Neutral Citation Number: [2019] EWHC 87 (QB)

Case No: D90MA131

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Manchester Civil Justice Centre
1, Bridge Street West, Manchester, M60 9DJ.

Date: 24/01/2019

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

SUHAIL MOHMED	**Claimant**
- and -	
ELLIOT BARNES	**First Defendant**
- and -	
EUI LIMITED	**Second Defendant**

- -
- -

Richard Norton (instructed by **Irwin Mitchell LLP**) for the **Claimant**
James Arney (instructed by **Horwich Farrelly**) for the **Defendants**

Hearing dates: 14, 15 and 16 January 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.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. On the evening of 4 July 2014, the first defendant, driving a Volkswagen Polo car, collided with the claimant pedestrian in the car park of McDonald's in China Town, Bolton causing him serious injuries. The claimant brings this claim in negligence. Liability is denied and contributory negligence is alleged. The second defendant, as insurer of the first defendant, played no material part in the events giving rise to this claim and its status as a party calls for no further consideration in this judgment. For convenience, therefore, I propose henceforth to refer to the first defendant simply as "the defendant".

2. The court ordered that the disputes relating to liability and contributory negligence should be tried as preliminary issues and so no consideration of the potential quantum of the claim is called for at this stage.

BACKGROUND

3. In so far as they are uncontroversial, the events leading up to the collision can be summarised briefly.

4. The defendant was one of a group of young people who travelled to McDonald's in two cars. The defendant, driving the Polo, was carrying two passengers: Lauren Houghton and Robyn Green. The other vehicle, a Ford Fiesta, was being driven by one Bradley Fenney whose passengers were Jack Nicholls and Lucy Greenwood.

5. The two vehicles were parked up side by side in adjacent bays in the car park. Mr Fenney and Ms Greenwood stayed in the Fiesta while the occupants of the Polo together with Mr Nicholl's from the Fiesta went into McDonald's. Already there were a number of male Asian teenagers. The arrival of Lauren and Robyn provoked a level of banter from the Asian males which contributed to an uneasy frisson between the groups. This, in turn, degenerated into open hostility when one of the Asian males made a derogatory comment about Mr Nicholls' T shirt to which he responded with disproportionate vulgar abuse.

6. This trivial altercation, nourished by testosterone, led to a serious confrontation at the conclusion of which the defendant's group left McDonald's followed by a number of the Asian males. The departure of the two groups is evidenced by CCTV footage from a camera within the premises.

7. The members of the defendant's group repaired to their respective vehicles.

8. In the bay immediately to the left of the Fiesta and pointing in the same direction was parked a Mercedes in which the claimant was sitting in the passenger seat. His friend, Mr Noor Bagas, was occupying the driver's seat. Neither the claimant nor Mr Bagas knew any of the members of the two groups now emerging from McDonald's.

9. There is no dispute that, at this stage, one or more of the occupants of the Fiesta made clearly audible and racially provocative references to "Pakis", doubtless confident that they would be able to make off from the scene before there were further repercussions. It should be recorded that neither the defendant nor Mr Fenney is alleged to have descended into racist abuse at any time.

10. Unhappily, rightly or wrongly, Mr Bagas thought that he was the target of this abuse and reacted to it by getting out of his car and attempting to remonstrate with Mr Fenney who was in the process of reversing the Fiesta out of the parking bay before driving forwards and away from the scene. Both the Fiesta and the Polo had been parked facing a barrier which prevented them from driving forwards

11. Mr Bagas then turned his hostile attention to the defendant who was, by now, in turn intending to drive away with his passengers in the Polo.

12. Having reversed out of the bay, the defendant set off forwards and collided with and injured the claimant who, by this time, had also alighted from the Mercedes.

THE RESPECTIVE CASES

13. The claimant, who gave evidence, alleges that he had got out of the Mercedes with the intention of getting hold of Mr Bagas, calming him down and persuading him back into the car. He had walked into the traffic lane which ran at right angles to the rear of the parked vehicles. Then he stopped but was run over by the Polo before he had any chance to move out of the way.

14. Mr Bagas, who also gave evidence, admitted that he shouted at Mr Fenney to get out of the Fiesta although it was not Mr Fenney but Mr Nicholls, the front seat passenger, who he said had earlier used racially abusive language. He said that Mr Fenney then drove off whereupon the defendant started shouting abuse at him and making vulgar hand gestures from his position in the driving seat of the Polo. He did not, however, suggest that the defendant had resorted to racial abuse. He admitted shouting at the defendant to get out

of the car. He said that the defendant reversed out of the parking bay, set off forward and then appeared to run over something. This "something" later turned out to be the claimant of whose presence Mr Bagas said he had previously been unaware.

15. The defendant's case is that, as the atmosphere in McDonald's started to deteriorate, he pulled Mr Nicholls back and started to walk out. At this stage nothing had been said of a racist nature but they were outnumbered and he did not want the situation to get any worse. As they were leaving, they were followed out by a group of Asian males one member of which became very aggressive and was balling his fists shouting that the defendant should not be in that area.

16. As the group were getting into the cars, he heard Mr Nicholls make a racist remark and Ms Greenwood also shouted a provocatively racist comment at the group of Asian males. Her taunt resulted in the Asian group running over towards the two vehicles. He then saw a man, who must have been Mr Bagas, shouting and swearing at Mr Fenney demanding that he get out of the Fiesta. Mr Fenney was able to drive off but the Asian group then turned their attention to his vehicle kicking and hitting it. He managed to reverse from the parking bay but Mr Bagas not only told him to get out of the car but threatened to fight him if he did. The defendant tried to calm him down and explain, as was the case, that he had was not involved in what had happened. Mr Bagas, however, again challenged him to fight. Indeed, on the defendant's account, Mr Bagas went further and opened the driver's door and attempted physically to pull him from the vehicle. He said that the claimant had positioned himself in front of the Polo with his hands on the bonnet.

17. By this time, Lauren was hysterical and Robyn was on the phone trying to call her boyfriend. In a panic, he accelerated forwards with the door still open fearing for the safety of himself and his passengers and for the integrity of the car. He thought that the claimant would move out of the way but he did not and he ran over him and made good his escape. When he got home, his father unwisely advised him not to report the matter to the police. However, when he arrived home from work late the following evening he discovered that the incident had been reported on the local news and so he resolved to go to the police station on the following morning but he was arrested at 6am before he had set off to do this.

THE LAW

18. The claimant's case is framed exclusively in the tort of negligence. It is not alleged as a matter of fact that the defendant deliberately used his car as a

weapon against the claimant. No reliance is placed upon the tort of trespass to the person.

19. The defence denies negligence but goes on to plead the defences of self-defence and necessity. It does not raise issues of either volenti or ex turpi causa.

20. In the particular circumstances of this case, I have concluded that the defences of self-defence and necessity merit no separate consideration. The litmus test of breach of duty in negligence involves the application of the test of objective reasonableness. I am unable to conceive of any practical or conceptual circumstance material to this claim in which this court could conclude that the defendant's conduct had fallen below the standard of the reasonable man and yet liability could nonetheless be avoided on grounds of self-defence or necessity.

21. The law relating to self-defence and injury to third parties is referred to in Clerk and Lindsell on Torts 22nd Edition at 3-156:

> "What would be the position if the defendant injured a bystander when defending himself against an attack? Self-defence cannot avail against the bystander, who was not attacking. In the early common law, when liability was strict, subject only to specific defences, the defendant was liable. Self-defence would have been a defence against the attacker had he been injured, but not against the bystander. Today liability for personal injury is based on fault, so the defence might be absence of fault as long as the act in self-defence was itself reasonable, i.e. the defence of inevitable accident, or possibly necessity. In Scott v Shepherd, the defendant threw a lighted squib into a crowded marketplace. It landed on the stall of X, who to save himself and his goods, threw it aside. It fell on the stall of Y, who to save his goods, did the same; and the squib exploded in the claimant's face. The defendant was held liable to the claimant; but two judges said, obiter, that X and Y would not have been liable because they acted "under a compulsive necessity for their own safety and self-preservation".

22. It is to be noted that ***Scott***, the most recent case in which this issue was considered, related to events which happened as long ago as 1770 and long before the emergence of the tort of negligence in its modern form. Caution must, therefore, be exercised in applying the dicta in that case as though the law has stood still in the interim.

23. In my view, at least in circumstances where the court finds that the injured claimant is merely an innocent bystander upon whom it was not the intention of the defendant to inflict harm, the availability of a remedy can be gauged

simply by the application of the familiar tests for breach of duty and causation in negligence. In many cases, the deployment of descriptive terms such as "self-defence" or "emergency" is apt to mislead by the implication that once a case is so labelled then some special and different test of liability are to be applied. The better modern view is that the stallholders X and Y in ***Scott*** would have escaped liability because their conduct was objectively reasonable without the need to demonstrate a "compulsive necessity for their own safety and self-preservation".

24. This does not, of course, mean that the court must ignore the fact that any given defendant was acting under particular circumstances involving elements of self-defence, emergency or the like. However, such circumstances must be taken to comprise no more than factors to be taken into account in the balancing exercise involved in the judgment of the court as to what courses of action was objectively reasonable at the time.

CRIMINAL PROCEEDINGS

25. The defendant was prosecuted in the Crown Court for the offence of causing serious injury by dangerous driving and was acquitted by the jury. Both sides have sought to rely to some degree on the outcome of these criminal proceedings. The claimant refers to comments made by the trial judge purporting to absolve the claimant from blame and the defendant relies upon the very fact of the acquittal.

26. I find that I am not helped by either of these factors. In particular:

    (i) The degree of fault required to make out the offence with which the defendant was charged is significantly higher than that imposed under the tort of negligence. It is a matter of speculation as to whether the jury considered the defendant to be wholly without blame or that his blameworthiness, although established, fell short of the level necessary to make out the element of dangerous driving;

    (ii) The burden of proof which fell to be discharged by the prosecution was more onerous than that which falls upon the claimant in a civil claim in negligence;

    (iii) The evidence before this court was not the same as that before the judge and jury;

    (iv) The jury, of course, does not give reasons for its verdict and so it is impossible to determine the basis for its conclusion or the reasoning behind it;

(v) It is arguable that, in any event, the fact of acquittal and the judge's comment are not in themselves material evidence in a subsequent civil trial by the application of the common law position set out in ***Hollington v F Hewthorn & Co Ltd*** [1943] K.B. 587.

27. This does not, however, mean that the evidence given at the criminal trial, as opposed to the verdict, is to be disregarded. It is, of course, hearsay, but is admissible subject to the provisions of the Civil Evidence Act 1995.

DISCUSSION

28. As is almost invariably the case where there are a number of witnesses to a rapidly unfolding sequence of events, conflicts of evidence arise. Some are more significant than others. Recollections can easily be coloured by later reconstruction either deliberate or unconscious. It would be disproportionate and, indeed, counter-productive for me to attempt to identify and resolve every discrepancy but I have carefully considered the entirety of the evidence and satisfied myself that my central findings would not be vitiated by whatever conclusions I would otherwise have expressed on these more minor issues.

29. I do not doubt that, by the time the defendant and his party were leaving McDonald's, trouble was already brewing. No purpose would be served by attempting to allocate blame for this save to say that the defendant denies that he contributed to the developing hostile atmosphere and there is no evidence to contradict him on this point. Indeed, I found the defendant to be a witness who was generally doing his best to assist the court with his genuine recollection of what had happened. For example, he openly admitted from the outset that members of his group had behaved in an openly and provocatively racist way. Although less important, I found nothing in his demeanour to suggest that he was obfuscating. He gave thoughtful and considered answers to the questions put to him during the course of cross-examination and gave no indication that he was attempting to tailor his evidence in order to present himself in an unduly favourable light.

30. It is not disputed that Mr Bagas got out of the Mercedes to remonstrate with the occupants of the Fiesta. I am satisfied that he genuinely believed that Mr Nicholls was directing a racist comment to him personally. Indeed, this belief goes some way to explain why his subsequent reaction was so energetic. I do not, however, find Mr Bagas to be a generally reliable witness. He was disputatious and argumentative in response to cross examination and, in contrast to the defendant, presented as a man who was prone to volatility when challenged. Furthermore, there were occasions during cross examination when his answers either missed the point or were

so vague as to provide the court with no assistance on the issues to which the questions were directed. I felt obliged to remind him on more than one occasion that the court was anxious to know what he actually saw and heard but this encouragement met with but limited success. Mr Bagas is clearly an intelligent and articulate man and I concluded that where his answers were opaque this was attributable to deliberate obfuscation.

31. Counsel for the defendant attempted further to undermine the weight of Mr Bagas' evidence with reference to earlier previous convictions one of which related to dishonesty. I have to say that I found Mr Bagas' responses to questions on this topic to border on the impenetrable. I was left wondering whether he was asserting that the record of his antecedents was wrong or that, despite the fact that the conviction for criminal dishonesty was correctly recorded, he challenged the basis upon which he had been convicted. In any event, I have concluded that the safe course would be to give no weight to these antecedents in my assessment either of his credibility or propensities.

32. I am satisfied that, by the time Mr Bagas had emerged from his Mercedes, some members of the group of Asian males had already arrived at the Fiesta in irate response to the shamefully racist provocation of Ms Greenwood. Mr Fenney, the driver, gave evidence about what happened at this stage. I found him to be a thoughtful and measured witness who was doing his best to assist the court. He said that one of the group had managed to pull open the front passenger door and Mr Bagas was shouting and swearing at him to get out of the car. He described leaving in a panic and never having been so scared in his life.

33. After, the Fiesta had been driven away, Mr Bagas, by his own admission, began to remonstrate with the defendant. I believe the defendant's account of what happened thereafter. Mr Bagas was not only shouting and swearing at him but was demanding that he should get out and fight. Furthermore, despite the fact that the defendant was trying to temporise, Mr Bagas had got as far as opening the driver's door and grabbing the defendant's arm in order to drag him out.

34. One particular difficulty with Mr Bagas' account is that he denied in his witness statement that there was any group of Asian males around either the Fiesta or Polo. Under cross examination he conceded that he was indeed aware of people to the left side of the Polo. His attempts to explain this discrepancy were unimpressive. He suggested implausibly that he may not have appreciated the importance of this point or the people he saw may merely have been casual passers-by.

35. The fact that there were people in the immediate vicinity of the Polo as the defendant was attempting to manoeuvre it out of the parking space is evidenced by the CCTV film taken by a camera located outside the premises. The direction in which the camera was pointing is such that the film records only the legs of those in the vicinity of the car but a close viewing reveals the presence of at least some other people close to the Polo. Furthermore, the footage from the interior clearly shows several Asian males leaving in quick succession shortly after the defendants' group had emerged.

36. In short, I do not believe Mr Bagas on this issue. I find that he was lying in his witness statement when he said that there was no other group gathered around either car.

37. Further support for my conclusion on this point is to be found in the Police Incident report and Police Logs. I stress that I would have reached this conclusion even without this further corroboration but the contents of these documents reinforces my confidence still further.

38. The Incident Report records a call received by the police very shortly after the incident in the following terms:

> "Call … reporting that this was not a hit and run. There was a large group of males on the car park and they were screaming and shouting at two lads in a Polo and they were trying to pull the driver out of the car. The driver tried to drive off and they surrounded him and he ran over one of them."

39. This call could not have come from any member of the defendant's group nor is it suggested that it might have done.

40. The reports recorded in the police notebooks included the following:

From witness Ihsaan Ahmed:

> "… one of the white girls shouted "Paki" at us. My friend shouted, "What did you say?" and he's walked towards their car. As [he] was walking towards their car, two passengers both Asian got out of another car, a green Mercedes-Benz as they overheard the white males shouting. [He] and the other two Asian males out of the other car ran towards the white male's car which I don't know who it was and the other Asian males reached the car tried to open one of the back passenger's doors which did open as one of the other Asian males tried to open another door. At which point they did drive off with the other Asian male ending up being run over."

From witness Nikesh Gola:

> "Myself and friends then went outside. The group continued to shout racial slurs at us. A male from another group and some of my friends tried to open his car door. A male exited another vehicle and was walking across the car park when he was stuck by the vehicle containing the two males and two females."

From witness Alex Naslam:

> "I was sat in the carpark of McDonald (sic.) when I saw a group of Asian males, about five, running out of the store. They started banging on the passenger side of a green ford Fiesta which I think had two people in it. The car has sped off with no lights on and I don't know if the guy fell or tripped but the next thing I saw was the Ford bounce over him. The vehicle made no attempt to stop and sped off out of the car park."

41. After the conclusion of the evidence, counsel for the claimant sought to persuade me, on the strength of the case of ***Smith v The Chief Constable of Nottinghamshire Police*** [2012] EWCA Civ. 161, that the evidence in the police records was wholly inadmissible despite the fact that it was in the agreed bundle of documents and that no objection had hitherto been taken as to its admissibility. However, he had, it would appear, overlooked the case of ***Charnock v Rowan*** [2012] EWCA Civ. 2 in which the Court of Appeal observed:

> "15. It is the insurers' case that there was no procedural defect in the preparation or presentation of their case, and therefore no power in the judge to attenuate the value of the evidence they adduced of previous inconsistent statements made by a number of the claimants. As the acquiescence of the claimants' own counsel at trial confirmed, they were fairly cross-examined on the basis of properly adduced material. It was properly adduced because it formed part of an agreed bundle which, by virtue of CPR 32 PD 27.2, not only operates – subject to notice of objection or to a contrary order of the court – as an admission of the authenticity of the documents in the bundle but makes them admissible as evidence of the truth of their contents. From that point, subject to any want of proper pleadings, it is for the claimants' lawyers to take instructions on any apparent discrepancy revealed by the documents and thus capable of being a topic of cross-examination. This being so, Mr Turner submits, no question of ambush or want of notice arises…
>
> 22. Section 2(1) of the 1995 Act goes on to require such prior notice of intention to adduce hearsay evidence "as is reasonable and practicable in the circumstances for the purpose of enabling [the other party or parties] to deal with any matters arising from its being hearsay". Section 2(3) makes provision for the notice requirement to be waived. It is, however, unnecessary to explore

> the wording of the section further because s.2(2) authorises the making of provision by rules of court either to disapply this requirement or to regulate its implemention (sic). This is now done by CPR 33.3, which inter alia waives the need for notice where a practice direction so provides. This, it would seem, gives 32 PD 27 the force, or at least the support, of law when it provides:
>
> All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –
>
> (a) the court orders otherwise; or
>
> (b) a party gives written notice of objection to the admissibility of particular documents…
>
> 23. It may be said that this reverses the notice requirement set out in s.2(1). It can equally be said that the effect is to treat the agreement of a bundle as the requisite notice, leaving it to the objecting party to serve what is in substance a document-specific counter-notice. But Mr Burton contends that more is needed for the admission of such hearsay than simply agreement of a court bundle. It requires, he submits, at least express notice of the fact that reliance is to be placed on the hearsay contained in the bundle, leaving it to the party served to require specificity. Mr Turner, by contrast, takes the stance described above in paragraph 15.
>
> 24. It has to be said that Mr Burton's position, in addition to sitting ill with the practice direction, is an invitation to almost limitless and costly wrangling both before and at trial. It may be that, at least in essentially straightforward litigation like the present, the answer to his problem lies in ensuring that the opposing case is properly pleaded, if need be by amendment following disclosure…From that point the obligation will lie on each party's lawyers to go through the agreed documents with the client or witness and take instructions on any discrepant evidence, albeit hearsay, relevant to the pleaded issues. But a party which has failed to plead its case with sufficient clarity may well find itself barred from adducing any evidence, hearsay or not, in support of an unpleaded contention.
>
> 25. The generic defence in the present cases was somewhat thin in this respect. It may therefore have been to this that Judge Gore QC should have looked in seeking – as he was justifiably doing — to forestall trial by ambush. But the question is not one on which it is necesssary (sic) to rule here."

42. In the present case:

(i) The relevant records were included in the trial bundle without objection from the claimant;

(ii) the defendant's case was pleaded in detail and it would have been obvious that the material in the police records would be likely to be deployed in support of his version of events;

(iii) this was "essentially straightforward litigation";

(iv) the defendant's counsel referred at length to the records during the course of the trial but counsel for the claimant raised no objection as to admissibility until after the conclusion of the evidence.

43. These factors leave me in no doubt that the evidence in the records are admissible and the fact that they are hearsay goes to weight rather than admissibility.

44. Upon reflection, counsel for the claimant conceded that the records are admissible but invited the court to place little or no weight on their contents. He pointed, in particular, to: certain discrepancies in the details of the evidence recorded, the fact that the evidence was double hearsay and that the ages and relative competence of at least two of the witnesses were uncertain.

45. Of course, such untested evidence is bound to carry less weight than that which is challenged and survives cross examination. Nevertheless, the contents of the reports are, in my view, not lightly to be dismissed. The following factors fall to be taken into consideration:

(i) the accounts recorded were made very soon after the events to which they relate;

(ii) they were noted down by a police officer in the course of his or her duty in the full knowledge of the importance of their accuracy and the fact that they were later liable to be scrutinised in a court of law;

(iii) the authors of the accounts were either neutral or, in at least two cases, members of the group of Asian males whose loyalties would give them no incentive to exculpate the defendant's group some members of which had so recently abused them;

(iv) the discrepancies in the accounts given were with respect to details which are easily attributable to genuine mistakes of recollection or observation in a fast-moving situation. The descriptions of members of

the Asian group and of Mr Bagas trying physically to open the doors of the Polo are, in contrast, unlikely to be attributable to error.

46. In my view, Mr Bagas cannot have failed to see the group of young Asian males beginning to surround the Polo as the defendant was attempting to manoeuvre out of the parking bay. His likely motives for his economy with the truth on this aspect of the case are twofold. Firstly, the fact that he was part of a group trying to prevent the defendant from getting away and aiming to pull him out of the car sheds a much worse light on his own involvement than if he had merely remonstrated with him one to one. Secondly, Mr Bagas is an intelligent man who would have readily appreciated that his friend, the claimant, would be likely to be seeking compensation for his injuries and that his prospects would be enhanced by deliberately minimising any extenuating circumstances upon which the defendant might later rely.

47. I am less critical of the claimant. I believe his evidence that he got out of the car to calm Mr Bagas down. He presented as a far less volatile witness than Mr Bagas and was, in contrast, somewhat reticent in his demeanour. Nevertheless, there is one central aspect of his account which I reject. In common with Mr Bagas, he claimed to be unable to recall the presence of the young Asian males in the vicinity of the Polo. He said that after he had alighted from the Mercedes, he headed towards the rear of the vehicle and then proceeded to walk for a distance roughly equivalent to his own height into the traffic lane which ran at right angles to the direction in which the vehicle had been parked. I find that the natural direction in which he would have been looking would have been to his left. After all, the whole purpose of getting out of the vehicle was to go after Mr Bagas who had, himself, gone off in that direction. The Mercedes was not of a height which would have obscured the claimant's view. He would also be expected to have looked to his left before walking into the traffic lane to make sure that there was no vehicle approaching.

48. It follows that I am satisfied that the claimant saw the Asian males congregating around the Polo and would have been aware, at the very least, of their hostile intent if not that of Mr Bagas. His selective recollection is, I find, attributable to his reluctance to concede that the defendant had any justification for trying to get away which might weaken his civil claim.

49. I accept the defendant's evidence that the Asian males were banging on the Polo and trying to open the doors. Mr Bagas was threatening violence and had managed to open the driver's door and grab him. He was in genuine fear for his safety and that of his two female passengers. These are not circumstances in which the reasonable man could be expected to weigh to a

nicety the relative risks involved in choosing between the options open to him.

50. The fact that he accelerated away at speed was, in my view, understandable and reasonable. Unfortunately, the claimant was standing in his path. The defendant knew of his presence but did not run him down intentionally. I accept that he hoped and expected that the claimant would have been be able to move out of his way.

51. In his later interview with the police, the defendant, looking back on what had happened, described his own actions as having been irresponsible. I am satisfied, however, that this comment was made with the benefit of hindsight and by someone who was burdened with the guilt of the consequences of the decision he had made. I do not doubt that, if he had acted less decisively and one or both of his passengers had suffered serious harm as a result of being dragged from the Polo and assaulted, his level of guilt would have been no less acute.

CONCLUSION

52. I find that the defendant acted in a way which did not fall below the standard of the reasonable driver placed in the threatening and rapidly developing situation in which he found himself. In these circumstances he is not liable in negligence. I do not consider that it would be appropriate to hypothecate on the level of contributory negligence which it may have been proper to find in the event that the defendant had not been exonerated.