased work as a driver but was now back driving lorries on a part-time basis. He spoke of his issues with Crohn’s Disease but stated his health was now better than it had been.
26. In cross-examination he stated his belief that he had done “nothing wrong”. He said there had never been a reason for him not to give a true account.
27. He was asked about a “formal history of events” that he had given David Ballard, a paramedic who spoke to Mr Timms (Bundle 2 p786) where he is recorded as saying: “The motorcyclist had been accelerating down the inside of the lorry, the lorry driver noticed him when he was level with the lorry’s wing mirror. Motorcyclist clipped the side of the lorry, motorcyclist came off motorbike, the motorbike continued forward ahead of the motorcyclist and lorry”.
28. Mr Timms stated that he recalled speaking to the paramedic. Having had the section from the record referred to above put to him Mr Timms responded that he noticed he was there earlier but then not before he clipped the side of the lorry. He agreed the paramedic had accurately recorded what he said. He agreed that he had not referred to having moved left.
29. He stated that he braked and moved over to give Mr Molyneux space to get through. Mr Timms said braking would have given Mr Molyneux more time to get past. He agreed that there was no mention of the other motorbike and no mention of the oncoming van in the note written by the paramedic. He accepted that he only mentioned seeing him in the wing mirror at the point of impact and did not mention having seen him earlier but claimed that he had done so. He did not agree that the account he gave to the paramedic was “completely wrong” as was suggested by counsel for the Claimant.
30. Mr Timms was asked about what he said in an initial conversation with a police officer and stated that he had no memory of that. He accepted that he should have given a truthful and accurate account.
31. The record of what Mr Timms was recorded as saying (to PC Briers) at 09.48 that morning (Bundle 2 p506) was put to him: “I was in the middle of the lane. He came up beside me very loud and very fast. He hit the side of me. I tried to swerve but it was too late. He then hit me”. Mr Timms agreed that the account was “wrong” and that it was the “other bike” that was noisy. He accepted that he did not mention a second bike. He accepted that he did not mention braking. Mr Timms asserted that he

- must have meant he swerved right but in fact he went to the left. He agreed that he said he had swerved to try and avoid the accident. He denied that this was a deliberately false statement to the police.
32. He was asked about choosing not to answer questions when the subject of a formal interview process by the police. He said he acted on legal advice and agreed he had a choice. He asserted that he was not comfortable saying ‘no comment’. He denied being told he might provide a “prepared statement”. He denied his motivation in going ‘no comment’ was because he feared he might get himself in trouble had he answered questions. He said he was aware that the vehicle had cameras but did not know what they showed or what the other witnesses might say.
33. He was asked about the fact he ended up being prosecuted for causing death by careless driving. He said he was aware the police had a report in April 2020 from PC MacAlpine (accident reconstruction expert) and that his solicitors instructed Ms Evers, also an accident reconstruction expert, to prepare a report on his behalf. He agreed she provided a report in October 2021. He agreed that it was very important that she be given the full information to do so. He said that such information as she was given was provided to her by his solicitors and said that he had not spoken to her himself. He agreed that his solicitors had taken his instructions as to the circumstances of the events.
34. The attention of Mr Timms was drawn to paragraph 8.13 of the October report (bundle 3 p976), the suggestion being made to him that Ms Evers had not been told anything about the potential significance of a motorcycle travelling on his offside and his case that his actions were prompted by that. Mr Timms asserted that he had given that account to his solicitors by this stage and could proffer no explanation as to why it appeared they had not informed Ms Evers of this detail.
35. He was taken to the Defence Statement served on his behalf in the criminal proceedings (Bundle 3 p892). He agreed that the document, dated 7th December 2021, was “important” and that there was no reason why it should not contain “the truth”.
36. Paragraphs 10-13 of the Defence Statement were put to him (although paragraphs 8 and 9 are included for the sake of completeness) where it is stated:
- “8. He heard the sound of a motorbike accelerating and looked into his offside mirror.
9. He was aware that a motorbike would most likely attempt to overtake on his offside.
10. He did not see any vehicle passing on his offside and turned his head to check his nearside mirror. He would have to move his head to face the nearside mirror by at least 45 to 60°.
11. He did not see Mr Palmer in either his nearside Class ii or Class iv mirrors, but felt something clip his near side.
12. He did not see Mr Palmer until after his motorbike had gone past his truck, when he became visible through the nearside corner of the windscreen.
13. At that moment Mr Timms put his foot on the brake and stopped his vehicle.”
37. Mr Timms agreed that moving to the left was the single most important factor but his Defence Statement did not say that. He could proffer no explanation as to why that was not mentioned in the document. He said there should also have been a reference to the vehicle coming the other way. He agreed the Defence Statement did not refer to moving left at all.
38. He asserted that he had been aware of Mr Palmer’s motorbike further back but that the Defence Statement stated that he first saw him at the point of collision. He said he first saw him when Mr Palmer was near the Nissan. He could not explain why the

- document was inaccurate in this regard or why he did not refer to having seen Mr Molyneux's motorbike. He maintained he had given such an account to his solicitor.
39. He was asked about an exchange of correspondence between the Claimant's solicitors and those representing himself in the civil proceedings. On the 7th of October 2019 the Claimant's solicitors wrote to Zurich Insurance, the defendant's insurers, putting them on notice as to the allegation. The relevant paragraph (Bundle 3 p1307) states:
"It is alleged the accident was caused by the negligence of Russell Timms who was the servant or agent of your insured and for whom they are vicariously liable. We have not at this stage received full information about the accident circumstances but, without prejudice to any subsequent or more detailed allegations to be set out in the Particulars of Claim, it seems clear that Mr Timms was negligent for crossing into lane one when it was not clear to do so."
40. The response, that was eventually sent by email on the 16th of March 2022 from the solicitors acting for Zurich "and their insured", set out the basis upon which liability would be disputed thus:
"I should mention now that liability will be disputed in relation to your client's claim in that the deceased motorcyclist tried to squeeze through a gap that was too narrow to the near side of the insured's vehicle (i.e. by undertaking it). Mr Timms was travelling straight ahead at the time rather than (as alleged in the letter of claim) it being in the process of completing a manoeuvre into its left hand lane. The road layout itself establishes the version of events set out in the letter of claim cannot be correct. Mr Palmer sadly misjudged the very limited available room during what was clearly an unsafe manoeuvre, leading to his untimely death."
41. Mr Timms stated he had never seen the email but that what it asserted was true. He denied having made a significant manoeuvre suggesting it was 50 cm in a busy road. He agreed what was stated in the email would have come from him and that it did not acknowledge that he had moved left. He asserted that he had gone "straight ahead" and that the lorry only moved 50 cm over the relevant distance; what he maintained was a "minute manoeuvre" and "slight deviation".
42. Mr Timms was asked about the way this issue was dealt with in the Defence (Bundle 1 p55) served in response to the Particular of Claim and in particular paragraph 5c and part of d:

"c. It is admitted that in the moments before the contact, the First Defendant moved the lorry slightly to the left and braked. It is however specifically denied that there was no reason for the lorry to move to the left and/or to brake other than to interfere with the deceased's path, as alleged."

d. ...The First Defendant's Movement to the left was slight and, but for the presence of the deceased attempting to squeeze through a gap on the near side that was not reasonably available, would have been inconsequential."
43. Mr Timms maintained that he had notified the solicitors that there was another motorbike on his offside and a vehicle coming the other way and that these factors had an impact upon how he drove. He said he had no explanation as to why this was not asserted in writing in that level of detail until a later stage.
44. He was asked about the criminal trial and a document that featured in that "COLLISION RECONSTRUCTION EXPERTS' JOINT REPORT" (Bundle 3 pp 986-989). His attention was drawn to paragraphs 2.4, 2.9 and 2.12:

- “2.4 As the motorcycle passed along the near side of the LGV, the LGV moved slightly to its left and braked.
- 2.9 If Mr Timms had checked the nearside mirrors during this time the motorcycle would have been available to be seen.
- 2.12 Due to the relative speed of the vehicles and the lack of space to manoeuvre it would not have been possible for the motorcyclist to avoid making contact with either the LGV or the kerb once the LGV started to move to the left.”
45. Mr Timms agreed that it would have been a problem for him if he had moved left for no reason. He asserted there was a reason that he had articulated before this stage. He denied having adopted a suggestion emanating from Ms Eyer’s to try and get himself “off the hook”.
46. He was asked about some differences of detail as between his witness statement in the civil proceedings and his evidence in the criminal trial.
47. Mr Timms was challenged as to the narrowness of the road and why that might lead him not to expect to be undertaken. He responded by referring to the width of his vehicle but agreed there was space to have been passed on both sides and agreed it was not “very narrow”.
48. He was asked about the fact that he had failed a roadside test for cannabis and the explanation he gave for that. He said he was in the habit of ingesting a small amount of cannabis in the form of a “brownie” because doing so assisted him with the pain of Crohn’s Disease.
49. His attention was drawn to the fact that at 09.59 on the day of the accident, and in the course of the roadside test procedure, he was asked if he had smoked cannabis in the past week and responded that he had “been in a room with some people who were, could that be it?” (Bundle 2 p772) but that later the same morning, and after he had been arrested, he explained “he occasionally used cannabis to supplement” his pain relief medication. Mr Timms said there could be two reasons for him failing the roadside test and that there always were. He agreed he had only referred to the “brownie” reason in his witness statement in the civil proceedings. He denied “making it up as I go along”. The level of cannabis in Mr Timms’ system did not in fact exceed the permitted limit and no charges flowed from this issue.
50. Mr Timms accepted that he was familiar with the Highway Code and stated that he had a general knowledge of Road Traffic Acts and was aware of advice and guidance concerning driving large vehicles. He was asked about Rule 151: “*In slow-moving traffic. You should ... be aware of cyclists and motorcyclists who may be passing on either side*”. Mr Timms agreed that he had to have an awareness of people passing on either side.
51. His attention was drawn to Rule 160: “*Once moving you should ... be aware of other road users, especially cycles and motorcycles who may be filtering through the traffic*”. Mr Timms agreed he was negotiating a busy suburban arterial route with slow moving traffic. He agreed that the fact of cyclists and motorcyclists passing either side was a common feature and that sometimes they would do so by passing through small gaps. He agreed to having made that same concession when giving evidence in the criminal trial (Bundle 3 p1198).

52. He was asked whether he was aware that Mr Palmer was catching up and he denied that he was but agreed there was a “fair chance” he was doing so. It was put to him that there was room for Mr Palmer to pass the lorry on its nearside but he did not accept that. It was put to him that the gap was big enough but he suggested it was “tight”. He did not disagree with the general suggestion that motorcyclists go through tight gaps “all the time”. Mr Timms stated that he had seen Mr Palmer when he was adjacent or behind the Nissan Micra but the next time saw him was when the collision occurred. He referred to the fact that he had to be watching the pedestrian crossing and had to be “be vigilant of everything”. He asserted that there were “mitigating circumstances” and that he “did not think he would attempt to pass me there. If there was a motorbike on my nearside I would expect him to undertake there but not at the pedestrian crossing”.
53. Mr Timms agreed that given there was a narrow gap then any movement to the left by the lorry would make it too narrow for Mr Palmer and he stated “had I been aware he was there I would not have moved left”.
54. Mr Timms asserted that he would be passed more often on the offside but that it also happened regularly on the nearside. He also stated that he “would not pull to my left every time there was something passing on the offside”.
55. He agreed with the suggestion that the oncoming van was just part of the general stream of traffic. He agreed that the action of Mr Molyneux “happens regularly”, stating that he “made a snap decision on the basis of what I saw” and that he “did not think Mr Palmer was there”. He denied that he had made a quite serious misjudgement.
56. He said this: “Had I seen him in my mirror before I saw Molyneux in my mirror I would not have moved left. I was distracted by the noise that caused me to look in my offside mirror. It is an early warning sign that something is coming at speed. I had checked my mirror and seen Mr Palmer before the crossing. If I was aware Palmer was there, I would definitely not have moved left. I don’t want to intentionally hurt anyone. Had I anticipated he might have been undertaking I would not have moved left – I would have stayed in a straight position. You can’t look everywhere all at once. Did not move left anticipating he was undertaking and move left anyway. I did not obstruct him deliberately”.
57. Mr Timms further denied that he had inadvertently drifted to the left. He maintained it was a “conscious move” and only carried out “because of Mr Molyneux”.
58. In the context of Rule 161 and “*Remember: Mirrors – Signal – Manoeuvre*” he said this: “I did not indicate or check my mirrors as I did the manoeuvre. I was turning my head in that direction and that was when the collision occurred. I don’t need to do mirror signal manoeuvre when doing so in one lane. The manoeuvre was 50 cm”.
59. He went on to assert that Mr Molyneux was catching up at speed and claimed that he had moved to try to avoid an accident. He stated: “I had checked my mirror a few seconds before. It is a massive responsibility to drive a vehicle of this size. I have seen people get squashed between two vehicles in London.”
60. His attention was drawn to Rule 168: “*Being overtaken. If a driver is trying to overtake you, maintain a steady course and speed, slowing down if necessary to let the vehicle pass. Never obstruct drivers who wish to pass. Speeding up or driving unpredictably while someone is overtaking you is dangerous*”. Mr Timms agreed he did change direction but suggested Mr Palmer was responsible for a “suicidal manoeuvre”. He agreed that it could be said he had moved into his path and caused the collision, but denied that he had done so deliberately or that his actions were negligent in so doing.

Expert evidence

61. Turning to the agreed expert evidence it is sufficient in order to deal with the issues that arise in this case to set out the most pertinent areas of agreement as between the Claimant's expert, Mr S Cash and the expert instructed on behalf of the Defendants, Ms V Evers (Bundle 1 pp 487-501). I have, of course, considered with care each of the individual reports emanating from Mr Cash and Ms Evers as contained within the trial bundle. I have also considered the report and evidence of the police accident reconstruction witness who featured in the criminal trial and I have already mentioned the report of Ms Evers that was commissioned on Mr Timms' behalf in anticipation of those proceedings.
62. In the joint report the experts begin by providing a narrative description of the accident and the work undertaken by each of them. The document goes on to identify areas of agreement and, importantly, makes clear that there are no areas of disagreement.
63. The 'Summary', 'Collision Scene' and 'Vehicle condition' sections are non-controversial. Under the subheading 'Impact Configuration' it is stated: "The sideways movement of the DAF was such that the front nearside corner of the vehicle struck the top box of the Honda which, in turn, caused Mr Palmer and the Honda to fall". The relative vehicle speeds are then set out, including that of Mr Molyneux and the oncoming van to which reference has already been made.
64. In section 7 under the heading 'Movements of the DAF Prior to Impact' it is recorded:
 - 7.1. the footage recorded by the 4-camera CCTV system fitted to the DAF well documented the movements of the DAF immediately prior to impact, recording the moment of impact also.
 - 7.2. As the DAF travelled southeast and Mr Palmer approached the rear of the vehicle, the gap between the nearside of the DAF and the kerb was about 1.3 metres.
 - 7.3. The front camera of the system recorded the initial change in the DAF's orientation, caused by Mr Timms' turning of the steering wheel, as commencing about 1.3 seconds prior to impact.
 - 7.4. From Mr Palmer's perspective, it is unlikely that he would have detected these first subtle movements, and would have first been presented with a notable displacement of the vehicle a few tenths of a second later, and about 1 second prior to impact.
 - 7.5. The manoeuvre of Mr Timms was such that during his 1.3-second steering input the front of the DAF (around the area of the impact) displaced to the left by about 0.5 metres.
 - 7.6. A few tenths of a second after Mr Timms initially commenced steering left, he applied the brakes of the DAF. Whilst Mr Cash calculates this interval as 0.5 seconds, and Ms Evers 0.3 seconds, a difference of 0.2 seconds in this time to either expert's analysis will not affect their conclusions."

65. The experts identify that as Mr Palmer approached from the rear Mr Timms's mirrors did provide him with a view of that process. They calculate that Mr Palmer would have entered the field of view 7.9 seconds prior to the commencement of the steer to the left. Mr Palmer reached the rear of the Nissan 6.8 seconds before the steer. He reached the front of the Nissan at 4.9 seconds and the rear of the DAF 1.3 seconds before the steer. It is stated that: "At, or immediately after, the time Mr Timms commenced steering left it is likely that Mr Palmer and the Honda would have no longer been in the view of the rearview mirrors". The report notes factors that would have made it more or less difficult for Mr Timms to detect Mr Palmer as a hazard if he looked. It is suggested that if he had looked more than once during the period upon which the report is focussed then the progression of the Honda "may have been more apparent". Neither expert suggests that in the relevant timescale the two close proximity mirrors would have been checked.
66. The experts make reference to sections of the Highway Code that they consider relevant from the respective positions of both Mr Palmer and Mr Timms. With regard to the former they cite:
- (i) Rule 88 "*Position yourself so that drivers in front can see you in their mirrors. Additionally, when filtering in slow-moving traffic, take care and keep your speed low*";
 - (ii) Rule 163 "**Overtake only** when it is safe and legal to do so. You should... only overtake on the left if the vehicle in front is signalling to turn right, and there is room to do so";
 - (iii) Rule 86 "*Make yourself as visible as possible from the side as well as the front and rear. You should wear a light or brightly coloured helmet and fluorescent clothing or strips. Dipped headlights, even in good daylight, may also make you more conspicuous. However, be aware that other vehicle drivers may still not have seen you, or judged your distance or speed correctly, especially at junctions*";
 - (iv) Rule 164 "**Large vehicles.** Overtaking these is more difficult. You should... drop back. This will increase your ability to see ahead and should allow the driver of the large vehicle to see you in their mirrors".
67. So far as Mr Timms is concerned the joint report highlights the following DVSA Guide 2020 Edition extracts:
- "Awareness - You need to know what's happening around you"
- "Effective observation – you should use the mirrors constantly and act upon what you see in them ..."
- "Check the offside ... for overtaking traffic coming up behind or already alongside ..."
- "Check the nearside for cyclists or motorcyclists filtering up the nearside ..."
- "...They're (motorcyclists) very vulnerable because, like cyclists, they're much smaller than other vehicles with a narrow profile so they're difficult to see. However they also travel faster than cyclists so any situation develops much more quickly".
68. With respect to the Highway Code the following quotes are included:
- "In slow moving traffic. You should ... be aware of cyclists and motorcyclists who may be passing on either side".
- "Mirrors. Mirrors should be used effectively throughout your journey. You should ... use your mirrors frequently so that you always know what is behind and each side of you ... use them in good time before you signal or change direction or speed ... be aware that mirrors do not cover all areas and there will be blind spots. You would need to look round and check ... Remember: Mirrors – Signal – Manoeuvre".

“It is often difficult to see motorcyclists and cyclists, especially when they are waiting alongside you, coming up from behind ...”.

69. At 10.4 the experts include an image taken from Mr Molyneux’s helmet camera to assist with assessing the overtaking movement that he was contemplating relative to the point when Mr Timms began to move to the left. Mr Palmer can be seen to already be travelling alongside the lorry and cannot have been far from the point of impact between the camera and the top box. They opine that the offset as between the DAF and the approaching Mercedes van was about 1.5 metres. That was a gap wider than that through which Mr Palmer was attempting to pass at the point when Mr Timms moved the steering wheel resulting in the gap being reduced to one through which he could not safely proceed.
70. In Section 11 they address “Collision Avoidance” and it is stated:
- “11.1. At the material time Mr Palmer was filtering to the near side of the DAF through a gap of about 1.3 metres. Had he not completed the manoeuvre the collision would not have occurred.”
- 11.2. At the material time the impact was essentially made between the front nearside corner of the DAF on the rear (the front of the top box) of the Honda. Therefore, irrespective of the reason Mr Timms steered left, had he maintained a steady course and not steered left Mr Palmer would likely have passed the DAF without contact at this final stage of his passing manoeuvre, and Mr Palmer would not have fallen from the Honda and his impact with the bollard would not have occurred.”

Relevant Law

71. The parties have identified a number of cases to which they look for support. *Stewart v Glaze* [2009] EWCH 704 (QB) is identified as assisting in respect of the assessment of the “reasonable driver” and in particular by reference to paragraphs 5 and 7. *Doughty v Kazmierski* [2024] EWHC 1393 (KB) is identified as providing a helpful exposition on the law relevant to this decision, with paragraphs 63-65 being highlighted. There is also a reference in the judgment to the relevance of the Highway Code and the potential for a failure to comply with a provision to establish or negative liability. Reliance is placed by counsel for the Claimant on the concluding paragraph of the judgment of Lord Uthwatt in *London Passenger Transport Board v Upson* [1949] AC 155 at p173 where he stated: “I desire only to register my dissent from the view expressed by the Master of the Rolls (2) that drivers “are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care”. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take”.
72. *Landau v The Big Bus Company and Pwael Zeital* [2014] EWCA Civ 1102 is suggested by defence counsel to have some factual similarity to the issues that arise here. The Court of Appeal declined to overturn a judgment that neither driver was responsible for an accident where the rider of a 125cc motor scooter became effectively trapped when travelling between two vehicles seeking to negotiate a left-

hand bend. My attention has in particular been drawn to paragraphs 15-16, the final sentence of paragraph 32 and the concluding part of paragraph 34.

73. *Rehill v Rider Holdings Ltd* [2013] R.T.R. 5 was an appeal against the finding of negligence on the part of a bus driver whose vehicle struck a pedestrian who stepped in front of the bus when the pedestrian crossing lights were showing red for pedestrians. The appeal was rejected. It was held that the judge had been entitled to find that the bus driver ought to have noticed the claimant as he stepped off the pavement. The court could see no basis for departing from the judge's conclusion that the driver's negligence was causal of the claimant's injuries, emphasising the heavy responsibility that rests on a driver of a bus in a town centre. The court did, however, substitute a finding of one half contributing negligence for that of one third as found by the trial judge.
74. *McGreer v McIntosh* [2017] EWCA Civ 79 involved an appeal where the basic facts were not in dispute. An HGV driven by the defendant was in collision with the claimant cyclist. Both parties were travelling in the same direction. The defendant stopped at traffic lights, planning to turn left and signalling his intention so to do. The lorry was positioned straddling two lanes of traffic. When the lights turned green in favour of the defendant, he executed a left-hand turn but at the same time the claimant passed along the nearside of the vehicle and across its front. A collision took place. Liability was denied on the basis the defendant made a proper check in his side rear view mirrors before setting off and saw nothing coming down or towards his near side. It was denied that he had been negligent to execute his left turn in the manner that he did. Having checked his mirrors before setting off it was contended there was no further need for him to check as the turning was made. The judge at first instance found that the driver had either not taken sufficient care when looking in his mirrors, or if he had done so he would have seen the claimant, or alternatively, he had made his observations at an excessive interval before moving. A feature of the evidence in that case was that the defendant asserted it did not occur to him that anyone would come up his nearside in an attempt to pass. As was noted at paragraph 14 of the judgment: "It was common knowledge that accidents involving undertaking cyclists and HGV vehicles were all too common, and the defendant had accepted that he knew that the road configuration gave the impression to someone behind that he was moving to his right. In those circumstances, the judge held that the exercise of reasonable care in making the manoeuvre required the defendant check again in his mirrors, after he moved off, and immediately before starting to turn left. If he had done so he would have seen the claimant". The judge found the major responsibility for the accident lay with the defendant identifying the causative potency of the HGV as being highly significant in assessing apportionment. The claimant was found to be 30% contributory liable. On appeal the court declined to interfere with the findings that the judge made as to liability and level of contribution identified in respect of the claimant's own responsibility.
75. In *Sabir v Osei-Kwabena* [2016] R.T.R. 9 the claimant pedestrian stepped into the path of a car being driven at 30 mph. A judge at first instance found the defendant liable in negligence, subject to a finding of 25% contributory negligence on the claimant's part. The appeal was dismissed, the court noting that the destructive capacity of a driven car was relevant to both aspects of evaluating liability between a claimant and a defendant, namely the respective causative potency of what they had done, and their respective blameworthiness; that driving a car at even a moderate speed without keeping a proper lookout in a situation in which pedestrians could reasonably be expected to be present in the carriageway pointed to a considerable

degree of blameworthiness. My attention has been drawn, by way of highlighting, to paragraphs 13, 15, 16 and 18 of the judgment.

76. I was also directed to *Jones v Lawton* [2013] EWHC 4108 (QB), notable as it involved a collision between a car and an overtaking motorcycle. By way of highlighting my attention was drawn to the first two sentences of paragraph 40. Reliance was also placed on the final two paragraphs and the assessment of underlying blameworthiness that resulted in a finding of one-third contributory negligence on the part of the motorcyclist who was filtering through heavy traffic.
77. *Hernandez v Emre Acar and EUI Limited* [2019] EWHC 72 (QB) involved a turning car and a speeding motorcyclist. The trial judge having initially concluded that more blame attached to the claimant motorcyclist adjusted that to produce a 60:40 result in the claimant's favour, doing so by reference to the causative potency which he assessed tilted the balance back onto the side of the more vulnerable road user.
78. Although *Rogers and another v Hoyle (Secretary of State for Transport and another intervening)* [2013] EWHC 1409 (QB) was included in the authorities bundle it did not appear to me to call for discreet consideration and was not mentioned in final submissions as having any significant impact decision-making process here.

Skeleton arguments and closing submissions.

79. It would not be productive to reproduce or even extensively summarise the entirety of the respective skeleton arguments but I have of course taken account of those.
80. Counsel for the defendants maintained the stance that there was no basis for concluding Mr Timms had undertaken a deliberate 'blocking' action and that the much more likely trigger for his change of direction, accompanied as he argued it was with effectively simultaneous application of the brakes, was the noisy approach of Mr Molyneux on the offside of the DAF. Emphasis was placed on the evidence of the normal reaction time when considered in the context of Mr Molyneux becoming visible in Mr Timms mirrors.
81. It was suggested that some stimulus caused Mr Timms to steer and brake and that this would have been effectively simultaneous, Mr Timms saying he did so because of Mercedes van approaching in the opposite carriageway. It was argued that the fact of braking and steering suggests a positive act, and not a matter of simply 'wandering' to the left.
82. Counsel suggested that there was either some external stimulus and/or the manoeuvre was deliberate. The defence contention was that it defied common sense for Mr Timms to drive deliberately in the manner that he did but with an intention to hurt Mr Palmer. If that was not the allegation, and it was pointed out that the Claimant did not contend that it was, then the only alternative explanation is that he did it in response to the stimulus of Mr Molyneux's approach combined with his anticipation of the potential danger of the approaching Mercedes.
83. In respect of the attacks on the credibility of Mr Timms it was pointed out that his evidence in the criminal trial was consistent with what he said in this one. It was argued that it would be a "big step" to conclude that he acted maliciously simply on the basis of attacks on his credibility when viewed alongside the agreed expert evidence and when factoring in the act of braking which was "not neutral". Accordingly, the defence suggested that the Claimant's primary case failed.
84. As to the claim that a movement to the nearside when the Honda was alongside amounted to negligence on the part of Mr Timms, it was submitted that such criticism placed too great a burden on drivers; that it was effectively a counsel of perfection that the law did not impose. In the context of the distance between DAF and Mercedes

- it was argued that moving to make space for an overtaking motorcycle, even if not strictly necessary, did not amount to negligence.
85. As to contributory negligence it was submitted that I should adopt the same level as Foskett J said would have been appropriate in *Landau* (75%), had he found there to have been any negligence on the part of either defendant in that case. Counsel did accept that levels of contributory negligence did not tend to be that high and it is also worthy of note that on appeal the court was not required to assess whether the judge at first instance would have been right in attaching such a level of blame to the claimant.
86. The defence contended that there was a significant level of fault attaching to Mr Palmer's decision to try and navigate such a narrow gap in the course of approaching a pedestrian crossing and that, assessed in the context of relative blameworthiness and causative potency, Mr Palmer's action was more blameworthy than that of Mr Timms in moving to the left.
87. The Claimant's submissions were that Mr Timms either committed trespass or was negligent. It was suggested that the answer turned on whether I accepted the evidence of Mr Timms that he did not consider the possibility of Mr Palmer undertaking. It was suggested that if I were to reject this evidence then I should conclude that he knew if he moved left he might obstruct Mr Palmer or did so regardless, which was said to amount to trespass. The credibility of Mr Timms was said to be fundamentally undermined by reference to the issues explored in cross-examination. His version of events was suggested to lack any real credibility.
88. Alternatively, reliance was placed on breaches of Highway Code:
- (i) Mr Timms should have anticipated the potential for someone to be undertaking. He should not have assumed there would be no one on his inside and if he had entertained the possibility there could have been he should not have moved left.
 - (ii) He did not check his nearside mirror to ascertain it was safe to do so. That was said to be the clearest possible breach of the Highway Code. Had he done so and seen Mr Palmer he would not have moved left.
 - (iii) The Highway Code states that if being overtaken you should maintain a steady course. Mr Timms did not do so and that was the cause of the accident.
89. Counsel for the Claimant argued that I should reject the account advanced by Mr Timms on the basis that it lacked credibility but also because it was highly unlikely that Mr Timms did not anticipate the possibility of being undertaken. It was suggested that the mere fact of Mr Molyneux overtaking should not have caused him to move left because no lorry driver proceeding in an appropriate fashion would have done so.
90. It was argued that the manner and time over which the account Mr Timms eventually settled upon emerged undermined its credibility. It was asserted that if it was truly the case that Mr Timms moved left to allow Mr Molyneux to pass, he would have said so years earlier. Even on Mr Timms's own case there was said to be no conceivable reason, tactical or otherwise, for him not to have given the account much earlier, such as in the defence statement. Even leaving aside the moral obligation to give a truthful account there was said to be no possible benefit for him not to provide that explanation. Keeping back why he said he acted as he did could only have been to his detriment. It was submitted that the only really credible explanation is that the case now advanced is a late invention tailored to fit the evidence as it emerged. In exchanges, however, counsel did acknowledge that another plausible explanation was that Mr Timms had undertaken an exercise of "reconstruction" in order to provide himself a narrative with which he could live.

91. Counsel analysed in some detail the development of this narrative and the responses he elicited from Mr Timms when exploring these with him in cross-examination. Reliance was also placed on the efforts of Mr Timms to advance an exculpatory stance, counsel commenting on Mr Timms volunteering the suggestion he had seen people ‘crushed’ between two vehicles before, which counsel suggested was an exercise in what might be considered self-justifying hyperbole. Counsel also challenged Mr Timms’ assertion that the road was very narrow at the point where Mr Palmer was passing on the nearside. Again, this was said to be an exculpatory ‘twist’ on the part of Mr Timms.
92. It was suggested that Mr Timms did not have a good explanation for most of the points that were put to him; that he was argumentative and appeared more concerned with fighting his own corner rather than telling the truth. It was conceded, however, that I would have to take a very negative view of his credibility to find trespass. Counsel suggested that it would be enough if what Mr Timms did amounted to a bit of motoring ‘boorishness’ designed to obstruct the motorcycle.
93. Counsel highlighted that Mr Timms said he did not anticipate an undertaking manoeuvre but agreed the Highway Code requires that he should have anticipated that happening. It was pointed out that Mr Timms also agreed it (undertaking) could happen through a small gap and agreed he should be aware of the potential for motorcyclists passing on either side, particularly in rush hour.
94. Counsel referred to the evidence of Mr Timms that overtaking, such as was undertaken by Mr Molyneux, was a regular event and that he could not change direction every time someone passed close by. Accordingly, it was submitted that it was unlikely that this overtaking manoeuvre was in fact the reason for him moving to the left; that there was nothing remarkable or unusual about what Mr Molyneux did that could explain why he should move to the left. It was submitted that the oncoming van did not in reality provide a sensible explanation. It was also submitted that all the evidence demonstrated that there was always room for Mr Molyneux to pass between the DAF and the Mercedes even if they were alongside one another when he was still in the process of so doing.
95. It was submitted that the evidence from Mr Molyneux established he was riding safely and that his exclamation “Fuck me” was before the sound of the Honda coming into contact with the ground. It was submitted that Mr Timms’ assertion that he was not expecting undertaking was objectively wrong and demonstrated a mindset that Mr Palmer should not have been undertaking at that point. It was argued that this made it more plausible that he should have “expressed” that view by the movement of his vehicle. By way of comment, counsel observed that at times Mr Timms was argumentative and aggressive and particularly so on the topic of whether he should have allowed for the possibility of someone undertaking; the “suicidal manoeuvre” remark.
96. It was posited that in the event of the primary case being rejected there remained a basis for finding that Mr Timms just ‘drifted’ left for no reason; it could simply have been a case of irrational driving. Emphasis was placed on the highlighted passages in *Upton* and the fact that Mr Timms agreed motorcyclists had a habit of undertaking through small gaps. Counsel underlined the ‘mirror, signal, manoeuvre’ mantra and the need to maintain a steady course when being overtaken. He suggested Mr Timms had accepted in evidence the high level of responsibility that rested upon him and as identified in the ‘DVSA Guide to Driving Goods Vehicles’. Counsel also reviewed a number of the cases to which mention has already been made, seeking to distinguish those elements not supportive of the Claimant’s position.

97. Counsel queried whether Mr Palmer was negligent at all in choosing to undertake, suggesting that moving around London by way of two-wheeled transport would be unworkable if doing so (undertaking or filtering through slower traffic) was not effectively 'standard practice'. It was argued that in so far as it might be suggested to be a breach of the Highway Code it was not, in the circumstances that pertained here in respect of Mr Palmer, something that should be found to amount to negligence on his part.
98. As to contributory negligence reference was made to *Sabir* and the potential for 'destructive disparity' to tip the balance in the favour of the Claimant. It was suggested that the logic of para 13 addressing car/pedestrian should apply equally to motorbike/lorry. It was submitted that causative potency points all one way and that the assessment of blameworthiness should go against the Mr Timms given the level of responsibility that attaches to a lorry driver in this situation. It was submitted that any finding of contributory negligence should be limited to 20%.

Discussion

99. One of the overarching issues relevant to the decision in this case concerns my assessment of the credibility of Mr Timms. This has relevance to both the primary and alternative bases upon which the claim is advanced, as well as my assessment of the defence. Accordingly, I address this topic first.
100. I have concluded that Mr Timms lacks credibility for a variety of reasons and in some significant regards. I am sure to the requisite standard that his narrative of the events has developed over time and that he is not a reliable historian as to what happened or why. Even allowing for the fact that he was in shock in the immediate aftermath of the accident, his account to the paramedic, and then to the first police officer to speak to him, was significantly different from that upon which he has finally settled. I do not find that the differences are explicable by reference simply to shock and normal human frailty. His account to the paramedic evidenced a substantial level of confusion as to what he did and why. The same can be said about the record made by PC Briers. In my judgment, Mr Timms was confused about what had happened because his mind had not been focussed on his driving, and even at that very early stage he was trying to find a way to offload responsibility. That may have been to some degree an instinctive defence mechanism as it became apparent to him, as it must have done very quickly, that Mr Palmer had suffered very serious injuries which were to prove fatal.
101. Thereafter, Mr Timms elected to respond 'no comment' to the questions he was asked in the police interview. He was of course entitled to do so. What if any inference arises from that decision is principally relevant to the Claimant's primary case which I will deal with a little later.
102. Other factors which support the conclusion that Mr Timms did not have a clear and/or reliable recall of the accident and its causes are that (a) the defence expert was not provided with the scenario upon which Mr Timms eventually settled and (b) the defence statement did not specifically identify the case he was to advance at trial. These two matters point firmly toward the case now advanced by Mr Timms as being a developing narrative that is not tethered to a clear recall on his part as to what he did or why.
103. It is a matter of common human experience that people tend to rewrite events over time, particularly if they have been traumatic and potentially blameworthy. Someone who has to live with the prospect of moral, and in this case potentially criminal,

- responsibility for taking the life of another human being will cast around for an interpretation of their actions that places them in the best light possible. The degree to which this may be a conscious or unconscious reaction is a matter that has potential relevance to the disposition in respect of the claimant's primary case.
104. I attach rather less significance to the response by the defence solicitors dated the 16th March 2022 and no particular significance to the criticism levelled at the pleading of the defence. The email smacks of lazy composition but does not seem to me to imply a clear understanding on the part of the defendant's lawyer in the civil action as to the case Mr Timms would eventually settle upon. The Defence as served in response to the Particular of Claim is perhaps less explicitly at variance with the Mr Timms's evidence but the precise timing of the development of the 'final version' is of substantially less importance than the fact that it took place. If Mr Timms lacked a clear appreciation of what he did or why, either at the time of the accident and/or in its immediate aftermath, the duration for how long it was before his case crystallised into its current form appears to me to be of less potent significance. Whenever that might have been the fact that it did so strongly suggests that a clear and reliable recall did not exist at the time of the events.
105. On the evidence as a whole it is clear that a consistent account did not develop for really quite a long time, and certainly does not appear to have been communicated to others by the stage upon which the defence expert was instructed. Whilst it is perhaps unnecessary to reach a firm conclusion there does appear to be some merit in the point made by the Claimant's counsel that Mr Timms could have picked up on a reference by Ms Evers at paragraph 8.13 of the report she prepared in October 2021 where she alluded to the possibility that Mr Timms could have reacted to the approach of Mr Molyneux. The degree to which that was a conscious or unconscious mental process on the part of Mr Timms is a different issue but again not one upon which it is necessary or potentially even possible to reach a concluded view. The capacity for people to persuade themselves that they remember things differently from how they actually were is again a matter of common experience.
106. I accept the points made by counsel for the defence that some of what Mr Timms did can be said to be consistent with facts that are agreed and which are consistent with the evidence that he gave; the motorbike ridden by Mr Molyneux was approaching from behind; it was making a loud noise; the movement to the nearside was potentially consistent with a reaction to that; that Mr Timms applied the brakes either simultaneously or at least very shortly after he moved left. The problem with these points is that this is what would be expected given the physics of what occurred. What they do not establish, when considered in the context of the evidence as a whole and looked at in conjunction with my assessment of Mr Timms as a witness, is that Mr Timms is a reliable historian and/or witness.
107. My assessment of Mr Timms, which also has some overarching significance, is that he was not an impressive witness. He was at times somewhat irritably defensive i.e. irritable on his part. His enthusiasm to defend his position smacked of a sense of guilt or recognition of responsibility. Inevitably perhaps it is arguably a case of 'damned if you do, damned if you don't' in terms of someone in the position of Mr Timms being challenged as to events of this nature with the tragic consequences that resulted. There is force, however, in the comment made by Mr Roy as to the potential significance of Mr Timms describing the actions of Mr Palmer as being "suicidal"; the impression gained is that he was choosing overly dramatic terminology as a form of defence. The refusal of Mr Timms to even entertain the possibility that he might have had some responsibility for what occurred certainly created a strong impression that he had

found a narrative with which he could live, and one that was operating as a defence mechanism for him on a variety of fronts. He was, assessed overall, a witness on whose account I would not place much reliance save and in so far as it was supported by other evidence.

Claimant's 'primary case'

108. The claimant invites the inference that because the account of Mr Timms should be rejected as unreliable, and in fact in certain regards be considered potentially untruthful, then the inference to be drawn is that his action in moving to the left was deliberate but not for the reason Mr Timms contends. It is argued that because Mr Timms saw Mr Palmer's motorcycle travelling behind him in a position close to the pavement Mr Timms must have taken a positive decision to try and block an anticipated undertaking manoeuvre. In the course of exchanges with counsel for the Claimant, he agreed that what he was suggesting might be considered a form of 'brake checking' as such behaviour is sometimes described – aggressive or at least deliberately obstructive driving designed to impact upon another road user, perhaps to demonstrate, or at least be reflective of, annoyance at something another road user has done or is anticipated as planning to do.
109. It is argued that the reason Mr Timms did not, until a late stage, come up with the case he eventually advanced during the criminal trial, and has advanced during these civil proceedings, is because he knew he had deliberately blocked the path of an undertaking vehicle and was covering up for that fact. So it is suggested that what he said to the paramedic and the police officer at the scene was incorrect and potentially deliberately false; that he knew he had caused the accident and was engaging in an exercise of dissembling. It is suggested that the motivation on the part of Mr Timms in responding 'no comment' when subject to a police interview was to conceal the fact that he knew what he had done and did not want to be found out as having caused the death of Mr Palmer by carrying out a deliberate action with the motive as alleged. It is submitted that he was seeking to give himself the scope to come up with an innocent explanation that he could try and fit around the evidence that might eventually emerge.
110. It is suggested that it should be assessed as being more likely than not that Mr Timms carried out a deliberate blocking action because:
- (a) If he had done that which he claims, namely steered to the nearside to make room for Mr Molyneux to complete an overtaking manoeuvre, then that is what he would have said to the paramedic and/or to the first police officer who spoke to him and/or by way of answers in the course of the police interview and/or to the defence expert who prepared a report on his behalf (either directly or through the medium of his legal representatives) and/or in his 'defence statement' submitted in the course of the criminal proceedings and/or to his civil solicitors who responded to the letter before action (in terms that have been criticised) and also in pleadings settled on his behalf.
 - (b) It is also suggested that the reason given by Mr Timms for the move to the left is not credible because:
 - (i) It is unrealistic that a lorry driver navigating a busy city environment would be constantly pulling over to allow motorcycles and other two-wheeled traffic to pass on the offside.
 - (ii) Further, on the evidence here there was no necessity for Mr Timms to move to his left as there was space for Mr Molyneux to successfully

complete the overtaking manoeuvre without the need for any assistance on the part of Mr Timms.

111. On behalf of the defence, it is argued that the action of Mr Timms in moving to the left is consistent with it being a reaction to the approach of Mr Molyneux on his offside. It is also suggested that the combination of both steering slightly to the left together with braking makes sense in the context of that which Mr Timms claims to have been doing but does not accord with the Claimant's 'blocking' scenario. It is suggested that the evidence does not support an adverse finding against Mr Timms as to motive on his part in steering and braking as he did. It is pointed out that if such were the case then rather than supporting a charge of causing death by careless driving, as was pursued against Mr Timms in the Crown Court, much more serious charges would have been justified.
112. I am unpersuaded of the Claimant's 'primary' case. With all due respect to the enthusiasm with which this has been pursued, I do not accept that it has a sufficient foundation in the evidence or on inferences that can confidently and safely be drawn from that. I do not accept that it is a necessary corollary of Mr Timms being an unreliable historian that I should conclude he acted intentionally by way of seeking to block an anticipated or potential undertaking manoeuvre. Neither do I consider that to be a necessary or even reasonable inference to draw based upon the developing narrative or the circumstances of the accident. Whilst responding 'no comment' in interview may allow for an inference that, to put it colloquially, a suspect has something to hide, that is not the only conclusion to which such a stance in an interview may lead. In the context of directing a jury in a criminal trial there are checks and balances designed to ensure that the jury does not place undue reliance upon an accused's failure. In the criminal trial that took place here the judge directed the jury specifically that they should not hold against Mr Timms the fact that he remained silent in interview. The failure to mention the detail of his case in the defence statement, about which he was asked in cross-examination, did not rate being mentioned in the summing up at all.
113. In submission, and in his skeleton argument, counsel for the Claimant recognised that the conclusion for which he contended would be a "strong finding" against Mr Timms. It was further recognised that the evidence would have to be assessed with "great care" before reaching such a conclusion. It is suggested, however, that "if the evidence supports this as the likely explanation the court should not shy away from so finding".
114. I have considered the evidence with great care and taken account of all the arguments advanced by counsel both for and against their respective positions. I have concluded on this issue that a deliberate obstructive act on the part of Mr Timms in circumstances of him being aware Mr Palmer was intending to pass along his nearside is in fact the least likely explanation for his movement to the left. Accordingly, on the Claimant's primary case, I have concluded that it is in fact more likely than not that the defence position as to this is the correct one i.e. this was not a deliberate "block" by Mr Timms but rather that the movement to the left had some other cause and/or motivation.

Claimant's Alternative case

115. I am satisfied to the requisite standard that Mr Timms was negligent in steering or allowing his vehicle to move to the left when it was unsafe so to do. I reject his evidence that he had made a specific assessment that no one would be undertaking his vehicle and thus it was safe to move left without checking whether anyone was there.

Whether he in fact had registered the presence of Mr Palmer as he travelled along the road behind him is not determinative of this issue. It was not suggested to him that he was ignorant of the presence of Mr Palmer on Holloway Road, not least because the Claimant was seeking to make a positive case that Mr Timms carried out a deliberate blocking action. Mr Timms certainly should have been aware of what was going on behind him and, if he registered the presence of Mr Palmer either alongside or close to the Nissan Micra, he should have been alerted to the risk that Mr Palmer might catch up and pass the DAF on its nearside. Mr Timms accepted that such a manoeuvre as Mr Palmer was attempting to execute is normal for city driving generally; that it is commonplace to have two-wheeled vehicles passing on both the nearside and offside. As a matter of common experience, this is a normal feature of how traffic flows on busy streets in cities up and down the land. It is not necessary to be a professional driver in order to be aware of that. It is reasonable to expect, however, that the professional lorry driver should have a significant level of awareness of what may be termed 'standard' driving conditions in a busy environment. Mr Timms did not seek to suggest otherwise.

116. For reasons given earlier, I do not accept Mr Timms's evidence that he had made a careful qualitative assessment of what was going on at the moment he pulled left. Insofar as the approach of Mr Molyneux was the prompt for him to do so I am confident that his reaction was not a reasoned or considered one. His focus in his evidence on the proximity of the pedestrian crossing and the bus lane up ahead (which he suggested he assessed as being the earliest someone might choose to pass on his inside) was, in my judgment, an obvious recreation by way of the developing narrative to which I have referred. The description of the accident that he gave to the paramedic was telling. He was already in defensive mode but clearly did not have a mental picture of what he had done and why he had done it.
117. I am satisfied that the DAF did not need to move left and/or brake in order to facilitate an overtaking manoeuvre on the part of Mr Molyneux. Insofar as Mr Timms may have believed it was necessary for him to do so he was wrong. Studying the footage there was ample space and time for Mr Molyneux to pass Mr Timms on his offside notwithstanding the oncoming traffic. It was an unnecessary action on the part of Mr Timms. As already related, however, I am not satisfied that Mr Timms made any such analysis prior to turning the steering wheel and applying the brakes.
118. Something may have caused him to move left or it may just have been inadvertent on his part. In my judgment, the most likely explanation, and the one of which I am satisfied to the requisite standard, is that the movement left was not prompted by a conscious decision on the part of Mr Timms; it was an action born of inattention and notwithstanding his long experience as a professional driver. The approach of Mr Molyneux may have acted as a subconscious trigger but had he been paying proper attention he would have looked in his mirror to check whether there was anything on his nearside or, if he could not be sure one way or the other, he would have maintained a steady course. If he had noticed Mr Palmer earlier then there was a good reason to consider that a motorcyclist travelling close to the pavement might do exactly what so many other two-wheeled users of the highway choose to do i.e. filter past slower moving traffic both on the offside and nearside. If Mr Timms needed some additional warning as to the potential risk of that happening the fact that he had just negotiated a bend where there was a partial cycle path should have triggered that thought in his consciousness. In my judgment he did not think and he did not check and had he done either of those the accident would have been avoided.

119. Had Mr Timms continued travelling in a straight line then there was room for Mr Palmer to successfully carry out the undertaking manoeuvre he was attempting. If Mr Timms had applied his mind to the potential overtaking manoeuvre that Mr Molyneux had in mind the most he might have thought he needed to do was to apply his brakes. It was not in fact necessary for him to do so (there being room for Mr Molyneux even if Mr Timms maintained his line and speed) but that would at least have been a safe response to such awareness as Mr Timms had in respect of the approaching motorcycle on his offside.
120. I do not accept the submission made on behalf of the defence that this amounts to a counsel of perfection. Further, I do not accept the suggestion that such a criticism of Mr Timms driving on this day should be considered as applying the standard of the “ideal driver” as per paragraph 5 of *Stewart v Glaze*. The approach of Mr Molyneux did not represent an emergency situation. Mr Timms rather sought to suggest that it did by referring to previously having seen someone ‘crushed’ between two vehicles. That was in my judgment an exercise in overstatement on his part rather akin to his suggestion that Mr Palmer was carrying out a ‘suicidal’ manoeuvre. Before changing course Mr Timms should have carried out the most basic of checks. Had he thought about what he was doing at all I am confident he would not have done it. The potential risk to anyone that may be undertaking is obvious and the level of risk created by closing the available space extreme. Someone driving a large vehicle through a busy city street where there are people overtaking and undertaking on motorcycles and bicycles of necessity has to exercise a high level of care and had Mr Timms done so this accident would not have occurred.

Contributory negligence

121. The defence suggest that Mr Palmer is responsible for a high level of contributory negligence. They contend for 75%. On behalf of the Claimant a finding of contributory negligence is resisted but, in the alternative, it is suggested that any such finding should not exceed 20%.
122. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides (so far as relevant):

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

123. The proper approach to this apportionment exercise was considered by the Supreme Court in *Jackson v Murray* [2015] 2 All ER 805. The principal issue for the Supreme Court in that case was the appellate approach to apportionment decisions, but it gave some helpful guidance on the approach that should be taken at first instance. Lord Reed, giving the majority judgment, reviewed the authorities and noted the emergence of the concepts of 'respective causative potency' and 'respective blameworthiness' as aids to forming a conclusion on just and equitable apportionment. He observed more generally (at paragraph 27):

- “27. *It is not possible for a court to arrive at an apportionment which is demonstrably correct. The problem is not merely that the factors which the court is required to consider are incapable of precise measurement. More fundamentally, the blameworthiness of the pursuer and the defender are incommensurable. The defender has acted in breach of a duty (not necessarily a duty of care) which was owed to the pursuer; the pursuer, on the other hand, has acted with a want of regard for her own interests. The word 'fault' in s.1(1) of the 1945 Act, as applied to 'the person suffering the damage' on the one hand, and the 'other person or persons' on the other hand, is therefore being used in two different senses. The court is not comparing like with like.*
28. *It follows that the apportionment of responsibility is inevitably a somewhat rough and ready exercise (a feature reflected in the judicial preference for round figures), and that a variety of possible answers can legitimately be given. That is consistent with the requirement under section 1(1) to arrive at a result which the court considers "just and equitable". Since different judges may legitimately take different views of what would be just and equitable in particular circumstances, it follows that those differing views should be respected, within the limits of reasonable disagreement.”*
124. Further broad guidance as to the type of factors it is right to take into account, and how to weigh them, can be garnered from cases decided on what may be roughly comparable facts. Every case must, however, be decided on its own facts, and this is not an apt field for hard case law and well-founded distinctions between cases. Very often a party can cite a first instance decision in this area for their purpose. It is clear from reviewing a number of examples of apportionment that have been drawn to my attention that a range of outcomes has been reached and the exercise of making a just and equitable apportionment of liability is extremely fact sensitive and highly evaluative. It is the precise combination of facts in this case that must be determinative. I am required to consider relative causative potency and blameworthiness by reference to the acts and omissions of Mr Palmer and Mr Timms. That turns on the options they had in the circumstances that faced them and the principles that should have guided the exercise of those choices.
125. Taking all of this into account, I turn to the relative assessment of 'causative potency' and 'blameworthiness', as directed by the authorities. I bear in mind that these concepts are designed as aids to analysis and judgment rather than requiring rigidity of categorisation – far less mutual exclusivity – of the relevant considerations.
126. On the question of causative potency I attach particular weight to the creation of a situation of hazard in circumstances of a large vehicle having to negotiate a busy city environment where there are many two-wheeled road users. I also weigh the disparity in the vulnerability of the vehicle creating the hazard, and that of the other traffic being subjected to it – or, as it is put, the potential 'destructive disparity' between the two. The dangers large vehicles pose to cyclists and motorcyclists are very well known and Mr Timms could not but recognise that when questioned about this topic.

- The tragic incidence of harm being caused by large vehicles to two-wheeled road users are all too common and everyone who drives in the city is fully familiar with the risks arising therefrom. Mr Timms, as a professional driver, should have been all too well aware of the danger his vehicle could pose to others, and as already mentioned he did not shy away from that fact. There was a very substantial destructive disparity.
127. That does not, however, absolve Mr Palmer from having a responsibility to try and ensure his own safety. The gap was undoubtedly a narrow one. That was apparent to Elisca Renwick, the driver of the Nissan Micra, and it was also apparent to Mr Molyneux. The fact that Mr Palmer could potentially have successfully negotiated the passing manoeuvre if Mr Timms had not diverted from his line of travel is not a complete answer. Neither is it irrelevant that Mr Palmer chose to begin this manoeuvre as he and Mr Timms were approaching a pedestrian crossing, albeit one where the traffic had (at that moment) precedence over pedestrian users.
 128. Apportionment has also to be assessed according to the limited options that were in fact available to Mr Palmer for avoiding the hazard once it had been created. The causative potency of Mr Palmer's decision to ride into a narrow space must be fairly reflected in the apportionment exercise. But once Mr Timms steered the lorry so as to close that gap there was nothing Mr Palmer could do about it. He had no time to react and no space in which to take avoiding action.
 129. The blameworthiness attaching to the Mr Palmer is in practical terms limited to his decision to trust the driver of the lorry to maintain his position on the road and not to veer left. The blameworthiness attaching to Mr Timms was to fail to check whether his driving action was a safe one to carry out and/or to steer to his left not knowing if there was anyone on his nearside. All drivers, but in particular lorry drivers, have to keep in mind blind spots.
 130. In my judgment the blameworthiness of Mr Timms significantly outweighs that of Mr Palmer. Each of the errors perpetrated by the parties was relatively venial. Such things happen regularly without an adverse outcome. They each perpetrated a species of common or garden negligent driver error that, absent consequences such as resulted here, is not worthy of particular moral blame and, even if observed, would be unlikely to promote much if any reaction on the part of the observer. It is the simple unfortunate concatenation of circumstance that has caused such commonplace errors to result in these tragic consequences. There can be few drivers who haven't failed to look over their shoulder or in their mirror as they should have done. There will be few riders of two-wheeled conveyances who have not at times chosen to weave a way through busy traffic when perhaps holding back might have been the better and safer option.
 131. Weighing all this up, a robust and common-sense approach seems to me to dictate that apportionment should be one third/two thirds in favour of the Claimant. Mr Timms moved to his nearside without checking as he should have done and/or in circumstances where he could not be sure it was safe so to do. He moved to the left without there being any actual need for him to do so at all. He moved left when there was someone on his inside who needed all the space available even before Mr Timms changed his line of travel. The causative potency of the conduct of each is weighted more heavily toward Mr Timms. Both were at fault to some degree but Mr Timms bears the greater responsibility such that Mr Palmer's contributory negligence is to be assessed, as I have indicated, at one third.
 132. For the reasons set out above there will be judgment for the Claimant on the issue of liability with damages reduced by one third in respect of contributory negligence.