



Neutral Citation Number: [2019] EWHC 2049 (QB)

Claim No: HQ18P0!360

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION

Date: Tuesday 30<sup>th</sup> July 2019

**Before:**

NICHOLAS BRASLAVSKY QC  
(sitting as a Deputy Judge of the High Court)

**Between:**

RICHARD LAWRENCE EVERETT

**Claimant**

**-and-**

CALVIN DYER

**Defendant**

**Ms Sadie Crapper** (instructed by Anthony Gold, Solicitors) for the Claimant  
**Mr Richard Hartley QC** (instructed by Plexus Law, Solicitors) for the Defendant

Hearing date: 5<sup>th</sup> June- 7<sup>th</sup> June 2019

## 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.

### *Background*

1. At approximately 0805 hrs on 21.04.17 a serious road traffic collision occurred on the North-Westbound slip road at junction 11 of the M25 motorway near Chertsey, Surrey as a result of which the claimant ("C") who was then aged 35 years (dab 07.mUH) and is now 3g sustained serious injury.
2. Pursuant to an Order dated 09.11.18 [A/51] the case was listed for a preliminary trial on the issue of liability. The principal issues for my determination are (a) whether primary liability attaches to the defendant, Calvin Dyer ("D") and, if so, whether the damages recoverable by C should be discounted by reason of any contributory negligence on his part.
3. During the course of the trial, live evidence was given by both C and D and from the witness Christian Cave who was not directly involved in the collision but who was travelling along the M25 motorway at the material time and made certain observations close to the eventual accident scene.
4. Agreed written evidence was also received from a number of witnesses at the scene together with evidence from the police vehicle examiner (PC Wilson) and the police collision investigator (PC Wood).
5. Finally, and importantly, independent reconstruction experts (Mr Rusted for C; Mr Crouch for D) gave live evidence on behalf of each of the parties and, between them, photographs, moving footage both actual and reconstruction, plans and maps were produced to the Court.
6. Footage of the relevant vehicles was captured by a CCIV camera operated by Highways England on a nearby motorway gantry approximately 450m south of the

accident location. Whilst the footage did not capture the actual collision, it was able to demonstrate in both the original film and by technological enhancement undertaken by experts (Verden Forensics) the paths and progress of each of the vehicles concerned.

*The collision and the location*

7. The manner in which this collision occurred might be summarised as follows: soon before the collision, the white Ford Transit 'Luton' 3.5 tonne van being driven by D left the M25 motorway at junction 11 with the intention of travelling along a two lane slip road towards a set of automatic traffic signals positions at the end of that slip road. C was riding a Yamaha MT motorcycle and left the M25 motorway some distance behind the white van at the same junction with the intention of travelling along the same slip road.
8. As the motorcycle approached D's vehicle, D manoeuvred his van from the second or offside lane (I shall refer to this as "lane 2") in which there was a long line of slow moving or stationary traffic in order to take up a position in the left or nearside lane of the slip road ("lane 1") which was free or virtually free of traffic.
9. Within a few seconds of the commencement of D's manoeuvre, both C and his motorcycle collided with the rear of D's vehicle and/or other vehicles in the vicinity and/or with the road surface. Both the motorcycle and C came to rest within the carriageway of the slip road.
10. The accident location requires some further, detailed explanation. The M25 motorway comprises a carriageway with four lanes of traffic in each direction at this location. Traffic is subject to the national speed limit of 70 mph unless temporary speed limits are in force. In fact, at the material time the motorway was subject to a

60 mph speed limit which was mandated by the standard illuminated overhead gantry signs on the approach to the junction in question. That is an agreed fact.

11. At the 1/2 mile marker for junction 11 the first lane of the motorway itself becomes a dedicated lane (known by some as a 'deceleration' lane) which serves the slip road for the junction. This lane is designated by white line markings between the first and second lanes of the motorway along with an overhead sign giving details of the road destinations served by the junction.
12. The lane designations remain constant until the countdown markers to the junction. At the 100 yards countdown marker the motorway passes below a bridge. Some 110 m north of the bridge, the hard shoulder tapers to the carriageway edge over a distance of approximately 80 m. The effect of this is to widen lane 1 to a width of approximately 6.1 m. This lane continues to widen over a distance of approximately 130m to a width of approximately 7.3 m whereafter the lane is divided by centre lane markings some 190 m prior to the collision site. These road configurations remain reasonably constant past the collision location to the top of the slip road.
13. The slip road separates from the main carriageway of the motorway approximately 420 m north of the bridge. The tapered separation is defined by a system of solid white lines that border an area of hatched markings. At the separation of the slip road, lane 1 is designated by overhead signage for traffic turning left onto the A320 road towards Woking and lane 2 is designated for traffic turning right onto the A317 road to Chertsey. The lane designations are also marked on the road surface. The carriageway of the slip road is level to the collision point whereafter it climbs via a modest incline to the top of the slip road.
14. Four vehicles had direct involvement in the collision although the vehicle driven by D and the motorcycle ridden by C are of central importance. C was a reasonably

experienced motorcycle rider who had previously owned a Suzuki GSXR (750cc) motorcycle and who had acquired the Yamaha MT-10 (touting version) some months before the collision.

15. Some reviews of this motorcycle appeared in the trial bundle and emphasis was placed by Mr Hartley QC, counsel for D, on an authoritative 'Bennett's' review [D/836] and a review for a journal called "Piston Heads" [D/857]. Whilst caution should be exercised in the reading of these reviews which sometimes seek audience attraction and therefore speak in commercial hyperbole, there is no doubt that this Yamaha motorcycle (1000cc) was capable of high-performance and high-speed.

16. C also attempted for some adaptations to be made to the motorcycle including a change in the exhaust system so as to produce a much louder motor sound (he asserted for road safety), a change of brakes to Brembos (which, he contended, were less spongy and more effective/responsive and reduced stopping distances) and a change of tyres to Pilot Road 4 tyres to improve stopping distances and manoeuvrability in adverse weather conditions. C also changed the windshield, the handguards, grips and the seat [A/29].

17. D was employed at the time as a delivery driver. The 'Luton' van (2198 cc) which he was driving was equipped with a rear mounted tail lift. In his evidence, D frequently referred to this vehicle as a 'panel' van. The effect of the incorporation of the tail lift is to permit driver views to the rear of the van only via nearside and offside divided wing mirrors (each offering observations in two different dimensions). The vehicle incorporated indicator lights both at the front and at the rear and also at the front of the van adjacent to the wing mirrors.

18. The other two vehicles involved in the collision were a blue Ford Focus TDCi five door hatchback driven by Mr Bradding and a red Skoda Citigo driven by Mr

Roulston. The involvement of neither vehicle assists with the resolution of the principal issues.

19. C was employed at the time of the accident as a prosthetic artist and was en route to his place of work at Shepperton Studios on the morning in question.
20. During the course of his live evidence, he was cross-examined carefully and appropriately by Mr Hartley QC on behalf of D. I found C to be a thoughtful, impressive and credible witness upon whose evidence I could place considerable reliance.
21. He did, however, find it difficult to make appropriate concessions about the manner of his riding immediately prior to the collision. For example, whilst it was agreed between the parties that the motorcycle travelled at speeds of approximately 100mph along the motorway shortly before the collision whilst the gantry signs were displaying a mandatory 60 mph limit, C was reluctant to concede that riding at such speeds amounted to the taking of considerable risk.
22. When asked to comment upon captured footage illustrating the riding of his motorcycle on the motorway between two lanes of moving traffic and effectively along the broken white lines dividing two lanes at speeds of approximately 156mph, C was again reluctant to acknowledge that such riding gave rise to potential danger whether to himself or others.
23. Ultimately, some concessions were made by C during the course of cross-examination.
24. The unrealistic position adopted by C is perhaps explicable by a natural defensiveness arising from the catastrophe which has befallen him as a result of this collision and the injuries sustained.

25. I found Don the other hand it to be an unsatisfactory witness who appeared to regard his principal purpose during the course of his live evidence to criticise - often in strident terms - the manner in which Ms Crapper for C conducted the case on behalf of her client. The criticism was gratuitous and unjustified. The examination by counsel was undertaken meticulously and with comtesy. It is difficult to understand D's motive in being evasive and, regrettably, insulting. Of course, I accept that the events which unfolded largely occurred at the rear of D's vehicle and the evidence he could give of the immediate pre-collision events was therefore limited. I also accept that the happening of this collision and his presence during the aftermath and knowledge of the extent of C's injury must have had (as D insisted) an adverse effect upon him.

26. However, none of that explains the attitude he adopted. Perhaps more importantly, his live evidence contradicted in many material respects the versions of events he had given to the police both in the immediate aftermath of events and in a lengthy interview conducted under caution sometime later. Similarly, his witness statement prepared for the purposes of this action in places contradicted both his earlier versions of events.

27. Ultimately, I regret that I was unable to place much reliance on D's evidence.

*The competing cases*

28. The case advanced on behalf of each of the parties was straightforward. On behalf of Cit was contended that as C approached the rear of D's van the latter pulled out from lane 2 of the slip road into lane 1 along which C was travelling and that O so acted without checking (properly or at all) to the rear of the van and without indicating his intention to do so. As a result, C was unable to bring his motorcycle to a safe stop but, instead, braked sufficiently hard to cause the rear end and wheel of his

motorcycle to be raised into the air (known to motorcyclists as a "stoppie") causing C to be ejected from the motorcycle seat into collision with the rear of D's vehicle.

29. D's case was that he did indeed decide to move from lane 2 into lane 1 because of the long line of stationary or slow-moving traffic ahead of him. He checked his wing mirrors, indicated to move **left**, checked his mirrors again and moved out slowly. C was at no time visible in his mirrors despite careful checks. He heard both a sound from (as it turned out) C himself and the thud of a collision which caused him to stop and discover what had occurred.

30. D maintained this position throughout the trial and, in closing submissions, it was argued that primary liability did not attach to D for the reasons advanced. Alternatively, the contributory negligence to be ascribed to C was significant indeed so as to reflect the greater culpability of C in riding his motorcycle at too fast a speed and in an erratic manner (as to which see below).

31. For C it was contended that the collision occurred quite simply because **D** pulled out into the path of C's properly positioned and proceeding motorcycle thereby creating an insurmountable hazard for C which led to an inevitable collision which could not be avoided despite appropriate braking and manoeuvring on the part of C and the motorcycle.

*The expert evidence*

32. The accident reconstruction experts provided written reports and an almost entirely agreed joint statement [C/527]. Both gave live evidence at trial and both were asked to explore both major and minor issues arising from the circumstances of the collision.



33. I remind myself of the appropriate approach to the analysis of such accident reconstruction evidence as characterised by Coulson J (as he was then) in *Michael James Stewart v (Protected Party by His Litigation Friend Christopher Ramwell) v David William Glaze* [2009] EWHC 704 (QB). He said this at p3, para 10:

"In my judgement, it is the primary factual evidence which is of the greatest importance in a case of this kind. The expert evidence comprises a useful way in which that factual evidence, and the inferences to be drawn from it, can be tested. It is, however, very important to ensure that the expert evidence is not elevated into a fixed framework or formula, against which the defendant's actions are then to be rigidly judged with a mathematical precision"

34. In my judgement, Coulson J was re-stating in a slightly different but entirely consistent approach the earlier dictum of Stuart-Smith LJ in *Liddell v Middleton* [1996] PIQR P36 when he said this:

"...the function of the expert is to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence of the marks on the road, the damage or whatever it maybe. What he is not entitled to do is to say in effect 'I have considered that the statements and/ or evidence of the eye-witnesses in this case and I concluded from there (sic) evidence that the defendant was going at a certain speed, or that he could have seen the plaintiff at a certain point'. These are facts for the trial judge to find based on the evidence that he accepts and such inferences that he draws from the primary facts found".

35. Whilst I found both the expert witnesses to be clear, independent and extremely helpful, I found this to be a case to which the dicta in these previous authorities I have referred to were particularly applicable. In fact, the longer the case went on and the evidence developed, the more obvious it became as to how this most unfortunate collision occurred. Whilst the reconstruction evidence served, in my judgement, to confirm how the collision was likely to have occurred, it could not- and did not- act as a substitute for the reaching of conclusions based on the primary witness evidence.

*The approach to the scene of each of the principal vehicles*

36. C provided a statement to the police on 22.06.17 [D/713]. He also signed a witness statement for the purposes of these proceedings on 19.12.18 [B/70] and gave live evidence at trial.
37. The pleadings relied upon by C followed the usual course although D was given permission to amend his Defence [the amendment is at A/22] in order to plead a positive case alleging that C failed to brake as soon as possible after D's vehicle indicated and/or started to move to its left but instead deliberately steered to the right in an attempt to move between D's emerging van and another vehicle in front of it – a manoeuvre, it was said, not unlike one undertaken by C on the M25 motorway soon before this collision. It was further alleged that under heavy braking, the front wheel of C's motorcycle locked, causing C to be thrown forwards leaving the machine to collide "headfirst" into the back of D's van.
38. C was given permission to serve further evidence dealing with this series of amendments and he did so in a further witness statement signed on 20.05.19 [B/93].
39. C was employed on a short-term contract at Shepperton studios at the material time and enjoyed flexible working hours in a relaxed working atmosphere. He said that he was not late in setting off that morning and it usually took him between 50 minutes and one hour to ride to work. Having later appreciated that the collision occurred shortly after 0800 hrs that Friday morning and that he was only about 15 minutes riding time from work when it occurred, he conceded that he could not have left home somewhere between 0600 and 0630 that morning as he stated in his original police statement.
40. C remembers riding in his winter protective gear with a black Shoei crash helmet, a black textile motorbike jacket and trousers which were zipped together. He wore black motorbike boots and gloves.

41. He described it as being light and the weather conditions as dry and cold with good visibility at the material time.
42. In evidence, C was asked a series of questions about the nature of his riding before and on the approach to the scene. He was shown some moving footage which was taken from a dashboard camera ("dashcam") fitted to a Volvo vehicle being driven by Mr Cosmas Cosmas who had exited the M25 and noted that an incident had occurred involving a "bearded motorcyclist "who was lying in the road. Having realised that the incident was serious, Mr Cosmas checked the dashcam footage on his vehicle and made contact with the police.
43. In fact, the footage taken by that camera captured a motorcyclist passing Mr Cosmas' vehicle a few moments before the collision.
44. C had not finally accepted that the rider depicted in that footage was himself until shortly before the trial. The reconstruction experts were in no doubt that it was C who was depicted in the footage [C/528 § 1]. They estimated the speed of the motorcycle as a point some 2 miles from the collision point to be approximately 86 mph [ibid, §2].
45. C accepted during the course of cross-examination that he was travelling at a probable speed of 86mph and was riding between two lanes of moving traffic shortly before the turn off at junction 11.
46. The witness David Legrand was driving his red Hyundai motor vehicle along the M25 that morning. He recalls driving at about 65 mph as he was approaching junction 11 when he became aware of a motorcycle both because of the noise it generated and when he saw it approach him in the nearside lane from behind. The motorcycle "then came alongside me, squeezing between my car and the lony in lane 2" [B/108 §14]. He estimated the speed of the motorcycle at approximately 90 mph.

47. Although he lost sight of the motorcycle as it progressed beyond him, as soon as he saw the motorcycle and motorcyclist lying in the road he felt "sure it was the same motorcycle that had just overtaken me" [*ibid* §21].
48. Mr Christian Cave was driving a Suzuki Swift motorRvehicle at about the same location. He described to the police in a witness statement datt:d 17.05.17 travelling along the M25 in the inside lane. He saw overhead gantry signs indicating a 60 mph speed limit. He noticed a lorry slightly ahead of him to his right but his attention was drawn to a motorcycle passing him on his right hand side. He described the motorcycle squeezing between his vehicle and the lorry at speed. He regarded the speed as excessive and the manoeuvre as dangerous. He sounded his horn as a result.
49. Mr Cave may have been describing the same incident as that described by Mr Legrand. Mr Cave gave live evidence at trial and accepted that he had been mistaken about a number of details of his recollection but he remained firm in his conviction that to the best of his knowledge the motorcyclist involved in the collision was the same motor cyclist that had passed him earlier.
50. I found Mr Cave to be a credible witness. In my judgement, it is likely that he was describing the same incident as that referred to in the witness statement of Mr Legrand. I find that the observations of both Mr Mr Cave and Mr Legrand were largely accurate and that they were describing the movements of C's motorcycle. I also find that the dashcam footage from Mr Cosmas' vehicle depicted C.
51. It was C's intention to leave the M25 at junction 11 and turn right at the top of the slip road in the direction of Chettsey (A317). C's evidence was to the effect that as he filtered off the M25 he could see that the rightRhand lane "was blocked with stationary traffic" but that the left-hand lane of the slip road (leading to a left turn at the traffic signals at the top of the slip road towards Woking) seemed to be clear of traffic. As he

stated in his witness statement: "I decided to ride up the slip lane in the clear left hand lane and then filter into the traffic in the tight-hand lane before the traffic lights" [B/74 §9].

52. In both his statements to the police (22.06.17) [D/713] and his witness statement within these proceedings, C was unable to recall the speed at which he was travelling along the slip road but thought that he would have been in 3rd or 4th gear "I tended to stay in a lower gear than what is required and use the engine braking to slow down as it reduces the strain on the brakes. This means that the bike would slow down naturally and has the benefit of making a louder noise from the exhaust which I preferred as it made me more noticeable to other motorists who would therefore know I was there".

53. C said in his witness statement that he considered that being in third or fourth gear would give him sufficient momentum to reach the end of the road a manner in which he usually rode and reduced momentum. C acknowledged that after the collision his motorcycle was found to have been engaged in sixth gear. He considered the likely cause of this was the effect on and movement of the gear lever of the motorcycle striking the ground at the time of the collision. I accept C's evidence as to the likely cause of the gear position finding.

#### *Speed of the motorcycle*

54. Having considered the CCTV footage, the reconstruction experts agreed that when the motorcycle entered the view of the camera as it travelled along the slip road it was travelling at approximately 100 mph at a position some 300m and 9 seconds from the impact.

55. They also agreed that the motorcycle slowed on its approach to the collision at a rate consistent with engine compression and that the speed of the motorcycle was approximately 90 mph when it was about 185m and 6.5 seconds from the impact. The

speed of the motorcycle had reduced to approximately 75 mph when it was about 130rr. and 5 seconds from the impact.

56. C was pressed during the course of cross-examination about the speed and nature of riding both on the M25 and along the slip road. He frankly conceded that he had seen neither the illuminated gantry lights showing a mandatory 60 mph speed limit nor a separate illuminated sign showing that there was a queue on the slip road. He accepted that he entered the slip road at approximately 100 mph, described himself as being "calm and composed" and riding "in a progressive manner" as he did so and indicated that he did not realise the "unintentional" speed at which he was travelling.

57. C conceded that he ought to have seen the signage referred to (obviously having to agree that such signs provided important information which ought to have been seen and acted upon) and was travelling at too fast a speed. He eventually conceded that riding at high speed between two lanes of moving traffic (ie in the manner earlier described soon before the tum off) "probably is dangerous".

58. I did not form the impression that C was generally an irresponsible and reckless motorcycle rider. He proceeded carefully to respond to those points that were properly put to him in cross examination and answered in a measured and considered although he could not avoid the concessions he ultimately had to make both in respect of his approach speed (C... on reflection, I was travelling too fast") to what was to become the collision scene and the general manner of his riding.

59. The clear impression I gained was that C enjoyed the performance which his powerful motorcycle was able to provide and enjoyed riding at high speeds and, at times, in ways which necessarily gave rise to risk.

60. Mr Calvin Dyer ("D") was a professional driver at the time of the collision. He had previously been a professional chauffeur and had held a number of driving jobs before

becoming an agency driver two years before the incident in question. However, his employment with XPO Transport Solutions UK Ltd was a full-time position in which he was undertaking a 13 week probation period. He usually drove a 7.5 tonne lorry but on this day he was driving the 3.5 tonne vehicle which was involved in the collision. Whilst he had previously driven 3.5 tonne vehicles, he had not usually driven such a vehicle fitted with a tail-lift.

61. He told me that during the course of a normal day he drove some 12-13 hours and there was an obvious tension between the number of hours D generally worked and the number of permitted hours under the relevant legislation. As he said to the police in his interview on 30.06.17<sup>1</sup> "... the only reason I was in [the 3.5 tonne vehicle] was because of my tachograph hours, you are obviously limited to a certain amount of hours per week and I was majoring on my hours so they took me out of the lorry and put me into the van...".

62. It became clear the course of cross-examination that D was at work at that morning under a degree of sufferance. It was his intention not to work on that day but early that morning he had been asked to do so by staff at his company. D indicated that he had finished work late on the previous night and that he was tired. In fact, it became clear that he had been involved in an argument with his manager on the telephone which led to his decision not to work on this particular day prior to receiving the early morning telephone call.

63. D described the traffic conditions as being "horrendous" that morning (in terms of volume) but he insisted that he was not behind schedule albeit that this was a point in time early in the course of that schedule. He also said that it was a warm day and that he was driving with his windows down.

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<sup>1</sup> NB the date shown on the transcript of interview is incorrect

64. It was D's intention to leave the M25 at junction 11 and to turn right at the top of the slip road towards Chertsey. However, as he left the motorway D became aware of the queueing traffic in the offside lane and "... decided to move across into the nearside lane and to head into Woking" thereby changing and effectively reversing his delivery schedule.
65. In his initial description of events to the police [D/638] D did not mention his decision to alter his delivery schedule but merely stated "I wanted to turn left at the top of the slip road so moved into the left-hand lane".
66. In his witness statement D said that he checked both his nearside and offside mirrors before carrying out the manoeuvre. Of course, only the wing mirrors were available for rear views because of the presence of the tail-lift in this 3.5 tonne van.
67. The wing mirrors on this vehicle are illustrated in various photographs within the trial bundle but the available rear view via the nearside mirror is depicted in a series of photographs accompanying MrCrouch's report [C/C25 et seq]. These represent a series of reconstruction photographs which provide no more than a general impression of what might and might not be visible by looking into the nearside wing mirror at various distances behind the van. Nevertheless, they do provide a helpful series of sequenced photographs which assist to some extent in reaching a view as whether and at what stage D might or ought to have seen the approach of C's motorcycle from behind.
68. On the first check of the nearside wing mirror, D said in witness statement [B/98] that he "... could not see any vehicle coming up the nearside lane". Nor, he stated, could he see the motorcycle. D said that after he had checked that the nearside lane was clear he put his indicator on "... and waited a couple of seconds before rechecking my mirror and then [sic] commencing my manoeuvre into the nearside lane".



69. He stated that he could at no time see the motorcycle coming up behind him and that he moved across slowly into the nearside lane. His vehicle was "fully established" within the nearside lane "before anything occurred".
70. D said that it was a couple of seconds after he had straightened up in the nearside lane that he heard the noise of an impact to the rear of his vehicle which shocked him and caused him to look in both of his rear view mirrors. In his offside mirror he could see a motorcycle in the road behind his vehicle which caused him to pull over to the offside and stop. He describes the motorcycle as being "roughly level with the beginning of the grass verge dividing the slip road with the hard shoulder of the M25".
71. In cross-examination, D conceded that there was a gap in the traffic that allowed him to pull out from lane 2 to lane 1 on the slip road. Importantly, he also stated that when he looked in his nearside wing mirror he could see vehicles further back (by which I took him to mean either on the slip road itself or on the deceleration lane beyond) but not a motorcycle.
72. He conceded that if the motorcycle had been positioned "mid-lane" in lane 1 of the slip road some 80m or so behind the van, "I should have seen him". He also accepted that the same was true if the motorcycle had been 100m behind in a similar position.
73. D also accepted that if the motorcycle light was switched on at the time, that would have made the motorcycle more visible. He was unclear about the speed at which the traffic was moving in lane 2 of the slip road. He considered that he would have been travelling up at a speed greater than 5 mph otherwise he thought his vehicle would have stalled.
74. Importantly, he was asked in interview how long his indicator had been on before he moved out. He answered: "...I mean it had been a couple of seconds at most" [D/545]. To a question implying that signalling, checking and moving would all happen quickly,

he added "...that's nature [sic] of driving you have to make decisions on the spot, spur of the moment you know..." [*ibid*J.

75. There was an issue in the case as to whether or not D had indicated his intention to change lanes at all. C had seen no such indication. D insisted that he had indicated. A witness statement from and apparently independent witness, Adam Garland, was served on behalf of C. In the event, Mr Garland was not called to give evidence and no explanation was provided as to why this course of had occurred.

76. Mr Hartley, QC invited me to draw an adverse inference because of the failure to subject to Mr Garland to cross-examination in accordance with the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* (1998). In my judgement, this is an inappropriate course to take in the circumstances of this case. Insofar as this evidence assists me at all (and I can place little weight on this untested evidence) it serves to provide further support for the contention that D did indeed indicate his intention to change lanes.

77. Whilst it is fair to say that the summary of events as set out in paragraph 10 of Mr Garland's statement [B/88] sit comfortably with some of the principal findings I shall reach, it seems to me that I must largely disregard this statement.

78. It was put to D in cross-examination that he indicated and moved out almost straight away. He responded "Well, when it was safe to do so".

79. D was unable to accurately state the speed at which he was moving as he moved from lane 2 into lane 1 (no more than 10 mph because he had been virtually stationary) but he was adamant that he did not pull out at a sharp angle.

80. D's recollection was concisely stated in the final paragraph of his witness statement [B/99]:

"I checked my mirrors carefully before I pulled across into the nearside lane and I could not see a motorcycle coming up behind me prior to me commencing my manoeuvre. I do not know where the motorcyclist had come from but he was not visible to me when I commenced my manoeuvre to change lanes"

81. In his initial statement to the police [22.06.17 – D/713] C stated that as he was riding along lane 1 of the slip road he saw that the lane was totally clear and that he was the only vehicle in it. As he proceeded along that lane and "10-15 feet ahead of me" he saw the van move out from the right lane into the left lane without any indication. Immediately, C braked which caused him to go up onto the front wheel "almost like a nose dive" and as the van looked like it was trying to correct its line and was "semi-straight" Chit the back of the van.

82. The distance referred to was maintained in his witness statement for the purposes of these proceedings [B/74]

83. During the course of his live evidence, C accepted that his initial estimates of distance were incorrect but maintained that the movement of the van was sharp and sudden- as if the driver had applied 'full lock' steering to the left.

84. C recalled that before the van moved, he thought the traffic in lane 2 of the slip road was stationary but that it might have been moving slowly at or about 5 mph. He was clear about the movement of the van: "The cars were nose to bumper. It must have been a sharper pull out".

*The joint expert report*

85. In their joint statement [C/527] the reconstruction experts agreed on a considerable number of issues which bear upon the evidence summarised above and upon the ultimate findings I must reach.

86. The experts agreed that the footage indicated that C was faced with signage indicating either "Congestion after Junction" or "Queue on Slip Road" in two locations within a half mile of the junction turn off. That the speed limit was limited to 60 mph was indicated at the 800m marker and again on the gantry over the slip road itself.

137. It was C's evidence that he probably saw none of this signage.

88. The experts also agreed that the movement of the van from lane 2 to lane 1 in the moments prior to the impact would have taken approximately 3.4 seconds and that the most likely speed of the van at the moment of its emergence was between 5 and 10 mph with firm acceleration through the manoeuvre. Thus, they were able to calculate, the speed of the van at the moment of impact was approximately 14- 19 mph.

89. As regards the speed and position of the motorcycle, the experts agreed that the motorcycle would have been travelling at approximately 90 mph some 3.0-3.4 seconds from the commencement of the van's manoeuvre. At between 1.5 and 1.84 seconds from the commencement of the manoeuvre, the motorcycle would have been travelling at approximately 75 mph at a point approximately 110m from the rear of the van.

90. On one important point there was a slight discrepancy between the experts. Mr Crouch calculated that the motorcycle was travelling at approximately 60 mph when approximately 60m from the rear of the van when the van began its manoeuvre. Mr Rusted calculated this 'separation' at 52m at a speed of 57-58 mph.

91. The experts agreed that on the approach to the collision, the motorcycle would have been in the field of view of D's nearside wing mirror. There was considerable discussion during the course of the evidence in relation to the conspicuity of the view via the wing mirrors. Conspicuity will be affected by a number of factors – not least the weather conditions generally, the quality of light and the exact nature of the sky conditions.

Neither reconstructions nor photographic illustrations can re-create the precise prevailing conditions.

92. All that said, both experts found during their separate static testing that the motorcycle could be seen at a distance of approximately 90m with a careful mirror check. Mr Rusted was of the opinion that the motorcycle was visible at a greater distance than 90 m mainly because (it was agreed) the headlight of the motorcycle was illuminated. Mr Crouch agreed that the motorcycle was within the field of view of the mirrors but that such a view became "more challenging to see as distances increased".
93. The experts were at pains to concede (see, for example, para 24 of the joint statement) that testing cannot replicate exactly what D could have seen and it must be a matter for determination via the witness evidence when mirror checks should have been conducted and what was capable of being seen at any particular moment in time.
94. The experts agreed that as C braked to avoid a collision in an emergency situation the rear wheel lifted from the ground and a 'stoppie' was effected. The level of braking caused the motorcycle to rotate about the front wheel.
95. There was a slightly surprising absence of meaningful physical evidence found at the scene by the attending police investigating and reconstruction officers. The physical evidence is described in the principal reports of each of the two experts and I did not find that this evidence assisted me in any material way in reaching conclusions on the principal factual issues.
96. There were marks on C's helmet which Mr Crouch considered indicated that the helmet struck the tail lift of the van whilst Mr Rusted, though accepting that thesis as a possibility, considered that it was more likely that C did not make substantial contact with the rear of the van.

97. Both experts agreed that there was no damage present to the motorcycle that was consistent with it striking the van itself. This is important because it is evidence that the motorcycle must have reduced its speed to such a degree that it was travelling at approximately the same speed as the van itself in the moments prior to any impact (ie 14-19 mph *per* the agreed expert position).
98. There was further agreement as to the movement of each of the vehicles immediately prior to the collision. At paragraph 32 of the joint statement, the experts agreed that the emergence of D's van into the path of C effectively created "an evolving obstruction" to C. They agreed that the van did not adopt a central position within the lane into which it was transferring at the point of impact but appeared to be positioned with its offside along the carriageway centreline.
99. At paragraph 30 of the joint statement, the experts agreed that after the van had commenced its manoeuvre C moved from a position approximately central in lane 1 of the slip road to a position centrally within the slip road, directly on the white lines dividing the lanes. They considered that Chad initially moved to the right under engine compression without applying the brakes. I shall return to the movement of the motorcycle to its right below.
100. Whilst the reconstruction experts were cross-examined at some length (particularly Mr Crouch) I did not find that there was (a) significant movement on the part of either expert from the written reports and the joint statement, or (b) evidence upon which I should find that the agreed positions reached in the joint statement should be displaced or questioned (save, perhaps, in relation to the movement of the motorcycle to the right).
101. Once again, I remind myself of the importance of reaching conclusions based on the factual evidence where possible and that the purpose of the expert evidence is to

assist the Court to interpret the factual evidence from a position of special skill and knowledge.

*Principal Findings – Primary Liability*

102. I find on the limited parts of D's own evidence which assist me that D was driving a vehicle which was less familiar to him than his normal, heavier, lorry. He had worked until late on the previous evening. He was admittedly tired and had little or nothing to eat on the morning of this incident. He was also not in the most genial of moods having had a clear disagreement with his boss.

103. I find that he made a very late decision to alter his route and that this decision was occasioned by the presence of slow moving or stationary traffic ahead of him as he joined lane 2 of the slip road. The line reached the automatic traffic signals at the top of the road.

104. I find that D checked his wing mirrors once, indicated his intention to move by switching on the left-hand indicator and fleetingly checked the nearside wing mirror again as he began to emerge from lane 2 into lane one. I find that all this occurred over a very short period of time and, more particularly, over no more than a couple of seconds.

105. I find that at the first mirror check, the motorcycle was capable of being seen as long as the mirror check was undertaken carefully. C is likely to have been no more than 90m away at the first check and, notwithstanding conspicuity issues, I am assisted by paragraph 20 of the joint statement of the reconstruction experts to which I have referred above – namely that during static testing the motorcycle could be seen at a distance of about 90m with a careful mirror check.

106. I find that at what ought to have been a second and careful mirror check (but which was probably a fleeting check at the moment the van commenced its manoeuvre) the motorcycle was entirely capable of being seen. In my judgement, the motorcycle was approximately 52R60m from the rear of the van and travelling at approximately 60 mph at this moment in time.
107. If the motorcycle had been seen by D at the first or, alternatively, at the second mirror check, the manoeuvre ought to have been postponed until it was safe to emerge.
108. I am fortified in reaching those conclusions by the following factors. D was a professional driver and although I do not import a higher duty of care upon him in the manner of his driving than that of an ordinary motorist, he ought to have been aware of the particular dangers of pulling out from a line of traffic until it was safe to do so.
109. Indeed, he declared that he was aware of this and of the dangers posed by motorcycles to other road users. At [D/543] he said this to the police in interview: "I am so used to motorbikes that you are always taught to be alert and to always Doublecheck your mirrors..."
110. When asked by the police how long he had been indicating his intention to pull out, D said LD/545J "it is all in one motion really so mirror, signal, manoeuvres, it is just ingrained [sic] you so". That, it seems to me, suggests that the mirror checking was all completed before the commencement of the indication all the manoeuvre itself. Even if that is too narrow a construction to be placed upon these own words, it is powerful evidence that the whole process occurred over a very short period of time indeed during which the motorcycle was gaining ground progressively and rapidly from behind.
111. During the course of his cross-examination, D indicated that what he could see by looking into his nearside wing mirror during the course of one or both of his mirror checks were motor vehicles (probably those of Mr Cave and Mr Legrand) which were



clearly positioned behind and beyond the motorcycle. That seems to me to indicate beyond doubt that the motorcycle was also visible if the checks had been carried out thoroughly.

112. It also puzzled me why, despite his vehicle windows being open on a warm day, D did not hear the approach of the (loud-noised) motorcycle. After all, he said in evidence that he heard a cry/whimper from Cas the collision occurred.

113. I find, therefore, that the principal cause of this collision was the emergence of D's van from lane 2 of the slip road into the lane 1 which caused a clear, immediate and, in the event, insuperable obstacle to C's approaching motorcycle.

114. I have no doubt on the factual evidence and upon the helpful and supportive expert reconstruction evidence that if D had driven carefully and to the standard expected of the reasonable driver he would have seen the approach of the motorcycle in good time to stay in lane 2 until it was safe to proceed therefrom.

115. Rather, I find that D acted in a hurried and careless manner having probably reached an instantaneous or very quick decision to avoid the frustration of solid traffic ahead of him queuing to turn right at the traffic signals by turning left at the top of the slip road and changing lanes all too quickly to execute that plan.

116. Primary liability has been established on behalf of C.

#### *Contribution*

117. The speed and manner of C's riding prior to leaving the M25 can only assist as a background feature and cannot determine any issue in relation to contributory negligence. I have found, however, that C enjoyed the power and performance of his motorcycle and rode accordingly.

118. The consequence of C probably not seeing both the speed limit signs and the signs indicating that there was queueing traffic on the slip road ill-prepared him for a safe and careful exit from the motorway. I find as a fact that on the approach to the collision and some 9 seconds from impact, C was travelling along the slip road at or slightly above 100 mph.
119. Whilst speed, of itself, does not necessarily imply negligence, it is self-evident that travelling at such a speed allows a rider significantly less time and opportunity to deal with an arising hazard or obstacle. In my judgment, that is exactly what occurred in this case.
120. I find that the speed of the motorcycle when it was no more than 280m from the rear of the van was more than twice the safe and reasonable speed at which it ought to have been travelling.
121. The motorcycle decreased its speed under engine compression and I find that it was travelling at a speed of approximately 75 mph at a point in time less than two seconds prior to the commencement of the van's manoeuvre.
122. In my judgement, the mere announcement of that fact is sufficiently compelling evidence not only that the motorcycle was travelling at too fast a speed but that it was travelling at a speed which offered its rider little chance of avoiding a collision once the obstacle appeared in its path.
123. Just as D was accustomed to motorcyclists causing danger to other road users, so experienced motorcyclists are- or ought to be- aware of motor vehicles undertaking careless manoeuvres like that undertaken in this case by D.

*Motorcycle move to the right ?*

124. A considerable amount of time was taken up during the course of the trial with the issue as to whether or not C deliberately moved his motorcycle to the right before braking upon the recognition that the van was moving from one lane to the other.

125. Certain it is that this was the conclusion of the experts in the joint statement. They agreed that C initially moved to the right under engine compression without applying the brakes because he was faced with a situation that required an emergency decision to be made and the available options were to adopt a position to the right, adopt a position to the left and/or brake.

126. The experts agreed that C decided on a strategy to move the motorcycle to its right and effectively to ride through a gap between the van and the vehicles being overtaken if that gap widened sufficiently to allow him to pass through. They concluded that because the strategy failed (the gap between the vehicles did not open sufficiently) C applied emergency braking.

127. This agreement between the experts in the joint statement allowed Mr Hartley QC on behalf of D to contend that C confronted the hazard by riding in a risky manner similar to that which been described by the witnesses referred to earlier on the M25. Ms Crapper on behalf of C (and C himself) were fiercely defensive of this allegation even though it had to be accepted that some physical marks at the scene did indicate that the impact had occurred towards the broken centre white lines dividing the two lanes of the slip road.

128. It was suggested on behalf of C that the very contour and camber of the slip road was likely to cause the motorcycle to move to its right although Mr Crouch demonstrated with some force that one was able to plot the exact course of the motorcycle which moved clearly and purposefully to its right in any event notwithstanding any (unlikely) contribution from the contour of the road itself.

129. Save that, in my judgement, there is insufficient evidence upon which I can reach a firm conclusion that the motorcycle moved to the right as a result of a deliberate and conscious decision made by C, it seems to me that I do not need to reach a conclusion as to the extent to which the motorcycle moved to its right or the reason for the same.

130. The central events in this case occurred over no more than a few seconds. The motorcycle would have been positioned closer than 100m from the rear of the van at a point in time some 1.5 seconds before the van began to pull out. In my judgement, the contributory negligence on the part of C was in failing to ride at a safe and reasonable speed as it travelled up the slip road so as to be able to take avoiding action in the event of obstacle or hazard.

131. I do not find that the contributory negligence was any greater because the motorcycle moved to its right (for whatever reason) between the moment of appreciation of hazard and the impact itself.

132. In fact, there was evidence to suggest that C was able to sufficiently reduce the speed of the motorcycle under braking almost to that of the van (which would have avoided the collision). It seems to me to follow that if the motorcycle had been travelling at even a modestly lower speed as it approached the van (as I find ought to have been the case) it is likely that a collision would have been avoided or, at least, less significant.

133. In considering the correct approach to the exercise of apportionment between the parties, I have in mind the recent dictum of Lord Reed in *Jackson v Murray* [2015] UKC 5 at paragraph 27 and his characterisation that "... the apportionment of

responsibility is inevitably a somewhat rough and ready exercise... And that a variety of possible answers can legitimately be given".

134. In terms of causative potency, I have reached the conclusion that the potency of D's manoeuvre was far greater than the potency of C's speed. D could and should have made careful observations and seen the approach of C. There was a significant destructive disparity between these D's van and C's motorcycle. The obstacle and hazard arose principally because of the movement of the van from lane 2 towards lane 1.

135. As far as blameworthiness is concerned, I have reached the conclusion that D was not unfit to drive his vehicle but was labouring under a number of adverse factors including fatigue, poor relations at work including his overridden decision not to work that day. It is no great leap of imagination to conclude that those factors might well have contributed to his instantaneous decision to change his route and therefore his road position.

136. Whilst I do not find that the manner of D's want of care should be labelled as "egregious" as Ms Crapper invites, I do find that his decision-making was too quick and significantly flawed and that the execution of his decision is capable of serious criticism.

137. As for C, he is to be blamed for proceeding at too fast a speed which unfortunately provided him with insufficient time and opportunity to deal with and potentially avoid the hazard created by D. In my judgement, riding at a significantly lower speed would have afforded him more time and opportunity to take avoiding action.

138. I do not find the consideration of the authorities on this topic to be of any real benefit not least because the factual circumstances in each case are often so very different on careful analysis.

139. It seems to me that a just and equitable apportionment of blame in this case results in a deduction of 25% for contributory negligence.

140. I hope that the parties will be able to deal with any consequential Orders arising from this judgement. In the event that that is not possible, I shall hear further argument.

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