Neutral Citation Number: [2020] EWHC 718 (QB)

Case No: QB-2017-000665

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 25th March 2020

Before:

ANNE WHYTE QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between:

SAGAL ADAM WARSAMA	**Claimant**
- and -	
LONDON FIRE BRIGADE	**Defendant**

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- -

Mr Gerwyn Samuel (instructed by **Powell & Co Solicitors LLP**) for the **Claimant**
Mr Lee Evans (instructed by **BLM Law**) for the **Defendant**

Hearing dates: 3, 4 and 5 February 2020

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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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Anne Whyte QC:

1. The Claimant seeks damages for personal injury and losses arising from a road traffic accident which occurred at around 03.00am on 30 December 2014 on Commercial Road in London. She suffered very serious injury when the nearside wing mirror of a moving fire appliance came into contact with her head whilst she was present on the carriageway. The case was listed for a two-day trial of liability only. The Claimant accepts some responsibility for the accident. The issues for the court therefore are:

    i) Was the driver of the Defendant's fire appliance negligent?

    ii) If so, by what proportion should the Claimant's loss and damage be reduced to reflect her contributory negligence?

    Summary

2. The fire appliance in question had been dispatched to respond to a "persons reported fire" in the Docklands which meant people were potentially in danger. This was therefore an emergency call out. The siren and flashing lights were activated as it proceeded along Commercial Road in an easterly direction. The weather was cold and the road surface damp.

3. In circumstances which are set out in more detail below and notwithstanding the obvious approach of an emergency vehicle, the Claimant proceeded on foot from the pavement, across a bus lane and out into the carriageway in which the fire appliance was travelling. It is alleged that the driver of the Defendant's vehicle, Fire Officer O'Kane, failed to take reasonable evasive action once he saw the Claimant. It is submitted that he ought to have anticipated the hazard that she potentially posed and applied emergency braking as soon as he saw her. One of the allegations is that he was driving too fast, in all the circumstances. It is not in dispute that Mr O'Kane saw the Claimant whilst she was in the bus lane. He says that he took reasonable avoiding action by lifting his foot from the accelerator and moving slightly to the right and then braking when it was apparent that she had entered his carriageway. In bringing this claim, the Claimant concedes that she created a hazard. It is agreed that had Mrs Warsama not stepped into the offside lane and into the path of the fire appliance, whose identity and speed she misjudged, this accident would not have occurred. In closing submissions, it was submitted on her behalf that any finding of contributory negligence should not exceed 33%. The Defendant submits that if I find the driving to have been negligent, I ought to assess the Claimant's contribution at between 66 and 75%.

4. I have heard evidence from the Claimant, five of the fire officers in the fire appliance and two eyewitnesses (one, the owner of an Audi parked in the adjacent bus lane and the other, a local resident, who was, coincidentally, at the time a Watch Manager employed by the Defendant). I also heard from a forensic collision investigator from the Metropolitan Police Service and from the parties' respective accident reconstruction experts.

    The Locus and the Fire Appliance

5. Commercial Lane is a very busy arterial highway and entirely straight at the point where this accident occurred. It is the main road between the City/Whitechapel and Limehouse/Canary Wharf. The relevant officers' fire station is situated on Commercial Road and so they are very familiar with the area. Mr O'Kane acknowledged in his statement that the road is busy at all hours. Shortly before the accident location there is a McDonalds restaurant which is open 24 hours a day. Nearby public transport facilities run through the night and takeaway restaurants lining the road remain open through the night. There are numerous side streets, traffic junctions and pedestrian crossings. One firefighter commented that because of the number of traffic signals and intersections, it is quite difficult to exceed the 30mph speed limit because you would need all the lights to be in your favour. Another said that it is difficult to exceed 40mph for this reason and to do so would be rare.

6. Parallel to the eastbound carriageway, at the site of the accident, there is a pavement and then a bus lane. The pavement is 5 metres wide and the bus lane is 3.7m wide. The bus lane contains a marked parking bay, some 2.4m wide. Beyond the bus lane and parallel to it is the main offside lane, in which the fire appliance was travelling at all material times. This offside lane is 3.35cm wide. The east/west opposing carriageways are separated by a raised central reservation. Consequently, there was only a distance of some 0.45metres for lateral offside movement in that carriageway before contact with the kerb of this central reservation. This is relevant because it is alleged that the driver of the fire engine should have appreciated, when choosing his speed and deciding not to brake sooner, that he could not take meaningful evasive lateral action because the reservation stood in his way. Just to the east of the collision site is a pedestrian crossing controlled by Pelican lights. The road is subject to a 30-mph speed limit.

7. Two vehicles were parked in the bus lane at the time of the accident, an Audi and a white van. It is accepted that when the Claimant emerged on foot from the bus lane, she was between these two parked vehicles.

8. The fire appliance in question is a bright red Large Mercedes Goods Vehicle, some 2.3m wide (outer tyre to outer tyre) and 7.9m long. The wing mirrors protrude by about .3m either side of the vehicle. The driver of such a vehicle sits with the eye line at about 2.1m above the road surface resulting in a driving position which allows a view over the roof of most cars and small vans.

The Joint Expert Evidence

9. Unusually, there is very little by way of physical evidence to inform the experts and to assist me in the reconstruction of events. The court is therefore predominantly reliant upon an analysis of lay witness evidence. Available CCTV only covered the movement of the fire engine after it had travelled some 20m beyond the Claimant's post impact location. There was however, helpfully, a large measure of agreement between the two experts. They agree that when the appliance came into that camera view it was travelling at 41mph and that there was dipping at the front indicating that firm braking was taking place by then. It came to a halt 58 metres beyond the locus which tells the experts that Mr O'Kane was not applying emergency braking at the point of impact. They could find no hard scientific evidence that he had braked at all before the collision but were able to agree calculations which indicated that Mr O'Kane either carried out minimal braking prior to impact or carried out some braking but from a higher speed

than he recalls. On their joint estimate, he was driving at a minimum of 45mph at the time of the accident. I accept this estimate of pre-accident speed.

10. None of the lay witnesses has been able to provide reliable evidence about distance in this case – i.e. where the moving appliance was at the times when the Claimant was potentially visible to the driver. If Mrs Warsama moved out at 90º from the edge of the parked car (when she first became visible to the driver Mr O'Kane), then proceeded nearly half way into the main carriageway and then turned back for a metre or so prior to impact, her total distance covered would be about 3.9 metres. If she did the same on an angle of 30º (as Mr O'Kane thought), the distance covered would be more like 6.4 metres. These distances are said to be relevant because they assist with assessing how long she was in the road and by extension provide the only means available of attempting to assess the time available to Mr O'Kane to react or slow down or stop.

11. Using such information, the experts went onto analyse a variety of scenarios which, by their own admission, involve calculations based upon "imponderables" or variable factors.

12. In virtually all scenarios (apart from one which assumed that Mrs Warsama was running at 90º into the offside lane), the experts concluded in a table called Appendix 1 that the driver, travelling at 45mph, could have stopped in time, had he applied continuous emergency braking and if one assumes that he should have reacted within 1 second of seeing Mrs Warsama move beyond the two parked cars. The experts take this location as the relevant point for their calculations because by then she must have been visible. Even if she had been running and had travelled the shortest stated distance they calculated that had Mr O'Kane applied emergency braking, his reduction in speed would have been enough to provide the Claimant with more time to clear the path of his vehicle though neither went so far as to say that this would have avoided the collision.

13. I guard myself against over reliance upon this material and view it as indicative only because:

    i) It pre-supposes that the only reasonable response available to Mr O'Kane as soon as he saw the Claimant moving beyond the parked cars was emergency braking;

    ii) It is based upon a pre-accident speed of 45 mph and pre-supposes that such a speed was reasonable;

    iii) It does not allow for a Perception Response Time ("PRT") in excess of 1 second – in other words it pre-supposes that Mr O'Kane ought to have applied emergency braking within a second at most of seeing Mrs Warsama move from beyond the parked cars;

    iv) If just one of the factors is varied, the calculation is out;

    v) It reflects at best what Mr O'Kane *could* have done based on the variations in the lay evidence. This is how I find the Claimant has characterised her case. As Coulson J (as he then was) observed at paragraph 82 in *Stewart v Glaze* [2009] EWHC 704:

> "The mere fact that, depending on the permutations and adjustments adopted, Mr Glaze might have been able to stop does not mean that he should have stopped and was negligent because he did not do so"

14. Although both experts were careful to avoid inappropriate findings of fact or judgments, they both suggested that once the Claimant had left the parking bay and moved towards the outside lane, she became a hazard that required a response from Mr O'Kane. Given his speed of 45mph and his very limited opportunity to move or swerve right, they suggested that his only response to avoid a pedestrian was to carry out emergency braking, which it is agreed he did not do.

15. In short, it was their view that had Mr O'Kane deemed it necessary (at 45mph), there was sufficient time and distance for him to have reacted and carried out emergency braking which would have resulted in the collision being avoided.

16. Before I turn to the detailed facts, I make it plain that whilst I note their opinion about this, I must decide those matters using my judgment combined with what I find the facts to be.

17. Some witnesses have provided three separate written accounts (one to the police at the scene, one to the London Fire Brigade accident investigators and one tendered for the purpose of these proceedings). They have each given oral evidence. The sheer number of accounts per witness and number of witnesses means that there are inevitable inconsistencies upon which each party has respectively seized where it has suited their case to do so. I have borne those inconsistencies in mind and do not propose to itemise each of them. This accident happened very quickly, and evidence was given about factors involving fractions of seconds. This means that recollections can be distorted, fragmented and incomplete. Memories have faded and some accounts have changed over time. As this is a case which will depend heavily upon findings of fact, I have had to do my best to compare and assess the varying accounts, consider the expert evidence and decide what probably happened. I have borne every account in mind when trying to reconcile the evidence, even those not specifically referred to in this judgment.

18. I will summarise in some detail the evidence of the Claimant (because it is alleged that she is the author of her own misfortune), the driver (because it is alleged that he was negligent) and the eyewitness Ms Carr (because on one view she had an elevated and more detached view). The remaining lay evidence will be more briefly summarised when I deal with the central issues of fact. I should note at this stage that through her counsel, the Claimant alleged that some of the fire officers had colluded and that their evidence should therefore be treated with scepticism and rejected. This is because the first brief accounts of three of them are in all material respects verbatim and identical. None could offer an acceptable explanation for this and it is obvious to me, despite their denials, that one of these officers must have drafted a brief account and the others adopted it. This and their inability to acknowledge it, is plainly unattractive and indeed requires me to exercise caution although it does not follow that the accounts are dishonest. The short cut involved in making such accounts could be the product of laziness and/or genuine agreement. In the end, it is of relatively little importance. These officers had far less of a view and their evidence is secondary to that of other witnesses.

The Claimant's Evidence

19. The Claimant was 28 years old at the time of the accident and is now 33. She provided a written and signed but undated statement to the police whilst in hospital. It has not been possible to obtain the date of this statement. In it she said that she had been to a party with two friends and had consumed two large glasses of wine and had shared a "spliff" with an unknown number of other people. Her friends had started misbehaving and she felt that the only way to get them to leave was to leave the party with them. After leaving, they argued amongst each other both before and after she had returned to her flat. She decided to buy a kebab from a nearby shop on Commercial Road. Whilst at the shop, with one of these friends, she became involved in a verbal altercation with a group of youths. She told the police that she could not recall what the argument was about but decided to call the police. She stated that, consequently, she crossed Commercial Road, called the police from a call box and then crossed back. She then said that she could not remember anything after crossing back over the road and was unable to offer any explanation as to how or why she was in the road at the time the fire appliance went past.

20. In the statement tendered for these proceedings dated 8 April 2019, the Claimant provided more detail. She said that she was not drunk at the material time. She could now recall that the verbal argument with the youths had concerned abuse from them about her ethnicity and perceived lack of observance to her faith. The incident included some spitting. This combined with what she described as a diagnosed personality disorder and possible post-natal depression caused her to feel very agitated and upset. She used the pay phone across the road to call the police. She could now remember waiting for the police to arrive after crossing back. She heard a siren and saw flashing lights. She thought that this must be the police responding to her call and so stepped out onto Commercial Road to flag the police down. This was the last she recalled of the incident.

21. As I have indicated, the Claimant gave oral evidence. Aspects of her evidence are difficult to reconcile. Her memory of the incident is plainly incomplete for entirely understandable reasons and therefore in written argument it is accepted on her behalf that the more reliable evidence of what she was doing immediately before the accident is likely to come from others. Despite denying being drunk, she conceded that everyone (by which she meant she, her friends and the group of youths) was "tipsy". She said that she had not taken alcohol or drugs for two years before the evening in question and agreed that this might have caused a lower tolerance to alcohol and cannabis. Despite saying that her conduct had not been affected at all by what she had consumed, she then suggested that perhaps it had been, but only by a small amount. Although she could not in 2014/2015 explain why she was in the path of the moving fire appliance or recall in April 2019 anything after her return crossing of the offside lane, in oral evidence she said that she could now recall hearing what she thought was a police siren and "putting her head and arm out" and leaning forward. The police had told her on the phone to stay at the scene. When asked how she could mistake a large red fire appliance for a police car, she responded that she was feeling desperate about the conduct of the nearby youths and hence had leaned out, eager to ensure that what she assumed was a police car, would stop. At one stage in her evidence she was adamant that she had not stepped out into the offside lane from between the two parked cars in the bus lane. In re-examination

she then said that she did not know whether she had stepped out or not into the offside lane. She then accepted that the contents of her civil litigation statement and her oral evidence did not reflect her actual recollection at all but her attempts at reconstruction.

22. It is, as I have remarked, not surprising that she cannot remember various details given the passage of time, the nature of the accident and of her injuries. Very real caution needs to be applied to her evidence as a result. Her counsel, Mr Samuel, rightly acknowledges that her explanation for the mechanism of injury is plainly wrong.

The Evidence of the Driver

23. In his account to the police at the scene, Mr O'Kane stated that:

> "all of a sudden one of the group [of pedestrians] ran out into the road. I instantly eased off the throttle and moved over into lane 2….the lady in the road was waving at me as though trying to flag me down. The lady continued to step out and was now stood in lane 2 completely blocking my path. I hit the brakes very [indecipherable] the female started to step back towards the pavement. I thought I had cleared the female but I was still braking I then heard a bang on the nearside...".

His simultaneous sketch of the scene included a depiction of the Claimant travelling across the bus lane at an angle towards his fire appliance.

24. It follows from this account that Mr O'Kane did not start to apply the brakes until the Claimant was in lane 2 and to use his words "*completely blocking my path*". He had obviously noticed the group of pedestrians on the pavement.

25. In his account to the Defendant's investigators less than 24 hours after the accident, Mr O'Kane provided more information. He estimated his speed at 30 to 35 mph. He had seen a group of ten to fifteen people standing on the pavement. He then said:

> "A woman wearing a dark head scarf lighter coloured jacket and long robe type garment walked briskly across the front of the parked car and into the road. She had her hand raised in the air…she continued moving out into the road as I got closer to her. As she moved further into the road I took my foot off the accelerator pedal. As she crossed the thick white line separating the bus lane from the main carriageway I applied the vehicle's brakes as firmly as I felt necessary to stop the appliance safely. I was concerned that heavy braking might cause the appliance to skid…when I was approximately 5 meters from her she started to move briskly backwards but still facing towards the road…the appliance was slowing… the lady momentarily disappeared from my view on the nearside…then I heard a dull thump."

26. This is similar to his previous account but inconsistent as to when he started braking and as to whether Mrs Warsama was running into the bus lane or walking briskly. Notably he did not deploy emergency braking, for fear of skidding.

27. In the statement tendered for these proceedings he more or less repeated the account given to the investigators. He explained that the act of taking his foot off the accelerator, equated to a light touch of the brakes because of the fitting of a retardation device. He estimated that the Claimant was coming towards him at a 30º angle towards him. By the time he was braking heavily, she was completely in his path, seemed to realise her error and move back by which time he was too close to avoid the collision. In this statement he estimated his speed as 35 to 38mph.

28. In his oral evidence, Mr O'Kane remarked, understandably, that he could now, no longer recall his exact thought processes. He was adamant that there was nothing about the group of people on the pavement to cause him alarm or to consider any one of them a hazard. Had they been "messing about" he would have slowed right down to first or second gear, which for this appliance means anything between 10 to 20mph.

29. He was also clear in oral evidence that the first time he saw the Claimant was when she stepped out from between the parked cars into the remainder of the bus lane. He accepted that his recollection about her speed had faded to such an extent that he could no longer recall the Claimant walking briskly out into his lane – all that he could say now was that she was moving quickly. When pressed as to why he had not seen her continuous movement before the edge of the parked cars, he surmised that he would have been concentrating simultaneously on other factors, including the road ahead, peripheral traffic, his wing mirrors and the like. He did not assess her to be a potential hazard even as she stepped beyond the cars because she was an adult and his approach was so visibly and audibly obvious. Had she been running at that stage, he would still not expect her or the majority of adults to step out into the carriageway. He acknowledged pedestrians can misjudge the speed of moving vehicles and that at 3am pedestrians might be drunk. He also agreed that from the time Mrs Warsama had stepped beyond the protection of the parked cars, if she continued to move towards his lane and was waving, she was a potential hazard.

30. The experts agree, as I have indicated, that at the time of this collision, the fire appliance was travelling at an approximate speed of 45mph. It follows that Mr O'Kane is wrong in his earlier assessments that he was travelling at anything between 30 and 38mph. He stated that he did not think that 45mph was too fast in all the circumstances but agreed that such a speed would require heightened awareness on his part because of the road layout. He referred to firm braking but as can be seen from the joint statement of the experts, they agree that he did not brake firmly prior to this collision. He could not say how quickly he had started to brake after taking his foot off the accelerator pedal but that he was braking before the Claimant started to move back across his carriageway. In answer to one of my questions, he stated that even once Mrs Warsama was over the white line, he would not have applied emergency braking because of his fear of losing control of the vehicle. He had referred earlier in his oral evidence to the damp road conditions, the obstacles to his left and right and to his fear of skidding. He stated that ABS (anti-lock braking system) would prevent the wheels locking but would not prevent skidding.

31. Mr O'Kane was clear in this statement and in his oral evidence that he had absolutely no reason to think that the Claimant would move beyond the thick white line separating the bus lane and the main carriageway, not least because his red Large Goods Vehicle was there to be seen with lights flashing and sirens wailing. This assumption on his part plainly informed the way he drove.

Evidence of Eyewitness Emma Carr

32. I set out this witness' evidence in some detail rather than the evidence of the other eyewitness Mr Mahmud. His friends were involved in the argument with the Claimant and her friends, one of whom afterwards, wrongly suggested to the police that Mr Mahmud had pushed the Claimant into the pathway of the fire appliance. He provided a description of Mrs Warsama's movements immediately before the collision which bear no resemblance to anyone else's description. It is not a description, I find, that I can easily rely upon.

33. By contrast, Ms Carr had a view of events from her second-floor balcony which is situated on Commercial Road just by the accident locus. She had been woken by the noise generated by the argument outside the kebab shop and had gone onto her balcony to observe the situation. Unlike Mr Mahmud, she was not directly involved in that argument or aware of its genesis. I caution myself, as the Claimant invites me to, about her independence, given her employment with and potential loyalty to the Defendant. Despite relying on certain aspects of her evidence, Mr Samuel invites me to conclude that she is "partisan". She is, by coincidence, an appliance driver herself.

34. She provided the police with a signed written account. She had seen the Claimant by the kebab shop. She described seeing the Claimant stagger sideways between the parked vehicles in the bus lane and into the middle of lane two where upon she seemed to turn around to face oncoming traffic which included the emergency activated fire appliance. As she moved back towards the pavement, she collided with the appliance. Her actions appeared voluntary and she seemed drunk.

35. In a statement made in these proceedings in June last year, Ms Carr expressed disbelief at what she had seen and said: "it was all so quick". She then said:

> "She was well into the outside lane, almost the centre, with her arms splayed out when she looked and turned back towards the bus lane and the cars but there was no time for the appliance to stop."

36. In oral evidence, when asked whether Mrs Warsama was staggering or running, she clarified that it was hard to describe – it was not calm walking and it was not a run. It seemed to be the product of intoxication and was either staggering or brisk walking. She did not think that the Claimant had moved out at an angle and confirmed that her movement was sideways on i.e. facing traffic and that her arms were stretched outwards and were not elevated. She felt that when Mrs Warsama was struck, she was about a foot over the main white line into the main carriageway. She could not stand by any previous description of how far the appliance was when Mrs Warsama first proceeded out between the parked cars.

Perception Response Time

37. Before a driver can take avoiding action, they must see a hazard that requires a response, perceive it as a hazard and decide on what form that action should take. This is known as perception-response time (PRT) or driver's reaction time.

38. Emergency vehicle drivers are generally expected to be more vigilant when they are driving on emergency calls and Mr Tydeman suggested that most such drivers have a response time of between 0.5 and 0.7 seconds.

39. I must decide as a matter of fact, what Mrs Warsama was doing in the seconds before this collision and what Mr O'Kane actually did in response. I must then exercise my judgment about whether his driving conformed to the standards to be expected of a reasonable driver and what the consequences would have been, if it did not. It is important to remember that his priority was to drive safely but efficiently to a suspected fire three miles away.

Findings of Fact: The Claimant's Actions

40. I have had very little difficulty in finding that at the time of this accident, Mrs Warsama was in an agitated state and under the influence of both alcohol and cannabis. I cannot possibly know by how much the alcohol and cannabis that she had consumed played a part in her behaviour. I am entitled to conclude and do conclude that after a period of abstinence of two years, her tolerance to such substances was low and that it must have played some part in her decision making. I note that Mr Mahmud referred to the Claimant as being very loud inside and outside the kebab shop. He formed the view that she and her friends were under the influence of drink or drugs. Although I treat the totality of his evidence with caution, it is notable that the other eyewitness, Ms Carr also perceived, from an entirely separate vantage point, that she appeared drunk. I did not find the Claimant to be particularly reliable on this as on other issues. By her own belated acknowledgement, she was tipsy. She had previously been on medication for her personality disorder and knew that alcohol and cannabis could have side effects given her psychological state.

41. Some of the inconsistencies about the speed of her movement are set out above. Notably, certain accounts made shortly after the accident refer to her running though by the time of trial, this evidence had become less firm. Mr Evans accepts, realistically, on behalf of the Defendant that the evidence does not establish that the Claimant was running. Firefighter Brooks who was the front seat passenger in the appliance said in his witness statement that the Claimant was moving "*swiftly towards our lane*" and whilst he did not resile from this in his oral evidence, he made clear that her movement was continuous. It was notable enough for him to check that Mr O'Kane had seen her, which I find to be a telling piece of evidence.

42. On the balance of probabilities, I find that Mrs Warsama moved in a continuous and rapid fashion from the pavement between the parked cars and out into the offside lane. Ms Carr struggled to characterise the movement. It was probably rushed and there was something sufficiently erratic and swift about her gait as to be obviously abnormal and unpredictable.

43. The combined evidence is sufficient to establish that Mrs Warsama's arms and hands were either raised or outstretched to her sides. A number of the firefighter witnesses, including Mr O'Kane had the clear sense that the Claimant was trying to attract their attention. Although she does not specifically recall this, it fits with her suggestion that she was probably trying to ensure that what she wrongly deemed to be a police vehicle, would stop and assist her.

44. On the balance of probabilities I find that once the Claimant had moved beyond the protection of the parked cars, she had extended her arms either upwards or outwards and was moving them in such a way as to try and obtain the attention of the Defendant's vehicle. I find that her arm movements alerted those who saw her to the fact that she was acting unpredictably.

45. Accounts varied as to how far Mrs Warsama proceeded into the offside lane. I find that she probably reached nearly halfway, some 1.25 to 1.5 metres across – this was the combined effect of the evidence of Miss Carr and Mr O'Kane. Only then did she appreciate that the approaching vehicle was in fact a fire appliance, as opposed to a police car, and started to move back towards the safety of the bus lane.

46. Mr O'Kane is the only witness who describes her trajectory as being on an angle other than 90º. It is notable that he depicted this graphically very shortly afterwards. Such an angle would also be in keeping with Mrs Warsama wanting to gain the attention of the vehicle i.e. moving out towards it rather than simply straight across the road. On balance I find that she was proceeding on some sort of angle rather than straight out. Even if I am wrong about this, bearing in mind my further findings, the outcome remains unaffected.

47. Mrs Warsama was struck whilst she was still in the offside lane. Again, accounts vary but I find that it was probably within a step or two and less than a metre of the thick white line.

Findings of Fact: The actions of Mr O'Kane

48. Mr O'Kane said that he did not brake sooner and harder for a number of reasons. He did not think that Mrs Warsama would enter the offside lane as I have explained in paragraph 31 above. He was worried about braking harshly because the road was damp, there was a central reservation, parked vehicles were present and he was under the impression that emergency braking combined with the ABS would cause skidding.

49. I have already summarised the central evidence about when Mr O'Kane began braking. Additionally, Mr Brooks, the front seat passenger felt the vehicle slowing down but did not know whether this was simply the effect of Mr O'Kane's foot coming off the accelerator. Mr Yardley who was third in from the nearside and sitting behind the front seats confirmed that his sense of the vehicle slowing was that of the accelerator being released and not the brake being applied. This occurred when Mr Brooks was asking Mr O'Kane whether he had seen the Claimant.

50. I find that Mr O'Kane did not take his foot off the accelerator and move slightly to the right until Mrs Warsama was on or by the white line.

51. I find that Mr O'Kane did not start to brake until Mrs Warsama was firmly established in the offside lane and in the process of realising the error of her ways. The braking that he did apply was neither heavy nor emergency in nature. I find that he misunderstood the effect of the ABS and that this would have been no bar to firm or emergency braking as PC Andrews and the experts explained. Mr Samuel has urged me to find that beyond his misunderstanding about ABS, his other stated reasons are deliberately false in order to mask his negligence. Whilst it could be said that Mr O'Kane was a somewhat truculent witness, I am not satisfied that I should make such a finding.

The Legal Principles

52. I have to apply to Mr O'Kane's actions the standard of a reasonable driver, not an ideal driver. I remind myself that courts must guard against the 20-20 hindsight that can infect accident reconstruction. The standard of care owed by a driver to other road users is not a counsel of perfection and does not bestow a guarantee of the Claimant's safety (per Law LJ in *Ahanonu v South East London & Kent Bus Company Limited* [2008] EWCA Civ 274). As Coulson J (as he then was) observed in *Stewart v Glaze* [2009] EWHC 714 (QB), the court in these sorts of cases must have regard to the practical realities rather than precise mathematical calculations when considering the standard of the reasonable driver.

53. The driver of an emergency vehicle owes the same duty of care to the public as a civilian driver when driving in the course of his/her duty – *Gaynor Allen* [1959] 2 QB 403, *Wardell-Yerbrurgh v Surrey County Council* [1973] RTR 462 and *Commissioner of the Metropolitan Police v Scutts* [2001] EWCA Civ 715. The standard of care to be applied is that of the reasonable and careful driver. The question of whether the driving in question fell short of the requisite standard is a question of fact. In *Scutts* at paragraphs 29 and 31 respectively, Judge LJ:

> "One significant feature of such cases where the vehicle is deployed by one of the emergency services is that the driver is normally entitled to assume that other road users will not ignore the unmistakable evidence of its approach, and where appropriate, temporarily at any rate, will use the road accordingly. Pedestrians can be expected to follow the relevant advice in the Highway Code"
> and
>
> "In my judgment, although drivers should allow for the unexpected when they are at the wheel of a car, it would inhibit the valuable work done for the community as a whole, if drivers in the emergency services were not allowed to drive their vehicles on the basis that pedestrians would recognise their warning lights and sirens and give them proper priority by keeping out of their paths."

54. By virtue of Section 87 of the Road Traffic Regulation Act 1984, the statutory speed limit is disapplied. When driving at speed, the emergency driver must exercise a degree of care and skill proportionate to the speed at which he is driving. Mr O'Kane agreed that the higher the speed, the more heightened his awareness needed to be.

55. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides, relevantly:

> "(1)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*"*

56. As the court observed in *Eagle v Chambers* [2003] EWCA Civ 1107, that section is premised upon both parties being at fault. The court has to compare the actions of the Claimant and the Defendant.

57. It is unusual for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle (see para 16 *Eagle v Chambers*). A car is "potentially a dangerous weapon" which is why speed and a proper awareness of potential hazards can often be critical.

58. Mr Samuel, on behalf of the Claimant provided me with a draft list of 40 factual issues, which he submitted I may wish to resolve before formulating any conclusions. I have considered the list with care but do not find it necessary or helpful to formulate my judgment around its contents. In short, he argued that had Mr O'Kane been driving at a more appropriate speed, the collision would have been avoided. He invited me to conclude that Mr O'Kane ought to have regarded the group of people on the pavement as being aggressive and to have reacted by slowing down at that point. Alternatively, he ought to have seen Mrs Warsama walk quickly in front of the parked Audi and braked. Her arm waving ought to have alerted him to slow down or stop. As soon as she moved beyond the Audi he ought to have applied emergency braking because it was obvious that she was not proceeding safely.

59. Mr Evans submitted that it was reasonable for Mr O'Kane to notice the Claimant at the point when he did, namely as she began to emerge from in between the parked cars. Further, he submits that it was reasonable to monitor her and to take the evasive action short of braking, that Mr O'Kane described. The act of monitoring extended his reasonable PRT. Mr Evans cautioned against over-reliance upon Appendix 1.

60. He also submitted that I am being asked by the Claimant to find that it was negligent of Mr O'Kane not to have reacted by immediately by applying emergency braking, within 1 second of seeing Mrs Warsama proceed beyond the parked cars.

Findings on Negligence

61. Although the experts commented on whether Mr O'Kane ought to have perceived the crowd outside the kebab shop as a hazard, this is an issue for the court and not for them. I do not find that Mr O'Kane ought to have appreciated that this group was "active" as opposed to "passive" or posed a potential hazard, without more. I do consider that given the street conditions described above, the group's size and presence was something that Mr Kane needed to monitor as he approached.

62. Mr O'Kane was proceeding too quickly through this section of Commercial Road. One has considerable sympathy for his desire to travel as swiftly as possible to a suspected fire and to his supposition that his obvious audible and visual approach along a very straight road would alert other road users to accord him priority. Mr O'Kane was plainly driving more quickly than he realised. 45mph was simply too fast in the circumstances, especially bearing in mind:

i) His awareness that Commercial Road was busy at all times and that the establishments lining it attracted all night footfall;

ii) Confirmation of this by virtue of the large group of people outside the kebab shop;

iii) The views of his colleagues that even on emergency calls it was difficult and rare to exceed 30 to 40mph;

iv) His appreciation that he was "hemmed in" by the central reservation to his right and parked cars to his left;

v) His concern that the damp road conditions would affect his ability to brake safely (conditions which the experts agreed were inconsequential);

vi) His misapprehension that application of emergency braking would cause wheel locking or skidding;

vii) The size and nature of his vehicle;

63. I find that Mr O'Kane ought to have started braking as soon as he saw that the Claimant was emerging from the parked cars, not least because he was set against any form of emergency braking and because he was proceeding quickly himself. By then he knew that she was a potential hazard. By then she was looking as though her path and his were at real risk of intersecting. Her continuity and speed of movement coupled with her erratic arm movements should have suggested to Mr O'Kane that as a pedestrian, she did not appreciate the danger that the emergency vehicle posed and she did not show any signs of slowing down and affording the fire appliance the precedence it clearly demanded.

64. That being so, it ought to have been obvious to him that if he had to respond to any sort of hazard, or potential hazard, braking, whether emergency or otherwise, was his only option until he had cleared the central reservation. If braking was going to be his only option, his speed needed, more than ever, to be proportionate to the road conditions. It was not.

65. Mr Tydeman said in his report that Mr O'Kane appeared to be travelling some 30-50% faster than his own assessment of 30-35mph and that had he been travelling between 30-40mph the collision would have been avoided regardless of his reaction.

66. Mr Lane, for the Defendant, said in evidence that if Mr O'Kane had braked when first seeing the Claimant, then given the indicative distances in Appendix 1, he could have avoided the collision.

67. If Mr O'Kane had been driving at a more reasonable speed, he would have had sufficient time to brake and respond to Mrs Warsama's presence in the road. Had he done so, this accident would have been avoided. Given his speed and the road layout, Mr O'Kane ought to have applied heavy/emergency braking almost as soon as he saw the Claimant. Had he done so, on the balance of probabilities and based on the combined expert evidence, this accident would have been avoided.

68. I have considered the data in Appendix 1 when coming to the above conclusions but I have not found it necessary to analyse negligence in terms of the precise distances, PRTs and timings of presence in the road contained within it. Given my findings that the Claimant was moving quickly, on some sort of angle and that Mr O'Kane was driving too quickly, I can utilise what Appendix 1 indicates especially about causation.

Contributory Negligence

69. When assessing the Claimant's negligence, I must compare her relative blameworthiness with that of Mr O'Kane and analyse the causative potency of their respective actions. Although I have been directed to various authorities dealing with accidents involving pedestrians and vehicles and in particular emergency vehicles, they are all fact sensitive and therefore whilst informative, of only limited application. I have read and considered all of them.

Causative Potency

70. The Claimant has set great store on her assumption that the siren that she heard was a police car responding to her 999 call, as if this would justify her standing in its approach. It did not. If she had really wanted to obtain the attention of the vehicle, she could have done so safely from the protection of the pavement on the opposing westbound side of the street.

71. This accident happened because Mrs Warsama, under the influence of drink and drugs, placed herself in an obviously dangerous situation in the main carriageway and misjudged the nature and speed of the fire appliance. She should easily have been able to appreciate its rapid path along the straight well-lit road and to comply with the basic requirements of the Highway Code. The Code enjoins pedestrians not to enter the highway when an emergency vehicle is approaching. This was a large red vehicle with its siren and flashing lights activated. In behaving as she did, she placed herself and the occupants of the vehicle at obvious risk.

72. In turn, Mr O'Kane misjudged the speed at which he was driving and failed to brake sufficiently when it was obvious that he was at risk of colliding with the Claimant. The group on the pavement was large and very visible and drivers must be on the lookout for pedestrians in the road. The longer a person is in the road, the easier it is to see them. At 3am, there is the added risk that adults might behave recklessly. At 45mph, Mr O'Kane's risk radar should have been heightened.

73. In terms of blameworthiness, there is little to add. The complication of drink and drugs goes against the Claimant. Her conduct impeded the legitimate and important public work of those tasked with attending the emergency call out. As I have observed – one has every sympathy with Mr O'Kane's assumption that no adult would be careless enough to place themselves in the path of this vehicle, even when positioned between parked cars in a bus lane.

74. Mr Evans conceded that this is not a case where the pedestrian moved out suddenly in front of the moving vehicle despite contending for a finding of contributory negligence of 66 to 75%. Although I bear in mind the danger posed by the moving fire appliance, I do find that Mrs Warsama's actions seriously contributed to this accident. In those circumstances her contribution is as high as 50%.

75. Accordingly, there will be judgment for the Claimant with a finding of 50% contributory negligence.