



Neutral Citation Number: [2019] EWHC 1245 (QB)

Case No: HQ17PO3273

IN THE HIGH COURT OF JUSTICE  
QUEENS BENCH DIVISION

Royal Courts of Justice  
Strand  
WC2A 2LL

Date: 16 May 2019

**Before:**

**HER HONOUR JUDGE MELISSA CLARKE**  
**Sitting as a Judge of the High Court**

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**Between:**

**CATHERINE PODESTA**

**Claimant**

**- and -**

**(1) RAYYAZ AKHTAR**  
**(2) AVIVA INSURANCE LIMITED**

**Defendants**

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**Mr Charles Woodhouse** (instructed by Irwin Mitchell) for the **Claimant**  
**Mr Niall Maclean** (instructed by DWF LLP) for the **First and Second Defendants**

Hearing dates: 1, 2 and 3 April 2019

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## **APPROVED JUDGMENT**

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

## **Her Honour Judge Melissa Clarke:**

### **Introduction**

1. This personal injury claim arises out of a road traffic accident in the early hours of the morning of 19 December 2015 in which the Claimant pedestrian, Miss Catherine Podesta, was struck by a car driven by the First Defendant Mr Rayyaz Akhtar on Aldwych, London WC2.
2. Liability and causation are in dispute and Master Thornett directed that they be tried as preliminary issues. This is my judgment following a two day trial heard over three days.
3. Master Thornett also directed that the parties could rely on the evidence of expert accident investigators. The Claimant's expert is Mr Hague and the Defendants' expert is Mr Stedman.

### **Relevant law**

4. The issues are whether the standard of the Defendant's driving fell below that of a reasonable driver in the circumstances that prevailed at the time, and whether this failure was causative of the accident. It is for the Claimant to prove her case on both liability and causation on the balance of probabilities.
5. I must be careful not to impose a counsel of perfection with the benefit of hindsight, or as put by Laws LJ in *Ahanonu v South East London & Kent Bus Company Ltd* at [23], not to "...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."
6. The Defendants deny that Mr Akhtar was negligent. They plead that the collision and any injury loss or damage was caused by, or alternatively contributed to by, Miss Podesta's own negligence. If I find that Mr Akhtar negligently caused the collision, Miss Podesta concedes that she contributed to it by failing to exercise such care for her own safety as was reasonable in the circumstances. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides that in that case I must reduce her damages to such extent as is just and equitable having regard to her share in the responsibility for that damage.

### **The scene of the collision**

7. Aldwych is a curved, crescent shaped road, which makes referring to it by compass points difficult as it changes directions as it progresses. It is one way, running from where the Strand meets Lancaster Place (which runs over Waterloo Bridge) in a crescent back to the Strand just before St Clement le Danes church and the Royal Courts of Justice. Kingsway runs south from Holborn and terminates halfway around the crescent. Between the entrance to Aldwych and Kingsway is the Waldorf Hotel. On the opposite side of Aldwych, on a spit of land forming the centre of the crescent north of the Strand, are well-known buildings which include (in order from Waterloo Bridge) Marconi House, India House, Bush House, and Australia House. The Waldorf

Hotel and India House face each other. For ease of reference I will refer to the Waldorf side of the road as the west and the India House side as the east.

8. Aldwych is a very wide road which accommodates four lanes of uni-directional traffic as well as parking bays on the sides and a central section I will come on to describe. It has a 30 mph speed limit. The accident occurred on that part of the road between the Waldorf Hotel and India House. Here the road is split in two carriageways by a central long, thin, kerbed traffic island, with a crossing space towards its north end. The eastern carriageway has a section of hatching on the nearside, delineating the traffic island, which the experts have measured at 1.3 m wide. On the offside there are diplomatic parking bays outside India House. Nonetheless there is still room for two lanes of traffic if needed, although the lanes are not marked by paint.
9. The traffic island is flanked by two taxi ranks also in the centre of the road. At the north end of the traffic island, also in the centre of the road, is a lamp post with two street lights suspended from it. On each of the east and west sides of the Aldwych are street lights just slightly further south than the end of the traffic island. At night there is also light from the various buildings on both sides, in particular from the lit arches on the ground floor of India House and from the Waldorf Hotel.
10. Fairly shortly after entering Aldwych, and well before that traffic island, is painted on the road of the western carriageway "EUSTON" and on the eastern carriageway "CITY". That is to warn traffic intending to travel up Kingsway to Holborn and beyond that they should progress in that western carriageway, and to warn traffic intending to go up the Strand to the City to move to, or stay in, the eastern carriageway.

### **The background to the collision**

11. The Claimant Miss Podesta is now 27 years old and on the date of the index accident was a few days short of her 24<sup>th</sup> birthday. She had a job on the graduate scheme at BP. On the night of 18 December she had been at the BP Graduate Winter Party at a venue in Covent Garden. That was an event she was in part responsible for organising. It started at about 6pm and she left at around 2.30am, during which time she was drinking mainly cocktails. At about 3am the next morning, she was walking with a group of four other colleagues and friends to a night bus stand to return home to Clapham, when they came to Aldwych.
12. It is not disputed that by the time Miss Podesta reached the Waldorf Hotel on Aldwych, she and her group of friends were not walking all together. Mr Thomas Hardinges and Miss Julie Crichton were together, some distance ahead of Miss Podesta who was walking alone. Some distance behind her and walking together were Mr Ewan Crichton and Mr Stuart Marshall. They all intended to cross Aldwych and make their way down the steps at India Lane, beside India House, to access the Strand and the night bus stand.
13. It is not disputed that Miss Podesta crossed the western carriageway of Aldwych without incident, and reached the traffic island. By the time she did so Mr Hardinges and Miss Crichton say they had already crossed the full width of Aldwych, including the eastern carriageway, and had continued walking. Miss Podesta then stepped off the traffic island and began to cross the eastern carriageway herself. While doing so,

she was struck by a Mercedes E220 taxi driven by the First Defendant Mr Akhtar, who was earning a living as an Uber driver. He had been driving taxis for about 2.5 years. His insurer is the Second Defendant.

14. Mr Akhtar's evidence has changed in some respects during the course of the proceedings, as I will come to explain. However he has been consistent from his first statement to the police minutes after the collision, in an interview under caution that day, to his pleadings, his witness statement and in oral evidence, that he did not see or notice the Claimant until she collided with the nearside front of his car.

#### **After the collision**

15. Miss Podesta was knocked unconscious and significantly injured. It is common ground that it is likely that her eventual landing place was that part of the road which was marked with bloodstains and which the police captured in photographs. This is close to the northern end of the traffic island, by the crossing point and double central street lamps. She was attended within minutes by police and then helicopter paramedics and taken to hospital. She sustained two brain bleeds (a left traumatic haematoma and a left traumatic subarachnoid haemorrhage); a left posterior haematoma; a left frontal contusion; a fractured maxilla and broken nose; a non-displaced fracture of the transverse process of the T1 vertebrae; a dislocated right acromioclavicular (shoulder) joint; a retrosternal haematoma and a moderate-severe (definite) brain injury. On 21 December 2015 she underwent manipulation of her fractured nasal bones under anaesthetic. On 17 June 2016 she underwent a Weaver Dunn reconstruction of her right shoulder. She claims some deficits which it is not necessary to go into for the purposes of this judgment. I am pleased to note that despite these difficulties she has maintained her employment with BP.

#### **Evidence from the scene of the collision**

16. Mr Akhtar told the police that evening that he had not been drinking as he was a non-drinker, and that he had not been using or distracted by his phone before the accident. Both appear to be borne out by the police – first in his negative breathalyser result, and second in an examination of his phone at the scene of the accident. He readily agreed to unlock it to enable the police access to it.
17. PC Peter Traylor of the Serious Collision Investigation Unit, Metropolitan Police attended the scene of the collision at 04.58 hours. He filed a witness statement and intended to come to court to be cross-examined, but fell ill and so could not attend. Mr Maclean for the Defendants asks that I consider his evidence and give it that weight which I consider proper. PC Traylor says in his witness statement that the Aldwych had been sealed off by the time he arrived, and as part of his investigation he scanned and photographed the collision scene; inspected the roadway including the traffic island, and inspected and photographed the Mercedes. The Mercedes was recovered and he subsequently examined it again later that day at the Police Vehicle Recovery and Examination Suite in Perivale. He attaches the photographs he took at the scene to his statement.
18. PC Traylor says that he found no marks in the western carriageway. He found blood and medical paraphernalia in the nearside lane of the eastern carriageway. He found clothes which appeared to have been cut from Ms Podesta close by, in the crossing

place on the traffic island. He said he could find no evidence of the impact area: no debris, no pick-up point and no tyre marks. On the Mercedes, the nearside corner of the front bumper was cracked and split and hanging loose. There were scuffs over the nearside front headlamp glass and at the nearside edge of the bonnet. There was a scuff mark up the A-post with a small dent half way up. There was some disturbance to the road film on the nearside front wing and bonnet.

19. PC Traylor said there was no evidence to indicate that Miss Podesta had gone on or over the roof or down the nearside of the car: *“All the damage and contact on the car was localised to the nearside front bumper and bonnet, which suggested this was not a high speed impact but more of a ‘glancing blow’.”* In his investigation the following day he also found a small dent at the top nearside edge of the bonnet. Although he found all four tyres were significantly worn and so made the car unroadworthy, he did not believe that to have caused or contributed to the collision. He said that in his opinion: *“the initial point of contact was the nearside of the front bumper. The pedestrian had been hit at the front corner of the car and then rolled down the side of the car. There were no signs of a head impact with the vehicle, so it is most likely she hit her head when she fell to the ground. There was no blood, hair, body tissue or remnants of clothing on the car”.*

#### **Witness evidence of the collision**

20. Miss Podesta has no recollection of the accident, having sustained a 2 hour retrograde amnesia and a 36-hour post-traumatic amnesia. None of Miss Podesta’s friends saw the actual collision although Mr Hardinges and Mr Crichton heard it. They only saw the aftermath. The Claimant and all four friends filed witness statements and attended court and were cross-examined. Mr Hardinges attended by videolink from the Caribbean where he is working. All were good careful credible witnesses who did not stray from their actual recollections. In fact their evidence is of little relevance to the issues I have to decide. The friends all say they saw her in the road a matter of moments after Mr Hardinges and Mr Crichton heard the impact, and that she was quickly surrounded by concerned passers-by. I accept that evidence. They also gave evidence of their alcohol intake and their impression of Miss Podesta’s level of intoxication. They say that they were tipsy but not drunk, having been drinking not excessive amounts over a long period of some 8 hours or more, and that it did not affect their ability to walk, for example. Mr Marshall described Miss Podesta as the least tipsy of all of them. This fits with her evidence that she had organising responsibilities at the Christmas party. I also accept that evidence.
21. A bystander called Mr Bupinder Saini was present on Aldwych during the collision and gave an account to PC Hannant. However his later witness statement on 12 January 2016 makes it clear that he did not see the actual collision either. I will return to his evidence in due course.
22. Accordingly the only witness to the actual collision is the Defendant, whose evidence I will come back to.

#### **CCTV evidence**

23. That would provide me with a very unsatisfactory basis to make findings sufficient to resolve this claim, if I did not have further evidence in the form of some CCTV

footage of the collision which has been retrieved from a single camera high up on a building on the west side of Aldwych, south of the Waldorf Hotel. This camera was facing north east with a line of sight down the curve of Aldwych to the double lamp post at the north of the traffic island. The experts agree that the camera from which it is taken is about 100-120m from the area of the accident, and about 6.5m above the carriageway. Accordingly it affords only a distant view from a very different vantage point to that of Mr Akhtar as the driver of the Mercedes.

24. There are a number of other factors affecting the quality of the evidence the CCTV provides. Firstly, the view that it shows is in large part obscured by the branches of a tree. It is necessary to piece together what may have happened from glimpses between branches. It is lucky that the tree was not in foliage as I suspect nothing useful would have obtained from it. Second, there are limited light levels as the images are taken at night. It is agreed by both experts that the CCTV footage may not represent the actual lighting conditions at the time. Mr Stedman for the defendant says that it does not represent the actual lighting, and Mr Hague says he cannot tell whether it does or not without a direct comparison to the actual scene, but I am satisfied that it is more likely than not that it does not represent the actual lighting. That is because I also have some good quality photographs taken by the police of the vicinity of the accident shortly afterwards, which are different and I am satisfied give a better idea of the actual lighting conditions, although they may also not be entirely accurate. Third, although one can zoom in on the CCTV images, at the level of magnification required the images become more pixillated and less distinct.

#### **Mr Saini's evidence**

25. PC Hannant recorded in his police notebook that Mr Saini said "*She was in the middle of the road. She looked like she was ready to cross. The car stopped and she stopped. The lady then ran into the road and the car sped off. The car was approx. 10 metres away. I would estimate he was driving at 20 – 25mph but I was a little way behind*".
26. The police then visited Mr Saini who made a witness statement dated 12 January 2016, in which he confirmed he did not actually see the collision. He said he was standing on the corner of Aldwych and Catherine Street (which is to the south of the Waldorf Hotel) when he "*saw a young woman run across the first lane of the Aldwych... I looked back in my direction of travel, with woman in my peripheral vision to the right. She looked to have almost stop, almost hesitate, then run further into the road. At this point I looked on in my forward direction without woman in vision. Not less than 1-2 seconds there was the sound of the collision to where I saw the woman fall to the ground*". He stated his opinion of who was to blame by saying "*the injured lady ran into the road where and when she shouldn't have*".
27. It common ground that the CCTV shows that: (i) Miss Podesta did not run from the traffic island into the carriageway and into the path of the Defendant, rather she walked; (ii) nor did she hesitate on the traffic island before running on, rather she stood waiting for 4.2s; (iii) nor did the Mercedes stop before the collision and then speed off, rather it travelled without stopping or applying brakes until after the collision with Miss Podesta. It then stops very quickly, and close to where she fell according to Stuart Marshall whose evidence is not disputed.

28. Mr Saini appears to be mistaken on all of these points. His account about the Mercedes stopping and speeding off is also difficult to reconcile with his evidence that he did not see the collision itself because he looked away. I conclude that I cannot place any weight on Mr Saini's evidence, save that he was where he said he was and that he did see both Miss Podesta and the Mercedes, given that he did not come to court for that evidence to be tested and to enable him to seek to explain those inconsistencies.

### **The Defendant's evidence**

29. Mr Akhtar in his initial statement to police at the scene, under caution, said he was "*driving along as normal and she stepped out and I hit her*". When asked if he had noticed Miss Podesta, he said "*Not at all*". He said "*she just walked out*" and it had happened very quickly. This was recorded in a police notebook which he signed.
30. In his pleadings and witness statement he repeated that he didn't see Miss Podesta until she hit the nearside front corner of his car. He described her as coming up the wing/bonnet before falling to the road. However he gave an explanation for why he didn't see her which he had not previously told the police. In his defence he pleaded that as he approached the vicinity of the Waldorf Hotel:
- i) He was aware of pedestrians standing to his nearside on the central kerbed traffic island and on the road waiting to cross. They were stationary and looking at traffic;
  - ii) The Claimant stepped from behind a group of stationary pedestrians into the path of his car giving him no opportunity to avoid her.
31. This was also his position in his witness statement, and he maintained that was his recollection in cross-examination. However his account that there were pedestrians on the central island between his approaching car and Miss Podesta, and she stepped out from behind them, cannot survive scrutiny of the CCTV images, as Mr Maclean anticipated in his skeleton argument and as Mr Akhtar accepted in cross-examination. Mr Akhtar conceded that the CCTV shows there are no others between Miss Podesta and his approaching Mercedes and that he has misremembered this. He said he thought he was confused with the group of people which, it is not disputed, gathered around Miss Podesta immediately after the accident. Mr Maclean fairly points out that those people must have come from somewhere. Although they are not visible on the island south of the crossing point in the CCTV, he submits that they might have been north of the crossing point or further up Aldwych, Alternatively, Mr Maclean suggests that they are a figment of Mr Akhtar's imagination, created after the event to justify why he did not see the Claimant when she was there to be seen. Mr Maclean asks me to ignore Mr Akhtar's detailed evidence in cross-examination about that group of pedestrians.
32. Despite this mistaken belief, I found Mr Akhtar to be a careful witness and I think he came to court to assist it to the best of his recollection. I am satisfied that his recollection is wrong in a number of material ways, but I do not believe he was lying. He made a number of candid admissions and accepted that the reality of the CCTV images undermined his recollections.

33. In cross-examination Mr Akhtar said that he was reasonably familiar with the Aldwych area. On that night there were quite a few people about as it was a few days before Christmas. He said that the Covent Garden area was busy at the time. He said that once he crossed Waterloo Bridge and into Aldwych, and after crossing from the west carriageway to the east towards the City, he knew that he was approaching an uncontrolled pedestrian crossing point by the Waldorf Hotel. He said that he took into consideration that at 3am just before Christmas pedestrians are not always as careful as they ought to be, and might be the worse for wear.
34. He described his recollection of a number of people standing on the traffic island obscuring where he said Miss Podesta eventually emerged from. He said that he was aware that those pedestrians were in the process of crossing the road, but waiting to cross this section of the carriageway. He agreed with Mr Woodhouse that they were standing, not moving, and looking at the traffic coming from his direction of travel.
35. Mr Akhtar agreed that around the traffic island was a well lit area with street lamps nearby. He said he had "*no problem*" seeing the pedestrians on the island. He agreed with Mr Woodhouse that he was aware someone might step into the road and that he must have been alert to that possibility. He said "*I approached cautiously. Aldwych goes slightly uphill. If you are not on the accelerator you slow. I came off the accelerator.*" He said he was slowing down and ready to apply the brake if required. I am satisfied that he did not come off the accelerator, and he is mistaken in that. That is because I am satisfied that the point of impact was somewhere alongside the traffic island to the south of the crossing point, and that would have required him to accelerate from the 19 and 20mph the experts agree he was travelling while he was crossing from the western to the eastern carriageway and once established in the eastern carriageway respectively. That latter point is when he had an unobstructed view of the traffic island.
36. Mr Akhtar said that he kept the pedestrians on the traffic island under close observation. He said "*they were right there in my line of vision*".
37. Mr Akhtar in cross-examination agreed that there was nothing else to distract him on his offside, and he had no obstructed view. Despite this, he maintained in oral evidence what he had told the police on the night in question, that he did not see Miss Podesta at all and the first time he was aware of her was when he hit her. In fact I am satisfied from the CCTV images that she was both the closest pedestrian on the traffic island to his approaching car and the only pedestrian on the island. I do not consider on the balance of probabilities there was anyone at the very far north of the island because I can see a taxi parked in the rank to the north which does not appear to be obscured by any figures.
38. Accordingly, Mr Akhtar's evidence that he saw pedestrians "*right there in my line of vision*" could be inferred as a reference to Miss Podesta. Mr Maclean says that I should not make such an inference as there evidently was no such group of pedestrians on the island, so Mr Akhtar cannot have noticed them. Once again, he described them as a fiction. Although that is a difficult concept given the clarity of Mr Akhtar's apparent recollection, I accept it. If Mr Akhtar had innocently created an ex post facto fiction in his mind that there was a group of pedestrians on the island in order to justify to himself why he did not see Miss Podesta, as he has appeared to have done, then I understand that he may have a clear mental image in his mind which



he is able to and did describe to the court. Nonetheless it did not exist. I am satisfied on the balance of probabilities that he did not see Miss Podesta while she was standing on the island, or beginning to move off the island.

39. Mr Akhtar agreed that if he had seen Miss Podesta moving into the road he would have moved to the right, or slowed, and kept her under close observation. He agreed that he should have noticed her as soon as she started moving and been alert, ready to brake hard if necessary. Mr Woodhouse put to him that *“the reason you weren’t alert is that you were not observing as you should, and failed to see her”* and he said *“Yes, I suppose so”*.

### **Accident Reconstruction Experts**

40. I have considered the CVs of both experts and am satisfied that they have the experience and expertise to assist the court as experts in accident reconstruction.
41. Mr Hague filed a report dated 10 July 2018, a letter dated 19 December 2018 and a joint statement with Mr Stedman of 25 March 2019. Mr Stedman filed a first report dated 10 July 2018, a letter dated 14 February 2019, a second ‘supplementary’ report dated 3 March 2019 and the joint statement with Mr Hague of 25 March 2019. Both attended court and were cross-examined and re-examined.
42. I found Mr Hague to be a careful, thoughtful expert witness who generally confined himself to opining on matters properly within the province of the expert and did not seek to usurp the court’s fact-finding function. His opinions were supported by observations, measurements, evidence and literature. Mr Maclean criticises him as vague and evasive, but I did not find him so. He criticises Mr Hague for saying in his first report that Miss Podesta *“could have been projected 10 metres”* during the course of the collision, and in the joint statement that *“based on an assessment of her position in the CCTV footage and also the likely distance she would have been projected”*, he has assessed that she was most likely crossing around 10m south of where she came to rest. The emphases are mine. Mr Maclean submits that represents a hardening of Mr Hague’s position which goes, adversely, to his objectivity. I am not with Mr Maclean. Mr Hague explained the difference by saying in his opinion she would have been projected (by which he meant moved), but that the distance she could have been projected was 10m, and I accept that distinction.
43. Conversely, I found Mr Stedman a less than satisfactory expert witness. Mr Woodhouse submits in terms that Mr Stedman did not fulfil his duty of independence to the court. He put it directly to Mr Stedman in cross-examination that he sought at every stage to present the most favourable of any possibility in order to exonerate Mr Akhtar of blame. Mr Stedman denied it.
44. There are a number of aspects of Mr Stedman’s evidence which trouble me and lead me to accept Mr Woodhouse’s submission. The first is his first report. Mr Stedman wrote that report having been specifically instructed that the CCTV was not to be enhanced in any way. That meant that he could not discern much from the CCTV, and he set out the various limitations in paragraph 6 of his first report. I do not criticise him for this, as whether or not he could use a zoom within the terms of the prohibition on enhancement was unclear. However, he wrote his first report adopting Mr Saini’s evidence that Miss Podesta had run into the road, although it is clear from his report

that he also had the Defendant's own witness statement that she had walked in front of him. Mr Woodhouse put it to him that he should not have treated Mr Saini's evidence as fact and ignored Mr Akhtar's own contradictory evidence, and that he did so because that placed Miss Podesta in the road for the least possible time, and so was most favourable to Mr Akhtar. Mr Stedman's responses did not, in my opinion, show that he properly understood the criticisms that were fairly, in my view, being made.

45. Secondly, once it had been confirmed to Mr Stedman that the prohibition against enhancement did not preclude use of the zoom function, and once he was provided with the proprietary software which allowed the zoom functionality which Mr Hague had utilised in writing his first report, Mr Stedman wrote a letter of 14 February 2019 confirming that he had now viewed the CCTV zoomed in. It should have been apparent to him that, amongst other things, Mr Saini's evidence that Miss Podesta had run into the collision was wrong, and that the basis of his first report was, therefore, wrong. He certainly now accepts that to be the case. However in his letter he said "*There is no advantage in using the proprietary viewer or zooming in to determine the issues in this case... it's not possible to determine anything useful by zooming in... It is also not possible to positively identify Miss Podesta*". This letter was used to support the Defendants' application to exclude Mr Hague's evidence from trial.
46. Mr Woodhouse described his assertion that zooming in the CCTV conferred no advantage as 'preposterous'. Certainly, I am satisfied that it is wrong, as is apparent from the next section of this judgment. The zooming function has enabled me to establish a very clear chronology and make a number of findings about matters which remain in dispute. It has also enabled a large number of points of agreement to be reached, including that the figure wearing black and white on the traffic island and then in the collision is indeed Miss Podesta. In cross-examination Mr Stedman maintained that it was still not possible to positively identify Miss Podesta although he did not dispute that it was her. I accept Mr Woodhouse's submission that this was 'hair-splitting'.
47. Finally, I consider that Mr Stedman displayed in cross-examination an intransigence and unwillingness to alter his opinion even when it was demonstrated to him that it must be wrong. In particular, his opinion about Miss Podesta's position on the island as she stepped off it. Mr Stedman opines that it is more likely than not that she stepped off the traffic island when her body is seen to block the view of the lamp post at the north end of the island. He accepted in cross-examination that because of the line of sight of the CCTV, that would put Miss Podesta very close to the lamp post and the crossing point when she did so, which is where the bloodstains are in the road. That would mean that she was carried no or very little distance by the impact. However, in the joint statement he expressed the opinion that she was either projected or carried on the Mercedes before coming to rest, and that given that fact, no relevance can be made between the impact and her point of rest.
48. Mr Woodhouse drew Mr Stedman's attention to his calculation that the Mercedes had been travelling at 19mph at a point 85-88m from where Miss Podesta came to rest and some 7.8 seconds before impact. Mr Stedman agreed these measurements. Mr Woodhouse put to him that simple mathematics meant that if the Mercedes carried on at a steady speed of 19mph as Mr Stedman had opined it probably did, then the impact would have been well short of the traffic island, within the taxi rank to the south of it, and it would mean she had been projected or carried some 19-22m in the

collision. Mr Stedman agreed that this was not consistent with the CCTV footage. Alternatively, Mr Woodhouse put to him that if Mr Stedman was right that the point of impact was by the crossing point, the Mercedes would have to have reached an impact speed of 30mph to cover that distance in the time. Mr Stedman agreed the mathematics of that, but conceded that at an impact speed of 30mph (i) it would be unlikely that there would be no movement forward of Miss Podesta; and (ii) he would expect to see different and greater damage to the car. The damage caused in the collision, he said, was not consistent with a 30 mph impact. However, when Mr Woodhouse put to him the obvious conclusion that Miss Podesta must have stepped from the island further south than the lamp post and crossing point, Mr Stedman said “*I’m happy with my analysis, I won’t be moved from that*”.

49. It is the duty of an expert to help the court on matters within their expertise, and this duty to the court overrides any obligation to the person from whom they have received instructions (CPR 35.3.). Mr Stedman made signed declarations to that effect. In my judgment Mr Stedman did not treat the Defendants’ case with the impartiality which his duty to the court requires.
50. This has an effect on my consideration of Mr Stedman’s evidence, in particular, about the typical perception response time of drivers to hazards in the road. This is an area of significant dispute between the experts in this case.
51. Mr Hague’s opinion is set out in para 9.6(1) of the joint statement: that the typical response time of a driver to a previously unseen and unexpected emergency hazard emerging into view is around 1.0 second and is typically between 0.75 and 1.5 seconds. He relies on section 18.5 of a text relied on by both experts, ‘Forensic Aspects of Driver Perception and Response’ – Krauss et al, 4<sup>th</sup> Edition (“Krauss”) which states that when dealing with a clear hazard which appears nearly directly in front of a driver who is looking ahead, i.e. not in their mirrors “*it is probable that something like 90-95 per cent of perception response times for such situations will be in the range of 0.75 to 1.5 seconds*”.
52. Mr Stedman at para 9.6(9) of the joint statement relies on Krauss at Chapter 18.9, which he describes as a summary of Chapter 18. In Mr Stedman’s own words, he says that “*The published research deals with [a] simple or straightforward emergency situation in which a hazard is relatively conspicuous and first appears directly ahead or nearly so, it states most drivers will respond in about 1.5 to 2.0 seconds. The minimum time to respond is unlikely to be much less than 0.75seconds.*”
53. Mr Hague accepts that “*most drivers will respond in about 1.5 to 2.0 seconds*” is a quote from Krauss but he believes that it is ambiguous, and Mr Stedman has misinterpreted it. Mr Hague says that wording could suggest that most drivers respond between 1.5 and 2 seconds (i.e. only a minority are faster or slower), or that most drivers respond by 1.5 to two seconds (i.e. only a minority are slower but many may be faster). He argues that the ambiguity resolves on consideration of what is said in the Chapter as a whole and the studies which underlie it, and in particular in the paragraph he relies on which is that 90-95% of people will respond in the range of 0.75 to 1.5 seconds. I agree with Mr Hague’s interpretation and find that 90-95% of drivers will respond in 0.75 to 1.5 seconds, that almost all will respond in 2 seconds and that the minimum time to respond is unlikely to be much less than 0.75 seconds.

54. Mr Stedman opines that the perception response time will be affected by factors including low light; expectancy (whether the driver was expecting the hazard or not); target conspicuity (whether the hazard was conspicuous or not); location of the target relative to the vehicle's path (in this case he opines that Miss Podesta came from the nearside and not the front); the driver's view (whether he was looking at the hazard or not); and the cognitive load (whether the situation into which the hazard comes is a simple one or made complex by other potential hazards or distractions).
55. Mr Hague's view is that whether the perception response time needs to be altered in low light depends on the circumstances. His view is that in the hours of darkness in a well lit street, he would not alter it. On an unlit road where a pedestrian cannot be detected until close by, he would. He notes that Krauss at section 25 says that there is no basis for arbitrary increases in PRT simply because it occurs at night. This is something I will bear in mind when considering the circumstances as a whole.
56. In relation to conspicuity of Miss Podesta, this is not something which was raised in the Defendants' pleaded case or by any of the witnesses. It has been raised only by Mr Stedman, and adopted by Mr Maclean in his submissions. Of course Mr Akhtar in his pleadings and witness statement said she was concealed by a group of people. Nonetheless in oral evidence when he conceded she was not, he agreed she was there to be seen. Miss Podesta was wearing a white dress with a black jacket over and black tights. The white of her dress can be seen on the CCTV camera image taken from 100-120m away. Mr Saini appears to have seen her without difficulty from about 40m away. There is no evidence that she was inconspicuous. I am satisfied on the balance of probabilities that Miss Podesta was sufficiently conspicuous that the perception response times should not be changed.
57. The factors raised about Mr Akhtar's view and the cognitive load cannot, in my judgment, survive his clear evidence that there were no other distractions around him, and that he had a clear view of the traffic island from when he moved into the Eastern carriageway.

### **Findings from CCTV evidence**

58. I have viewed the CCTV evidence a number of times in court – at full speed, by frame, forwards and back and in full image as well as zoomed in. The experts agree there is a constant time of 0.075s between consecutive images on the CCTV and therefore the time between images can be accurately calculated.
59. I am satisfied that the following chronology can be discerned from the footage. The timings are gleaned from the table contained in Mr Hague's report at 245 of the bundle. I have indicated in the third column whether the experts agree the timings and events: if not I have made findings and indicated which expert disagrees. I give my reasons for those findings after the table:

<b>Displayed time (in sec from 03.06 am)</b>	<b>Time cf. impact</b>	<b>Event</b>

37.275	-9.750	Mercedes is first fully in view of the camera travelling in the western carriageway of Aldwych (but not visible in the area covered by the zoomed-in footage). Agreed.
39.825	-7.200	Miss Podesta is seen to stop on the traffic island between carriageways. Agreed.
41.175	-5.850	Mercedes positions itself fully in the eastern carriageway. I am satisfied on the balance of probabilities that this is the first moment Mr Akhtar had an unobstructed view of Miss Podesta on the traffic island, and his view continued unobstructed until the collision. Mr Hague disagrees – see (i) below.
41.850	-5.175	Two pedestrians seen crossing the eastern carriageway reach the eastern pavement of Aldwych. I am satisfied on the balance of probabilities that they are Ms Crichton and Mr Hardinges. Agreed.
44.025	-3.000	<p>First visible movement of Miss Podesta following her wait on the island. It is a forward movement of her upper body. I am satisfied on the balance of probabilities that this is the point at which she sets off to cross the eastern carriageway. Agreed.</p> <p>The experts further agree that at this point the nearside edge of the Mercedes is approximately 0.6m from the hatched area separating the traffic island from the nearside lane of the eastern carriageway. I accept that opinion.</p>
44.850	-2.175	Apparent change in level of Miss Podesta's upper body. I am satisfied on the balance of probabilities that this is the point at which Miss Podesta steps from the kerb of the traffic island down into the eastern carriageway and begins crossing it. Mr Stedman disagrees – see (ii) below.
45.450	-1.575	Miss Podesta begins to obscure the CCTV camera view of the lamppost on the northern end of the traffic island. I accept Mr Hague's opinion that this post is on a line of sight between the CCTV camera

		and the edge of the hatched area/ beginning of the nearside lane. Accordingly I am satisfied on the balance of probabilities that at this point she had crossed the hatched area and is in, or is about to enter, the nearside lane of the eastern carriageway in which the Mercedes is travelling. Mr Stedman disagrees – see (iii) below.
47.025	0.000	Collision between Miss Podesta and the Mercedes, indicated by the nearside headlamp beam momentarily dimming. Agreed.
47.175	+0.150	The Mercedes' brake lights illuminate. Agreed.
47.400	+0.375	Miss Podesta is visible falling from the nearside of the Mercedes. Agreed.
47.700	+0.675	Ms Podesta lands on the road. Agreed.
49.125	+2.100	(Approx) The Mercedes stops. Agreed.

60. My reasons for making the findings of the disputed aspects of the chronology are as follows:

- i) **Mr Akhtar's first unobstructed view of Miss Podesta waiting on the traffic island:** Mr Hague agreed with the timing that I have found in the joint statement, but in oral evidence said that in fact he prefers the position that he set out in his first report at para 9.2. That is that Mr Akhtar would have had an unobstructed view of the traffic island while he was still in the western carriageway, in the process of moving across into the eastern carriageway, at about 8 seconds before impact. Mr Stedman disagrees and points to a white van and another car visible on the CCTV in front of the Mercedes at that time. In oral evidence he opined that they would likely be obstructing his view. Mr Woodhouse accepted that as a fair point in his closing submissions. I agree with Mr Stedman.
- ii) **When Miss Podesta steps off the traffic island:** Mr Hague's opinion is that it is possible to see Miss Podesta stepping off the island by the change in level of her torso visible on the CCTV through the branches. He has demonstrated that the pedestrians who walked across the eastern carriageway before her also showed a similar change in level as they stepped down. I agree that Miss Podesta stepping off the kerb into the roadway is the most likely explanation for that visual effect. Mr Stedman does not give an alternative opinion for why Miss Podesta, Mr Hardinges and Miss Crichton would appear to change level in the same way at approximately the same point, if it was not the obvious one,

i.e. that they were stepping off the raised kerb. His evidence was that it wasn't clear to him that there was a change in level. It was clear to me.

- iii) **Mr Stedman's opinion that Miss Podesta stepped off the traffic island when her body can be seen to be blocking the view of the lamppost at the north of the traffic island:** Mr Hague disagrees for a number of reasons connected with his opinion that the line of sight of the CCTV camera is such that Miss Podesta would only block the view of the lamppost at the time she stepped off the island if she was at the very north of the island by the lamppost at the time. He has surveyed and measured the line of sight, and taken photos which I have seen. I agree with his opinion. I am satisfied on the balance of probabilities that if she stepped off the island at any point south of the crossing point, the line of sight of the CCTV is such that she would not block the view of the lamppost until after she was on the eastern carriageway. For the reasons that I have already discussed, I am satisfied on the balance of probabilities that (i) she must have stepped off the traffic island further south than the crossing point in order to make sense of the speed of travel of the Mercedes and the likelihood that she was projected or carried some distance by the car and the damage to the car; and (ii) she stepped off it 0.6s earlier when there was a change of level.

61. To recap, then, I find that:

- i) Miss Podesta was stationary on the island for 4.2s in total
- ii) Mr Akhtar had an unobstructed view of the traffic island with Miss Podesta on it from 5.85s before impact
- iii) Miss Podesta began to move forward on the island 3s before impact
- iv) Miss Podesta stepped off the kerb into the eastern carriageway 2.175s before impact
- v) Miss Podesta stepped out of the hatched area into the nearside lane at about 1.575 – 1.6s before impact

62. In addition, the experts agree that:

- i) The Mercedes had no defects which contributed to the collision (although they agree with PC Traylor that all four tyres were unroadworthy and the vehicle would have failed its MOT for this reason)
- ii) Miss Podesta was struck by the front of the Mercedes close to the front nearside headlight.
- iii) She was probably either stationary or walking, not running, at the moment of impact.
- iv) The impact caused damage along the nearside edge of the bonnet and dents at the near top of the bonnet and nearside A pillar.

- v) Mr Akhtar could not have reacted by braking only when Miss Podesta hit the car, as a reaction time of 0.15s is not realistically possible. Accordingly he must have been aware of her and started braking before the collision.
63. I accept those opinions.
64. Finally, Mr Akhtar's evidence is that he was going about 20-25 mph at the time of impact. The experts agree two points of measurement: that when he was around the top of the "EUSTON" sign painted on the western carriageway he was travelling at about 19 mph (Mr Stedman's calculation) and shortly after while moving to the eastern carriageway he was travelling at about 20 mph (Mr Hague). They can calculate this from the CCTV images. Mr Hague opines that Mr Akhtar accelerated in the last few metres before the point of impact, to about 25mph, but this is based on his estimate of where the Claimant was, which in turn is based on an assumption that she was moved 10m up the road during the course of the accident. He accepted in cross-examination that she could have been moved anywhere between 8 – 12m during the collision, with the impact position moving accordingly and this would affect the impact speed but still fit with the damage seen to the vehicle and the approximate place of impact visible in the CCTV. I accept his evidence, which means that I am not able to make a finding on the balance of probabilities of the likely speed of the Mercedes on impact.
65. However I am able to find that: (i) Mr Akhtar must have accelerated from the 19 and 20mph points to the point of impact, or he would not have travelled to the likely area of the impact (alongside the traffic island, some metres to the south of the crossing point); and (ii) the impact speed was less than 30mph, or the damage to the car would have been greater. It is no parties' case that he was driving at above the speed limit at any relevant time, and I accept that is so..

### **Was Mr Akhtar negligent?**

66. I find on the balance of probability that Mr Akhtar failed to exercise the standard of care to be expected of a reasonable driver that evening, so that he was negligent.
67. That is because Miss Podesta was there to be seen by him, standing on the traffic island, from the moment that he had an unobstructed view of the traffic island. He should have seen her, and he did not.
68. If he had seen her, as the reasonable driver would have seen her, in my judgment he should have identified her as a potential hazard at least 5s before the impact. She was on a central island between carriageways, close to a designated crossing point, facing the eastern carriageway that he was established in, and it should have been obvious to him, as it would have been obvious to a reasonable driver, that she was in the process of crossing the road. There was no obvious reason why she would be waiting there in that manner otherwise. Even Mr Akhtar himself stated in cross-examination in relation to the fictional group of pedestrians that it was obvious that they were halfway through the process of crossing Aldwych and their next move would be to enter the eastern carriageway to complete the crossing. Mr Maclean says that what Mr Akhtar thinks is not the standard of the reasonable driver, which is the test I must apply. I agree, but it seems to me that he was putting himself in the position of a



reasonable driver in his ex post facto fiction, in describing how he would have noticed them, been alert, kept them under observation, prepared to cover the brake etc.

69. I distinguish this situation from the sort of scenario in *Stewart v Glaze* [2009] EWHC 704 (QB) in which the Claimant was sitting and chatting with a friend in a bus stop before getting up and inexplicably running into the road. His friend accepted, as did Coulson J (as he then was), that the reasonable driver would not have perceived the claimant as a hazard while he was sitting at the bus stop or even walking towards the kerb, because the reasonable driver would assume he was waiting for a bus, and going to the kerb to look for a bus, respectively. This situation is quite different. In my judgment, the reasonable driver would consider that a pedestrian standing in a safe island in the centre of a road late at night would be there in order to complete crossing the road, and would have anticipated the possibility that the pedestrian might walk into the road.
70. Accordingly, holding Mr Akhtar to the same standard, he should have seen Miss Podesta, identified her as a potential hazard, and anticipated the possibility of her stepping into the eastern carriageway. If he had, he would have been ready to react to her doing just that at 3 seconds before the impact. Mr Hague in the joint statement and Mr Stedman in his oral evidence agreed that he would have had time in those three seconds to react, apply the brakes and stop before the collision even if he had not taken other action before she stepped into the road, like taken his foot off the accelerator to slow the car, or covered the brakes, or moved his car to the right. In fact, I have found that he was accelerating not decelerating from the point at which he should have seen her, and although he did apply the brakes some little time before impact, it was too late to prevent the collision. He breached his duty in failing to see Miss Podesta, in failing to identify her as a potential hazard, in failing to keep a proper look out for her movement into the carriageway, and for failing to avoid colliding with her. Those breaches were causative of the accident.
71. Even if I am wrong and the reasonable driver would not have identified Miss Podesta as a hazard while she was standing on the island, but only as she started to move towards the kerb at 3s before impact, I am satisfied that the reasonable driver would have identified her as an unexpected hazard at that point. Mr Maclean submits that a driver would have to be watching Miss Podesta like a hawk for imperceptible movements in order to be fixed with awareness of her as a hazard at this point. I do not accept that submission. She was in full view on the traffic island in the middle of the road, and the timings I have given for movement relate to the obvious movement forward of her torso in a white dress visible under the black jacket on CCTV 100m-120m away. Of course the driver would have a full view of her body from much closer. Again, in my judgment, they would have anticipated that a person moving towards the kerb of a traffic island in the centre of the Aldwych might step into the eastern carriageway in order to cross it, and either taken avoiding action such as taking their foot off the accelerator, or covering the brake, or moving to the right. Again, even if none of that action was taken, the experts' evidence is that 3 seconds would be sufficient time to apply the brakes and stop the Mercedes before the collision.
72. Mr Maclean submits that this is not reasonable, and that the reasonable driver would not have perceived Miss Podesta as a hazard until she crossed the kerb of the central

island at the earliest, or more likely was in the nearside lane itself. For the reasons I have given, I disagree.

73. In both these scenarios, there is significantly more time to react than the perception response times. The perception response times of 0.75 – 1.5s I have accepted relate to unexpected hazards and of course in the first scenario I have described Miss Podesta moving is an expected hazard, having been identified as a hazard already, when stationary and waiting. In the alternative second scenario Miss Podesta is an unexpected hazard, but even if those times were slightly increased by ¼ second because of the low light (although I accept the evidence of the witnesses including Mr Akhtar that the lighting level was good, which is supported by the police photos) it does not affect my finding that Mr Akhtar could have stopped the Mercedes in time.
74. I have been taken to a number of authorities in which various findings of breach of duty have been made on the facts, including *Hughes-Jones v Etti* [2006] EWHC 2493, *Wormald v Ahmed* [2016] EWCA Civ 823 and *Wooldridge v George* [2017] EWHC 332 (QB), but all have their different factual matrices and so do not really assist me although they provide useful guidance as to how to go about an assessment of this kind. Mr Woodhouse also asks me to test the experts' evidence on perception response times against the findings in those judgments, but I decline to do so. I must judge the evidence in this case on its own merit, as I have done.

### **Contributory negligence**

75. Turning then to the question of contributory negligence. In Mr Woodhouse's skeleton argument and closing submissions he concedes for the Claimant that Mr Akhtar's Mercedes was also clearly visible to her and that she should have seen his approaching vehicle and not stepped into the eastern carriageway. He concedes that a finding of contributory negligence against her is inevitable, but asks that I find that Mr Akhtar has a high degree of blameworthiness, and so asks me to fix Miss Podesta's contribution at 25%.
76. Mr Maclean submits that this is one of those unusual cases where I should find that Miss Podesta is more to blame than Mr Akhtar. He asks me to set her contribution at 80%.
77. Both rely on the authority of *Karen Janet Eagle v Garth Maynard Chambers* [2003] EWCA Civ 1107 in which Lady Justice Hale (as was) at para 10 to para 16 provided the following guidance to a court seeking to assess the fair and equitable contribution: that there are two aspects to apportioning responsibility between claimant and defendant, the respective causative potency of what they have done, and their respective blameworthiness (at [10]); that a car can do so much more damage to a person than a person can usually do to a car, and 'destructive disparity' between the parties can be taken into account as an aspect of blameworthiness (at [15]); and that "*it is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle. That is not this case. The court 'has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon'*" (at [16]).
78. Mr Maclean submits this is a case where Miss Podesta has suddenly moved into the path of an oncoming vehicle, and so it inverts the usual case identified by Hale LJ and

should take the court to a level of contribution which is greater than 50%, despite the accepted destructive disparity between Miss Podesta on the one hand and an E-class Mercedes on the other. Mr Maclean submits that *Stewart v Glaze* is an analogous case, and one in which the claimant was held to be more responsible than the defendant driver. He acknowledges that the claimant in *Stewart v Glaze* ran into the road and into the defendant's car, but set against that he submits that the driver was more blameworthy than Mr Akhtar because he was found to be going 'about 31mph' in a 30mph zone, whereas there is no dispute that Mr Akhtar was within the speed limit at all relevant times.

79. I do not agree that this case is analogous to *Stewart v Glaze*. Even Mr Stewart's own friend accepted that his running into the road and charging at an angle at the defendant's car was inexplicable. In this case Miss Podesta did no running, she did no charging, she simply appears to have attempted to complete an ordinary crossing of the road, albeit without noticing the defendant's car, which she should have done. At the time she did so, she was an identifiable hazard. She had some degree of intoxication and impaired judgment but Mr Maclean fairly accepts that there is no evidence that she was staggering around or had any difficulty in walking. Mr Woodhouse submits that this is not the sort of sudden movement into the path of an oncoming vehicle to which Hale LJ was referring, and I agree. The fact that Mr Glaze was driving 'above the speed limit' (although 'about 31 mph' is sufficiently imprecise to allow the possibility that he was driving at the speed limit and not over it) is not material, in my view, to blame.
80. Once again, I have been directed to a number of authorities where there have been findings of contributory negligence, but both counsel accept that those all turn on their own facts, and that ultimately this is a decision for me in the circumstances of this case. The key factors, in my judgment, are the length of time that Miss Podesta was standing on the traffic island and available to be seen, but not seen, by Mr Akhtar; that Mr Akhtar accepts the road was well-lit and that he was aware at 3am in that part of town just before Christmas there were likely to be pedestrians the worse for wear; that although Miss Podesta had been drinking and was undoubtedly under the influence of alcohol there is no evidence that she was excessively intoxicated in a way that made her unduly careless or blameworthy; and that although she stepped into the nearside lane in which he was driving, that was only after she had crossed 1.3m of hatchings after stepping off the kerb. Still he did not see her until she collided with his car.
81. I put Miss Podesta's share of the blame a little higher than Mr Woodhouse submits. I consider the fair and equitable share of her blame to be 30%.