Neutral Citation Number: [2020] EWHC 825 (QB)

Case No: HQ17P03107

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2020

Before :

MR JUSTICE LINDEN

- -

Between :

IDRIS FARAH
(by his litigation friend Fatuma Mohamad)

Claimant

- and –

(1) AHMED ABDULLAHI
(2) PROBUS INSURANCE COMPANY LIMITED
(3) Removed
(4) EUI LIMITED
(5) MOTOR INSURERS' BUREAU
(6) OSMAN ELMI

Defendants

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Mr Robert Weir QC (instructed by Irwin Mitchell LLP) for the claimant
Mr William Audland QC (instructed by Kennedy's Law LLP) for the second defendant
Mr Derek O'Sullivan QC and Mr Michael Standing (instructed by Horwich Farrelly) for the fourth defendant
Mr Tim Horlock QC (instructed by Weightmans LLP) for the fifth defendant

Hearing dates: 19, 20, 21, 24, 25, 26, 27, 28 February 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 8th April 2020 at 10.30am.

INTRODUCTION.

1. These proceedings arise out of events which occurred shortly after 3:30 am on Saturday 6 September 2014 on High Street, Harlesden, London NW10. In very brief summary, the claimant was a pedestrian on the High Street when he was involved in collisions with two cars: a Ford Focus driven by the first defendant and a Mercedes 'A' Class. The identity of the driver of the Mercedes is in dispute, but the claimant and the second defendant say that it was the sixth defendant.

2. As a result of these events, the claimant was left with severe head injuries. In addition to a fractured skull and abrasions and lacerations to the head, he suffered two types of brain injury: a coup/contrecoup injury and a severe Diffuse Axonal Injury ("DAI") which has caused him very significant disabilities. The claimant lacks capacity to litigate and brings this claim by his litigation friend. He recalls nothing of the relevant events and has been unable to participate in the trial.

3. In August 2015, the first defendant pleaded guilty to causing serious injury to the claimant by dangerous driving, and driving whilst disqualified. He was sentenced to a total of 3 years and 11 months imprisonment by Harrow Crown Court.

4. The second defendant is, in effect, the insurer of the Ford Focus. Pursuant to Article 75 of the Articles of Association of the fifth defendant ("the MIB"), of which it is a member, the second defendant will be liable to pay any damages which are ordered against the first defendant and which the first defendant fails to pay the claimant within 7 days of the execution date of the judgment.

5. The fourth defendant is, in effect, the Article 75 insurer of the Mercedes. In the event that I find that the sixth defendant was the driver of that vehicle during the relevant events, the fourth defendant will be liable to pay any damages which are ordered against the sixth defendant and which he fails to pay within the specified period. If, on the other hand, I find that the sixth defendant was not the driver of the Mercedes, any damages which I would have ordered against the driver of that vehicle will be recoverable by the claimant from the MIB pursuant to the Untraced Drivers' Agreement of 7 February 2003, between the Secretary of State for Transport and the MIB, albeit by way of a separate claim to the MIB.

6. The claim against the third defendant, on the basis that the driver of the Mercedes was unidentified, was struck out by consent following the decision of the Supreme Court in *Cameron v Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau*

Intervening) [2019] UKSC 6; [2019] 1 WLR 1471 that it is not permissible in law to bring proceedings for personal injury against a defendant who has not been served and is not aware of those proceedings.

7. Breach of duty by the drivers of the two cars is not disputed by any of the defendants. The issues in relation to liability relate to the question which defendant or defendants should compensate the claimant for which of his injuries. Accordingly, on 5 November 2018, Master Davison directed a preliminary hearing to determine:

> *"The issue of liability and causation (to include all indemnity issues and causation of all physical injuries)".*

8. Mr Robert Weir QC appeared for the claimant. Mr William Audland QC appeared for the second defendant. Mr Derek O'Sullivan QC appeared, with Mr Michael Standing, for the fourth defendant and Mr Tim Horlock QC represented the fifth defendant. The first and sixth defendant did not acknowledge service and have played no part in these proceedings.

PRELIMINARY MATTERS.

9. There were various preliminary matters which I dealt with before the evidence commenced.

10. First, there was an issue as to the involvement of the MIB in the trial. Mr Weir QC, on behalf of the claimant, made detailed submissions to the effect that I should not allow the MIB to participate in the trial, notwithstanding that it is a party, and/or that I should make a ruling that the MIB should not in any circumstances recover its costs from the claimant given that their interests are adequately protected by the second and fourth defendants.

11. Ultimately this issue was resolved by agreement and so it was not necessary for me to rule on Mr Weir's submissions. In reply to Mr Weir, having taken instructions overnight, Mr Horlock QC proposed that, on certain terms, he would play no further part in the trial. The solicitors instructed by the MIB would have a 'watching brief'. Mr Horlock would also be notified by Counsel for the second and fourth defendants in the unlikely event that there was any material change in their cases. He would also be permitted to make submissions as to the terms of the final order, particularly in relation to costs, in the light of my Judgment. Mr Weir agreed to this approach and I was content with it.

12. Second, Mr Audland QC applied to amend the Defence of the second defendant in the terms of a draft dated 31 January 2020. This was uncontroversial and I gave permission.

13. Third, Mr O'Sullivan QC applied to amend the Defence of the fourth defendant in the terms of a draft dated 14 February 2020. Mr Weir did not oppose the application but Mr Audland took issue with two aspects of the proposed amendments. After argument I gave permission. My reasons are set out at Annex 2 to this Judgment.

14. Fourth, Mr Audland invited me to determine the identity of the driver of the Mercedes as a preliminary issue and/or at an early stage in the trial. This was contested by Mr

Weir and Mr O'Sullivan. I refused Mr Audland's application. My reasons for doing so are set out in Annex 3 to this Judgment.

OUTLINE OF THE ISSUES AND HOW THEY ARISE.

Introduction

15. I was provided with an Agreed List of Issues which is at Annex 1 to this Judgment. I address all of these issues below, as well as other factual issues, although not necessarily in the order in which they are presented in that document. The commentary in this section of my Judgment is intended to explain those issues and how they arise.

16. The key events for present purposes arose out of an altercation between a number of young men who appear to have been drinking. To give a flavour of the situation immediately before the relevant events, the CCTV footage shows a group of in the order of 15 men roaming around the High Street in the small hours of the morning, mostly in the road itself, apparently shouting at each other, scuffling and fighting, occasionally throwing things at each other and disrupting the traffic. However, the details of the altercation and why it occurred are not relevant to the issues which I have to decide. The claimant had been drinking, and may have been involved in the altercation, but there is no longer any suggestion that he is to blame for any of his injuries.

17. For the purposes of identifying the issues between the parties, they have divided the events which led to the claimant's injuries into four phases in the evidence. The beginning and end of these phases overlap with each other, so they are not strictly a sequence, but it is helpful to divide the events up in this way for reasons which will become apparent.

Phase 1.

18. In the first phase the claimant was standing with others near the Mercedes, which was parked on the High Street facing south east. The Ford Focus drove south east along the High Street, U-turned, picked up two passengers and then drove back north west along the High Street in the direction of the parked Mercedes. The Ford Focus then crossed into the wrong lane, overtook two cars and a bus and drove in a snaking movement, with lights off, at the claimant's group. The claimant, who was facing the oncoming Ford Focus, and his companions took evasive action ("Phase 1"). It is common ground that, in Phase 1, the first defendant was deliberately driving at the claimant's group with the intention of causing injury to him.

19. The claimant sustained a fracture to his right tibial plateau at some stage during the relevant events and there is an issue between the parties as to whether this injury was caused by his being struck by the Ford Focus during Phase 1, or whether he sustained this injury later in the sequence of events. The claimant's case, which is supported by the fourth defendant, is that this injury was sustained in Phase 1 or alternatively Phase 4 and that, in either event, the driver of the Ford Focus, and therefore the second defendant, is liable. The second defendant's case is that the Ford Focus did not strike the claimant in Phase 1: the claimant's knee injury was sustained in either Phase 3 or alternatively Phase 4.

20. It is common ground that the claimant did not sustain any other injury during Phase 1.

Phase 2

21. In the second phase, the Mercedes moves forward from a stationary position behind and to the left of the claimant, travels a metre or two and stops just before the Ford Focus passes on its right, with the claimant between the two vehicles. The Mercedes then accelerates away with the claimant spread-eagled in a vertical position on its front, his body over the windscreen and bonnet, apparently having rotated through 180 degrees ("Phase 2").

22. It is common ground that no material injury was caused to the claimant in Phase 2. There are, however, issues as to whether the driver of the Mercedes was intending to cause harm to the claimant and how the claimant came to be on the front of the Mercedes which are said to be relevant to the question of legal causation. In particular, the second defendant suggests that the claimant may have jumped onto the bonnet and this is disputed. The second defendant also argues that the driver of the Mercedes was driving with intent to injure the claimant. The claimant pleads that the driving at this stage was either negligent or deliberate and the fourth defendant, as a result of its late amendment, admits that the driving was negligent but makes no admissions as to whether it was deliberate.

Phase 3.

23. In the third phase, having accelerated to a speed of approximately 27 mph, the Mercedes braked sharply and the claimant was propelled backwards, off the front of the car, to the ground. On the CCTV his head is seen to rise above the level of the roof of the car, his feet and then his bottom hit the ground in front of the Mercedes with his right arm outstretched and he bounces to his right. His head strikes the tarmac as he rolls over onto his back and comes to a halt. As he lies on the tarmac people gather around him. They include Mr Haile, who gave evidence. ("Phase 3").

24. It is now common ground that the claimant sustained a fracture to the L4 vertebra of his lumbar spine and that this occurred in Phase 3, most likely when the claimant sat down hard on the tarmac. Again, there is an issue as to whether the driver of the Mercedes was driving with an intention of injuring the claimant, as to which the parties' positions are as in relation to Phase 3. There are also issues as to precisely how the claimant came to fall off the front of the car: the second defendant raises the possibility that he jumped off, and this is disputed by the claimant and the fourth defendant.

25. The key issue as to what happened in Phase 3, however, is whether, and if so to what extent, it was during this Phase that the claimant sustained his DAI. The second defendant contends that the DAI was sustained in Phase 3 and the driver of the Mercedes, and therefore the fourth defendant, is liable for this injury. This is disputed by the claimant and the fourth defendant who contend that the DAI was sustained in Phase 4. The resolution of this issue depends on the evidence as to the rotational forces exerted on the claimant's head and raises the question whether he was conscious at any point after he fell from the front of the Mercedes and came to a rest on the tarmac and before Phase 4. If he was, it is highly unlikely that he had sustained any material DAI in Phase 3 although the converse does not apply: if he was

unconscious throughout Phase 3 it would not follow that he had sustained the DAI in this Phase. The claimant's level of consciousness during Phase 3 is a topic on which Mr Haile gave evidence.

Phase 4

26. In the fourth phase, having continued north west up the High Street on the wrong side of the road, the Ford Focus turned right into Park Parade, turned around and then turned left and drove south east again, down the High Street. It then drove at the claimant and his helpers. The helpers jumped clear, leaving the claimant on the tarmac. The Ford Focus then struck the claimant at a speed of approximately 20-21 mph and continued for a further approximately 33 metres down the High Street with the claimant underneath the car. The Ford Focus eventually came to a stop because, despite various attempts to keep going, the claimant's body prevented it from doing so ("Phase 4").

27. It is estimated that 40-45 seconds elapsed between the claimant hitting the ground in Phase 3 and the Ford Focus striking him in Phase 4. Again, there is no dispute that the first defendant was deliberately intending to injure the claimant in Phase 4.

28. At the end of these events, the claimant was left with multiple injuries. In summary, these were as follows:

    i) A fractured skull. The fracture was to the left frontal bone, extending into the left frontal sinus and through the anterior base of the skull involving the sphenoid bone, the left ethmoid and nasal bones and the right maxillary sinus.

    ii) Bruising of the brain tissues. There were left frontal and right temporo-occipital haemorrhagic contusions resulting from an impact to the left side of the forehead.

    iii) Subdural brain haemorrhages.

    iv) The DAI.

    v) The comminuted fracture of the fourth lumbar vertebra.

    vi) The fracture of the right tibial plateau.

    vii) Several mid dermal and full thickness abrasions and friction burns to the left and right sides of the claimant's head, body and limbs as well as lacerations to his scalp at the left forehead and the right temple and the left iliac region.

29. It is now common ground that all of these injuries other than the fractured vertebra and right tibial plateau and the DAI were sustained by the claimant in Phase 4. The second defendant therefore accepts that the claimant's friction burns, lacerations and other head injuries, including the fractured skull and the injuries to his brain other than the DAI, were sustained in Phase 4.

30. There are issues as to the claimant's precise position and degree of consciousness when he was struck by the Ford Focus but the key issue between the parties is whether the claimant's DAI was sustained during Phase 4 and, if so, to what extent.

As noted above, the claimant and the fourth defendant contend that the DAI was sustained in Phase 4, and that the driver of the Ford Focus is therefore liable. This is disputed by the second defendant.

The issues as to legal causation.

31. There are then issues as the legal causation. In particular:

    i) The claimant argues that the first defendant, and therefore the second defendant, is liable for any injuries sustained in Phase 3 and that the actions of the driver of the Mercedes did not operate to break the chain of causation between the Ford Focus driving at the claimant in Phase 1 and the claimant coming off the front of the Mercedes in Phase 3. This is disputed by the second defendant.

    ii) The second defendant argues that the driver of the Mercedes is liable for all injuries sustained by the claimant in Phases 3 and 4 on the basis that the deliberate actions of the Ford Focus in Phase 4 did not break the chain of causation between Phases 3 and 4. This is disputed by the claimant and the fourth defendant.

    iii) There are arguments as to whether the claimant's overall traumatic brain injury and/or his DAI are divisible or non-divisible injuries and, if so, how liability should be apportioned if the first defendant and the driver of the Mercedes both caused the claimant's brain injuries.

The issue as to the identity of the driver of the Mercedes

32. Finally, there is an issue as to whether the sixth defendant was the driver of the Mercedes. The claimant and the second defendant say that he was and that, on that basis, the fourth defendant is liable to such extent as the sixth defendant is liable given that it is the Article 75 insurer of the Mercedes. The fourth defendant contends that the evidence does not establish that the sixth defendant was the driver of the Mercedes and, on this basis, takes the position that it would not be liable even if I were to find that the driver of the Mercedes (whoever that was) is wholly or partly liable to the claimant. Rather, the claimant's remedy is to make a claim against the MIB. The parties agree that this issue is a matter for submissions on the admissible documents given that no oral evidence on the point has been adduced.

THE HEARING

33. The hearing took place over a period of eight days. Counsel submitted helpful skeleton arguments prior to the trial commencing, as well as closing notes at the end of the evidence. I have read these documents and listened to their oral submissions carefully and am grateful for their assistance.

34. I received written and oral evidence from two witnesses of fact: Mr Ahmed Farah, the claimant's brother, attended court and was cross examined. Mr Guled Haile gave evidence and was cross examined via video link from Mogadishu in Somalia.

35. I also received expert evidence on behalf of each of the claimant, the second and the fourth defendants in three disciplines: accident reconstruction, accident and emergency medicine and neurosurgery. Each of these three groups of experts had helpfully submitted individual reports and agreed a Joint Statement which set out the areas of agreement between them and summarised their opinions in relation to the matters about which they did not all agree. There were also various supplemental reports prepared after the meetings between the experts.

36. The following accident reconstruction experts gave oral evidence:

    i) Mr David Hague, a Collision Investigator, of Hague Forensic Collision and CCTV Analysis, who was called on behalf of the claimant. He provided a first expert report dated "April 2019" and a supplementary report, dated 4 February 2020, which commented on aspects of the evidence of Mr Helmy, the expert neurosurgeon instructed on behalf of the second defendant;

    ii) Ms Victoria Eyers, a consultant in the Investigations Group at TRL specialising in road accident reconstruction, who was called on behalf of the second defendant. Her report is dated "April 2019"; and

    iii) Dr John Horsfall, a consultant in road traffic accident investigations with Hawkins & Associates Limited, who was called on behalf of the fourth defendant. He provided a first report dated 26 April 2019 and a supplementary report, dated 20 September 2019, commenting on aspects of the evidence of Mr Helmy.

37. The Joint Statement of this group of experts is dated 10 July 2019. Their reports and calculations were based on their interpretation of CCTV footage of the events which was available from cameras on the High Street and on the N220 bus as it travelled along the High Street. The experts also considered the materials from the police investigations and the evidence in relation to damage to the Ford Focus. It was clear to me that they all took their duties to the court under CPR Part 35 very seriously. They worked together constructively in seeking to narrow the issues and in presenting the CCTV evidence to the court and they gave careful and considered evidence with the intention of assisting the court to get to "the right answer". Ms Eyers also, very fairly, accepted that biomechanics and the calculation of rotational forces were not within her sphere of expertise.

38. The following experts in accident and emergency medicine gave evidence:

    i) Mr Manolis Gavalas, a Consultant in Accident and Emergency medicine at University College London Hospital, who was instructed on behalf of the claimant. He provided an expert report dated 15 May 2019;

    ii) Mr Richard Warren, a former Consultant who now works in the independent medical sector and who has a special interest in musculoskeletal/orthopaedic medicine particularly in relation to back and neck injuries. He was instructed on behalf of the second defendant and he provided an expert report dated 21 May 2019;

iii) Dr Roderick Mackenzie, a Consultant in Emergency Medicine at Addenbrookes Hospital in Cambridge and in Pre-hospital Emergency Medicine with the Magpas Air Ambulance and East of England Ambulance Service. He was instructed on behalf of the fourth defendant and he provided an expert report dated 24 June 2019.

39. The Joint Statement of this group of experts is dated 7 August 2019. Again, each of these witnesses clearly took his duties to the court seriously and each gave careful and considered evidence.

40. The following neurosurgeons gave oral evidence:

i) Mr Adel Helmy, a Consultant Neurosurgeon at Addenbrooke's Hospital in Cambridge, who was instructed on behalf of the second defendant. He provided a first expert report dated 9 June 2019, a first supplementary report dated 4 December 2019 and a second supplementary report dated 16th February 2020.

ii) Mr Robert Macfarlane, who is also a Consultant Neurosurgeon at Addenbrooke's Hospital and who was instructed on behalf of the fourth defendant. He provided an expert report dated 26 June 2019 and a supplementary report dated 11 October 2019 commenting on aspects of the evidence of Mr Helmy.

41. The claimant relied on the evidence of Mr Macfarlane and therefore did not call his own expert, Professor Michael Vloeberghs, a Consultant Paediatric Neurosurgeon at Nottingham University Hospital, who had submitted a report and who had agreed the Joint Statement for this group of experts.

42. I found Mr Macfarlane to be a highly reliable witness whose evidence I accepted. I did not accept Mr Helmy's evidence on the key issues in this case, not only because it did not accord with my view of the evidence, and that of the other experts in the case, but also because I found him to be highly unreliable as a witness. For the avoidance of doubt, I am not in a position to comment on his qualities as a doctor and do not do so. But, for reasons which I will explain below, I found his approach as a witness to be careless and partisan in a way which was inconsistent with his role and duties as an expert.

43. In addition to the lay and expert witness evidence I was shown various scientific papers in relation to the causes of brain injuries, to which I will refer below. The parties also relied on the CCTV footage of the relevant events as well as stills from that footage, which they invited me to assess. I was also shown photographs of the claimant's soft tissue injuries in the context of arguments about how he sustained his DAI.

44. Documentary evidence which was prepared in the course of the police investigations into the events of 6 September 2014, and as part of the criminal proceedings against the first defendant which resulted, was also put before the court pursuant to a decision of Master Davison that they were admissible. And I was also shown extracts from the transcripts of the criminal trials of the first defendant at Harrow Crown Court. The trial bundle ran to ten lever arch files.

MY APPROACH TO THE EVIDENCE

45. I have taken all of the evidence relied on by the parties into account in coming to my conclusions.

46. In assessing the expert evidence I particularly had in mind the guidance provided by Green J (as he then was) in *C v Cumbria University NHS Trust* [2014] EWHC 61. Although that guidance was given in a slightly different context, the following passages from paragraph 25 of his judgment are relevant here:

> *"iv) In making an assessment of whether to accept an expert's opinion the court should take account of a variety of factors including (but not limited to): whether the evidence is tendered in good faith; whether the expert is "responsible", "competent" and/or "respectable"; and whether the opinion is reasonable and logical…..*
>
> *vi)…. A "responsible" expert is one who does not adopt an extreme position, who will make the necessary concessions and who adheres to the spirit as well as the words of his professional declaration (see CPR 35 and the PD and Protocol).*
>
> *vii) Logic/reasonableness: By far and away the most important consideration is the logic of the expert opinion tendered. A Judge should not simply accept an expert opinion; it should be tested both against the other evidence tendered during the course of a trial, and, against its internal consistency."*

47. As to what can actually be seen on the CCTV footage and the stills from that footage, the parties agree that this is a matter for me. I have, however, taken into account the interpretations of this material by the expert witnesses, and particularly the accident reconstruction experts, given that they have greater experience of interpreting this type of footage.

48. I have also been careful not to lose sight of the fact that the interpretation of one category or aspect of the evidence may well be affected by the interpretation of another. For example, oral evidence of a witness who was present at the scene may assist in interpreting CCTV evidence on a point and, conversely, the CCTV evidence may help to decide whether the oral evidence on that point is accurate. Although it is necessary to address different aspects of the evidence separately in order to explain my reasoning, the evidence has to be assessed as a whole and I have done so.

THE NATURE OF DIFFUSE AXONAL INJURY.

49. There was no material dispute between the parties as to the nature and extent of the injuries sustained by the claimant. It is, however, relevant to distinguish between the two types of brain injury suffered by him. For this purpose, I adopt the descriptions given by Mr Macfarlane at paragraphs 148 and 149 of his report dated 26 June 2019.

50. The first type is the coup/contrecoup injury which, it is agreed, was sustained in Phase 4. Mr Macfarlane gives the following explanation:

"148. Coup contrecoup injury is the result of linear forces being applied to the head/brain. If the head strikes an object and the skull decelerates rapidly, the brain moves relative to the skull, causing injury both at the site of impact and the diametrically opposite pole of the brain. This is analogous to Newton's cradle, where three touching metal balls are suspended by threads from a beam. When one ball is pulled back and released (analogous to the striking force) the centre ball (analogous to the skull) stays still and the third ball (analogous to the brain) moves away in the opposite direction before swinging back again.

51. Mr Macfarlane goes on to explain that:

"149. The other classical pattern of brain injury is diffuse axonal injury. This occurs because the brain is relatively mobile within the cranial cavity. If the head is struck a tangential blow then the brain will rotate relative to the skull. The brainstem and deep basal nuclei are relatively fixed both because they are in the central axis of the rotation and because of the attachment of the cranial nerves. In contrast, the hemispheres of the brain and cerebellum are relatively mobile relative to these fixed structures. This leads to shearing at the site between the two."

52. The neurosurgery experts therefore agree that DAI is caused by rapid acceleration/deceleration of the head causing shearing forces to develop at the grey-white matter junction within the brain and between the deep structures of the brain and the more superficial structures. Linear acceleration or deceleration does not, of itself, cause DAI.

DETAILED FINDINGS IN RELATION TO THE ISSUES.

Phase 1.

Did the Ford Focus strike the Claimant's right leg?

53. It was common ground that if the Ford Focus struck the claimant's right knee on the lateral (outer) aspect in Phase 1 this was the probable cause of the claimant's right lateral tibial fracture. Mr Gavalas took the view that, even if there was an impact between the car and the claimant's right knee, if the impact was with the inner (medial) aspect, his fracture was more likely to have been sustained in Phase 4 although Mr Gavalas agreed that an impact on the lateral aspect of the knee would be consistent with the injury which the claimant sustained.

54. Conversely, if the Ford Focus did not strike the claimant it was common ground between the accident and emergency experts that it was unlikely that this injury was sustained in Phase 1 and more likely that it was sustained in Phase 4. Ms Eyers raised the possibility that it was in Phase 3 when the Mercedes may have driven over the claimant's legs as it went around him, and I deal with this point below.

55. The agreement between the accident and emergency experts is because, as Dr Mackenzie explained, this type of injury typically results from a combination of axial loading on the knee (i.e. downward pressure from the femur with the foot in contact with the ground) and the application of lateral force to the outer aspect of the knee,

causing it to buckle inwards. Indeed, the fracture pattern is commonly associated with a standing pedestrian being struck on the outside of the knee by the bumper of a car. Both types of force are, however, needed to cause the injury.

56. The accident reconstruction experts agree that the CCTV footage shows the claimant facing the Ford Focus as it approaches him and then moving left towards the pavement to avoid a collision. The footage shows the Ford Focus passing very close to the claimant, on his right as he faces it. The Mercedes is behind the claimant. It moves forward from stationary as the Ford Focus passes on its right and the claimant is effectively sandwiched between the two cars. As the cars pass each other the claimant is then rotated though 180° so that he is facing the Mercedes, although the experts were unable to say from the footage whether this was clockwise or anti clockwise.

57. All of the experts agree that the CCTV footage does not establish clearly or definitively whether there was an impact between the Ford Focus and the claimant in Phase 1. I agree.

58. Ms Eyers considered that the Ford Focus probably did not strike the claimant's leg and Mr Warren took a similar view.

59. Dr Horsfall acknowledged that it is possible that there was an impact, but was not able to conclude that this was probable given the lack of clarity of the CCTV footage, and Mr Gavalas took a similar position in his original report. In his oral evidence it appeared that Mr Gavalas was under the impression that the claimant had a depressed fracture of the right knee and that it was on this basis that he considered that it was more likely that this injury occurred in Phase 4 when the Ford Focus ran over the claimant. When it was pointed out to him by Mr O'Sullivan that the fracture was not depressed, however, Mr Gavalas agreed that it was more likely that this injury occurred when the claimant was standing up and therefore in Phase 1.

60. Mr Hague's opinion was that the claimant was most likely struck on the right leg as the Ford Focus passed him. Dr Mackenzie considered that, in the CCTV footage, there appears to have been contact between the outer aspect of the claimant's right knee and the front offside of the Ford. They therefore considered that the injury to the claimant's right knee was sustained in Phase 1.

61. In the accident reconstruction experts' Joint Report Mr Hague's opinion was summarised at paragraph 2.3(1) as follows:

> *"Mr Hague's opinion is that [the claimant's] sudden movement and rotation suggests he was most likely struck on the right leg by the Ford as it passed (probably in combination with [the claimant] attempting to move out of the way)".*

62. Under cross-examination by Mr Audland he confirmed that his opinion was based on the claimant's movement. Mr Audland put to him Ms Eyers' view that the light from the Ford is never broken by the claimant's leg coming between it and the camera, but he disagreed. He also said that in his opinion the footage showed the claimant's right leg in the path of the Ford. He accepted that there was no damage to the Ford which appeared to have been caused by impact with the claimant's right leg but he said that

he would not necessarily expect such damage particularly if, for example, the bumper of the car struck the claimant.

63. Dr Mackenzie said in evidence that the footage from the N220 bus camera showed the claimant being struck by the offside (driver's side) wing of the Ford and being forced onto the bonnet of the Mercedes. His position was that the claimant turned to his left to get to the pavement and was struck on the right leg. In answer to a question from me, he was clear that lateral force from the car was necessary if I was to find that this injury was sustained in Phase 1 but he said that a glancing blow would be sufficient. He said that his opinion was supported by the fact that the front light of the Ford Focus is briefly obscured, as well as by the movement of the claimant on the CCTV footage. But he also said that it was more likely that the injury was caused in Phase 1 because he did not see how it could have been sustained in Phases 3 or 4 given the need for downward pressure from the femur. It was possible that it occurred in incident Phase 3 but unlikely because the claimant's legs were flexed during this incident.

My finding on whether the right tibial fracture was sustained in Phase 1.

64. Doing the best I can, I think it probable that the claimant's right tibial plateau fracture was sustained as the result of a glancing blow from the Ford Focus in Phase 1. Having viewed the footage, I cannot say that I can clearly see an impact but nor is it clear that there was no impact. I accept that the claimant's right leg appears to have been in the path of the Ford as it came towards him and that his movement is consistent with, although not inevitably the result of, an impact. Although the point was made by Ms Eyers that such an impact would have spun the claimant back round to his right I am not convinced that this is so if he was effectively struck on the lateral aspect of the right knee when he was sideways on: he might well have been rotated or fallen to his left i.e. in the direction in which he was already going. But, in any event, this would only be a cogent point if it was known that he rotated left onto the bonnet despite the alleged impact. When I asked her, Ms Eyers was not able to say in which direction the claimant rotated onto the bonnet of the Mercedes.

65. In assessing the balance of probabilities, I also think that Dr Mackenzie's undisputed evidence about the typical mechanism of this type of injury is important. Phase 1 was the only phase in which the claimant was standing and turning in front of a car which came close enough to strike him as it passed. The lack of any clear damage to the Ford Focus does not seem to me to be significant. On the evidence I would not expect material damage if the bumper hit the claimant or if he was struck a glancing blow by some other part of the car.

66. I also agree with Dr Mackenzie that the events of Phase 3 were not consistent with such an injury given that the claimant's legs were flexed as he fell and, as I find below, the Mercedes did not run over his legs. I therefore agree that if I am wrong, and this injury was not sustained in Phase 1, it was sustained in Phase 4. Although the precise mechanism for the injury is unclear if it was sustained in Phase 4, the violence to the claimant's body which was caused by his being run over by the Ford Focus was such that it is possible that it occurred at this stage.

Phase 2.

67. As noted above, the parties agree that it is unlikely that any significant injury occurred during Phase 2. There are, however, factual issues for me to resolve which potentially go to causation.

How did the claimant come to be on the front of the Mercedes?

68. As to how the claimant came to be spread-eagled on the front of the Mercedes, again the accident reconstruction experts are agreed that the CCTV footage does not provide a definitive answer.

69. Mr Hague said, at paragraph 8.12 of his report dated 23 April 2019, that it was the result of either the claimant falling onto the Mercedes whilst it was stationary or the Mercedes setting off or travelling a very short distance before making contact with the claimant. In cross-examination he rejected the suggestion that the claimant jumped onto the bonnet. His evidence was that he could not exclude this as a possibility from a viewing of the CCTV footage but he regarded it as unlikely given the very short timeframe, less than a second, between the claimant facing the Ford Focus as it came towards him, rotating and then coming to be on the front of the Mercedes.

70. Ms Eyers' opinions on this point, as set out in her report of April 2019, are curious.

    i) At paragraphs 7.72 and 7.73 she notes that it appeared from the CCTV that the claimant stepped into the path of the Mercedes and his height did not appear to change. At paragraph 7.74 she then says this: *"it is therefore unlikely that he jumped onto the front of the Mercedes, and more likely that he stepped backwards into its path ending up in front of but very close to it"*.

    ii) However, paragraph 9.12, in her Discussion section, says this: *"How he came to be on the vehicle cannot be determined from the CCTV; it is likely that either he was standing in front of the Mercedes when it moved off, causing his feet to be swept out from under him, or that he deliberately jumped onto it."*.

My finding on this issue

71. My finding is that the claimant did not jump onto the front of the Mercedes. He did not have the time to do so and it is difficult to see why he would choose to do so, even if he did have the opportunity. On the balance of probabilities he was off balance as he tried to move out of the path of the Ford Focus as it advanced towards him from a short distance away and he was struck a glancing blow to his right knee. He effectively fell onto the Mercedes as he took evasive action in relation to the Ford Focus and the Mercedes moved forward from behind him. This is consistent with what can be seen from the CCTV footage. In my view the claimant acted instinctively in an attempt to avoid the Ford Focus, which would otherwise have collided with him, and was forced into the position in which he found himself, on the front of the Mercedes, rather than having any choice in the matter.

In Phase 2, was the driver of the Mercedes driving with the intention of injuring the claimant?

72. I deal with this question compendiously in the section on Phase 3 below given that my findings on it are based on a consideration of all of the actions of the driver of the Mercedes.

Phase 3.

73. As noted above, it is now common ground that the fracture to the claimant's L4 vertebra is likely to have been caused during Phase 3. This fracture is likely to have occurred as a result of the combination of axial (downward) forces, forward flexion and lateral rotation as the claimant's trunk struck the ground. There is, however, an issue as to whether the claimant's DAI was sustained at this Phase as well as various other issues as to what occurred which go to legal causation.

Did the claimant jump off the Mercedes?

74. The possibility that the claimant jumped off the front of the Mercedes was raised by Ms Eyers in her report dated April 2019. At paragraph 7.99 she said:

> *"In my opinion there is not enough evidence to confirm whether [the claimant] jumped from the bonnet or was thrown by sudden braking; both appear to me to be equally likely."*

75. At paragraph 7.106 she suggested that a tyre mark left on the tarmac, if left by the Mercedes, was consistent either with brief heavy braking or with braking in combination with the claimant pushing down as he jumped off the car, thereby causing greater friction between the tyre and the road surface.

76. At paragraph 9.15 of the Discussion section of her report she said:

> *"[The claimant] either jumped from the Mercedes or was thrown from it under heavy braking. ….His body position, in my view, suggests a deliberate attempt to jump clear. I therefore consider both scenarios equally likely."*

77. It is common ground that the Mercedes accelerated away from a stationary position and that the claimant was on the front for approximately 5 seconds during which time the car travelled approximately 33 metres and reached a speed of at least 27 mph. Ms Eyers said that the speed may have been as high as 31 mph but, based on the calculations carried out by Dr Horsfall, with which Mr Hague agreed, I accept that it was 27.1 mph. Dr Horsfall said, and he was not challenged on this, that his measurements were based on the footage from the CCTV camera outside the Green Man restaurant which provided the most reliable data.

78. The Mercedes then braked sharply. This was described by Mr Hague, at paragraph 8.17 of his Report of April 2019 as *"emergency braking"*. The claimant, as Mr Hague put it in oral evidence *"just carried on"* as his momentum carried him forward. Mr Hague said that this would have been at a slightly slower horizontal speed than 27 mph, perhaps 1 or 2 mph slower. Dr Horsfall calculated the likely horizontal speed as the claimant separated from the car to be approximately 24 mph based on the claimant coming to rest approximately 9 metres from where he left the front of the car. Mr Hague and Dr Horsfall are therefore broadly in agreement on this point and I accept their evidence which was, in any event, uncontradicted.

79. Mr O'Sullivan put to Mr Hague that there was no part of the front of the Mercedes which would provide the claimant's feet with sufficient purchase to jump. Mr Hague agreed and pointed out that the front of the Mercedes sloped from windscreen to

bumper in a continuous line. He added that it would be very surprising if the claimant had decided to jump backwards off, and into the path of, a moving car. Mr O'Sullivan also put to Mr Hague Ms Eyers' opinion that tyre marks apparently created by the Mercedes may be further evidence that the claimant had jumped. Mr Hague's evidence was that the marks would have been created in either scenario i.e. on the basis of the car braking and the claimant falling off or on the basis of the claimant applying downward pressure as he jumped.

80. Ultimately the suggestion that the claimant jumped off the front of the Mercedes was not pursued with any vigour by Mr Audland on behalf of the second defendant and, in my view, rightly so. To be fair to Ms Eyers, nor was she advancing this possibility as the probable reason why the claimant came off the bonnet of the Mercedes. I can see no sign on the CCTV footage that the claimant so much as *attempted* to jump off the bonnet of the Mercedes and I agree with Mr Hague's opinions on this point. In my judgement the claimant, again, had no choice in the matter: he was propelled off the bonnet by the sharp braking of the Mercedes.

Did the Mercedes then push the claimant forward/drive over his legs?

81. Ms Eyers also suggested that the Mercedes may have run over the claimant's legs. Again, she made the suggestion tentatively in her report of April 2019. At paragraph 7.110 she said:

> *"After [the claimant] falls to the ground, the Mercedes steers around him….[The claimant] falls to his back and rotates towards his left side with arms outstretched. It cannot be clearly made out but it is possible the front nearside wheel drives over his legs."*

82. At paragraph 9.20 she said:

> "*He may have been briefly pushed forwards on the road surface by the Mercedes, before it steered clear of him. It is possible the front nearside wheel of the Mercedes drove over his legs, which caused him to rotate further."*

83. Again, this point was not pursued with any vigour by Mr Audland and, in my view, rightly so. The CCTV footage does not appear to show the Mercedes pushing the claimant forward as he falls to the ground. He was propelled forward by his own momentum as the car braked. The Mercedes can be seen slowing almost to a halt and driving round the claimant as he lay on the ground, albeit the car passed close to his feet. Mr Hague could not see any evidence of an impact, although he could not exclude the possibility of minor contact. He pointed out that if the Mercedes had run over the claimant's legs one would have expected to see it rise and fall as it did so, but it did not.

84. Dr Horsfall agreed with Mr Hague's opinion. Mr Haile also said that he did not think the Mercedes ran over the claimant's legs as it drove round him. I agree. Nor is there evidence of any other injury to the claimant's legs which would be consistent with the Mercedes having run over either or both of them.

Was the driver of the Mercedes driving with the intention of injuring the claimant?

85. My finding on this point is based on interpreting the CCTV footage in the context of the evidence as a whole, the opinions of the experts as to what happened and the actions of the driver of the Mercedes in both Phases 2 and 3. I also note that there is no suggestion that the drivers of the two vehicles were working together to injure the claimant, for example in Phase 2.

86. In Phase 2 the Mercedes can be seen in a stationary position with three young men alongside the driver's window, one of whom appears to interfere with a passenger's attempts to close the driver's side rear passenger door. Two more young men appear from behind the car and all of the men then run ahead of it. As noted above, the Mercedes moves forward 1 or 2 metres and then stops as the Ford Focus approaches it, with the claimant moving across the front of the Mercedes towards the pavement. The Mercedes then accelerates away with the claimant spread-eagled on its front.

87. There can be little doubt that the driver of the Mercedes was aware of the presence of the claimant in front, or on the front of, the car as he started to accelerate away, and he knew or ought to have known that there was a risk that the claimant would be injured as a result of his actions. But I do not consider that the driver's intention in Phase 2 was that the claimant would be spread-eagled on the front of his car. His intention was to drive off, and I do not think that he had any wish or expectation that the claimant would be on his car as he did so. Nor was it his intention to injure the claimant in the sense that this was his *aim*. Rather, the actions of the driver of the Mercedes appear to be consistent with panic or hastiness, with a wish to get away, and with not caring about the risk of injury to the claimant. This view tends to be reinforced by his actions in Phase 3.

88. My view in relation to Phase 3 is essentially the same. Clearly the driver of the Mercedes was aware of the claimant's presence on the front of his vehicle and he probably braked sharply in order to get him off. He knew or ought to have known that the claimant would be *thrown* off and that there was a high risk that the claimant would be injured by this manoeuvre but, in my judgement, his *aim* was to get the claimant off the front of the car rather than to injure him. This view is consistent with the fact that the driver of the Mercedes did not then run over the claimant when he was on the ground. Rather, as noted above, he slowed almost to a halt and carefully drove round him so as to avoid making any contact.

<u>What happened to the claimant's head as he fell from the Mercedes onto the road, what forces were applied to it and when?</u>

89. It is necessary to describe the mechanism of the claimant's fall from the front of the Mercedes in a little more detail. He can be seen on the CCTV footage spread-eagled over the windscreen and bonnet in a vertical position, as I have noted. As the Mercedes brakes, his head and shoulders rise above the level of the roof of the car. His knees are bent, as they would be if he were kneeling on the sloping bonnet, his feet slide down onto the tarmac, as he falls backwards his right arm goes out to break his fall. As his feet hit the tarmac he appears to be in a crouching position as his backside then hits the tarmac, and he bounces to his right and rolls or tumbles over onto the left side of his back as he lands on the tarmac, pivoting around his right arm and with his left arm stretched up in the air. As the back of his upper body comes into

contact with the road, and he tumbles with bent legs in the air above his body, the back of his head appears to hit the tarmac as he rolls to his left and his legs fall to the ground. He can then be seen lying motionless on the road on the left side of his back with his arms stretched wide. His head is towards the pavement and his feet are towards the middle of the road.

90. Mr Hague accepted that the claimant's head rose slightly above the claimant's normal height of 6'5'' as he moved backwards and upwards with the momentum of his body before falling backwards and downwards. The parties also agree that fall was to some extent broken by his feet, and then his backside, hitting the tarmac and his body then tumbling to his right and rolling so that, as a consequence, his head struck the road at a vertical speed of 4 to 8 mph. Dr Horsfall's evidence, with which Mr Hague agreed, was that the claimant moved approximately 2 to 2.5 metres along the road after his head had struck the tarmac and that this would suggest a horizontal speed of approximately 12 to 14 mph immediately after his head struck. Ms Eyers did not dispute these calculations.

91. Under cross-examination by Mr Audland, Mr Hague also agreed that, *in the course of the fall to the ground* the claimant's head underwent rotational forces on a number of planes before it hit the ground. Mr Hague agreed that the claimant's head was free to move and *"pivoted around his neck"*. He also agreed that no one had been able to calculate the forces in operation during this phase.

92. Other witnesses, including Mr Macfarlane, were more resistant to this degree of generalisation when it was put to them. Mr Macfarlane described the characterisation of the forces operating on the claimant's head as *"a whiplash effect"* as *"misleading"*, when it was put to him by Mr Audland, and emphasised that what matters in relation to DAI is how the brain moves relative to the head rather than how the head moves relative to the body. The injury is sustained when the brain rotates within the skull.

93. By way of explanation for this line of cross-examination by Mr Audland, in his first report dated 9 June 2019, Mr Helmy's opinion as expressed at paragraph 53 was that:

> *"It is likely that the claimant suffered a degree of diffuse brain injury or diffuse axonal injury as a result of being thrown from the bonnet of the Mercedes vehicle and striking the road surface with significant force to the right side of his head and with some degree of angular acceleration given that the momentum of the blow causing (sic) him to roll onto his left hand side."* (emphasis added)

94. Although he fenced with Mr O'Sullivan on this point (amongst a number of others) when he was cross examined, it is plain from, for example, paragraphs 6, 7, 37-40 and 53-57 of Mr Helmy's first report that his opinion was that some DAI was caused by the impact of the claimant's head on the tarmac in Phase 3. Indeed, although his report did not say so in terms it seemed implicit in the use of the words *"a degree of"* in paragraph 53 that he also recognised that the whole of the claimant's DAI could not have been caused in Phase 3 and some of it must have been caused in Phase 4.

95. In evidence, Mr Helmy eventually accepted that he did not have specialist expertise in biomechanics and the calculation of rotational forces, and that he therefore deferred to Mr Hague and Dr Horsfall on these issues. After some fencing as to whether he had

"revised his opinion" in the light of their calculations of the forces operating on the claimant's head when it impacted with the road in Phase 3, paragraph 5 of his second supplemental report, dated 16th February 2020, was drawn to his attention. He then also admitted that he *had* revised his opinion.

96. It ought to have been entirely unnecessary for Mr O'Sullivan to have to exert himself in extracting these admissions from Mr Helmy given what Mr Helmy himself had written in paragraph 5:

> *"In paragraphs 4.3 - 4.8 of his supplemental report Mr Hague agrees with Dr Horsfall that the impact forces suffered during the impact in [Phase 3] could not cause diffuse axonal injury. In my original report… paragraph 40 I originally ascribed that the rotation during the injury had occurred on impact. However, at the time of the joint report on 31 July 2019, having been provided with the additional expert witness reports of Mr Hague and Dr Horsfall, I revised my opinion and provided additional scientific evidence (Gennarelli et al 1980) demonstrating that rotational injury could occur, even in the absence of impact."* (emphasis added)

97. I will return Mr Helmy's, at best, superficial use of the Gennarelli paper to support his revised opinion. For present purposes the key point is that, having appreciated that the blow to the claimant's head in Phase 3 was not sufficient to have caused his DAI, Mr Helmy developed a second theory which was, in effect, that the claimant had sustained this injury as a result of the rotational forces operating on his head before his head hit the ground. This theory made its first appearance in the Joint Statement of the neurological experts. It was now his opinion that *"the head was not rotated rapidly as a result of the initial impact of [Phase 4]"* (paragraph 19, emphasis added) and, apparently, that the whole of the claimant's DAI was sustained in Phase 3 (paragraph 20).

98. Mr Helmy then followed up with his first supplemental report, dated 4 December 2019. The first sentence of paragraph 5 of this report now stated: *"The rapid rotation of the head in phase 3 of the injury does not occur when the head contacts the ground."* (emphasis added). His second theory, as reflected in this sentence, was developed in this report which concluded, at paragraph 24:

> *"The analysis provided by Dr Horsfall and Mr Macfarlane have (sic) only considered the impact of the head with the ground. This mechanism of injury ('impact') is not relevant to the risk of DAI. It is the rotation of the head ('impulse') that causes DAI.''.*

99. Mr Helmy purported to *"correct"* the first sentence of paragraph 5 of his first supplemental report, at the beginning of his oral evidence, by inserting the word *"just"* so that the sentence now read: *"The rapid rotation of the head in phase 3 of the injury does not just occur when the head contacts the ground."* But this was, in truth, to bring it into line with his third theory, which was that the DAI was caused by a combination of the forces when the claimant was tumbling off the front of the Mercedes with the forces when his head hit the ground. This was his position in his second supplemental report, dated 16 February 2020.

100. Mr Helmy's second theory was said to be founded on his analysis of the CCTV footage of Phase 3 and he placed particular reliance on stills from that footage, numbered 3549 to 3556, from which he derived the following narrative:

> *"(a) Between frame 3549 and 3550 the back of the head can be seen in frame 3549 however by frame 3550 the head cannot be seen in front of the left front headlight. This suggests rapid flexion of the head (i.e. the chin is coming towards the chest) and, given that the claimant is also moving to his right side, there is also likely to be sagittal rotation to the right accompanying this. After rapid forward flexion of the head, the neck limits further forward movement and the head snaps back in the opposite direction i.e. a 180 degree rotation in the sagittal plane. It is at the specific instant of change in direction at which the rotational forces are highest and DAI occurs.*
>
> *(b) Between frames 3551 and 3552 the head is not originally visible and the bare back of the claimant is visible. However, in the subsequent frame the head can be seen above the right shoulder facing the floor. This suggests extension at the neck in the sagittal plane as well as axial rotation towards the floor accompanied by coronal rotation in addition.*
>
> *(c) Between frame 3553 and 3554 it can be seen that the left arm of the claimant comes over and rotates behind him and it appears that the head is subsequently obscured by his arm and body as it snaps forward once more in the axial and coronal planes. At the instant in which the right shoulder contacts the tarmac (frame 3554), the head will be rotated in the coronal plane first towards the ground (right ear will move towards the right shoulder) and once the limit of neck movement is reached the head will snap back, i.e. a rotation of 180 degrees in the coronal plane. It is at this instant that rotational forces are highest and DAI occurs.*
>
> *(d) Between frame 3554 and 3555 the head is not visible in the initial frame but, as the body turns and the shoulders come out of the way, the head can be seen rotating. Finally, in frame 3556 it can be seen pointing upwards with the face now visible."* (emphasis added)

101. I do not accept this interpretation of the CCTV footage. Indeed, I regard it as seeking to emphasise sharp movements of the claimant's head, pivoting on his neck, in order to support Mr Helmy's second theory, rather than based on an objective assessment of the evidence:

i) First, Mr Helmy did not claim to be able to see the alleged snapping backwards and forwards of the claimant's head. His interpretation was largely a matter of inference as his own text indicates. Although he said that he could see that the claimant's head was obscured by his arm between frames 3553 and 3554, this was contentious and, in any event, it was Mr Helmy's inference that this was because the claimant's head was snapping forward *"once more in the axial and coronal planes"*.

ii) Second, it is true that the claimant left the front of the Mercedes at a speed of approximately 27 mph but it is common ground that, as he fell, he was conscious and was taking steps to protect himself including stretching out his

right arm, bending his legs and tumbling to his right. This fact makes it less probable that his head was "snapping" in different directions, as Mr Helmy describes, given that the claimant had a degree of control over its movements.

iii) Third, the CCTV footage is not of the highest quality, and I accept that this point cuts both ways, but doing the best I can it appeared to me that the claimant's head was falling and rotating in much the same way as the rest of his body rather than "snapping" in different directions. This was also Mr Macfarlane's view and one of his reasons for emphatically rejecting the suggestion that the rotational forces operating on the claimant's brain as he fell to the ground were sufficient to cause DAI, when this was put to him.

iv) Fourth, Mr Helmy accepted that two of his inferred movements of the claimant's head were not entirely correct. In cross examination he was driven to describe his reference to *"sagittal rotation to the right"* in subparagraph (a) (cited above) as *"clumsy"* and intending to refer to coronal rotation. In answer to a question from me he appeared to accept that, when he suggested in subparagraph (c) that when the claimant's right shoulder came into contact with the tarmac it snapped right and then back in the coronal plane, it was more likely that in fact his head kept going and struck the ground.

v) Fifth, Mr Helmy's interpretation of the CCTV and the effect of the claimant's fall on the movements of his head appears to have been influenced by his misunderstanding the speed at which the claimant was travelling as he left the front of the Mercedes. At paragraphs 18 and 19 of the same report Mr Helmy states his understanding that the CCTV footage was taken at 24 frames per second and, on this basis, that the gap between frames was 40 milliseconds. He comments that *"the frames in question show significant blurring of the head suggesting that the head is moving quicker than the 24 frames per second can capture accurately."* In fact, as Dr Horsfall told the court, the footage was taken at 12 frames per second, the gap between frames was 80 milliseconds and Mr Helmy's interpretation of the footage was therefore based on a rate of acceleration which was four times higher than was actually the case.

vi) Sixth, I accept Mr MacFarlane's evidence that a person whose head was snapping around in the manner described by Mr Helmy, and with sufficient force to sustain DAI, would be highly likely to suffer significant injuries to his neck. The comprehensive scans and other examinations of the claimant when he was admitted to hospital on 6 September 2014, and subsequently, have not revealed any injury to his neck although he had multiple other injuries, as I have noted.

102. For these reasons, I reject Mr Helmy's interpretation of the CCTV the footage. In the light of this footage and the expert and other evidence I have received I consider that although the claimant's head was rotated in various planes in the course of falling to the tarmac, striking the tarmac and subsequently, it was undergoing similar rotations to the rest of his body rather than snapping around as Mr Helmy describes.

Was the claimant conscious when others came to help him?

Introduction.

103. The question of the claimant's level of consciousness after his head struck the tarmac in Phase 3, and before he was struck by the Ford Focus in Phase 4, is a potentially decisive issue. This is because, in their Joint Statement, the neurosurgery experts agreed the following at paragraph (7):

> *"We agree that if the claimant had a Glasgow Coma Score ("GCS") 9 or greater prior to the moment that he was struck by the Ford Focus (i.e. accepts the evidence of Mr Haile [that the claimant was communicating with his helpers] or accepts the interpretation of the CCTV footage that [the claimant] was able to support the weight of his torso with his arm) then he did not suffer a severe brain injury in the third phase…."*.

104. The experts also agree that the converse is not the case: even if the claimant was unconscious for the whole of the period between his falling from the front of the Mercedes and his being struck by the Ford Focus this could be consistent with either a minor head injury or a very severe traumatic brain injury. This is simply because he might have come round seconds later had he not been struck by the Ford Focus, or he might have been 'out' for a very long time. We will never know for certain. A finding that the claimant remained unconscious throughout Phase 3 would therefore not be decisive.

105. Paragraph (6) of the Joint Statement records that the experts in neurosurgery disagreed as to how to assess the claimant's level of consciousness in Phase 3. Mr Helmy apparently advocated an approach based on actually assessing the claimant's GCS. Mr Macfarlane considered (and Professor Vloeberghs agreed with him) that it is not feasible formally to assess the claimant's GCS from the CCTV footage. It is necessary to adopt a *"broad brush"* approach. If the claimant was communicating as Mr Haile said he was in his police statement, or if the claimant *"was up on one elbow in the 40 to 45 seconds between the third and fourth events then that is inconsistent with"* the DAI having been sustained in Phase 3.

106. GCS is an objective categorical scale for assessing the level of consciousness of a patient. The assessor awards scores in three categories - eye-opening, verbal response and motor response - according to specified criteria which correspond to numerical scores. This results in a score between 3 and 15. I accept Mr Macfarlane's evidence that a formal assessment of the claimant's GCS cannot be carried out from the CCTV footage because none of the claimant's helpers was attempting to assess him for these purposes and nor did they have the expertise to do so. For example, Mr Haile told the court that he did not recall looking to see whether the claimant's eyes were open. Moreover, as Mr Macfarlane explained, the assessor seeks to ascertain the patient's best response in each of the three categories. Thus, for example, the patient's eyes may be closed but they will be asked whether they can open them. They may not be speaking but the assessor will ascertain whether they can do so and, if so, how coherently.

107. This particular difference of opinion between the experts may not matter, however. As paragraph (7) of the Joint Statement records, the neurosurgeons were agreed that if the claimant was communicating with his helpers or able to support the weight of his torso with his arm then his GCS was 9 or greater. These, then, are the questions on which I have focused in this part of my judgment.

The evidence on this issue

108. There are three sources of evidence in relation to the issue of the claimant's consciousness in addition to the evidence which I received as to the mechanism of the claimant's fall and the forces which were "in play". These are the evidence of Mr Haile, the CCTV evidence and the hearsay evidence of other witnesses at the scene. I consider each of these categories in turn below.

The evidence of Mr Haile

109. As one of the people who tried to help the claimant after he had been projected off the front the Mercedes, Mr Haile's evidence is potentially important because he was a direct witness to the consciousness or otherwise of the claimant. Unfortunately, he was unable to attend court in person and, as noted above, therefore gave evidence by video link from Mogadishu. When he initially gave evidence, he did not appear to have appreciated that he needed to print up and read the documents which had been sent to him. His evidence therefore had to be rescheduled. The connection with Mogadishu was not of a high standard and there were difficulties at his end with hearing the questions which were put to him and, in London, with hearing his answers.

110. Mr Haile was, in my judgement, a straightforward, intelligent and honest witness but quite properly he repeatedly emphasised that the events in question took place a long time ago, that the time between the claimant falling off the front of the Mercedes and the Ford Focus returning to run him over was a matter of seconds, and that he did not remember the details clearly. It was clear to me that, indeed, he no longer had a recollection of the details of what occurred when he and others were attempting to help the claimant up off the tarmac albeit he remembered the broad outline of the events.

111. Mr Haile's witness statement for the purposes of these proceedings is dated 27 February 2019 and he told the court that it had been prepared over the telephone. At paragraph 19 he said this:

> *"a few of us ran onto the road to check if Idris was okay. Idris was lying in the road. We asked if he was in any pain, whether he had any broken bones and whether an ambulance was needed. Idris was responsive and conscious. He said he did not feel any broken bones but was in some pain."*

112. At paragraph 20, Mr Haile added that the claimant's helpers were having difficulty lifting him off the road because the claimant is a big man:

> *"He was intoxicated and I think this contributed to him not being able to get himself up. He was also probably in shock from the collision with the Mercedes."*

113. Under cross-examination, however, Mr Haile repeatedly referred to the claimant as *"mumbling"*. In the earlier parts of his testimony, his evidence was to the effect that, although the claimant was not speaking clearly, and although Mr Haile did not remember clearly, he thought that the claimant's words were *"I am all right"*. However, as his cross-examination progressed, firstly by Mr Audland and then by Mr

O'Sullivan, he said that the claimant was not speaking *"clear words….Nothing clear that was coming out of his mouth… so I assumed he was all right"*. In answer to a question from Mr O'Sullivan he said *"he was mumbling and so must not have said it clearly. I don't remember him replying clearly but from the mumbling we were guessing"*.

114. Mr Haile was asked by Mr Audland whether he remembered the claimant sitting up and he said that *"he never sat up at all after getting hit"*. In answer to questions from Mr O'Sullivan, however, he said that the claimant *"wasn't knocked out but it was in shock"*, that the claimant did not have a clear injury at this stage and that he remembered the claimant "*moaning and looking as if he was in pain but not extreme pain"*.

115. Mr Haile was also cross-examined by Mr Audland about whether he had been drinking on the night in question. In his police witness statement, dated 26 September 2014, Mr Haile had implied that he had not been drinking when he said: *"I do not drink at the moment due to a recent event in my life"*. In a later statement, dated 2 December 2014, in which he had clarified certain points, Mr Haile had been asked about how he came to have the key for the Ford Focus. He explained that he did not remember who had given it to him *"I was under the influence of alcohol and really distressed about what had happened to Idris so I've forgotten who handed it to me…. I totally forgot about it until the next morning when I sobered up and found a Ford car key in my jeans pocket"*. This obviously suggested that, at least after the events, Mr Haile had been intoxicated.

116. At paragraph 27 of his witness statement for the purposes of these proceedings Mr Haile said *"As this occurred a few years ago, I cannot recall too clearly now but I may have had a shot or two of alcohol after the accident occurred. I did not consume any alcohol until after the accident."* Under cross-examination by Mr Audland, Mr Haile maintained his position that he had drunk alcohol after the event because he was distressed by what had happened. He also appeared to say that he may have had a drink shortly before the incident but he insisted that he had not been drinking all night and he emphasised that he had been sufficiently sober to be able to accompany the claimant to hospital.

117. I have borne this aspect of the evidence in mind in assessing Mr Haile's evidence but I do not consider that it renders his earlier accounts unreliable. The variance, on the subject of drinking, between Mr Haile's first and second police witness statements does not suggest to me that he was therefore lying about the question of the claimant's consciousness or otherwise after he had fallen from the front of the Mercedes. This was a different topic and he had no reason to lie about it. Nor does the evidence suggest that Mr Haile was so intoxicated, either before or after the relevant events, as to have no reliable recollection (particularly shortly afterwards) or that, in effect, he was inventing his recollection when he described those events subsequently.

118. Mr Haile was interviewed by DS Hamlet and DC Edwards between 21:40 and 22:22 Hours on 7 September 2014, in other words less than 48 hours after the incident. The summary of the interview, which was prepared by DC Edwards, and is dated 8 September 2014, states that:

> *"HAILE went to FARAH who was still lying in the road and spoke to him. He didn't appear to have any bumps on his head and no bleeding from anywhere. FARAH complained that his shoulder hurt but stated he was not badly injured".* (emphasis added)

119. In my judgement, there is no reason to take the view that this is anything other than an accurate note of what Mr Haile told the police officers shortly after the relevant events. Moreover, in terms of reliability, this is in my view a reasonably reliable account and the most reliable account on this issue which Mr Haile provided, given the proximity in time.

120. In his police statement dated 26 September 2014 Mr Haile said this:

> *"I ran towards Idris who was still lying in the road and spoke to him. He didn't appear to have any bumps on his head and no bleeding from anywhere. Idris complained that his shoulder hurt but stated he was not badly injured".* (emphasis added)

121. I make due allowance for the fact that the statement is likely to have been drafted from DC Edwards' interview summary of 8 September 2014 but it does seem to me to be of significance that Mr Haile signed this statement to confirm that its contents were true to the best of his knowledge and belief. The statement also contained the standard warning, on the first page, that he would be liable to prosecution if he had wilfully stated anything which he knew to be false or did not believe to be true. Given that he was making and signing a statement in the context of a criminal investigation it also seems to me to be a reasonable conclusion, on the evidence, that he read the statement before signing it and was therefore confirming what he had said to DC Edwards in the interview on 7 September 2014, and that it was accurate.

122. The first defendant was tried at Harrow Crown Court for (1) attempted murder and (2) conspiracy to cause grievous bodily harm in March 2015 but the jury acquitted him on Count 1 and was unable to come to a verdict on Count 2. He was therefore tried again in August 2015. Mr Haile gave evidence at both of the trials. The transcript of the trial in March 2015 records the following exchange with him:

> *"A. But when I went over and I was asking him, 'How are you? Are you okay? Do you feel, do you have any bones that are hurting in any part of your body which is?' As I was asking him and bent over trying to help him and we are trying to lay him flat somehow just to get him out of the road then we don't know what injuries he's got even if he had injuries at that time.*
> *Q. Do you remember seeing any blood under him at that stage?*
> *A. No. There was no blood that I could see on his face internally or under his clothes I don't know.*
> *Q. Was he complaining of any pain anywhere?*
> *A. He was just saying, 'Ouch' like normal, someone who got hit with a car. He was just complaining of aches and that but there was nothing wrong at the time, I think."* (emphasis added)

123. In the transcript of the trial in August 2015 Mr Haile is recorded as giving the following evidence:

"*Basically, we all ran towards him .....as we were trying to attend to him-we were talking to him and asking him, 'How are you? Are you okay? Do you have any injuries?'- he's replying in a way, like someone's in pain but not saying, like, anything happened or he broke a bone or anything....."*

124. Later, Mr Haile was asked:

> *"And you've told us already that this is when you were talking to Idris, trying to see how badly hurt he was?".*

125. Mr Haile replied:

> *"Yes, I was asking him at that time, 'Are you injured? Can you move? Can you get up for yourself?' He wasn't replying; he was mumbling."* (emphasis added)

126. It is apparent, therefore, that by the second trial Mr Haile was referring, in parts of his evidence, to the claimant as *"mumbling"* and, on one reading, was saying that the claimant was not actually articulating words.

My findings in relation to Mr Haile's evidence

127. In assessing the evidence of Mr Haile I have had regard to the words of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), at paragraph 22 in particular. I also agree with Mr O'Sullivan that the following observation of Lord Pearce in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403, 431 is apposite in the present case:

> *"It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance."*

128. On the balance of probabilities I find, on the basis of Mr Haile's evidence, that after the claimant fell from the Mercedes, and before he was struck by the Ford Focus, he was what a layperson would describe as conscious. That was Mr Haile's perception of the claimant, as he told the court when he said that the claimant *"wasn't knocked out"*, and this was why Mr Haile and the other helpers thought it worthwhile to ask the claimant, more than once, how he was. Importantly, I also find that the claimant understood and was responding to questions about how he was, and he was communicating verbally that his shoulder hurt but that he was not badly injured. He may have been groaning, speaking less distinctively than usual or "mumbling" but he was able to understand questions which were put to him and to respond coherently to them. I appreciate that Mr Haile's evidence in this regard has not been consistent, but I regard his accounts to the police on 7 and 26 September 2014 as being accurate and accept them.

129. Accordingly I find that, whether or not the claimant was initially unconscious, by the time he was struck by the Ford Focus he had a GCS of 9 or more on the balance of probabilities. I would have reached this conclusion on the basis of my assessment of

Mr Haile's evidence as a whole even if CCTV evidence had not been available. For reasons which I will now explain, however, I consider that the thrust of this aspect of Mr Haile's evidence is consistent with what can be concluded about the claimant's level of consciousness from the CCTV footage.

The CCTV evidence

130. The Joint Statement of the accident reconstruction experts states, at paragraph 2.14, that the question whether the claimant was moving independently in Phase 3 would be dealt with by the medical experts from their review of the CCTV recordings. In the event, however:

i) Mr Hague was cross examined on the point. In answer to Mr Audland's questions he said that he did not see any evidence of the claimant moving his body independently. He also agreed that, early in the 40 to 45 second period, the claimant's arm is seen to flop to the ground when it was released by one of his helpers, who was apparently trying to lift him off the ground. However, Mr O'Sullivan suggested to Mr Hague that some of the stills later in the period showed the claimant supporting himself using his left arm and that, having been abandoned by his helpers immediately before the Ford Focus hit him, the claimant raised his body slightly. Mr Hague agreed.

ii) In her expert report Ms Eyers says, at paragraphs 7.115 to 7.117, that the claimant did not appear to move after coming to rest in Phase 3 or to make any independent movements or to lift his head, although her reference to the claimant's arm falling straight to the ground suggests that these were observations about the earlier part of the period. Paragraphs 9.24 to 9.26 of her Discussion section are to similar effect. When Ms Eyers gave evidence, after Mr Hague, she was asked by way of supplemental questions from Mr Audland whether she agreed with Mr Hague that the claimant raised his body slightly immediately before he was struck by the Ford Focus. Very fairly, she said that his body did appear to be a pixel or two higher – or what she said was a very small amount higher as a proportion of his body - although she could not say why that was. She said that it could be that he was being helped or that the impact of the car was pushing him forward.

iii) Dr Horsfall made no observations on the consciousness issue in his report of 26 April 2019. When he was asked about this by Mr Audland he explained, and I accept, that he understood that this would be a matter for the medical experts as the Joint Statement reflects. He said that therefore he had not analysed the claimant's movements after he came to rest and that he was reluctant to do so, as it were, "on the hoof" on the witness stand. I do not accept Mr Audland's submission that Dr Horsfall's reluctance was because he did not feel able to support the case of the claimant and the fourth defendant on this point. As stated above, I found Dr Horsfall to be an entirely straightforward, helpful and nonpartisan witness.

131. As for the medical experts, Dr Mackenzie's opinion, as set out at paragraph 4.8 of his report of 24 June 2019, was as follows:

> *"The continuous CCTV footage shows that the claimant is initially motionless on the ground after coming to a rest. It then shows people coming to the claimant's aid and attempting to lift him from the road. Although the quality is poor, it appears that the claimant may be initially unresponsive but subsequently, within approx. 30 seconds, he appears able to support his own weight with his left outstretched arm as he is being assisted towards a sitting position."* (emphasis added)

132. In evidence, he explained his view by reference to the relevant parts of the footage. It was put to him by Mr Audland that the claimant's posture was simply the result of his being pulled up by his right arm by one of his helpers. Dr Mackenzie disagreed. His view was that the claimant's body shape and tone were not consistent with him being unconscious. The claimant was supporting his own head, rather than it being limp and floppy, and the position of his arm was no longer lifeless. It was put to Dr Mackenzie that the position of the claimant's head was the result of it being supported from behind by one of his helpers but Dr Mackenzie said that, if so, he would have expected the head to flop forward if the claimant was unconscious.

133. Mr Audland also put to Dr Mackenzie that the claimant would not have attempted to support his weight with his left arm given that he had sustained a lumbar fracture. Dr Mackenzie did not agree. His evidence was that, particularly in the period immediately after an accident, such an injury would not prevent a person from trying to sit up or from supporting his weight. The pain from this injury would be one of a number of areas of pain and nor would he appreciate the nature of his back injury.

134. Mr Macfarlane's opinion as set out at paragraph 145 of his report, dated 26 June 2019, was that he agreed with Dr Mackenzie that:

> *"…in the CCTV footage, claimant appears to be lifting his torso up with his left arm and is supporting the weight of his head".*

135. Under cross examination by Mr Audland, Mr Macfarlane defended this opinion by reference to the footage. His clear view was that the claimant can be seen supporting his own head. He also pointed out, in effect, that signs which were consistent with unconsciousness did not necessarily demonstrate that the claimant was unconscious. Thus, the fact that the claimant was initially motionless may or may not have been because he was temporarily stunned or not choosing to move. The fact that his left arm flopped to the ground may have been because he was unconscious, but it could also have been because he had not been expecting his arm to be dropped.

136. Mr Gavalas did not claim to see what Dr Mackenzie and Mr Macfarlane saw, remarking that the former must have better vision than Mr Gavalas.

137. Mr Warren said, in his report dated 21 May 2019, that he agreed with those instructing him that "*based on the CCTV evidence I have seen the claimant appears to have remained unconscious up to the point where the Ford Focus ran over him"*. In evidence, however, he said in answer to a question from Mr Weir that he had not watched all of the CCTV at the time of his report and that he had watched the remainder between the hours of 2:30 and 5:30 am on the day on which he gave evidence. He said that he could not see any signs of consciousness but that he didn't think that any of the experts could give a definitive opinion.

138. Somewhat predictably, Mr Helmy saw no evidence that the claimant regained consciousness at any point during Phase 3.

My findings in relation to the CCTV footage

139. I was shown the CCTV footage and stills from that footage repeatedly in the course of the hearing and have studied these materials further before coming to my decision. In short, I agree with Dr Mackenzie and Mr Macfarlane as to what can be seen. Whilst the footage and the stills are not of the highest quality, I am satisfied that initially the claimant does indeed lie motionless on the tarmac. There are then attempts to move him by a man in dark trousers and a stripy top. These are unsuccessful and the claimant's left arm flops to the ground. Two or three more men gather round and the man in the stripy top runs towards the camera. Thus far it does appear that the claimant may well be unconscious or, at least, stunned. The group is then obscured by a passing N18 bus.

140. When the group comes back into view, they are trying to help the claimant get up off the tarmac and out of the road. There is a reasonably clear shot of the claimant apparently leaning on his left elbow. Importantly, he appears to be supporting his own head. It is true that one of the of helpers appears to have his left arm behind the claimant but I agree with Dr Mackenzie and Mr Macfarlane that the contact between this helper and the claimant appears to take the form of the helper attempting to pull the claimant up by his left shoulder rather than directly supporting the claimant's head. I also agree that the claimant's head is not flopping forward as one would expect if he were unconscious. The claimant's head and body tone appear to show that he is conscious rather than "knocked out" and lifeless.

141. The claimant is then briefly obscured from view by what appears to be a red car which is driving towards the camera. As he reappears, the Ford Focus also comes into view and the claimant can be seen, still on the ground but apparently supporting himself with his left arm as the helpers abandon him and get out of the path of the oncoming car. It also appears that he has not flopped to the ground by the time he is struck by the Ford Focus. Whether or not he had actually raised his body higher off the ground as Mr Hague and Ms Eyers' oral evidence may suggest, he appears to have held his body and head where they were, and sufficiently off the ground for the front of the Ford Focus to strike him from behind rather than simply driving over what would otherwise have been a more or less prostrate body.

142. Even making allowances for the quality of the footage and the speed of events, then, in my view the CCTV footage supports the conclusion that the claimant was able to support the weight of his torso with his arm and, indeed, to support his own head at least by the time that he was struck by the Ford Focus. On this basis alone it would appear that the neurosurgeons agree that the claimant must have had a GCS of more than 9 at this point i.e. within 45 seconds of falling from the Mercedes. But the evidence of Mr Haile is not only consistent with the CCTV footage (and vice versa); it is further evidence that the claimant's GCS was more than 9 when he was struck by the Ford Focus.

Hearsay evidence of other witnesses at the scene

143. I was referred to accounts of the relevant events which other witnesses gave to the police but did not find these particularly illuminating because they conflicted with each other and because, in my view, the CCTV footage and the evidence of Mr Haile were the best available evidence of what occurred. In the event, only Mr Audland sought to rely on this category of evidence on this point and he did so only very briefly. In summary, this category of evidence actually pointed in different directions:

i) A Ms Welenc was sitting on the top deck of the N18 bus as it passed the claimant's group. Looking out of the windows on the right-hand side of the bus she saw a male lying in the middle of the road who was not moving and who she thought might be unconscious. She then referred to him as *"the unconscious guy"* in her witness statement and as being *"unconscious"* in her evidence at the first criminal trial of the first defendant. This material did not take the matter a great deal further, however, given that the evidence of the claimant supporting himself relates to the period after the N18 bus had passed the claimant's group. It is, in any event, merely evidence of Ms Welenc's impressions from the top deck of the bus.

ii) A Ms Bolton was watching TV when she heard a commotion in the High Street. She said that the claimant appeared unconscious for a short period of time and then started to come round. This part of her account is consistent with the evidence of Dr Mackenzie and Mr Macfarlane. Mr Audland submitted that Ms Bolton was wrong on other aspects of the incident, and must therefore have been wrong on this aspect, but this type of argument tends to illustrate the point that the best available evidence is the CCTV footage, which can be studied closely, together with that of Mr Haile who was physically helping the claimant at the material time.

iii) A Mr Pereira said he witnessed the event from his bedroom window in the High Street. The claimant came off the bonnet and landed on the road and wasn't moving. Again, this evidence does not take the matter very far.

iv) A Mr Kendell was a lorry driver who stopped his lorry short of where the claimant was lying on the road and saw others getting him to a seated position but did not say that he had seen the claimant making any independent movements. Nor, however, did Mr Kendell say that the claimant had <u>not</u> moved or express any opinion as to his consciousness.

v) A Ms Gedi, who was a passenger in the Mercedes, said that as it drove round the claimant he was still conscious and didn't appear to be in any pain. This evidence is consistent with the evidence of Mr Macfarlane and Dr Mackenzie but, on its own, it would not be regarded as reliable because it is potentially self-serving given that Ms Gedi might well have wished to exculpate the driver of the Mercedes, who appears to have been a friend or connection of hers. There were other inaccuracies in Ms Gedi's evidence which I mention below.

vi) Mr Ahmed Farah, the claimant's brother, told the court, at paragraph 19 of his witness statement, that he was told that the claimant was conscious. Again, however, this evidence, on its own, is of little value.

144. For the reasons I have given, this category of evidence fell far short of establishing, in the context of the evidence as a whole, that the claimant was unconscious from the point at which it had struck the tarmac in Phase 3 to the point at which he was struck by the Ford Focus in Phase 4.

Conclusion on the claimant's level of consciousness when he was struck by the Ford Focus

145. For all of these reasons, I find on the balance of probabilities that the claimant had a GCS of 9 or more and was conscious at the point at which he was struck by the Ford Focus. He was also supporting his own body with his left arm and, indeed, his head. On the basis of paragraph (7) of the Joint Statement of the experts in neurosurgery even Mr Helmy agrees that, on the basis of this finding, the claimant *"did not suffer a severe brain injury in [Phase 3]"*. The correctness of this conclusion is also clear to me from the evidence which I received in the course of the trial.

146. Although Mr Helmy would only go as far as to concede, in paragraph (7), that therefore *"the majority of his cranial injuries were a consequence of [Phase 4]"* (emphasis added) for the reasons which I set out above and will explain further below this does not make sense in the context of the evidence as a whole. In any event I prefer the evidence of Mr Macfarlane that, on the basis of the evidence about the claimant's consciousness alone he "*did not suffer any significant head injury in [Phase 3] of the accident and all of the organic brain injury was a consequence of [Phase 4.]"*.

Further reasons for concluding at that the claimant did not sustain a DAI in Phase 3.

147. Quite apart from the fact that the claimant was conscious when he was struck by the Ford Focus, however, there are additional reasons for concluding, even before considering what happened in Phase 4, that the claimant did not sustain a DAI in Phase 3. In particular, I accept the evidence of Mr Macfarlane, Dr Mackenzie and Mr Gavalas that the rotational forces operating on the claimant during this phase were insufficient to cause DAI.

148. I have already made detailed findings as to the mechanism of the claimant's fall from the Mercedes, and the forces involved, which I do not repeat here. As noted above, when Mr Helmy saw Dr Horsfall's calculations he recognised that the rotational forces on the claimant's head when it hit the tarmac in Phase 3 were not sufficient to have caused the claimant's DAI, hence his second theory that it was the rotational forces before his head hit the ground.

149. The problem with Mr Helmy's second theory, however, is that it is based on an account of the claimant's fall which, I have found, significantly exaggerates the likely rotational forces on the claimant's head. Quite apart from this, Mr Hague and Dr Horsfall were quite clear that that when a person falls and hits his head the peak rotational forces are likely to occur when the head strikes the ground. This is because the issue is one of acceleration/deceleration. The rate of deceleration as the claimant fell from the front of the Mercedes and dissipated or absorbed kinetic energy as his feet, then his backside, landed on the ground and he tumbled over, was significantly lower than when his head then hit an immovable object in the form of the tarmac. As I put to Mr Helmy and Mr Audland, and neither appeared able to answer, if the

rotational forces when the claimant's head hit the ground in Phase 3 were insufficient to cause DAI it ought to follow that it was even less likely that they were sufficient before his head hit the ground.

150. Mr Hague also said that rotational acceleration will be a lot greater if the head comes into contact with the ground than if it does not. His position was that Phase 3 was closer, by analogy, to a fall from a bicycle. Phase 4 was closer, by analogy, to a case in which a car strikes a pedestrian. Mr O'Sullivan put to him a possible analogy with a gymnast and, consistently with his overall position, he said that rotational forces on the gymnast's head would be greater if the head hit the ground than if it did not.

151. Although Mr Helmy argued that a paper by Thomas A Gennarelli and others – *"Diffuse Axonal Injury and Traumatic Coma in the Primate"* (1982) - supported his second theory his approach was, at best, superficial. Mr Helmy's main point on the basis of this paper was that it showed that DAI could result in cases where there was no impact to the head. As the title suggests, Gennarelli and his team carried out experiments on monkeys. The monkeys' heads were subjected to rapid acceleration through a 60° arc in sagittal, lateral and oblique planes. The paper records that:

> *"Angular acceleration was produced by moving the head rapidly through the 60° arc in time periods ranging from 11 to 22 milliseconds. The shape of the wave consisted of a relatively long ramp like acceleration phase followed by a more abrupt deceleration component; it thus simulated injury situations such as a fall or an auto crash".* (emphasis added)

152. In other words, the Gennarelli team were seeking to simulate situations in which there would be an impact on the head but without actually hitting the monkeys on their heads. Moreover, as Dr Horsfall and others pointed out, and Mr Helmy ultimately did not dispute, the accelerational forces applied to the monkeys' heads in this experiment also far exceeded the forces in operation in Phase 3. In the Gennarelli experiment, forces of 500-1000G were applied i.e. the equivalent of the head being struck by the windscreen pillar of a car (one of the hardest parts of the car) which was travelling at 25 mph. The accelerational/decelerational forces in Phase 3 were at nowhere near this level: when the claimant was propelled from the front of the Mercedes he continued to travel in the same direction at a slightly slower speed, slowing down as he made contact with the ground, striking his head at 4-8 mph but continuing to move forward along the tarmac until he came to a rest.

153. In his second supplemental report, dated 16 February 2020, Mr Helmy also placed reliance on a paper by Hans Khristian Moe and others entitled *"Association of cause of injury and traumatic axonal injury: a clinical MRI study of moderate and severe traumatic brain injury"* which was published in October 2019. This paper, he said, "*demonstrates unequivocally that Diffuse Axonal Injury can and does occur in patients that have low energy trauma, even fall from height less than their own height"* (emphasis added). Apart from the claim that the evidence is unequivocal, this statement may be literally true but it is at best a superficial treatment of this piece of medical evidence. The Moe paper does not define *"low energy trauma"*. It does make the point that DAI may be sustained by patients who fall from their own height or less but the writers of the paper do not appear to have had information as to *how* they fell: obviously, there is a difference between falling headlong from 6 feet in height and

falling from such a height in the way that the claimant fell from the Mercedes, with his fall being broken and energy dissipated at various stages before the head impact.

154. In terms of assessing the probabilities in the present case the following points in the Moe paper, to which Mr Helmy did not draw attention in either of his two supplemental reports, are relevant:

i) First, as to Mr Helmy's suggestion that DAI can be sustained without a head impact the paper notes that: *"Pedestrians in RTAs were all hit by a car, and all had [DAI]. Their [DAI] grades were overall very high, as illustrated by the high median [DAI] grades. This is not surprising, as pedestrians are often hit by vehicles with a relatively high speed. The impact will accelerate the body and often throw the pedestrian several metres, leading to an instant deceleration when the head hits the ground."*.

ii) Second, the paper notes that: *"the lowest percentage of [DAI] and the lowest [DAI] grades in the RTA category were found among bicyclists. Still, as many as 60% of these patients had [DAI]. Bicycle accidents typically involve the patient flying over the handlebars and hitting the ground at a relatively high speed."*.

iii) Third, under the heading *"[DAI and Falls"* the authors said: *"It is important to note, however, that most patients who suffer such low-energy injuries do not sustain moderate to severe, but rather mild DAI. In fact, such falls were a rare cause (only 1% from < own height and 6% from own height) of moderate or severe DAI in our cohort"*. In other words, severe DAI of the sort sustained by the claimant was highly unlikely in the event of him falling from slightly higher than his own height. Notably, when it was put to Mr Helmy by Mr O'Sullivan (albeit not in the context of this particular paper) that the claimant in the present case had *"severe"* DAI (a matter on which it appeared all parties were agreed) he quibbled with the use of this term, purportedly on the grounds that it lacked precision. The impression which his overall evidence gave, however, was that he did not wish to concede points which undermined his case.

iv) Fourth, under the heading *"Bilateral Lesions in the Brainstem and Thalamus"* the authors said: *"Lesions in central and deep parts of the brain would indicate high-energy trauma, and bilateral [DAIs] in the brainstem and/or thalamus are suggested to possibly be a separate and worst grade of DAI in a new DAI classification"*. When it was put to Mr Helmy that this described the injuries in the present case, and that the authors of the Moe paper would therefore consider that the claimant's DAI indicated *"high energy trauma"* he disputed that the claimant had bilateral DAI in the brainstem and/or thalamus. It was pointed out to him, however, that paragraph 27 of his own report of 9 June 2019 recorded that the claimant had *"differential diffuse axonal injury and shearing as well as further micro haemorrhages in both thalami"* whereupon he was forced to concede the point. In answer to a question from me he said that it had been a mistake on his part to deny that the claimant had bilateral DAI. That may be so but in my view his mistake was symptomatic of his wish to defend his theory, often in the teeth of the evidence, rather than to assist the court.

155. I also accept Mr MacFarlane's evidence that, in his experience, DAI is almost always the consequence of a head strike. The sort of exception which he identified might be the case of a motorcyclist who was flung into the air at speed. Mr MacFarlane's evidence also accords with the following passages from a chapter of a book entitled *"Biomechanics of Closed Head injury"* where Mr Robert Anderson and Mr Jack McLean state:

> *"In practice it appears that injury to the human brain is almost always the result of an impact to the head, or to a protective helmet, rather than an impulse transmitted through the neck (Tarriere, 1981; McLean 1995). It is worth noting that the magnitudes of linear and angular acceleration of the head that can be produced from direct contact far exceed that possible from indirect impulse loading transmitted through the neck (Meaney et al 1994)";*
>
> *"Meany et al (1994), at the University of Pennsylvania, used a mathematical model of the human body to investigate the likelihood of brain injury occurring to a car occupant subjected to severe lateral impact without head contact. They concluded that the acceleration of the head is unlikely to reach a level that would be injurious to the brain. This is consistent with McLean's finding, referred to earlier, that there were no cases of brain injury without head impact in a series of more than 400 fatally injured road users…"*

156. Mr MacFarlane's evidence was also strongly supported by that of Mr McKenzie who routinely sees head injury cases in the course of his work, albeit the treatment of patients who are found to have brain injuries is then referred to the neurosurgery team. Mr McKenzie did not consider that the forces operating on the claimant's head before it hit the tarmac in Phase 3 could cause a shearing injury to his brain. He pointed out that the vertebral column acted as a shock absorber in the present case, absorbing sufficient evidence to cause a fracture to the L4 vertebra, and that there were other contacts between the claimant and the ground before the head strike, which dissipated the energy in his fall.

157. Mr Gavalas also routinely deals with head injuries in the course of his work. Like Mr MacFarlane it is part of his role to assess possible brain injuries with a view to referring the significant cases to the neurosurgery team. He was also emphatic that he had not seen, and would not expect to see, DAI resulting from the injury mechanism in Phase 3.

158. Although Mr Helmy claimed that in his experience the claimant's DAI could and did result from cases where there was no impact the head, and was not an exceptional occurrence in this type of case, I did not find his evidence on this point, amongst others, to be credible for the reasons given in this judgement. Nor did I find his explanation, when asked why his second theory is not mentioned in his first report, at all plausible. He told the court that he did not think it would be contentious that the forces prior to the head strike in Phase 3 were capable of causing the claimant's DAI and that he considered this to be *"self-evident"* and *"widely accepted"*. In my view he cannot have thought this. As will be quite apparent, his view was and is highly controversial.

159. For completeness I have considered what is effectively Mr Helmy's third theory of how the claimant sustained his DAI in Phase 3, which appears in his second

supplemental report. As noted above, this is that the DAI resulted from rotational forces during the claimant's fall, on impact with the road and after impact. The weakness in this theory is that if the rotational forces applied to the claimant's head were insufficient, at their highest point, to cause DAI it is highly unlikely that their cumulative effect over the entire sequence of events was sufficient. This is because, as Dr Mackenzie and Mr MacFarlane explained, the mechanism of the injury does not operate in this way. DAI is caused by sudden acceleration or deceleration. If the rotational forces in operation never reach a sufficiently high level to cause DAI the injury will not be sustained. It is no answer to say that there were insufficiently high levels of rotational force at any point in time but that rotational forces were applied over a period of time and operated cumulatively. If it were then gymnasts, dancers and divers might be at risk of this type of injury.

Phase 4.

Introduction.

160. Thus far I have reached the conclusion that the claimant did not sustain his DAI in Phase 3 without needing to consider what happened in Phase 4, but I accept Mr Weir's argument that if one is considering whether event A or event B caused an injury one is entitled to have regard, not only to the likelihood that it was caused by event A but also the likelihood that it was caused by event B. If it is far more likely that one of the two events would result in the injury in question, that tends to support the proposition that that event was the cause of the injury. This, with respect, common sense point underlies the following dictum of Toulson LJ (as he then was) in *Hilda Drake v Eric Anthony Harbour* [2008] EWCA Civ 25 which was referred to with approval by the Supreme Court at paragraph 121 of its judgement in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6:

> *"But where a claimant proves both that a defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the claimant is unable to prove positively the precise mechanism. That is not a principle of law nor does it involve an alteration of the burden of proof; rather, it is a matter of applying common sense. The court must consider any alternative theories of causation advanced by the defendant before reaching its conclusion about where the probability lies. If it concludes that the only alternative suggestions put forward by the defendant are on balance improbable, that is likely to fortify the court's conclusion that it is legitimate to infer that the loss was caused by the proven negligence."*

161. Paragraph 2.15 of the Joint Statement of the accident reconstruction experts states the following: *"we agree that the CCTV footage shows that [the claimant] was struck from behind while on the road, and rotated underneath the car".* They go on to say, at paragraph 2.16, that*: "The initial impact to the [claimant's] head would have been with either the bumper or the valance and his head was probably struck by the valance in any event before his head appears to have come into contact with the front nearside tyre"*.

162. I also agree that this is what can be seen. The claimant lies on the ground with head and shoulders raised above the level of the gap between the lowest part of the front of

the Ford Focus and the tarmac. As the car approaches his group, with lights off, it moves slightly to its left, apparently to get around a car which is in front of it. As Mr O'Sullivan submitted, this may well account for the fact that the Ford Focus braked at approximately this point. It then straightens up and drives straight at the claimant. When the Ford Focus strikes the claimant he immediately rotates, like a rolling pin, so that he is horizontal and facing the car with his head in the region of the front nearside tyre. He may have rotated again as the car drove forward with him underneath. As noted above, the Ford Focus carries on for approximately 33 metres before being forced to stop because the claimant is effectively acting as a brake. But the footage shows the Ford Focus continuing to attempt to drive over him and get away. A still from the footage at page 34 of Mr Hague's first report shows, fairly clearly, the claimant lying on the tarmac under the front of the Ford Focus with the right side of his face to the tarmac and the left side apparently under, or very close to, the nearside tyre. His feet are behind the offside tyre.

163. It is agreed by the accident reconstruction experts that the Ford Focus struck the claimant at a speed of 20 to 21 mph and that the overall horizontal speed change of the claimant's body and head would have been from nought to 20 mph in an instant. Dr Horsfall's evidence, which I accept, was that (obviously) there is a positive correlation between the height from which the head drops and the rotational forces on the head upon impact with the ground. The contact between the front of the Ford Focus and the stationary claimant would be *"broadly equivalent to a drop height of up to 4.0 to 4.5 metres"*. This compares with the equivalent of a drop height of 0.16 to 0.65 metres in Phase 3 when the claimant's head struck the tarmac. In Phase 4, the claimant's head struck the tarmac sufficiently hard to cause the skull fracture and the coup/contrecoup injuries noted above. Mr Hague's evidence, which I accept, is that it struck the road surface between 0.08 and 0.16 seconds after the impact with the Ford as compared with his head taking around 0.4 seconds to drop from around bumper height to the road surface when he fell from the front of the Mercedes.

164. I therefore accept the evidence of Mr Hague and Dr Horsfall that the forces involved when the claimant was struck by the Ford Focus were of a very significantly higher magnitude than at any stage in Phase 3. This is consistent with the fact that, as noted above, the neurosurgery experts agree that all of the soft tissue injuries to the claimant's head, his craniofacial fractures and the coup/contrecoup component of his brain injury were sustained in Phase 4.

165. The accident reconstruction experts also agree, at paragraph 2.16 of their Joint Statement that *"[The claimant's] head could have.. impacted the road upon being pushed towards it by the rotating tyre."*. At paragraph 2.18 they also agree that "*There could have been further impacts between [the claimant's] head and the road whilst he was being pushed along the road"*. In my judgement both of these are likely given that, as Mr Hague confirmed, there was sufficient space between the underside of the Ford Focus and the tarmac for his head to move and rotate as it collided with each of these two surfaces in turn: borrowing words from Professor Vloebergh's report, to rattle around *"similar to a bobble head toy"* . Dr Horsfall also points out that there appears to be a blood splatter on the inside of the nearside wheel arch liner of the Ford Focus which is consistent with his head having been struck directly by the tyre. The claimant also had abrasions and friction burns to <u>both</u> sides of his body which would be consistent with it being rotated.

166. In the light of the evidence Mr Helmy's opinion, as recorded at paragraph (19) of the Joint Statement of the neurosurgery experts is surprising: "*In Mr Helmy's opinion, the head was not rotated rapidly as a result of the initial impact of the fourth event"* (emphasis added). The rest of paragraph (19) goes on to develop an argument that the abrasions to the claimant's head indicate that the left side of his face was dragged along the road surface in Phase 4 with the right side of the head uppermost and therefore not subject to friction burns caused by being dragged along the road surface. In fact, the photographs of the claimant's injuries show a relatively minor "starburst" on the left side of his forehead and relatively serious abrasions to the left side of his neck under his ear, but they also show significant abrasions to the right side of his head starting mid forehead and extending to below his lower eyelid, as well as loss of skin colour extending down the right-hand side of his face.

167. In his oral evidence, Mr Helmy developed an argument that the medical evidence was *"absolutely clear cut"* and *"unequivocally"* showed that the claimant's head had been pinned to the road surface by the underside of the Ford Focus and was therefore unable to rotate when it impacted with the road just, he said, as a nut is unable to rotate when it is between the closed jaws of a nutcracker. He based this argument on the pattern of the abrasion on the left side of the claimant's forehead, the position of the skull fracture, and the contusions to the front and back of the claimant's brain which, he said, were consistent with one, linear, impact but not consistent with rotation.

168. This theory was inconsistent with the CCTV footage, the opinions of the accident reconstruction experts and the other medical evidence, including the evidence of Mr Macfarlane. As noted above, the claimant was struck by the Ford Focus at speed whilst in a stationary position and is seen to rotate before and after impact with the road as he goes under the vehicle. The vehicle continues to move forward as he rolls under it. The abrasions to his head are consistent with rotation, during which there was a glancing blow to his left forehead, whereas the lack of surface injuries to the back of his head, let alone any crushing injuries to the head, is inconsistent with the nutcracker theory. So is the fact that there was sufficient space between the underside of the Ford Focus for the claimant's head to move about and, indeed, the fact that the front of the vehicle rises up slightly as the claimant goes underneath it.

Conclusion on when the claimant's DAI was sustained.

169. For all of these reasons, then, I have concluded that no significant brain injury was sustained by the claimant in Phase 3. On the contrary, all of his brain injuries were sustained in Phase 4. I have found that the claimant was sufficiently conscious before he was struck by the Ford Focus to lead to this conclusion, and was supporting his body with his left arm, as well as supporting his head, but I would have come to the same conclusion even if I had found that the claimant was still unconscious at this point. This is because I accept Mr Macfarlane's opinion, shared by Mr McKenzie and Mr Gavalas, that it was overwhelmingly likely that the claimant's DAI was sustained in Phase 4 given the mechanisms of injury in Phases 3 and 4, and the nature and level of the forces involved in each of these Phases.

THE ISSUES ON LEGAL CAUSATION

Authorities on causation/novus actus interveniens.

170. A helpful starting point for present purposes is paragraph 67 of the Opinion of Lord Rodger in *Simmons v British Steel plc* [2004] ICR 585 HL in which he set out the relevant framework in characteristically lucid style:

> ***"67** These authorities suggest that, once liability is established, any question of the remoteness of damage is to be approached along the following lines which may, of course, be open to refinement and development. (1) The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable:* McKew v Holland & Hannen & Cubitts (Scotland) Ltd *1970 SC (HL) 20, 25 per Lord Reid;* Bourhill v Young *[1943] AC 92, 101 per Lord Russell of Killowen;* Allan v Barclay *2 M 873, 874 per Lord Kinloch. (2) While a defender is not liable for damage that was not reasonably foreseeable, it does not follow that he is liable for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a novus actus interveniens or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable:* McKew v Holland & Hannen & Cubitts (Scotland) Ltd *1970 SC (HL) 20, 25 per Lord Reid;* Lamb v Camden London Borough Council *[1981] QB 625; but see* Ward v Cannock Chase District Council *[1986] Ch 546. (3) Subject to the qualification in (2), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or it was caused in a way that could not have been foreseen:* Hughes v Lord Advocate *[1963] AC 837, 847 per Lord Reid. (4) The defender must take his victim as he finds him:* Bourhill v Young *[1943] AC 92, 109–110 per Lord Wright;* McKillen v Barclay Curle & Co Ltd *1967SLT 41, 42, per Lord President Clyde. (5) Subject again to the qualification in (2), where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of his wrongdoing:* Page v Smith *[1996] AC 155, 197 f–h per Lord Lloyd."*

171. In relation to Lord Rodger's point (1), the threshold question of reasonable foreseeability, the issue is as to the foreseeability of the type or kind of injury which results from the breach of duty: see the helpful discussion of this topic in the Opinion of Lord Nicholls in *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC, [2004] 1 WLR 1273 at paragraphs 21-29. Here, it is common ground that such injury as the claimant sustained in Phase 3 was of a kind which was a reasonably foreseeable consequence of Phase 1, and such injuries as the claimant sustained in Phase 4 were of a kind which was a reasonably foreseeable consequence of Phase 3.

172. The issues in this case are therefore in relation to Lord Rodger's point (2). There is no suggestion of contributory negligence on the part of the claimant in the present case and the questions therefore relate to pleas of novus actus interveniens by the parties and whether the driving of the Mercedes in Phase 3 and/or the driving of the Ford Focus in Phase 4 'broke the chain of causation'.

173. Paragraph 67 of Lord Rodger's Opinion was cited with approval by Lord Bingham at paragraph 8 of his Opinion in *Corr (administratrix of Corr dec'd) v IBC Vehicles Ltd* [2008] 1 AC 884. Lord Bingham went on to say, at paragraph 15:

> ***"15*** *The rationale of the principle that a novus actus interveniens breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible."*

174. As Sedley LJ pointed out at paragraph 14 of his judgment in *Spencer v Wincanton Holdings Limited* [2009] EWCA Civ 1404, this reflected what Lord Nichols had said in *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19:

> *"69. How, then does one identify a plaintiff's "true loss" in cases of tort? This question has generated a vast amount of legal literature. I take as my starting point the commonly accepted approach that the extent of a defendant's liability for the plaintiff's loss calls for a twofold inquiry: whether the wrongful conduct causally contributed to the loss and, if it did, what is the extent of the loss for which the defendant ought to be held liable. The first of these inquiries, widely undertaken as a simple "but for" test, is predominately a factual inquiry. The application of this test in cases of conversion is the matter now under consideration. I shall return to this in a moment.*
>
> *70. The second inquiry, although this is not always openly acknowledged by the courts, involves a value judgment ("ought to be held liable"). Written large the second inquiry concerns the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable (the epithets are unchangeable). To adapt the language of Jane Stapleton in her article "Unpacking 'Causation'" in Relating to Responsibility, ed Cane and Gardner (2001), p 168, the inquiry is whether the plaintiff's harm or loss should be within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question. The law has to set a limit to the causally connected losses for which a defendant is to be held responsible. In the ordinary language of lawyers, losses outside the limit may bear one of several labels. They may be described as too remote because the wrongful conduct was not a substantial or proximate cause or because the loss was the product of an intervening cause. The defendants' responsibility may be excluded because the plaintiff failed to mitigate his loss. Familiar principles, such as foreseeability, assist in promoting some consistency of general approach. These are guidelines, some more helpful than others, but they are never more than this."*

175. At paragraph 38 of his judgment in *Spencer* Aikens LJ also said:

> "*I agree with Sedley LJ that, as Lord Nicholls recognised frankly in* Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5) *[2002] 2 AC 883 at [70], the courts have to make a value judgment when dealing with the issue of "remoteness of damage". "Causation" and "remoteness" are two epithets which describe the same process of legal decision making: how to apply responsibility for things that happen. The question is always: having established the facts, what is the extent of the loss for which a defendant ought fairly, or reasonably, or justly to be held liable?"*

176. There has been a number of expressions, in the decided cases, of what overarching question the court has to answer where there is a plea of *novus actus interveniens*. Hamblen LJ (as he then was) said this in *Clay v TUI Ltd* [2018] EWCA Civ 1177, [2018] 4 All ER 672:

> *"**[27]** Determining whether there has been a novus actus interveniens requires a judgment to be made as to whether, on the particular facts, the sole effective cause of the loss, damage or injury suffered is the novus actus interveniens rather than the prior wrongdoing, and that the wrongdoing, whilst it might still be a 'but for' cause and therefore a cause in fact, has been eclipsed so that it is not an effective or contributory cause in law."* (emphasis added)

177. In other cases, such as *Stacey v Autosleeper Group Ltd* [2014] EWCA Civ 1551, it has been put in terms of *"obliteration"* of the prior event by the subsequent event. For example, at paragraph 14 Floyd LJ said this:

> *"(ii) To break the chain of causation, the intervening conduct of the claimant must be of such impact that it obliterates the wrongdoing of the claimant in the sense that the claimant's conduct must be the true cause of the loss rather than the conduct of the defendant. That is because, where the defendant's conduct remains an effective cause of the loss, at least ordinarily the chain of causation will not be broken."*

178. At paragraph 2-111 the authors of Clark & Lindsell 22nd Edition state:

> *"…. The question of the effect of a novus actus "can only be answered on a consideration of all the circumstances and, in particular, the quality of that later act or event". Four issues need to be addressed. Was the intervening conduct of the third party such as to render the original wrongdoing merely a part of the history of events? Was the third party's conduct either deliberate or wholly unreasonable? Was the intervention foreseeable? Is the conduct of the third party wholly independent of the defendant, i.e. does the defendant owe the claimant any responsibility for the conduct of that intervening third party? In practice, in most cases of novus actus more than one of the above issues will have to be considered together."*

179. In *Chubb Fire Ltd v Vicar of Spalding* [2010] EWCA Civ 981 Aikens LJ said, at paragraph 68:

> *"The first factor – whether the intervening conduct of the third party was such as to render the original wrongdoing merely a part of the history of events – involves a value judgment and requires the court to take account of the other three issues listed by Clerk & Lindsell."*

180. As to the factors which go to this overarching question, in *Clay* Hamblen LJ went on to say this:

> ***"[28]** As Aikens LJ observed in Spencer v Wincanton [2009] EWCA Civ 1404 at [45], where the line is to be drawn is not capable of precise definition. Various considerations may, however, commonly be relevant. In a case involving intervening conduct, these may include:*

(1) The extent to which the conduct was reasonably foreseeable—in general, the more foreseeable it is, the less likely it is to be a novus actus interveniens.
(2) The degree of unreasonableness of the conduct—in general, the more unreasonable the conduct, the more likely it is to be a novus actus interveniens and a number of cases have stressed the need for a high degree of unreasonableness.
(3) The extent to which it was voluntary and independent conduct—in general, the more deliberate the act, the more informed it is and the greater the free choice involved, the more likely it is to be a novus actus interveniens."

181. This approach also reflected Aikens LJ's emphasis in *Spencer* on the point that the categorisation of the conduct which is said to break the chain of causation as intentional, reckless, unreasonable or otherwise is not necessarily decisive. Aikens LJ agreed with the dictum of Evans-Lombe J in *Barings plc (in liquidation) v Coopers & Lybrand (a firm)* [2003] EWHC 1319 (Ch) that:

> *"what will constitute such conduct is so fact-sensitive to the facts of any case where the issue arises that it is almost impossible to generalise".*

182. Accordingly, whilst I accept that the following passage from the judgment of Cairns LJ in *Rouse v Squires* [1973] QB 889, 898D/E, which was relied on by Mr O'Sullivan, is illustrative of the higher likelihood that deliberate conduct will amount to a novus actus interveniens, it cannot be regarded as stating a generally applicable rule:

> *"If a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper lookout, <u>but not those who deliberately or recklessly drive into the obstruction</u>, then the first driver's negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person."* (emphasis added)

183. Mr Weir also relied on the principles that *"intention to injure [the claimant] disposes of any question of remoteness"* (per Lord Lindley, *Quinn v Leathem* [1901] AC 495, 537) and that indifference to the consequences of an act, or recklessness as to the consequences, will be treated as intention for these purposes: Clerk & Lindsell 22nd Edition paragraph 2-148. Here, of course, the drivers of both cars intentionally committed torts involving trespass to the person. However, as the authors of Clerk & Lindsell go on to state, at paragraph 2-148:

> *"Liability in such torts extends to all the consequences which can be linked to the tortious conduct, provided those consequences are properly attributable as a matter of causation to the defendant's conduct and not to some novus actus interveniens."*

<u>Was the chain of causation between Phase 1 and Phase 3 broken?</u>

184. The claimant's case is that, by his actions in Phase 1, the first defendant caused the injuries which the claimant sustained in Phase 3 despite the fact that it was the driver of the Mercedes who tipped the claimant into the road. This is disputed by the second defendant.

185. On balance, I prefer Mr Weir's submissions on this point. It is well established that drivers are not entitled, in law, to drive on the assumption that other will drive with reasonable care. As Lord Uthwatt put it in *London Passenger Transport Board v Upson* [1949] AC 155, 173 . *"A driver is not… bound to anticipate folly in all its forms, but he is not,….entitled to put out of consideration the teachings of experience as to the form those follies commonly take"*. The first defendant's actions in Phase 1 were deliberate and, as I have found, he intentionally caused injury to the claimant in the form of the right tibial fracture. He was using his car as a weapon. He is therefore deserving of less latitude than would be afforded to the merely negligent driver.

186. Although the actions of the driver of the Mercedes were deliberate, he was trying to get the claimant off the front of his car rather than to injure him. As I have found, the actions of the first defendant in Phase 1 effectively forced the claimant onto the front of the Mercedes, which was not something which the driver of the Mercedes wanted. It is entirely unsurprising that the driver of the Mercedes would then wish to get him off. As Mr Weir points out, the context for the first defendant's actions was an altercation in the small hours of the morning involving hot headed young men who had been drinking. The way in which the driver of the Mercedes sought to remove the claimant therefore cannot be regarded as a totally unexpected "folly". The events between Phase 1 and the end of Phase 3 were part of a closely connected sequence which took place over a matter of a few seconds.

187. Accordingly, I consider that the first defendant was responsible for the injuries to the claimant sustained in Phase 3 and that it is fair that he should be held liable for those injuries. The driving of the Mercedes did not eclipse or obliterate the actions of the first defendant or render them purely historic in nature.

Was the chain of causation between Phase 3 and Phase 4 broken?

188. The second defendant's case is that the driver of the Mercedes caused Phases 2 and 3 by his deliberately sweeping the claimant onto his bonnet, accelerating and then braking hard with the result that the claimant was catapulted onto the road and left lying there with severe brain and spinal injuries. It was reasonably foreseeable that the claimant might then be run over by another vehicle and the chain of causation between Phases 3 and 4 was not broken by the first defendant's deliberate act of driving into the claimant in Phase 4 with the intention of injuring him. This is disputed by the claimant and the fourth defendant.

189. I reject Mr Audland's submissions on this point. Obviously, there is a significant degree of inconsistency in his case that, on the one hand, the driver of the Mercedes broke the chain of causation between Phases 1 and 2, while submitting, on the other, that the driving of the first defendant did not break the chain of causation between Phases 3 and 4.

190. As I have found, the factual basis for the second defendant's argument that the driver of the Mercedes ought to be held liable has not been established to the extent

indicated above. As far as the question whether the first defendant ought to be held liable is concerned, after Phase 1 he continued up the High Street before turning around and coming back. He then deliberately drove at the claimant's group with the intention of causing injury i.e. he was again using his vehicle as a weapon. There was a gap of 40 to 45 seconds between the claimant hitting the ground in Phase 3 and the first defendant, running him over in Phase 4. After he had struck the claimant, the first defendant carried on driving for approximately 33 metres and he only stopped because the claimant's body, which was underneath the car, was acting as a brake.

191. Whilst it was reasonably foreseeable, the claimant having been dumped in the road by the driver of the Mercedes, that he might be injured accidentally or even negligently by another motorist, it was entirely unexpected that a motorist would act as the first defendant acted in Phase 4. I accept that the actions of the first defendant in Phase 4 should be regarded as separate to what went before, in Phases 2 and 3, and that the events in these Phases were rendered historic, eclipsed and/or obliterated by the events in Phase 4. Given the nature and intentions of his conduct, I also consider it just that the first defendant should be held liable for the injuries which the claimant sustained as a result of his actions.

Were the claimant's brain injuries divisible?

192. In the light of my findings this issue is academic. I would, however, have found that the claimant's brain injuries were divisible from his other injuries, that coup/contrecoup injury was divisible from his DAI but that neither injury is itself divisible.

WAS THE SIXTH DEFENDANT THE DRIVER OF THE MERCEDES?

Introduction

193. As noted above, the claimant and the second defendant contend that the sixth defendant, Mr Osman Elmi, was the driver of the Mercedes at the material time. The position of the fourth defendant is that they have not proved this contention on the balance of probabilities. I understood that it was common ground between the parties that since Mr Elmi was not the owner of the Mercedes there is no presumption that he was the driver (i.e. the presumption in *Barnard v Scully* (1931) 47 TLR 557 does not apply) and the burden therefore lay on the claimant and the second defendant to prove this aspect of their cases.

Summary of the evidence on this point

194. In the event, Mr Audland "made the going" on arguing that the driver of the Mercedes was Mr Elmi. The determination of this issue depended entirely on an assessment of materials derived from the police investigation. No witnesses were called either to prove the identity of the driver of the Mercedes or to explain or provide any context for the documents on which Mr Audland and Mr Weir relied. Nor, indeed, was any evidence put before the court to explain what efforts, if any, had been made to locate witnesses, to obtain evidence from them and/or to call them. Nor was I provided with any evidence, as opposed to assertions from the Bar, as to why they could not be called.

195. In his helpful submissions Mr Audland took me to the materials on which he relied and explained why, he and Mr Weir submitted, they proved on the balance of probabilities that Mr Elmi was the driver of the Mercedes.

196. First, Mr Audland relied on passages from the police statement of Ms Ayan Gedi dated 14 January 2015. Ms Gedi was a passenger in the Mercedes during Phases 2 and 3 and the girlfriend of a Mr Ali Hussein. In summary, she stated that shortly before the relevant events she saw a man called *"Buck"* standing next to her boyfriend and she explained that *"Buck is a friend of Ali's, Osman's brother. I do not know "Buck" by any other name."*. She went on to say that, effectively just before Phase 2, she and Ali got into the rear passenger seats of the Mercedes. There were two men pulling at their rear door. *"Osman then jumped into the driver's seat of the car, this was the first time I saw him this night"*. She then described how Osman drove the car away and said that one of the two men who had been pulling at the door had jumped onto the front of the car. She said that Osman braked, the man landed in the road, Osman then reversed a little and drove round him. They drove further up the road and "Buck" jumped in. They then drove away.

197. I have assessed the cumulative effect of all of the evidence relied on by Mr Audland and Mr Weir but it is worth taking stock after each item. Ms Gedi therefore gave evidence that the driver of the Mercedes was called "Osman" and that he had a brother called "Buck". She also gave the clear impression that she knew "Osman" and had seen him before, albeit the first time she saw him that night was when he jumped into the driver's seat of the Mercedes. It is therefore significant that she failed to identify Mr Elmi when she attended a video identification parade on 5 February 2015, shortly after her police statement. On the assumption that she was a reliable witness, the implication is that the driver of the Mercedes was <u>not</u> Mr Elmi as otherwise she would have recognised him. Mr Audland suggested that the implication is that she was now covering up for her friends but this raises the question why, if this was her attitude, she would provide the name "Osman" in the first place. I do not suggest that Mr Audland cannot possibly be right - she might have been "got at" or had a change of heart after her police statement and before the identification parade - but these are the sorts of questions which ought fairly to have been explored through cross-examination of Ms Gedi.

198. Similarly, it is clear that Ms Gedi's account is materially inaccurate in other respects. For example, she had the claimant pulling at the rear door with a bottle in his hand and then jumping onto the front of the car, when this is not what occurred. The reliability or otherwise of Ms Gedi's recollection just over four months after the event would therefore also potentially be a fruitful avenue for cross-examination.

199. Mr Audland then took me to the police interview of Mr Luqman Lamoudni on 7 September 2014. Mr Lamoudni had apparently hired the Ford Focus. He was asked about the first defendant and he said that he knew the first defendant's younger brother although Mr Lamoudni didn't really hang around with him because he was younger than Mr Lamoudni. He said that the younger brother's name was *"Abdullahi Osman Osman, Ossie"*. Mr Lamoudni was asked whether the first defendant used to *"hang around with his younger brother"* and said that he didn't.

200. Taking stock, this was further evidence that the first defendant had a brother with "Osman" in his name albeit possibly as a surname. There was no evidence before me

that the sixth defendant had the name *"Abdullahi"*. Nor has it been proved that the first defendant had or has a brother called Osman Elmi.

201. Mr Lamoudni also said that the first defendant and his younger brother did not hang around together whereas Mr Audland's case is that they did, at least on the night in question. Mr Audland commented that Mr Lamoudni's answers appeared evasive. I agree and, of course, he may have been uneasy about naming the sixth defendant but, again, this is the sort of question which lends itself to evidence and cross-examination rather than speculation.

202. Next, Mr Audland took me to a transcript of the first defendant's police interview on 7 September 2014. This showed that the first defendant described the people in the Mercedes as friends of his and said that he and the Mercedes had driven to Harlesden together *"sort of in convoy"*. He also declined to name the people in the Mercedes: *"I don't really want to be getting anyone involved"*.

203. I was also shown extracts from the transcripts of the first defendant's evidence in each of his criminal trials. In the course of the first trial the first defendant told the court that he met the owner of the Mercedes in Wood Green. They were going to go to a pub called The Goose but as there were going there one of his friends came out. He was asked who this was, and he said *"Ozzy"*. He was asked whether this was a nickname and said that it was. He was asked whether he knew Ozzy's real name and answered *"Osman"*. He was asked *"Something Osman or Osman something?"* and he replied *"Osman or something"*. He then described he and others driving from Wood Green to Harlesden in the Mercedes and the Ford Focus. Later in his evidence he said that the driver of the Mercedes was *"Ozzy"* when he jumped in, broadly as described by Ms Gedi (i.e. shortly after Phase 3), and later said that the driver could be seen on the CCTV *"punching a wall"* after the events, apparently in frustration at what had happened.

204. The first defendant gave similar evidence in his second trial, again stating that *"Ozzy"* was driving the Mercedes at the material time.

205. Taking stock again, the first defendant was also saying that the driver of the Mercedes at the relevant time had Osman in his name and that he knew the people in the Mercedes. However, he was saying that this person was a friend of his rather than a brother or younger brother. I appreciate that some people refer to friends as their brothers or cousins but there is no evidence before me to show that this was the first defendant's practice or, indeed, the practice of Ms Gedi or Mr Lamoudni. This is therefore a material unexplained discrepancy in the evidence of these witnesses. Again, Mr Audland submitted that the first defendant was evasive on the subject of the identity of the driver of the Mercedes. Again, he may have been right that this evasiveness was understandable on the basis that the first defendant did not wish to implicate Mr Elmi but, again, this in itself suggests that the first defendant is not necessarily a reliable witness as to the identity of the driver of the Mercedes. More generally, the first defendant's claim in the criminal proceedings that he did not intend to use his vehicle to cause harm is a further indication that he is an unreliable witness.

206. There is clearly room for the view that if the first defendant knew that his friend or brother Mr Osman Elmi was the driver of the Mercedes, as he must have known if it was the case, the last thing he would have done would be to volunteer that the first

name of the driver was Osman. On this view the fact that he did so indicates that the driver was not in fact called Osman. I accept that this is not the only possible interpretation of the first defendant's actions: he might felt safer in volunteering part of a name now that the trial stage had been reached and/or he might not have wanted to appear unhelpful in front of the jury when questioned. But this is speculation. Mr O'Sullivan said that the first defendant may have volunteered this information because he had seen Ms Gedi's police statement when it was disclosed in the course of the criminal proceedings but this, again, is pure speculation. In any event, it does not meet the point that if the first defendant wanted to protect Mr Elmi, as it seems likely was the case, he would not have volunteered Mr Elmi's first name particularly given that, as Mr Audland seeks to prove, they were living in the same house at the material time.

207. Mr Audland then made three points about Mr Elmi with reference to documents that I was shown.

208. Firstly, there is indeed police evidence which suggests that the first defendant lived at 38 Finsbury Rd, Wood Green, London N22 8PD and that Mr Elmi lived at the same address. An article from the Canterbury Hub, dated 7 December 2017, also refers to Mr Elmi living at "Finsbury Road, Wood Green", albeit this was three years after the events with which this case is concerned. This, says Mr Audland, reinforces the evidence of a connection between the first and sixth defendants and undermines Mr O'Sullivan's argument that there could have been any number of Osmans in the area at the relevant time: only one of them was living at the same address as the first defendant. That may be so but, as I have pointed out, this may suggest that it is less likely that the first defendant would have proffered the name "Osman" to the court if he had believed that the driver of the Mercedes was Mr Elmi.

209. Secondly, the article in the Canterbury Hub reports that Mr Elmi had been convicted of an armed raid on a house in Canterbury. The account of the offence stated that a group of men had been seen loading items into a Ford transit van outside the property. When they were approached by police officers the van mounted the pavement and drove at one of the officers, who was clipped by the van as it passed by. This, and police documents warning that Mr Elmi had convictions for violence, weapons and drugs, showed that it would not have been totally out of character for Mr Elmi to have acted as the driver of the Mercedes did in Phases 2 and 3. This is something of a "makeweight" point. The Canterbury Hub article does not say which member of the group was the driver of the transit van and the incident was obviously quite different in nature in any event. The fact that Mr Elmi appears to have had a criminal record does not tell the court anything specific about where he was at around 3.30am on 6 September 2014.

210. Thirdly, and in my view more importantly, Mr Elmi voluntarily surrendered to the police on 31 January 2015 after being informed that the police wished to speak to him. He gave a prepared statement which denied any knowledge of the events which took place in the small hours of 6 September 2014. This is unremarkable, but the statement went on to say:

> *"I was not in Harlesden on 6 September 2014 and did not drive a silver A class Mercedes. I will not be seen on any CCTV footage in the area.*
> *I am willing to take part in an identification parade to clarify the position."*

211. This item of evidence does seem to me to be significant. Although Mr Elmi may have had his reasons for surrendering voluntarily (I do not know) on the face of it he could have taken his chances and waited to see whether the police would trouble to apprehend him. He was also taking a significant gamble in denying that he was even in the area at the relevant time and stating unequivocally that he would not be seen on any CCTV footage. The same point applies to his volunteering to take part in an identification parade and then doing so. Again, this may simply have been shrewd tactics on his part, but I have not been shown any evidence that it was. Taken at face value, Mr Elmi's actions suggest that he was confident that it could not be proved, by witness evidence, CCTV footage or other technological means, or otherwise, that he was the driver of the Mercedes at the relevant time. There is no evidence before me to explain how he could be confident of this if in fact he was the driver.

212. In saying this I have not lost sight of the fact that Mr Elmi then made no comment in answer to the questions which were put to him in the course of his police interview. The approach of providing a prepared statement after consultation with solicitors and declining to make any further comment is a familiar one in the Crown Court. In the present case, however, it does not necessarily mean that what was said in the prepared statement was false. Mr Elmi may well have been acting on legal advice and/or have wished to avoid answering questions which implicated others and/or might result in his being a witness in criminal proceedings. On what I have been told about his antecedents, he may not have been in the habit of cooperating with the police. Again, it is difficult to know on the evidence with which I have been provided.

213. Mr Audland also relied on the fact that Mr Elmi has been served and that the address on the Claim Form was 38 Finsbury Rd, N22 8PD i.e. the same address as that of the first defendant. I do not doubt that this address was used for service but my impression from my exchanges with Mr Audland was that his understanding was derived from the claimant's legal team. When I asked when and how service had been effected, I was not provided with an answer by Mr Weir or Mr Audland, presumably because they did not know. Nor was any evidence of service put before the court. I was not told, and I am not prepared to assume, that Mr Elmi was served personally or that he was present or living at that address when service was effected.

214. Turning to further evidential points made by Mr O'Sullivan on behalf of the fourth defendant, first it does seem to me to be significant that what appears to have been a thorough police investigation did not produce any other evidence which suggested that Mr Elmi was the driver of the Mercedes. Indeed, the police apparently thought that a Mr Mohamed Abdi-Ali, the owner of the Mercedes, was the driver. He was prosecuted for attempted murder and remanded in custody, albeit on 3 February 2015 a verdict of not guilty was directed when the prosecution offered no evidence in his case. At the hearing on 3 February 2015 prosecuting counsel stated that on one view the driver of the Mercedes was guilty of no more than dangerous driving given that the driver of the Ford Focus had forced the claimant onto the bonnet of the Mercedes. He went on to state that the prosecution case had collapsed because the evidence on which they were to rely to show that Mr Abdi-Ali was the driver of the Mercedes at the relevant time had proved to be flawed to the point of being wrong.

215. Examination of the CCTV evidence by DC Dunstan, who interviewed Mr Elmi on 30 January 2015, did not identify Mr Elmi although DC Dunstan was able to identify the first defendant and Ms Gedi. Nor, it appears, was there any fingerprint or DNA

evidence to link Mr Elmi to the Mercedes. Moreover, a summary report from a DC Harris, which was adduced by Mr Audland, shows that, as is common practice, the police looked at mobile phone data to ascertain whether Mr Elmi was in the area of High Street, Harlesden, at the relevant time. Three telephone numbers were identified for him. One of these phones had remained in the N22 postal district at all material times and there was no data available for the other two. The relevant section of DC Harris's report concludes:

> *"There are no witnesses that place Elmi at the scene.*
> *There is no CCTV that places Elmi at the scene. There are no forensics that place Elmi at the scene.*
> *This subject was NFA'd. There is no evidence of criminality on his part".*

216. The documents emanating from the police investigation suggest that they identified 16 suspects but that these did not include Mr Elmi. They did, however, include a *"Hany Osman"* who was eliminated from enquiries by 24 September 2014. The police CRIS report also records that a *"Mr Ismail Osman"* was said to have been present on the night of the incident by a witness called Mr Hassan who had seen the incident and called an ambulance. There may therefore have been at least two people at the scene with "Osman" in their names but who were not Osman Elmi. I appreciate that it does not appear that either of these two shared an address with the first defendant but, as Mr O'Sullivan submitted, this does tend to demonstrate that Osman is not an uncommon name amongst members of the Somali community.

217. Second, I also consider it relevant that Mr Haile, when he was asked in oral evidence, said that the incident had been much discussed and he had heard rumours about who the driver of the Mercedes had been. When he was asked whether Osman Elmi had featured in these discussions, or had been mentioned as the name of the driver, he seemed genuinely surprised and said he did not recognise this name. It therefore seemed that someone other than the sixth defendant was rumoured to have been driving the Mercedes. This, of itself, would not be decisive given that there may have been different rumours, and Mr Haile is unlikely to have been aware of all of them. But Mr Haile was directly involved the events, and a friend of the claimant, so there must have been a reasonable prospect of his being aware of any rumours that the brother of the driver of the Ford Focus had been driving the Mercedes, if that was the case.

Case law and legal arguments

218. Mr O'Sullivan relied on the guidance given by Sharp J (as she then was) in *Miller v Associated Newspapers Ltd* [2012] EWHC 3721 (QB) at paragraphs 36-37 urging caution in deciding important issues on the basis of hearsay evidence alone and rejecting reliance on hearsay evidence when the party relying on it is 'cherry picking' the passages which support its case. I accept the point that hearsay evidence should be treated with caution, particularly where it is relied on as the only evidence to prove crucial or central issues in a case.

219. In relation to the second point, I note that in the *Miller* case the defendant was indeed 'cherry picking' in that it sought to extract favourable material from statements containing favourable and unfavourable material on the same point. Here, this was not the case in quite the same way. The claimant and the second defendant relied on

evidence which suggested that "Osman" was the brother or the friend of the first defendant – they were not seeking to rely only on the evidence, for example, that they were brothers – but they were also choosing to rely on evidence that the first name of the driver was Osman when arguably there was evidence from Mr Lamoudni that this was his surname. To my mind, these areas of uncertainty in the evidence reinforce the point, made in *Miller*, about exercising caution.

220. All parties relied on section 4 of the Civil Evidence Act 1995. Mr Audland submitted that his case scored well when the factors set out in section 4(2) were applied whereas Mr O'Sullivan submitted that they led the conclusion that no weight should be given to the hearsay evidence on which the claimant and the second defendant were entirely reliant on this issue.

221. I have taken the statutory factors into account and have indicated the considerations which affected the weight which I gave to the items of evidence which are relied on in relation to this point. Ultimately, the issue is not purely one of weight in the sense of the reliability of evidence which in principle proves a given point, as there is not even specific hearsay evidence that the driver of the Mercedes was a person called "Osman Elmi" or which unavoidably leads to this conclusion provided the evidence is accepted. But I also feel unable to attach sufficient weight to the evidence in favour of this conclusion to conclude, on the balance of probabilities, that this is what it shows when the evidence is considered as a whole. I have pointed out the gaps and uncertainties in the evidence in favour of this conclusion, some of the unanswered questions to which it gives rise, the fact that Mr Audland himself describes the witnesses who referred to "Osman" as evasive on this issue (albeit to make a different point) and, of course, the significant evidence which positively suggests that the driver was not in fact the sixth defendant. I have also pointed out the lack of evidence to explain the absence of any witnesses and the efforts to bring them to court and that I am not prepared to accept mere assertions that it would not have been reasonable or practicable to call any of them.

222. Both parties invited me to draw inferences based on the non-attendance of witnesses pursuant to the well-known guidance in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, 340 and *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882 [30].

    i) Mr Audland submitted, in effect, that I should infer that the reason for the sixth defendant's failure to take part in the proceedings and to appear as a witness was that he was the driver of the Mercedes and was not confident that he could persuade the court otherwise. I decline to draw such an inference. The foundation for it has not been laid in the evidence in that it has not even been proved that the sixth defendant is aware of the claim, let alone that he has chosen not to give evidence at the hearing before me. Even if this had been proved I would not necessarily have drawn the inference contended for. The evidence that he was the driver of the Mercedes is not particularly cogent, as I have pointed out. Moreover, in his prepared statement to the police the sixth defendant appeared confident that it could not be established that he was the driver and, indeed, the police investigations did not discover evidence which they considered was capable of even making him a suspect. His non-attendance is also consistent with what I have read of his character in that, on

the basis of that material, he seems unlikely to have any enthusiasm for the legal process.

ii) Mr O'Sullivan submitted that I should draw inferences from the non-attendance of the witnesses relied on by the claimant and the second defendant, presumably that they were not called because they would not support the case which was sought to be advanced. Certainly, the witnesses who identified the driver as "Osman" were described by Mr Audland as evasive on this subject, as I have noted, and this may have played a part in the approach to deciding whether they should be called, the level of effort made to trace them and the lack of any evidence that any efforts were made. But I do not infer that they were not called because, for example, they had been interviewed for the purposes of these proceedings and had indicated that they would give evidence which did not assist the claimant or the second defendants' cause.

223. Mr O'Sullivan also relied on the principle illustrated by *McPhilemy v Times Newspapers Ltd (No 2)* [2000] 1 WLR 1732 that a party may not put in evidence the witness statement of a witness knowing that that evidence conflicts with its case and then submit in his absence that the court should disbelieve his evidence. But that is not this case. The claimant and the second defendant are simply adopting material, for example from the evidence of the first defendant, which is already in evidence by order of Master Davidson. They are not putting in or relying on his evidence on the subject of his intentions when he ran over the claimant in order to show that he was an untruthful witness.

My finding on the question whether the sixth defendant was the driver of the Mercedes

224. For all of these reasons I have concluded that it has not been shown, on the balance of probabilities, that the sixth defendant was the driver of the Mercedes at the material time.

CONCLUSION

225. I therefore hold, on the balance of probabilities, that:

i) The claimant's right tibial fracture was sustained in Phase 1;

ii) The claimant's lumbar fracture was sustained in Phase 3;

iii) The whole of the claimant's DAI was sustained in Phase 4;

iv) The first defendant, and therefore the second defendant, is liable for these and all of the claimant's other injuries sustained in the events of 6 September 2014 which are the subject of his claim;

v) It has not been shown that the sixth defendant was the driver of the Mercedes at the time of the relevant events.

226. I propose to make appropriate declarations but will consider submissions as to relief and the terms of any declarations or other orders or direction sought by the parties.

Annex 1

Agreed List of Issues

227. The issues were agreed between the parties as follows

i) Was D6 the driver of the Mercedes car during Events 2/3?

ii) Did the driver of the Mercedes drive the car intending to cause the claimant harm (a) in relation to Event 2; (b) in relation to Event 3?

iii) Was C conscious at any point between Events 3 and 4?

iv) Did the claimant sustain a traumatic brain injury (TBI) in Event 3; if so, what was the nature/extent of that injury?

v) What was the nature and extent of the TBI sustained in Event 4?

vi) Was the claimant diffuse axonal injury (DAI) a divisible or a non-divisible injury?

vii) Was the claimant's TBI a divisible or non-divisible injury?

viii) Was C's tibial fracture caused by Event 1 or Event 4 or Event 3?

ix) Is D1/D2 liable for Event 3 or did the driver of the Mercedes' actions operate to break the chain of causation?

x) Is the driver of the Mercedes liable for Event 4 or did D1's actions operate to break the chain of causation?

Annex 2

The fourth defendant's application to amend

228. The two amendments to which the second defendant objected were:

i) A proposed amendment to paragraph 22(2) of the original Defence which stated that the fourth defendant's primary case was that the driver of Mercedes was deliberately seeking to injure the claimant. The effect of the amendment would be that the fourth defendant now made no admissions as to his intentions. Mr Audland complained that this was a material and highly prejudicial change to the fourth defendant's case, effectively withdrawing an admission, and that it should not be allowed so late in the day.

ii) A proposed amendment to paragraph 27(3) of the Defence so that it was now expressly pleaded that the sole cause of the claimant's brain injury was Phase 4. Mr Audland submitted that this was a material alteration in the fourth defendant's case in that it was previously effectively admitted that a minor share of the responsibility for the brain injuries rested with the driver of the Mercedes.

229. Mr O'Sullivan accepted that the application to amend was made late in the day.

i) In relation to the proposed amendment to paragraph 22(c) he said that the fourth defendant's change of stance resulted from consideration of CCTV footage from the cameras on the N220 bus, albeit he accepted that the amendments could have been sought earlier. He pointed out that the question whether the driver of the Mercedes acted negligently or deliberately was before the court in any event, given the claimant's pleaded case, and that the change in his case therefore did not add to the costs or otherwise cause prejudice to the second defendant. This was also a question which I would have to consider in any event in evaluating the arguments on causation.

ii) In relation to the proposed amendment to paragraph 27(3) he did not accept that this made any material alteration to his existing case or withdrew admissions, as Mr Audland contended. He proposed amendments to his proposed amendment which would make this clear. Again, there was no real prejudice to the second Defendant given the issues which already required to be considered by the court.

230. In coming to a view on these issues. I took into account the overriding objective and the principles set out in Practice Direction 14, particularly at section 7. I allowed the amendments (as amended in the case of paragraph 27(3)), essentially for the reasons given by Mr O'Sullivan.

Annex 3

The second defendant's application to deal with the identity of the driver of the Mercedes as a preliminary point

231. Mr Audland's application was put on the basis that resolution of the question whether the sixth defendant was the driver of the Mercedes would narrow the issues, potentially facilitate settlement and reduce costs because it would then be known whether the fourth defendant was potentially "on the hook" and whether it needed to play any further part in the proceedings. Paradoxically, of course, the greatest likelihood of savings in costs would be if I were to reject the arguments of Mr Weir and Mr Audland that the sixth defendant was, indeed, the driver of the Mercedes because in that event the fourth defendant would no longer need to play any part in the proceedings.

232. The trial would, however, go ahead. I rejected this application, essentially, for the reasons given by Mr Weir at paragraph 108 of his skeleton argument. If it was thought appropriate for this issue to be dealt with as a preliminary point, this should have been canvassed in one of the case management hearings in this case. This mattered because the parties, including the claimant and the fourth defendant, had prepared on the basis that the fourth defendant would participate in the whole of the trial and had incurred costs accordingly. It would therefore be potentially disruptive to the trial for a significantly different approach to be adopted at the eleventh hour.

233. Even if an application had been made at an early stage, and as part of the process of case management, I am very doubtful that it would have been successful. To my mind the key point here is that there is the potential for an appeal from my decision. Although it was suggested in the course of argument that I was being asked to make a finding of fact which would in all likelihood be unappealable, I consider this to be overly optimistic. The issue as to the identity of the driver of the Mercedes turns almost entirely on an assessment of documentary evidence and the Court of Appeal might be persuaded that it was in as good a position as I am to make that assessment. They would certainly be better qualified. If, for example, I held that the sixth defendant was not the driver of the Mercedes, and the fourth defendant then played no further part in the trial, only for the Court of Appeal to reverse my finding, it would then be necessary to rehear all of the issues in fairness to the fourth defendant.

234. I therefore considered that Mr Audland's proposal was not in accordance with the overriding objective and gave rise to a considerable risk of taking a "treacherous shortcut".