

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

QB-2022-BHM-00009

BETWEEN:

(1) MS JACQUELINE KIRK

(2) MRS KERRY JONES

(Administrators of the Estate of NEIL JONES, Deceased)

Claimants

-and-

(1) CULINA GROUP LIMITED

(2) MR KRZYSZTOF JAKUB WITKOS

Defendants

Hearing

Counsel for the Claimants – Mr Marwick instructed by Harris Fowler

Counsel for the Defendants – Mr Jones instructed by DWF Law LLP

INTRODUCTION

1. The claimants, Jacqueline Kirk and Mrs Kerry Jones (“the Claimants”) who are respectively the former partner and mother of the late Neil Jones (“the Deceased”) bring a claim, as administrators of the estate of the Deceased (“the Estate”) against Culina Group Limited (“Culina”) and Krzysztof Witkos (“Mr Witkos”).
2. The claim is for damages arising from the death of the Deceased which occurred at around 1:15 am on 16 December 2017 close to the entrance to the Belfry Golf Club and Hotel (“the Belfry”) located adjacent to the A446. The Deceased was struck and killed by

a Mercedes Atros articulated lorry (“the HGV”) owned by Culina and driven, at the time by Mr Witkos (“the Collision” or “the Impact” as the context requires).

3. The Claimants bring claims for the Estate of the Deceased under the Law Reform (Miscellaneous Provisions) Act 1934 (“1934 Act”) and for the Deceased’s dependents under the Fatal Accidents Act 1976 (“1976 Act”). The claim asserts that the negligent driving of the HGV by Mr Witkos at or about the time of the Collision caused or contributed to the Collision occurring and therefore the Deceased’s death.
4. Culina and Mr Witkos accept that the Collision caused the death of the Deceased but they say that Mr Witkos was not driving the HGV negligently at the time of the Collision (or, if he did drive the HGV negligently, such negligence was not a substantial cause of or contributed to the Collision) and the Collision was instead caused wholly, alternatively contributed to by the negligence of the Deceased.

BACKGROUND

5. It is common ground that the Deceased was attending a Christmas party at the Belfry Hotel on the evening of 15 December 2017 until the early morning of 16 December 2017.
6. CCTV footage taken inside the Belfry Hotel and its grounds (“the CCTV Footage”) shows the Deceased being escorted out of the nightclub area of the Belfry Hotel by security guards at approximately 12.55 am on 16 December 2017. The CCTV Footage taken in the Belfry Hotel grounds shows the Deceased walking out of the entrance of the Belfry Hotel at approximately 1:05 am into the grounds and that he was unsteady on his feet and stumbled to the ground. The Deceased also walked into the path of two cars which had to take evasive action. The Deceased then left the grounds of the Belfry to walk (as I will describe shortly) along the A446.
7. A toxicology report prepared by the single joint toxicology expert, Dr Victoria Jenkins (“Dr Jenkins”) confirms that blood and urine samples, taken during the course of an autopsy conducted upon the Deceased’s body on 22 December 2017, were upon analysis by Dr Jenkins found to contain:
 - (a) a blood alcohol concentration of 2.5 times the legal limit for driving;
 - (b) cocaine at four times the legal limit for driving;
 - (c) Benzoyllecgonine at seven times the legal limit for driving; and
 - (d) THS (the active ingredient of cannabis) at four times the legal limit for driving.
8. Dr Jenkins confirms, in a supplemental report, that the CCTV Footage of the Deceased from 12:55 am until 1:12 am on 16 December 2017, which she viewed, supports the conclusion that the Deceased was during that time intoxicated and suffering from poor balance and coordination, which she would expect, based on her toxicology results.

9. The CCTV Footage recorded in the grounds of the Belfry shows the Deceased leaving the Belfry main entrance on foot and then turning right at the T junction formed by the entrance road to the Belfry and the A446 (“the T Junction”) in a north westerly direction along the A446, but then returning to the T Junction, standing there for a short period, then walking back and forth across the entrance road and then turning left at the T Junction and walking in a south easterly direction along the A446, on the same side of the road as the Belfry entrance, apparently along an asphalt footpath that runs beside the A446 road on that side of the road.
10. The Deceased then walked out of the range of the Belfry CCTV cameras.
11. The HGV driven by Mr Witkos was travelling in a north westerly direction along the A446 (that is in the opposite direction to that which the CCTV Footage shows the Deceased to be walking in when he went out of range of the Belfry CCTV cameras) and on the opposite side of the A446 to the asphalt footpath which the Deceased appeared (according to the CCTV Footage) to be walking on when he went out of view of the Belfry CCTV cameras. There is no footpath on the opposite side of the A446.
12. Mr Witkos’s evidence is that he did not see the Deceased prior to the Collision, he braked when he heard the Impact, initially thinking that he must have hit an animal.
13. Both accident reconstruction experts instructed by the parties agree that the Deceased was struck by the front nearside corner of the HGV about 75m south-east of the centre line of the T-junction, to the entrance of the Belfry Hotel causing extensive trauma to the Deceased’s head which the medical experts confirm caused the Deceased’s death.

REPRESENTATION

14. The Claimants were represented by Mr Marwick.
15. The Defendants were represented by Mr Jones.

THE CLAIM

16. The Claimants’ plead that Mr Witkos’s negligence caused or contributed towards the Collision and thereby the death of the Deceased and that Culina is vicariously liable for such negligence.
17. The Particulars of Claim set out particulars of Mr Witkos’s alleged negligence which is said to consist of:
 - (a) failing to keep any or any adequate lookout;

- (b) driving too fast;
- (c) failing to stop, slow down or swerve to avoid the Deceased;
- (d) failing to observe or heed the presence of the Deceased as a pedestrian on or in the vicinity of the carriageway;
- (e) failing to have any or any sufficient regard for pedestrian traffic that he might expect to be in the vicinity of the Belfry;
- (f) failing to brake in time or at all so as to steer or control the HGV, to avoid the Deceased; and
- (g) failing to take all appropriate care in the prevailing conditions.

18. Loss and damage is claimed however the quantum of damages, subject to liability, is agreed and so, in this judgment, I am only concerned with liability.

THE DEFENCE

19. The Defendants admit that the Collision occurred between the HGV driven by Mr Witkos and the Deceased and that the Deceased's death was caused by the Collision.

20. The Defendants say that the Deceased was, at the time of the Collision, under the influence of alcohol, cocaine and cannabis and had no obvious reason to be on the carriageway of the A446, where he was at the time of the Collision.

21. The Defendants admit that Mr Witkos did not see the Deceased before the Collision. It is pleaded that it was dark at the time of the Collision and the road unlit.

22. The Defence pleads that Mr Witkos was proceeding behind another lorry which was around 100 metres ahead of the HGV and that that lorry did not swerve or brake in response to the presence of the Deceased. Where I refer to metres hereafter I will use the abbreviation "m".

23. It is denied that Mr Witkos was negligent as alleged or at all, without prejudice to which it is pleaded that:

- (a) the area where the Collision occurred was poorly lit;
- (b) the lorry ahead of the HGV did not swerve in response to the presence of the Deceased;
- (c) a reasonable motorist would not have anticipated a pedestrian being in the carriageway or on the verge of the A446 to the nearside of the HGV, on the opposite side of the road to the footpath; and
- (d) Mr Witkos was driving within the speed limit.

24. Finally it is pleaded that the Deceased's death, damages and losses were solely caused, or alternatively contributed to by the negligence of the Deceased in:

- (a) failing to keep any adequate lookout as he proceeded along the unlit carriageway;

- (b) proceeding along the carriageway or unlit verge adjacent to the carriageway rather than on the footpath on the opposite side of the carriageway;
 - (c) if it is found that the Deceased stepped onto the carriageway, then failing to make any adequate checks before doing so;
 - (d) failing to monitor the traffic on the carriageway;
 - (e) if attempting to cross the A446 attempting to do so when it was unsafe, because of the presence of the HGV, to do so;
 - (f) failing to see or hear the HGV or note its headlights;
 - (g) if the Deceased fell or stumbled into the carriageway, then walking along the unlit verge, when intoxicated and unable to walk in a safe or controlled manner;
 - (h) becoming so intoxicated that he was unable to walk safely in the vicinity of the highway;
 - (i) moving into the path of the HGV; and
 - (j) in the circumstances failing to exercise any or any reasonable care and attention.
25. The Defence does not plead to the allegation that Culina is vicariously liable for the negligence of Mr Witkos, but Mr Jones accepts that, if Mr Witkos is liable to the Claimants, then Culina is vicariously liable for the Claimants' claims.
26. Finally, although the Defence has not been amended Mr Witkos, as I will confirm next, accepts, in his witness statement, that he was mistaken in his original belief (as pleaded in the Defence) that a lorry was proceeding approximately 100 m ahead of the HGV at the time of the Collision.

FACTUAL WITNESSES

27. There was only one factual witness, as to the circumstances of the Collision, namely Mr Witkos. In a short witness statement dated 6 October 2022, Mr Witkos says:
- (a) he was driving the HGV, in the centre of the lane, with his headlights dipped, the road was unlit;
 - (b) whilst in a statement to the police he said that he could see ahead for 20 - 25 m, having checked on Google he thinks that it is more likely that he could see ahead for 40 – 45 m;
 - (c) his recollection is that there was a lorry in front of him, but he understands that the CCTV Footage shows that this was not the case and he accepts that there was no lorry in front of him;
 - (d) he did not see anything or anyone in the road prior to the Collision;
 - (e) he heard a bang and thought it must be an animal; and
 - (f) he has seen that Mohammed Iqbal told the police, on 19 January 2018, that he heard one of the lorry drivers saying "I hit somebody, he came out of the bushes, could you call emergency services". He assumes that Mr Iqbal is referring to him as he remembers asking Mr Iqbal to call the police, but he cannot recall the details of any conversation with Mr Iqbal. He did not say that he saw someone come out of the bushes, because he did not.

28. Mr Witkos who is a Polish national attended for cross examination and gave evidence with the assistance of an interpreter.
29. Each of the Claimants made witness statements that deal with the issue of quantum only. As quantum is agreed it is unnecessary for me to relate what is said in the Claimants' witness statements and they were not required to attend for cross examination.

EXPERT WITNESSES

30. The parties were given permission to rely on experts in three disciplines. They instructed the following experts, in the following disciplines:

(a) collision reconstruction:

- (i) the Claimants rely on the report of Douglas Boulton ("Mr Boulton") dated 25 January 2023;
- (ii) the Defendants rely on the report of Dr Hayley Ash ("Dr Ash") dated 31 January 2023; and
- (iii) there is a joint report of Mr Boulton and Dr Ash dated 24 April 2023;

(b) accident and emergency medicine:

- (i) the Claimants rely on the report of Mr Nigel Zoltie ("Mr Zoltie") consultant in accident and emergency medicine, dated 3 November 2022;
- (ii) the Defendants rely on the report of Dr Roderick Mackenzie ("Dr Mackenzie") consultant in accident and emergency medicine, dated 15 December 2022; and
- (iii) there is a joint report of Mr Zoltie and Dr Mackenzie dated 28 February 2023;

(c) there is a single joint expert on toxicology, namely Dr Jenkins, a forensic toxicologist, who prepared a report dated 31 January 2023 and a supplemental report dated 7 February 2023.

31. All of the experts, except Dr Jenkins, attended for cross examination.

COLLISION RECONSTRUCTION EXPERTS

32. Given the lack of factual evidence as to the circumstances in which the nearside front of the HGV cab came into collision with the Deceased, the expert evidence of the collision reconstruction experts is potentially of significant importance in determining the circumstances in which the Collision occurred, which in turn could be crucial to the question of whether the Defendants are liable to the Claimants. For that reason I will spend some time summarising the expert evidence of Mr Boulton and Dr Ash as set out

in their joint report. In doing so I will first summarise the general matters that Mr Boulton and Dr Ash agree about and disagree about. The issues of:

- (a) the orientation of the Deceased at Impact;
- (b) how far ahead of the HGV, the road would have been illuminated by the HGV's headlights;
- (c) how conspicuous the Deceased would have been to Mr Witkos, driving the HGV;
- (d) Mr Witkos's perception response time ("PRT") if he had seen the Deceased prior to Impact;
- (e) how much time or distance Mr Witkos would have needed to swerve to avoid the Deceased; and
- (f) whether Mr Witkos had sufficient time to avoid the Deceased had he seen him

have been dealt with by me separately. I have done this because of the importance of these issues and because the opinions of Mr Boulton and Dr Ash, upon those key issues are more complex than simple agreement or disagreement.

General points of agreement and disagreement

33. Mr Boulton and Dr Ash agree the following:

- (a) bodily fluids were found 71 m to the south-east of the centre line of the T Junction and the Deceased's body 27 m to the south-east of that same centre line. The HGV stopped 38 m to the north-west of the centre line;
- (b) the Deceased was hit by the front nearside of the HGV cab a short distance from the southern verge of the A446, at a point likely to be a little before the location of the bodily fluids;
- (c) the Deceased would have been able to see the HGV coming towards him, at a distance of around 200 m, from the point of Impact;
- (d) Mr Witkos's line of sight was restricted to the distance illuminated by the headlights of the HGV;
- (e) the height of the damage to the front nearside corner of the HGV indicates that the Deceased was relatively upright at Impact;
- (f) there was no evidence that the HGV had mounted the curb;
- (g) the tachograph of the HGV showed that it was travelling at 43.5 mph at Impact (within the 50 mph speed limit for that part of the A446); and
- (h) the HGV started braking about 31 m beyond the first area of bodily fluids, which, at 43.5 mph would take 1.6 seconds to travel.

34. Mr Boulton and Dr Ash agree the following timings for events shown on the CCTV Footage:

- (a) the Deceased first walked from the Belfry exit road, at the T Junction, right along the A446 in a north-westerly direction but then walked back to the T-junction about 3 minutes later, stopping at the Belfry entrance road and then walking in a

south-westerly direction along the A446 on the same side of the A446 as the Belfry entrance road, apparently on an asphalt footpath. He was last seen approximately one minute and 15 seconds before the Impact;

- (b) between 1:13:43 and 1:13:51, four HGV's passed the T-junction going in a South East direction along the A446;
- (c) at 1:13:47 a car went along the A446 past the entrance road to the Belfry going north west, about 15 seconds ahead of the HGV driven by Mr Witkos;
- (d) at 1:13:56 a car using the Belfry entry/exit road approached the T-junction intending to turn right onto the A446. The car waited whilst the HGV driven by Mr Witkos approached from its left;
- (e) the HGV driven by Mr Witkos entered the CCTV camera view at 1:14:02 and came to a halt at 1:14:11; and
- (f) the four HGV's travelling South East along the A446 (in the opposite direction to Mr Witkos) leave the CCTV Footage between 19 and 11 seconds before the HGV driven by Mr Witkos enters the CCTV Footage. Those four HGV's will have travelled past the point of Impact, past the Deceased and past Mr Witkos's HGV. A simple calculation shows that the last of those HGV's will have passed Mr Witkos's HGV around 3 seconds before the Impact. Both experts accepted that the 3 seconds was an approximate figure and the actual figure would depend on many variables.

35. Mr Boulton and Dr Ash disagree about whether Mr Witkos should have used full beam rather than dipped headlights. Dr Ash considers that he should not have used full beam because of the four lorries that had just passed the HGV and because of the car stopped at the T Junction wanting to turn right onto the A446, in front of the HGV. Mr Boulton believes that Mr Witkos could have used full beam because he had passed the four lorries three seconds before Impact and the car turning right was not a good reason not to use full beam. Neither expert provided an estimate of how far ahead of the HGV its headlights would have illuminated the road if they had been on full beam.

Orientation of the Deceased at Impact

36. In his report dated 25 January 2023, Mr Boulton suggested that:

- (a) as the Deceased's injuries were predominantly on the left side of his body it was likely that he was facing the southern verge of the A446 at Impact; and
- (b) marks on the nearside of the HGV cab and the fact that the Deceased's body came to rest on the grass verge indicated that the Deceased was moving in the direction of the southern verge at Impact.

37. Dr Ash, in her report did not consider that the evidence pointed to the Deceased facing in any particular direction or travelling in any particular direction at Impact.

38. In their joint report, having considered the joint report of Mr Zoltie and Dr Mackenzie, both of which referred to the Deceased being in an abnormal posture at Impact and neither of whom supported Mr Boulton's opinion that the Deceased was facing the curb

at Impact, both Mr Boulton and Dr Ash agreed that it was not possible to determine which way the Deceased was facing or travelling at Impact.

The range of the headlights/how conspicuous was the Deceased?

39. As to how far ahead of the HGV its headlights would have illuminated the road ahead, the experts agree that because the headlights of the HGV were not tested they cannot say how far they would have illuminated the road ahead.
40. The experts go on however to consider, not just how far ahead of the HGV its headlights are likely to have illuminated the road, but how visible the Deceased would be in those headlights. Dr Ash referred to research by Jeffrey Muttart ("Muttart") upon the extent to which the clothing worn by a pedestrian affects the point at which they can be seen by a driver in the headlights of a car. She says that for pedestrians to the near side who are wearing all black the distance is 39 m and for a pedestrian wearing grey 59 m. For a pedestrian to the offside the distances are 24 m for all black and 44 m for grey.
41. Mr Boulton says that, based upon that research the Deceased would have been visible for up to 59 m because he was wearing a light top. Dr Ash says that there were differences between the conditions in which the research was conducted and the index Collision, namely: (i) the four HGVs who passed Mr Witkos's HGV shortly before the Collision; (ii) the Christmas lights at the entrance to the Belfry; and (iii) the car turning right at the entrance to the Belfry. Dr Ash accepts that, because the Deceased was wearing a light top and black trousers and shoes, the figures from the Muttart research for "all grey" may be appropriate and she considers that, in those circumstances, a range 39 - 59 m should be adopted if the Deceased was to the near side and 26 - 44 m if the Deceased was to the offside. The experts agreed that a range was appropriate, but Mr Boulton said that 45 m appears to be "the consensus of opinion".
42. Dr Ash considered that the question of when a pedestrian actually became visible to a driver was not just a question of when the pedestrian entered their line of sight, a number of factors would adversely affect Mr Witkos's ability to see the Deceased in the headlights of the HGV, namely:
 - (a) it was dark;
 - (b) there were no streetlights at the point of Impact;
 - (c) there were Christmas lights at the entrance to the Belfry ahead which might distract Mr Witkos;
 - (d) the car turning right at the T-junction might distract Mr Witkos;
 - (e) the four lorries which passed the HGV going in the opposite direction shortly before Impact could have distracted Mr Witkos with their headlights;
 - (f) Mr Witkos was unlikely to have any expectation of pedestrians being where the Deceased was;
 - (g) the Deceased was wearing dark lower clothing; and
 - (h) it is unknown when the Deceased first entered the headlights of the HGV.

43. As to those factors Mr Boulton says:

- (a) the Christmas lights should not have distracted Mr Witkos as he could see them 200 m before the T-Junction;
- (b) the car turning right and the possibility that it might pull out in front of the HGV should not have taken precedence over looking ahead;
- (c) the oncoming four HGVs passed the HGV between 3 and 11 seconds before Impact and should not have affected Mr Witkos's vision; and
- (d) the Deceased was wearing a light top.

The effect of glare

44. Dr Ash suggested that glare from the oncoming headlights of the four HGVs could have affected Mr Witkos's vision, after they had passed, because his eyes would take a period of time to adjust to the darkness of the unlit road.

45. Mr Boulton did not consider that glare from the headlights of the four lorries would affect Mr Witkos's vision because:

- (a) dipped headlights do not cause glare;
- (b) Mr Witkos was sitting high above the lights;
- (c) the A446 is a wide road at the relevant point, lessening any glare;
- (d) he has visited the site of the Impact at night and observed no problem at the relevant point with glare from four HGVs coming in the opposite direction; and
- (e) the Impact took place three seconds after the last of the HGVs had passed which is long enough for Mr Witkos's eyes to adjust.

PRT

46. PRT (that is the amount of time, within which it would be reasonable for Mr Witkos to respond to seeing the Deceased, by starting to take evasive action) is an important issue because, even though Mr Witkos says he did not see the Deceased at all, prior to the Impact, I may find either that he did see the Deceased prior to Impact, or that he ought to have done so, in either case, at a particular point in time before the Impact.

47. Mr Boulton and Dr Ash agreed that Mr Witkos started to brake about 1.6 seconds after he passed the point at which the first bodily fluids were found (which they considered to be after the point of the Collision). Mr Witkos's reaction time to the sound of the Impact was therefore likely to be slightly more than 1.6 seconds.

48. Dr Ash does not however consider that slightly more than 1.6 seconds can be taken to be what Mr Witkos's PRT would have been, if he had seen the Deceased in the HGV's headlights, before the impact, because:

- (a) it is not known how far before the first area of bodily fluids the Impact actually occurred;
- (b) Mr Witkos's reaction time to a sound may be different to his reaction time to seeing a pedestrian; and
- (c) due to the unfavorable conditions Mr Witkos's PRT would be expected to be longer.

49. Mr Boulton expressed the opinion that:

- (a) It was highly unlikely that the bodily fluids would be thrown very far forward;
- (b) he did not consider that the points made by Dr Ash about unfavorable conditions were good points; and
- (c) if Mr Witkos had seen the Deceased, prior to the impact, he should have identified the Deceased as a pedestrian, in his headlights and reacted at least as quickly as he did to the sound of the Impact.

50. Mr Boulton suggested that there is a range of usual driver reaction times of 1 - 2 seconds, Mr Witkos's reaction time to the noise of the Impact of 1.6 seconds is within that range. Mr Witkos appears not to have treated his hearing the noise of the Impact as an emergency because he did not carry out emergency braking (as illustrated by the length of time it took the HGV to stop). Mr Boulton considered that, if Mr Witkos had seen the Deceased in the road, he would have treated this as an emergency and have reacted at least within 1.6 seconds, probably more quickly.

51. Dr Ash referred to research by Krauss and Muttart into PRT which suggested an average PRT of 2.1 seconds plus or minus .71 seconds, based upon a straight road at night. If Mr Witkos had seen the Deceased in the road his reaction time could have been more or less than his reaction time to the noise of the Impact and it is not known how long before the first patch of bodily fluids the Impact occurred. The Muttart PRT range of 1.39 - 2.81 seconds should therefore be used.

How much time or distance would be required by Mr Witkos to avoid the Collision and the ability of Mr Witkos to avoid the Collision

52. Mr Boulton and Dr Ash agreed that, even if Mr Witkos had seen the Deceased at the first opportunity before the Collision, Mr Witkos would not have had sufficient time to avoid hitting the Deceased, merely by braking. However Mr Boulton maintains that Mr Witkos would have had time to steer the HGV to the right, in order to avoid the Impact with the Deceased. Dr Ash disagrees.

53. Mr Boulton provided, in the joint report, a table, the purpose of which is to show how long Mr Witkos would have to take evasive action, based upon his seeing the Deceased in the road for the first time at 39 m, 45 m and 59 m. He then includes in the table, PRT times of 1, 1.5 and 2 seconds for Mr Witkos to take evasive action after seeing the Deceased. Mr Boulton's table shows for example that at the agreed speed of the HGV of 43.5 mph, based on PRT of 1.5 seconds, Mr Witkos had the following time to take evasive action (according to when he first saw the Deceased): (a) .5 of a second at 39 m;

(b) .8 of a second at 45 m; and (c) 1.5 seconds at 59 m. In his report, at paragraph 115 Mr Boulton says that Mr Witkos would only have to steer a metre to the right and it would be “highly probable”, that he would have avoided the Collision by doing so (as I will mention shortly however, in the same joint report, at paragraphs 114 and 134, Mr Boulton refers to it being “highly possible” that Mr Witkos could have avoided the Collision).

54. Dr Ash says:

- (a) Mr Boulton suggests a lower range of PRT than the Krauss and Muttart survey suggests;
- (b) based upon Mr Boulton’s table, only if Mr Witkos’s PRT was 1 second and he noticed the Deceased, for the first time, at 59 m, would Mr Witkos have as much as 2 seconds to take evasive action and a 1 second PRT is outside even the quickest of the PRT times suggested by the Krauss and Muttart survey and is unrealistic, given the prevailing conditions;
- (c) 2 seconds or less would leave little time for Mr Witkos to steer in order to avoid the Impact;
- (d) Mr Boulton has produced no calculation of how long it would take to steer to the right in order to avoid the Collision. Mr Witkos would have had to move the HGV sufficiently to the right for the rear of the HGV trailer (16.5 m long) to miss the Deceased and in Dr Ash’s view the time left to Mr Witkos to steer the HGV, to avoid the Impact would have been insufficient to enable this to be done.

55. Mr Boulton says:

- (a) the Krauss and Muttart survey was looking at PRTs for cars, not HGVs;
- (b) the trailer to a HGV would take a shallower route than the cab, if the cab missed the Deceased, the trailer would too; and
- (c) if the court accepts that the HGV headlights lit the road for 45 m and a PRT time of 1.6 seconds then, at 43.5 mph, the HGV would travel 31 m during that PRT, leaving 14 m to steer to the right and avoid the Deceased.

56. Dr Ash calculates that in order to steer the HGV sufficiently to the right to avoid the Impact a distance of 20 – 32 m would be required.

57. Mr Boulton and Dr Ash agree that the Deceased was, at the time of the Collision:

- (a) intoxicated;
- (b) had no reason to cross the road from the side which had an asphalt footpath;
- (c) was not wearing reflective clothing;
- (d) was wearing black trousers;
- (e) would have had a clear view of the lights of the HGV 200 m away;
- (f) was relatively upright at the point of Impact, but had an abnormal posture at impact and may have stumbled into the path of the HGV at the last moment, given his position at Impact, according to the medical evidence; and

- (g) appears to have taken action which brought him into conflict with the HGV and gave Mr Witkos a limited amount of time to react.

ACCIDENT AND EMERGENCY EXPERTS

58. In Mr Zoltie's report of 3 November 2022, he says that:

- (a) the medical evidence is of such poor quality that he is unable to provide an indication of the orientation of the Deceased at the point of the Impact;
- (b) most injuries are to the left side, suggesting the Deceased's left side was orientated towards the HGV and the damage to the HGV is consistent with the Deceased being upright at Impact;
- (c) although the post-mortem report does not mention a base of the skull fracture, he believes that this was the cause of death, in this respect he disagrees with the post-mortem report's conclusion that death was due to "multiple injuries";
- (d) it is not possible to determine from the base of the skull fracture, which he believes existed, how the Deceased was orientated at Impact;
- (e) the left lower tibial fracture in the mid-shin area, referred to in the post-mortem report, could have been caused by Impact with the HGV, being run over by the HGV or impact with the ground;
- (f) the remaining superficial injuries are consistent with Impact to the left side, but they could have been caused by the primary impact or, equally likely impact with the side of the HGV; and
- (g) he agrees with the police report that the Deceased was likely to have been vertical at Impact, but this is based on his "lay" interpretation of the photographs.

59. In his report dated 15 December 2022, Dr Mackenzie says:

- (a) he made measurements of a HGV similar to the HGV, and compared his measurements to the police photograph of blood marks on the HGV, he expresses the opinion that these are consistent with the Deceased being upright at Impact;
- (b) the injuries described in the post-mortem report and the CCTV Footage of the Deceased's movements in the grounds of the Belfry suggest that the Deceased struck the nearside corner of the HGV when he stumbled and fell or overbalanced, while on the carriageway or verge because:
 - (i) the CCTV Footage shows the Deceased making clumsy and unstable veering movements consistent with considerable intoxication;
 - (ii) the Deceased was intoxicated to the extent that his balance, mobility and judgement were all significantly impaired, showing that there was a high risk of him stumbling and falling, as he did in the CCTV Footage;
 - (iii) the blood at the top of the area of damage to the HGV is at approximately the Deceased's chin level when standing and there is a gash on the Deceased's chin, he believes that the blood is likely to have come from this gash and he therefore concludes that the Deceased was relatively upright at Impact;
 - (iv) the pattern of injuries suggest the initial impact was to the front left side of the head, chin, neck and upper chest/shoulder of the Deceased;

(v) he would expect a 97kg person experiencing a full frontal or side Impact from a HGV travelling at 40 mph to have much more severe injuries to their trunk and torso, but there are only minor injuries in these areas;

(vi) the lower leg fracture could have been caused by a glancing blow from the HGV bumper while weight bearing, but is more likely to be the result of twisting forces being applied to the Deceased when his foot was on the ground, rather than direct Impact with HGV;

(vii) it is most likely that the Deceased was walking with an ataxic gait along the carriageway or verge, facing the direction of the oncoming traffic; and

(viii) the injuries to the left side of the head, neck and upper chest/shoulder caused by Impact on the front nearside of the HGV and absence of injury to the trunk, torso and legs mean it is likely that the Deceased stumbled or over balanced so that his head moved into the path of HGV in an abnormal position.

60. In their joint report of 28 February 2023, Mr Zoltie and Dr Mackenzie:

(a) agree that:

(i) they defer to the engineering experts on: - the circumstances of the Collision; - nature of the Collision; - impact speed; - movements of the Deceased and the HGV; and - magnitude and direction of forces;

(ii) the CCTV Footage shows the Deceased having significant gait ataxia, truncal instability and impairment of balance, mobility and judgement. It is likely that he continued to experience those issues immediately prior to the Impact;

(iii) the post mortem is incomplete and it is difficult to draw conclusions from it;

(iv) the dominant injury was a head injury, which was the likely cause of death, there were limited skeletal injuries, the damage to the front nearside panel of HGV and markings on the nearside of the HGV's tractor indicate contact with the Deceased's body;

(v) it is not possible to be certain if the left lower limb fracture was caused by contact with the HGV or bending and twisting forces or landing on the ground;

(vi) some injuries may have been caused by secondary impacts;

(vii) the post-mortem report provides no evidence of thoracic, abdominal or pelvic injury;

(viii) the Deceased was relatively upright at Impact with the most severe forces being applied to his upper chest, neck, face and head;

(ix) the injuries are not typical of a pedestrian struck directly by a HGV travelling at 43.5 mph, more chest, abdominal, pelvic and spinal injuries would be expected; and

(x) the Deceased's body did not fully engage with any part of the HGV at Impact suggesting it had an abnormal posture at Impact.

(b) disagree about the following:

(i) the presence of a base of the skull fracture – Mr Zoltie thinks that a base of the skull fracture was most likely present and the most likely cause of death. Dr Mackenzie considers that, in spite of the limitations on the post-mortem report, a base of the skull fracture would have been visible during the post-mortem,

because the brain was removed and so such an injury was unlikely to be missed; and

(ii) as to whether the injury pattern can inform the orientation of the Deceased body at Impact:

- Mr Zoltie thinks that it is not possible to determine orientation from the injuries. The head injury being caused by the initial impact with the HGV is not the only possibility, it could have been caused by impact with the road or another hard surface. The left tibial fracture and other injuries might have been caused by impact with the HGV or by other mechanisms; and
- Mr Mackenzie says that the lack of direct impact to the torso and limbs, injuries to the left side of the head, face, neck and upper chest and the pattern of abrasions and bruising shown in the police report photographs do, in Dr Mackenzie's opinion, indicate the Deceased's orientation - the abrasions to the neck suggest an Impact at the front of the neck; and - the overall distribution of the injuries and level of intoxication suggest, on the balance of probabilities that the Deceased was either walking along the carriageway or verge with an ataxic gait or standing stationary in the carriageway with truncal instability when at the Impact, his body contacted the HGV in a predominantly upright position, facing the HGV but either stumbling or in an abnormal posture so that the dominant Impact was the left side of the head, neck and upper chest, but not the torso.

TOXICOLOGY

61. In her report dated 9 January 2023, Dr Jenkins provides her analysis of blood and urine samples taken from the Deceased's body at autopsy, she says that the samples show that:

- (a) the Deceased had a blood alcohol level of 192 mg%, which is five times the legal driving limit. At that level the effects, Dr Jenkins says, are likely to be drunkenness, slurred speech, a staggering gait, impaired coordination, drowsiness, exaggerated emotional responses, dizziness, nausea and disorientation. Consuming a large amount of alcohol in a short period would exaggerate those effects;
- (b) the Deceased had 43 ng/M1 of cocaine in his bloodstream which is over four times the legal driving limit of 10ng/M1 and 368 ng/M1 of Benzogleganine which is over seven times the legal driving limit of 50 ng/M1. At that level, in the short term (30 minutes to an hour) the effects would be euphoria, excitement and feelings of self-confidence and strength, increased risk-taking and the inability to concentrate, raised blood pressure, irregular heartbeat, increased body temperature and pupil dilation affecting vision. Once the stimulant effects wear off, depression, fatigue, disorientation and anxiety, with impaired concentration and coordination, delayed reaction and poor decision-making for 12 - 24 hours; and
- (c) the Deceased had almost two times the legal driving limit of cannabis in his blood sample. Its effects are maximised over 20 - 30 minutes, decreasing over 3 to 4

hours and include a sense of well-being or euphoria often feeling relaxed and drowsy, loss of coordination, memory, concentration, judgement and sense of time, impairing estimates of distance and decision-making.

62. In her supplemental report dated 7 February 2023 Dr Jenkins confirms that she has reviewed the CCTV Footage of the behavior of the Deceased within the grounds of the Belfry. She notes that at around 10 pm, in the bar the Deceased appeared to be acting normally, not showing any outward signs of intoxication. At 10:50 pm the Deceased, in the company of other males entered the nightclub, again neither the Deceased nor any of his companions appeared to be intoxicated. At 12:54 am the Deceased can be seen staggering and apparently being chased by security staff within the hotel and she observes that from that point, in the CCTV Footage, the Deceased showed significant signs of intoxication, suffering from poor balance and coordination and being unaware of his surroundings (including stepping onto the road in the Belfry grounds, unaware of the presence of two cars that needed to take evasive action to avoid him). In short, from 12:54 am, the Deceased was acting, as she would expect him to act, based on her toxicology report.

THE ISSUES

63. The issues that I need to determine in order to decide if the Defendants are liable to pay damages and reimburse the losses claimed by the Claimants in full or in part and if in part, what part are:

- (a) what duty of care did Mr Witkos owe to the Deceased in driving the HGV at about the time of the Collision;
- (b) did Mr Witkos breach the duty of care that he owed to the Deceased;
- (c) if Mr Witkos breached the duty of care that he owed to the Deceased was such breach of duty a substantial cause of the Collision (it being common ground that the Collision caused the Deceased's death); and
- (d) if Mr Witkos breached the duty of care that he owed to the Deceased and that breach of duty was a substantial cause of the Collision, then did the Deceased contribute towards the causes of the Collision by his own negligence and if so by what percentage should the Claimants' entitlement to recover damages/losses be reduced as a result of that contributory negligence?

64. Prior to addressing those issues I will say:

- (a) whether I found Mr Witkos, as the only factual witness, to be an honest and reliable witness;
- (b) whether I found the evidence of each expert witnesses to be credible and reliable and where the experts disagreed on issues, which expert's opinion on each issue I prefer and why; and
- (c) make such factual finding as I can.

HONESTY AND RELIABILITY OF MR WITKOS'S EVIDENCE

65. In closing, neither Mr Marwick, nor Mr. Jones submitted that Mr Witkos's evidence, in his witness statement and that he gave in cross examination at trial, was reliable (although Mr Marwick suggested that the statement given by Mr Witkos to the police, on 16 December 2017, and the record of Mr Witkos's interview, by the police on the 18 January 2018 were more reliable). Neither of them suggested that Mr Witkos gave evidence that he knew to be untrue.
66. Whilst I accept that Mr Witkos was attempting to assist the court with his honest recollection of events, in my judgment his recollection of events is wholly unreliable and the unreliability of his recollection of events extends to the statement that he gave to the police on 16 December 2017 and the information that he gave to the police in interview on 18 January 2018. I have come to these conclusion for the following reasons:
- (a) in cross examination, Mr Witkos accepted that he was in shock, certainly after he found the Deceased lying at the side of the road, he accepted that he could only remember some things;
 - (b) Mr Witkos says in paragraph 19 of his witness statement that he recalls another HGV travelling in front of him, prior to the Collision, but he says that he has been told by the Defendants' solicitor that there was no such HGV and he accepts that he was mistaken in his recollection of this. However, in cross examination Mr Witkos said that he had a clear recollection of a HGV travelling around 100 m in front of him. At first it appeared that he no longer accepted that he was mistaken about this, but ultimately he did accept, but only when reminded that the CCTV footage showed otherwise, that he must be mistaken;
 - (c) Mr Witkos could not recall passing four HGVs travelling in the opposite direction shortly before the Impact. It is clear however, from the CCTV footage, that four HGVs will have passed the HGV driven by Mr Witkos from around 11 seconds to around 3 seconds before the Impact; and
 - (d) Mr Witkos's misconceptions about travelling around 100 m behind a HGV, prior to the Collision, are repeated, in the short police witness statement that he signed on 16 December 2017 and in the information that he gave to the police in interview on 18 January 2018. In the police interview, Mr Witkos not only said that he recalled a lorry travelling around 100 m ahead of him but, prompted by the police, he provides details of his journey behind the lorry and said that it had a "Long Vehicle" sign on the back of it. Mr Witkos clearly has therefore a strong but mistaken recollection of a HGV travelling 100 m in front of him which has persisted from immediately after the Collision to the present day, when the CCTV Footage clearly shows that his was not the case;
67. In my judgment, particularly during his cross examination, but likely also in his witness statement, police witness statement and police interview, Mr Witkos was using his

recollection of his many previous journey's along the same stretch of road, rather than his recollection of events immediately prior to the Collision and he was answering questions about what he recalled, by reference to what he thought he should have done and why, rather than by reference to his recollection of what he actually did or why he did it. This means that I can attribute no weight to Mr Witkos's purported recollections that:

- (a) he was keeping a proper lookout and that he would have seen the Deceased (if he were there to be seen) in the HGVs headlights;
- (b) he used dipped headlights, rather than full beam, because there was enough ambient light from the entrance to the Belfry to make the use of full beam unnecessary (this is contrary to the agreed opinions of the accident reconstruction experts) and in my judgment, Mr Witkos has no recollection of why he was using dipped headlights at the time of the impact; and
- (c) in cross-examination, in response to a suggestion that he ought to have slowed down, when approaching the entrance to the Belfry, Mr Witkos said that he had slowed down (this is contrary to the tachograph record which shows no evidence of Mr Witkos slowing down). Ultimately however, after I asked Mr Witkos whether he really recalled slowing down, rather than thinking that that was what he should have done, Mr Witkos accepted that he could not recall whether he had slowed down, when approaching the Belfry entrance or not.

THE ACCIDENT RECONSTRUCTION EXPERTS – WHOSE OPINION DO I PREFER ?

68. Mr Jones criticises Mr Boulton for not including any calculations or references to relevant research in his primary report and referring only to research produced by Dr Ash, in the joint report. Mr Jones says that Mr Boulton's opinions are based on his own views and experience and have shifted over time (including in cross examination). In contrast Mr Jones says that Dr Ash based her primary report and opinions in the joint report on calculations and research she produces, which is capable of objective evaluation. Mr Jones also pointed to a number of errors which he said were made by Mr Boulton in his primary report and the joint report. Mr Jones said that where Mr Boulton and Dr Ash disagree, I should prefer the opinion of Dr Ash.
69. Mr Marwick says that there is a large measure of agreement between Mr Boulton and Dr Ash and that the criticisms levelled at Mr Boulton, by Mr Jones, are unfair. He provided some responses to Mr Jones's assertion that Mr Boulton has made errors in his primary report and in the joint report. Mr Marwick did not suggest that there were any specific points which I should conclude undermined the credibility of Dr Ash. He deals with the issues on which Mr Boulton and Dr Ash disagree on an issue by issue basis.
70. The errors which Mr Jones says that Mr Boulton makes in his primary report and in the joint report are as follows:

- (a) Mr Boulton makes a positive assertion, in his primary report that there is no pavement at or about the point of the Collision. He does so, even though PC Dumbleton's police report upon the Collision confirms that there is a footpath on the Belfry side of the A446;
- (b) Mr Boulton does not refer to any research in coming to his estimated PRT of 1 - 1.5 seconds. In cross-examination he suggested that research papers by Muttart, David Krauss ("Krauss") and Olson supported his conclusion that the range of PRT timings was generally from 1 - 1.5 seconds). However, Mr Boulton had to accept, when taken to papers published by Muttart and Krauss that they do not support an upper limit for PRT of 1.5 seconds;
- (c) in the joint statement, Mr Boulton said that the PRT was 1 - 2 seconds. In cross-examination, Mr Boulton said that he had spotted his mistake (in saying that the PRT was 1 - 2 seconds, rather than 1 - 1.5 seconds) however, Mr Boulton was invited, before his cross examination to say if he wished to alter anything in his reports and he said he did not wish to do so;
- (d) in the joint report, at paragraph 113, Mr Boulton says "depending on his PRT and the distance the lights lit the road ahead, there may have been up to 2 seconds for him to take some form of evasive action". At paragraph 117 of the joint report, Mr Boulton is recorded as saying that he does not use a PRT of 1 second and that 2 seconds is certainly long enough to take action. But, says Mr Jones, the table produced at paragraph 112 of the joint report, by Mr Boulton, shows that 2 seconds would only be available to take and complete evasive action at the highest distance (at which the Deceased was visible) of 59 m and a PRT of 1 second. Mr Boulton was therefore using a PRT 1 second in commenting that 2 seconds or up to 2 seconds was available for Mr Witkos to take evasive action;
- (e) in cross-examination, Mr Boulton was asked to confirm whether he had taken into account what he considered in his primary report to be the right to left movement of the Deceased at the time of the Collision, in saying that he believed that Mr Witkos could have swerved to avoid the Deceased. Mr Boulton said he had not, but then he was taken to his primary report, where he says, at paragraph (ix) "His movement, to the left, coupled with the driver steering right would mean, had the driver seen him at the first opportunity in his headlights, he had sufficient time to steer right and it is highly unlikely this collision would not have occurred";
- (f) in the joint report, paragraph 114 Mr Boulton says it is "highly possible he could have missed Mr Jones" and at paragraph 134 that "Mr Boulton had always been of the opinion that Mr Witkos could have steered right and avoided Mr Jones, and if he saw him at the first opportunity, it is highly "possible" he could. Mr Boulton was unable to explain why he used the word "possible" when he says that his opinion is that Mr Witkos probably would have had time to steer to the right to avoid the Deceased; and
- (g) paragraph 138, the last paragraph of the joint report, appears to included matters concerning the Deceased which are agreed between Mr Boulton and Dr Ash and it says, about the Deceased, "These actions brought him into conflict with Mr Witkos's HGV and gave Mr Witkos a limited amount of time to see and react to him, and insufficient time to avoid him"

71. Finally, Mr Jones says that Mr Boulton took on the role of an advocate for the Claimants, rather than that of an independent expert, when he was asked about how long it would have taken Mr Witkos to switch the headlights of the HGV to full beam after the last of the four HGV's going in the opposite direction passed him. When it was pointed out to Mr Boulton that he and Dr Ash had agreed that the last HGV passed the HGV driven by Mr Witkos approximately 3 seconds before the Impact, Mr Boulton described this as a minimum figure, but it was clear from the joint report that it was a best estimate and not a minimum figure.
72. I consider that Mr Jones is right to observe that Dr Ash has provided calculations and references to research papers to support her opinions in her primary report and the joint report. In contrast Mr Boulton provided no calculations in his primary report and no reference to any research papers. In the joint report, Mr Boulton refers briefly to the research papers produced by Dr Ash and makes a simple calculation in a table at paragraph 112 of the joint report of the time taken at 43.5 mph to travel 39, 45 and 59 m, beyond that he refers to no research papers and makes no calculations in the joint report.
73. I also accept that Mr Boulton made the errors identified by Mr Jones which I refer to in paragraph 70 (a) – (c) and (e) above. As to paragraph 70 (d) , (f) and (g):
- (d) whilst the content of paragraph 113 is factually correct, it gives the impression that Mr Boulton considers that a PRT of 1 second is at least a real possibility. Paragraph 117 contains a contradiction in saying that Mr Bolton does not use a PRT of 1 second but then goes on immediately to say that 2 seconds is certainly long enough to take action when 2 seconds would only be available for action, if the PRT was 1 second;
- (f) in cross-examination, Mr Boulton suggested that he put the word “possible” in quotations in paragraph 134, because he wanted to make it clear that it was a matter for the court to decide whether, on the balance of probabilities, Mr Witkos could have steered to avoid the Collision. I find that answer unconvincing because the words highly possible in paragraph 114 do not appear in inverted commas and because Mr Boulton uses the words “highly probable” in paragraph 115; and
- (g) I find the content of the final paragraph of the joint report, which appears to be agreed between Dr Ash and Mr Boulton (or if it is not, then it is not clear that it is not) surprising in that it directly contradicts the opinion of Mr Boulton, that the Collision could have been avoided by Mr Witkos steering to the right.
74. In my judgment Mr Boulton at least failed to exercise an appropriate degree of care in ensuring both that there were no errors in his primary report and his contribution to the joint report and that the wording of both reports accurately recorded his opinions.
75. As for advocating the Claimants' position, I consider that Mr Boulton was too quick to say that 3 seconds was a minimum time when it is clear from the joint report that it was an estimate and not a minimum time. Mr Boulton made a similar mistake, in cross-examination, when he was asked whether his opinion that Mr Witkos could have avoided the Impact, by steering to the right, at the first opportunity, took into account

Mr Boulton's view, expressed in his primary report, that the Deceased was moving right to left at the time of the Collision. Mr Boulton said that he had not taken it into account, whereas his primary report clearly says that the Deceased's movement to the left, coupled with steering to the right would likely have resulted in the Collision being avoided.

76. Whilst I do not say that, the concerns that I have about: (a) the lack of an objective basis for Mr Boulton's opinions (his lack of calculations and reference to published research papers) and reliance instead on his own views; and (b) what I take to be a lack of care in ensuring the accuracy of his primary report and his parts of the joint report and that their wording properly reflected his opinions, means that I will always prefer the opinion of Dr Ash to that of Mr Boulton, in respect of the matters on which they disagree, I approach those issues bearing those concerns in mind.

77. The issues on which Dr Ash and Mr Boulton disagree are:

- (a) the precise location of the Impact;
- (b) the likely headlight range of the HGV and how conspicuous the Deceased would be in those headlights;
- (c) was Mr Witkos affected by glare;
- (d) should Mr Witkos have switched the HGV's headlights to full beam, before the Collision;
- (e) the theoretical PRT of Mr Witkos, had he seen the Deceased before the Collision; and
- (f) what time or distance it would have taken Mr Witkos to swerve to the right to avoid the Deceased. The experts also give opinions as to whether Mr Witkos would have had time to swerve to avoid the Collision, but I will deal with those opinions, when considering the issue of causation.

THE PRECISE LOCATION OF THE IMPACT

78. In their joint report, Dr Ash and Mr Boulton agree that:

- (a) the first physical evidence of the Impact is an area of bodily fluids approximately 71 m from the centre line of the T Junction;
- (b) the Impact would have taken place prior to that first area of bodily fluids, because those bodily fluids will have been carried forward, for a distance from the point of impact; and
- (c) they could not say how far, prior to the first area of bodily fluids, the Impact had taken place.

79. At trial however, I asked Mr Boulton whether he could give any better indication of how far before the first area of bodily fluids it was likely that the Impact had taken place. Mr Boulton said that he considered that the distances of 5 m and 10 m, for which Dr Ash provided calculations in the joint report (see paragraph 80 below) were probably too far and, if pressed, he thought that 2 m was about right.

80. Dr Ash and Mr Boulton agreed that the time taken to travel the distance between where the first area of bodily fluids was and the point in time at which Mr Witkos applied the brakes of the HGV was around 1.6 seconds (based on the speed of the HGV of 43.5 mph). In the joint report, Dr Ash provided estimates of the time taken for the HGV to travel an additional 5 and an additional 10 m (.25 and .5 of a second respectively). When I asked Dr Ash whether she could provide any better indication of the likely distance between the point of Impact and the first area of bodily fluids, she said that it was strange that the next area of bodily fluids was some 20 m further down the road and the first area of debris was 25 m beyond the first area of bodily fluids. She regarded these distances as unusually far and as introducing an additional element of uncertainty as to how far the first area of bodily fluids would be, beyond the point of Impact. When pressed, Dr Ash said that both 5 m and 10 m were reasonable possibilities, but that she could not say beyond that.
81. In fairness to Mr Boulton he did not, in cross examination, resile from his agreement, in the joint report, that he could not say how far the first area of bodily fluids was beyond the point of Impact, he simply said that, if pressed to give his opinion as to a specific distance, then he thought 2 m was about right. Mr Boulton did not however give any reasons for his view that 2 m seemed about right. Dr Ash in contrast would not be drawn into specifying any distance that she considered was "about right", other than to say that the 5 or 10 m, for which she had provided calculations of additional reaction times were both reasonable possibilities.
82. I am not satisfied that I should conclude, on the balance of probabilities, that the difference between the point of Impact and the first area of bodily fluids was 2 m. Even Mr Boulton was not prepared to say, with any confidence, that that was the right figure, merely that it seemed about right. Whilst Dr Ash would not be drawn into suggesting any specific distance, in my judgment, the substance of her evidence, that both 5 m and 10 m were reasonable possibilities, enables me to say, in my judgment, on the balance of probabilities that the distance was between approximately 1 and 10 m. I choose 1 metre as a minimum, because Mr Boulton gave no indication that he thought it could be less than that and Dr Ash seemed to believe that it was likely to be more than that. I choose 10 m as a maximum, because there must be some limit to how far the bodily fluids would be carried and Dr Ash's view was that both 5 and 10 m were reasonable, but she did not suggest that anything beyond that would be, causes me to conclude, on the balance of probabilities, that 1 - 10 m is a reasonable estimate of the distance, although it is an estimate.

LIKELY RANGE OF HGV'S DIPPED HEADLIGHTS/HOW VISIBLE WAS THE DECEASED

83. I have summarised Dr Ash and Mr Boulton's opinions as to the range of the HGVs headlights and as to how visible the Deceased would be to Mr Witkos, as expressed in their joint report, in paragraphs 39 - 43 above.

84. Dr Ash and Mr Boulton agree that they are unable to say how far ahead the dipped headlights of the HGV would have illuminated, because those headlights were never tested.
85. Dr Ash produces a research paper authored by Muttart in which he compared the distances at which pedestrians would be visible at night to a driver, on a straight road, in the dipped headlights of cars, depending upon whether the pedestrian was wearing all black, grey or white. The research found that pedestrians were visible to the driver, if located to the nearside of the car at 39 m if dressed all in black and 59 m if dressed all in grey. If they were located to the offside of the car, they were visible at 26 m, if dressed all in black and 44 m if dressed all in grey. The difference in visibility, as between the nearside and offside is accounted for by the fact that the headlights of cars (and other motor vehicles, including HGVs) have a nearside bias. I was referred to no research carried out into the visibility of pedestrians in the dipped headlights of HGVs, but neither Dr Ash, nor Mr Boulton suggested that there would be any material difference between cars and HGVs.
86. Mr Boulton accepted the research findings of Muttart, but he suggests, for the HGV that there was a consensus for the Deceased being visible at 45 m in the dipped headlights of the HGV. The consensus that Mr Boulton referred to was:
- (a) PC Dumbleton who suggested, in his report, that the HGV's dipped headlights would have illuminated approximately 45 m ahead of the HGV;
 - (b) Mr Witkos said that, following the Collision he Googled the range of dipped headlights of HGVs and found that they would illuminate the road ahead for around 40 m (not the 40 - 45 m suggested by Mr Boulton in the joint report); and
 - (c) the CCTV Footage shows the Deceased illuminated in the headlights of a HGV travelling South East on the A446. Mr Boulton calculates that, if that HGV were travelling at 50 mph, then it illuminated the Deceased at a range of approximately 45 m.
87. Dr Ash says that it is not possible to tell how far ahead of the HGV the Deceased would have been visible to Mr Witkos and that the range 39 - 59 m should be used, if I find that the Deceased was located to the nearside of the HGV and a range of 26 - 44 m, if I find that he was located to the offside of the HGV, consistent with Muttart's research for pedestrians dressed all in grey. As to Mr Boulton's suggestion that a range of 45 m is the consensus and might be used, Dr Ash says:
- (a) while she agrees that the Deceased was not dressed all in black, she is not sure if his shirt was completely or only partly light blue in colour and whilst she agrees that a mixture of white and black clothing may be visible at a similar distance to someone who is dressed all in grey, the different coloured trousers and top may make pattern recognition more difficult;
 - (b) PC Dumbleton gives no reasons for his estimate of the range of the HGV's dipped headlights at 45 m and Mr Witkos does not name the sources that he found on Google which suggested a range of 45 m;

- (c) as to the CCTV footage, Dr Ash says that it is not possible to know how fast the HGV was travelling and how the illumination provided by the dipped headlights of that HGV compared to the illumination provided by the dipped headlights of the HGV; and
- (d) the factors mentioned by Dr Ash in the joint report (see paragraph 42 above) would reduce the visibility of the Deceased to Mr Witkos and she notes that in the Muttart research the drivers of the cars were expecting a pedestrian to appear, whereas Mr Witkos could have had no expectation of a pedestrian being present on his side of the A446.

88. I do not consider that I am able to find, on the balance of probabilities, that the Deceased would have been visible to Mr Witkos at a distance of 45 m ahead of the HGV (whether to the nearside or the offside or both). Mr Boulton, by accepting the research of Muttart accepts the ranges identified by him for a pedestrian to be visible to a car driver using dipped headlights at night. Notwithstanding his acceptance of the accuracy of that research, Mr Boulton suggests that there is a consensus around a visibility range of 45 m, for the three reasons he gave and it would be reasonable to use that figure, however:

- (a) PC Dumbleton does not explain how he arrives at his estimate of 45 m for the range of the HGV's headlights and I am unable therefore to understand whether this estimate has any objective justification. PC Dumbleton also does not distinguish between headlight range to the nearside and offside of the HGV, but Dr Ash and Mr Boulton agree that there is a significant difference between the range of the headlights to the nearside and offside and Muttart's research also shows that the difference is significant;
- (b) Mr Witkos's Google research is, in my judgment, of no value because Mr Witkos has given no indication of the source or sources from which he derived his estimated range of the HGV's headlights at 40 m;
- (c) whilst the lights of the other HGV do appear to illuminate the Deceased on the CCTV Footage and I accept Mr Boulton's calculation that, if the HGV was travelling at 50 mph, then the CCTV Footage suggests that the Deceased was illuminated approximately 45 m ahead of the HGV:
 - (i) what appears from the CCTV Footage is not necessarily what would be seen by the naked eye;
 - (ii) I accept Dr Ash's point that it is not known how fast the HGV was travelling or how its headlights compare (in terms of their ability to illuminate ahead) against the headlights of the HGV;
 - (iii) the Deceased is standing predominantly upright when first illuminated by the lights of the other HGV. It is not possible to know what posture was adopted by the Deceased when first illuminated by the lights of the HGV. If the Deceased was (as the accident and emergency experts have agreed he was at the time of the Impact) in an abnormal posture at the time that he first entered an area illuminated by the dipped headlights of the HGV, then his light coloured shirt may not have been fully exposed to the dipped headlights, which would reduce the range at which he was visible to Mr Witkos;

- (d) PC Dumbleton's estimate of 45 m and Mr Witkos's Google research which he says suggests a distance of 40 m, only relate to the range of the HGV's dipped headlights. Those estimates do not take into account how visible the Deceased would be to Mr Witkos. It is the visibility of the Deceased to Mr Witkos which determines the point in time at which Mr Witkos could have seen the Deceased and which the Muttart research is aimed at establishing; and
- (e) I accept that the matters identified by Dr Ash (see paragraph 42 above) (other than the Impact taking place at night, as the research conducted by Muttart was conducted at night) are likely to result in the visibility of the Deceased to Mr Witkos being reduced. In particular the drivers taking part in the Muttart research were expecting a pedestrian to appear in their headlights, whereas Mr Witkos will not only not be expecting a pedestrian but, in my judgment, would reasonably expect any hazard to appear from the other side of the road, where the Belfry complex and pavement were located.

89. Dr Ash agreed that, because the Deceased was not dressed all in black it was unlikely that the Deceased would only be visible to Mr Witkos at a distance of 39 m, if the Deceased was located to the nearside of the HGV and 26 m, if the Deceased was located to the offside of the HGV which the Muttart research found were the average distances at which a pedestrian would become visible if dressed all in black (provided that the Deceased was within the range of the HGV's dipped headlights at the relevant point).

90. I am satisfied, on the balance of probabilities that:

- (a) if the Deceased was positioned ahead of and to the nearside of the HGV, in such a position that he was within the beam of the HGV's dipped headlights, at the limit of their range, then he would have been visible to Mr Witkos at a range of not less than 41, nor more than 59 m; and
- (b) if he was positioned ahead of and to the offside of the HGV, in such a position that he was within the beam of the HGV's dipped headlights, at the limit of their range, then he would have been visible to Mr Witkos at a range of not less than 28, nor more than 44 m.

91. I make the findings in paragraph 90 for the following reasons:

- (a) the use of a range of distances, rather than a definite distance is appropriate because Mr Boulton accepted that a range was appropriate, only putting forward 45 m as a "consensus figure". For the reasons I have given I do not accept that the "consensus figure" of 45 m can be treated as the distance at which the Deceased will have been visible to Mr Witkos; and
- (b) as Dr Ash accepted, the lowest figures in the two ranges of 39 m for the nearside and 26 m for the offside, may not be appropriate, because they apply to a pedestrian wearing all black and the Deceased was wearing black shoes and black trousers, but a light blue top. For that reason, I find, on the balance of probabilities, that the Deceased would have been visible to Mr Witkos at a distance which is less than the minimum distance measured in the Muttart research for the nearside and offside, where the pedestrian was wearing all black. I

do not consider it appropriate however to reduce those minimum distances significantly, given that: (i) in the Muttart research, whilst it was dark, none of the other factors identified by Dr Ash (see paragraph 42 above) as reducing the visibility of the Deceased to Mr Witkos were present; (ii) the drivers in the Muttart research, unlike Mr Witkos, were expecting a pedestrian to appear in their headlights, Mr Witkos was not and it would be reasonable for him to consider that any hazard was more likely to come from the opposite side of the road than his side of the road (for the reasons I have already explained); and (iii) the effect of glare from the four HGVs headlights, which, for the reasons explained next would mean that Mr Witkos's eyes would take a short period of time to adjust to the unlit road.

WAS MR WITKOS AFFECTED BY GLARE ?

92. Glare caused by the headlights of the four HGV's that Mr Witkos passed between around 11 and 3 seconds before the Impact, has the potential to reduce Mr Witkos's ability to see the Deceased, before the Impact. I deal with "glare" as a separate issue from the general visibility of the Deceased to Mr Witkos, because Dr Ash and Mr Boulton deal with it separately from the other matters which Dr Ash identifies as potentially reducing the visibility of the Deceased to Mr Witkos (summarised in paragraph 42 above).
93. Dr Ash suggested that glare from the oncoming headlights of the four HGVs could have affected Mr Witkos's vision, after they had passed the HGV. In saying this, Dr Ash does not suggest that Mr Witkos's vision would be rendered totally ineffective, but rather that it would have taken Mr Witkos's eyes a short period of time to adjust to the unlit road, after the last of the four HGV's passed him, rendering his eyesight less effective for that short period of time.
94. In cross examination, Mr Boulton accepted that, in principle glare can affect a driver's eyes and that, once the source of any glare is removed it would take time for a driver's eyes to re-adjust, but he considered that glare was not an issue in this case because:
 - (a) the headlights of the HGV's were dipped and dipped headlights do not, in his opinion cause glare;
 - (b) when he drove along the index section of the A446 at night in November and December 2022 he was not dazzled by oncoming headlights at all. He attributed this to oncoming headlights being dipped and to the width of the road, at about 10 m, which he considered reduced the effect on his eyes (and on the eyes of Mr Witkos) of any oncoming traffic;
 - (c) Mr Witkos was sitting high up in the cab of the HGV and, as a result any glare would be reduced;
 - (d) Mr Witkos did not mention being dazzled by the oncoming lights of the HGVs; and
 - (e) the Impact took place 3 seconds after the last of the four HGVs had passed, which is long enough for Mr Witkos's eyes to adjust.

95. Dr Ash accepted that glare is reduced in vehicles where the driver is sitting in a higher driving position. She maintained, nonetheless that, while she was not suggesting that Mr Witkos would be unable to see the road ahead, the headlights of the four oncoming HGVs would have affected Mr Witkos's view of the road ahead to a certain extent, whilst his eyes adjusted to the darkness of the unlit road.
96. I prefer the opinion of Dr Ash to that of Mr Boulton and find that Mr Witkos's vision is likely to have been affected (albeit to a very limited extent and for a very short period) by glare from the headlights of the four HGVs, such that it would have taken his eyes a short period of time to adjust and for that period, the "glare" would have reduced Mr Witkos's ability to see the Deceased. I am unable to say how long Mr Witkos's eyes would have been affected for. I have taken this issue into account in arriving at my ranges for the distances at which the Deceased would have been visible to Mr Witkos of 41 - 59 m for the nearside and 28 - 44 m for the offside.
97. I prefer the opinion of Dr Ash because:
- (a) the headlights of the four HGVs would, in my judgment, in quick succession, have (even if not shining directly into Mr Witkos's eyes, because Mr Witkos was sitting high above the road and the road at that point is relatively wide) nonetheless at least have created bright ambient lighting that contrasted sharply with the unlit road after he passed the fourth HGV. The experts agree that the lights at the entrance to the Belfry would have provided no ambient light at that point on the A446 and there was no other ambient light. It seems to me self-evident, in those circumstances that Mr Witkos's eyes would take a limited amount of time to adjust, affecting his vision, albeit not significantly for the period of that adjustment. Mr Boulton seems at least implicitly to accept this in the joint report when he says that 3 seconds was long enough for Mr Witkos's eyes to adjust;
 - (b) when Mr Boulton wrote the joint report with Dr Ash in April 2023 it was 4 - 5 months after he had driven the index section of the A446, at night. The issue of glare was not addressed in Mr Boulton's primary report, dated January 2023. It seems to me unlikely that Mr Boulton would have recalled any minor effect that the dipped headlights of oncoming vehicles may have had upon his vision when he drove the index section of the A446, 4 - 5 months earlier, when he does not suggest that it was an issue that he was considering at the time. Dr Ash does not suggest that glare is a particular issue on that section of the A446 as opposed to any average unlit road (far from it, she accepts that glare from oncoming traffic would be reduced because of the width of the road at that point and because Mr Witkos was sitting high up in the cab of the HGV); and
 - (c) as for Mr Witkos not referring to being dazzled by the oncoming HGVs I have already explained why Mr Witkos's evidence as to the circumstances of the Collision is unreliable. In any event Dr Ash was not suggesting (and I am not accepting) that the effects of glare from the lights of the four HGVs was in any way exceptional.

SHOULD MR WITKOS HAVE SWITCHED THE HEADLIGHTS OF THE HGV TO FULL BEAM ?

98. The issue of whether or not Mr Witkos should have switched the headlights of the HGV to full beam was not raised in the primary reports of either Mr Boulton or Dr Ash. In the joint report however Dr Ash and Mr Boulton expressed the following opinions:

- (a) Dr Ash - that Mr Witkos would not have been able to use full beam, due to the car turning right at the T Junction;
- (b) Mr Boulton - that the last of the four HGVs passed Mr Witkos around 3 seconds before the Impact and he could have switched the lights of the HGV to full beam at that point. As to the car turning right at the T-junction, it was not relevant, because it was not moving, so there was no chance of the driver of that car being blinded by the headlights of the HGV, if they were on full beam;
- (c) Dr Ash - that the South - East bound HGVs would have prevented Mr Witkos from using full beam until around 3 seconds before the Impact and the car waiting at the T Junction would have prevented him doing so thereafter. The fact that the car was stationary at the T-junction is irrelevant, if its' driver looked in Mr Witkos's direction and the HGV had its full beam headlights illuminated they would have blinded the driver, whether moving or not; and
- (d) Mr Boulton - the driver of the car could have simply looked away, and the headlights of the HGV being on full beam therefore presented no danger to the driver.

99. Mr Jones says that:

- (a) the Highway Code says that drivers must not use their lights in such a way as to dazzle or cause discomfort to other road users and switching the headlights of the HGV to full beam would at least have caused discomfort to the driver driving the car stopped at the T-junction;
- (b) in cross-examination, Mr Boulton appeared to initially stop short of expressing the opinion that Mr Witkos ought to have switched his headlights to full beam, after the fourth HGV past him; and
- (c) PC Dumbleton, in his report, expressed the view that Mr Witkos would not be expected to have his headlights on full beam due to causing dazzle to the driver at the T-junction.

100. Mr Marwick says that Mr Witkos should have switched the headlights of the HGV to full beam as soon as he passed the last of the four HGVs and had he done so, the extra illumination of the headlights, on full beam, would have enabled him to see the Deceased immediately. Mr Marwick also says that, at the time that Mr Witkos passed the last of the four HGVs the car was still approaching, rather than being stopped at the T-junction and was not therefore a justification for not switching the headlights of the HGV to full beam.

101. I do not consider that Mr Witkos breached his duty of care, by not switching the headlights of the HGV to full beam after he had passed the last of the four HGVs going South-East:

- (a) I have already decided to disregard Mr Witkos's suggestion that he used dipped headlights, rather than full beam, because there was enough ambient light from the entrance to the Belfry, to make the use of full beam unnecessary, for the reasons explained in paragraph 67 (b) above;
- (b) Mr Marwick refers to "flicking on" the HGVs lights to full beam when Mr Witkos had passed the last of the four HGVs. In my judgment, exercising reasonable care, Mr Witkos ought to have looked ahead to see if there was any reason not to switch the headlights of the HGV full beam;
- (c) whilst I accept that the car may well have been a few yards away from the T Junction, rather than stopped at the T-junction, at the moment that Mr Witkos passed the fourth HGV, I am satisfied that Mr Witkos would have been able to see the car approaching the T-junction ahead of him when he passed the fourth HGV. Mr Witkos ought to have anticipated, when he passed the fourth HGV, that the car would be at the T Junction within a second or so and the driver of it would potentially look left before they got to the T Junction, or as they got to the T Junction;
- (d) whilst the driver of the car could, as Mr Boulton suggested, looked away if he was dazzled by the headlights of the HGV, on full beam, Rule 114 of the Highway Code states "you MUST NOT use any light in a way which would dazzle or cause discomfort to other road users, including pedestrians, cyclists and horse riders". Mr Boulton seemed to concede that, if Mr Witkos had switched the headlights of the HGV to full beam, the driver of the car at least might suffer discomfort if they looked in the direction of the HGV, even if the use of full beam would not be dangerous to that driver, because they could look away;
- (e) PC Dumbleton, in his report, expressed the view that Mr Witkos would not be expected to have his lights on full beam due to causing dazzle to the driver at the T Junction, and other road users;
- (f) Mr Boulton's opinion was somewhat equivocal on the question of whether Mr Witkos ought to have switched his headlights to full beam, at first saying that he could have done so and then saying, if pressed, that he should have done so; and
- (g) in any event, the question of whether or not Mr Witkos should, consistent with the duty of care that he owed to other road users, have switched the headlights of the HGV to full beam is, it seems to me, a question for me to decide. In circumstances where, had Mr Witkos switched the headlights of the HGV to full beam, immediately after passing the fourth HGV, this would be likely to at least have caused discomfort (contrary to the guidance in Rule 114 of the Highway Code) to the driver of the car approaching the T-junction. I am not satisfied that Mr Witkos breached the duty of care that he owed to other road users by not switching the headlights of the HGV to full beam as soon as he passed the fourth HGV.

102. Mr Jones objected to the Claimants raising the issue of Mr Witkos switching the headlights of the HGV to full beam, on the basis that it is not pleaded. Mr Marwick says that the point is sufficiently pleaded. As I have found that Mr Witkos did not breach his duty of care, by not switching the headlights of the HGV to full beam, it is unnecessary for me to decide whether this point was sufficiently pleaded by the Claimants or not.

MR WITKOS'S THEORETICAL PRT

103. Mr Boulton and Dr Ash agree that there are four elements to PRT:

- (a) detection, that is the amount of time that it takes the driver to see the hazard, which is within their field of view;
- (b) identification, that is the amount of time it takes the driver to identify what the hazard is;
- (c) decision, that is the amount of time that it takes the driver to decide what to do, about the hazard; and
- (d) response, that is the amount of time that it takes the driver to start to take action to avoid the hazard.

104. Mr Boulton and Dr Ash agreed that Mr Witkos started to brake about 1.6 seconds after he passed the point at which the first area of bodily fluids were found. They also agree that, Mr Witkos's reaction time to the sound of the Impact was likely, for that reason, to be slightly more than 1.6 seconds. I have found that the point of Impact was between 1 m and 10 m before the first area of bodily fluids, adding up to 0.5 of a second to Mr Witkos's reaction time to the sound of the Impact.

105. In the joint report, Dr Ash says that Mr Witkos's reaction time to a sound may be different to his reaction time to seeing a pedestrian in the road ahead and that, given the unfavorable conditions which she sets out in paragraph 99 of the joint report (see paragraph 42 above) she would expect Mr Witkos's theoretical PRT to be longer. Dr Ash refers to research by Krauss and Muttart into reaction times which suggested an average reaction time of 2.1 seconds plus or minus .71 seconds, based upon a straight road at night the range of reaction times identified by Muttart is therefore appropriate, 1.39 - 2.81 seconds.

106. Mr Boulton says, in paragraph 100 of the joint report, that he does not consider the points made by Dr Ash, in paragraph 99, about unfavorable conditions are good points and if Mr Witkos had seen the Deceased prior to the impact, he should have identified the Deceased as a pedestrian, in his headlights and as in those circumstances, he would have been reacting to an emergency, probably more quickly and at least as quickly as he did to the sound of the Impact. Mr Boulton considers that the speed of Mr Witkos's reaction to the sound of the Impact therefore offers a good guide to Mr Witkos's theoretical PRT. He thinks that a range for theoretical PRT from 1 - 1.5 seconds is appropriate.

107. In cross examination Dr Ash said:

- (a) in her opinion the range 1.39 - 2.81 seconds is appropriate, based on research by Krauss and Muttart;
- (b) if Mr Witkos's attention was focused on the entry road to the Belfry, then his PRT will increase; and

- (c) it was put to Dr Ash, in cross examination, that in paragraph 112 of her primary report she accepted that Mr Witkos may potentially have reacted more quickly to seeing a pedestrian hazard than he did to the sound of the Impact. Dr Ash suggested that paragraph 112 was concerned with how hard Mr Witkos might apply the brakes of the HGV, in response to his seeing a pedestrian hazard, as opposed how hard he applied the brakes after hearing the sound of the Impact, not Mr Witkos's PRT

108. In his cross examination, Mr Boulton:

- (a) asserted that research by Krauss and Muttart supported his range of 1 - 1.5 seconds for Mr Witkos's theoretical PRT. He accepted however, when taken to the research papers published by Krauss and Muttart that they do not support an upper limit for PRT of 1.5 seconds but rather an upper limit of 2.81 seconds;
- (b) agreed that the fact that the Impact took place in the dark and the fact that the presence of the Deceased ahead of the HGV would be unexpected, would add to Mr Witkos's theoretical PRT;
- (c) said that Mr Witkos should not be distracted by the lights at the entrance to the Belfry, he should have concentrated on looking ahead;
- (d) agreed that he made an error in the joint report in stating that his range for Mr Witkos's PRT was 1 - 2 seconds, when, in his opinion it is 1 - 1.5 seconds;
- (e) repeated that Mr Witkos's reaction time to the sound of the Impact is a good guide to the time that it would have taken Mr Witkos to react to seeing the Deceased ahead of the HGV; and
- (f) said that, on the basis that the Impact happened about 2 m before the first area bodily fluids, Mr Witkos's reaction time to the sound of the Impact would be increased by 0.15 of a second to 1.75 seconds.

109. Mr Jones says that the detection and identification phases of Mr Witkos's theoretical PRT would be increased by the factors identified by Dr Ash in paragraph 99 of the joint report, such that Mr Witkos's theoretical PRT would be in the upper part of the range identified in the research of Krauss and Muttart.

110. Mr Marwick says that:

- (a) Mr Witkos's actual reaction time to the noise of the Impact was between 1.6 and 1.75 seconds from the point of Impact;
- (b) in her primary report, Dr Ash seemed to accept that Mr Witkos would arguably have reacted more quickly to seeing a pedestrian in front of a HGV than he did to the noise of the Impact;
- (c) Dr Ash accepted that Mr Witkos's reaction time to the noise of the Impact is within the range of PRT identified by Krauss and Muttart in their research;
- (d) 1.6 seconds is consistent with the highway code which suggests PRT times of 1 - 1.5 seconds; and
- (e) Muttart's research on the distances at which pedestrians would be visible to the driver of a car, in that car's dipped headlights, includes reaction time and therefore there is an element of double counting in fixing the range at which a pedestrian

would be visible to the driver of the car (which includes a reaction time) and then including a figure for theoretical PRT. Mr Marwick suggests that Dr Ash was unable to explain, in cross examination, why there would be no element of double counting in using Muttart's figures on the visibility of pedestrians in the headlights of cars and then adding a PRT.

111. As to whether Mr Witkos's theoretical PRT would be likely to be similar to the time that Mr Witkos took to react to the sound of the Impact, I accept Dr Ash's opinion that it is not possible to say whether Mr Witkos's theoretical PRT would have been broadly the same. When Mr Witkos heard the sound of the Impact, it had already happened, it was not necessary for Mr Witkos to detect or identify a hazard or to decide how to avoid it. Mr Witkos simply reacted by braking, effectively missing out the first three elements of PRT. Against that, I accept that, Dr Ash in her primary report acknowledged that reaction times to an emergency situation unfolding in front of a driver may be quicker than a non-emergency situation, such as hearing the sound of the Impact. For those reasons, I consider that the time taken by Mr Witkos to react to the sound of the Impact is not a good guide to his theoretical PRT, had he seen the Deceased ahead of the HGV. I consider it more appropriate to make such findings as I can, as to Mr Witkos's theoretical PRT, by use of the research of Muttart and Krauss and by initially adopting their range of 1.39 - 2.81 seconds for PRT with the midpoint of that range being 2.1 seconds.
112. I will now consider whether there are factors in this case which would suggest that Mr Witkos's theoretical PRT, if he had seen the Deceased ahead of the HGV is towards the middle, upper or lower end of the range 1.39 - 2.81 seconds, so that I could safely conclude, on the balance of probabilities, that the range is narrower than 1.39 - 2.81 seconds.
113. In paragraph 99 of the joint report, Dr Ash puts forward the following factors as tending to increase Mr Witkos's theoretical PRT:
- (a) the night-time conditions compared to daytime conditions;
 - (b) the unlit road, such that Mr Witkos was reliant on the range of his dipped headlights for his view of the road ahead, compared with a lit road or one with ambient lighting;
 - (c) Mr Witkos was not able to use his full beam headlights;
 - (d) the low expectation of a pedestrian in the road at this location;
 - (e) an unlit pedestrian with non-reflective clothing and dark lower clothing compared with lit, reflective or lighter toned clothing;
 - (f) more conspicuous objects within the field of view, namely the Christmas tree lights at the entrance to the Belfry and the car at the T Junction;
 - (g) four HGVs passing the HGV, shortly prior to Impact;
 - (h) no other vehicle was taking avoiding action in response to the Deceased; and
 - (i) the limited time for which the Deceased would have been visible to Mr Witkos.

114. Mr Boulton accepts that the Collision took place at night, that there was a low expectation of pedestrians on Mr Witkos's side of the road and that the Deceased would only have been visible to Mr Witkos for a limited period of time. As for the remaining factors, Mr Boulton says:

- (a) PRT only applies from the moment the driver sees the relevant object/person, therefore the fact that the road was unlit and Mr Witkos's vision was limited to the range of his dipped headlights and the Deceased not wearing reflective clothing or lighter toned clothing are not relevant to PRT;
- (b) Mr Boulton disagrees that Mr Witkos was not able to use his full beam headlights;
- (c) Mr Witkos should not have been distracted by the Christmas tree lights or the car at the T-junction, he should have looked at the road ahead;
- (d) the last of the four HGVs passed Mr Witkos a minimum of 3 seconds before the Impact which was enough time for Mr Witkos's eyes to adjust; and
- (e) the fact that no other vehicle took avoiding action in response to the presence of the Deceased is immaterial.

115. I accept that Mr Boulton is right when he says that PRT only applies when the driver sees the hazard and therefore the fact that Mr Witkos could only see a hazard when it came within the range of the HGV's headlights and that the Deceased was not wearing reflective clothing are not relevant to Mr Witkos's theoretical PRT.

116. The Muttart research was conducted, as noted in paragraph 112 above, at night, it is unlikely that any of the cars driven in the Muttart research were using full beam, it is not mentioned in the Muttart research that pedestrians were wearing any reflective clothing and I have already taken into account the possible effects of glare from the headlights of the four HGVs that passed the HGV going South East (I do not consider that they would remain a relevant distraction for Mr Witkos after they had passed him). In those circumstances I do not consider that any of those factors should be taken into account in considering where in the range of 1.39 - 2.81 seconds, Mr Witkos's theoretical PRT may be.

117. Mr Witkos had in front of him, to the right a car approaching the T Junction at the exit to the Belfry onto the A446, the lights of the Belfry, including the Christmas trees and a footpath on that side of the road. In contrast to that, on Mr Witkos's side of the road there was no footpath, no lights, no road entering from the left and no vehicle ahead him. Mr Witkos was well acquainted with that stretch of road, as he had passed along it many times. In those circumstances, in my judgment, not only would Mr Witkos not be expecting there to be a hazard on his side of the road, but Mr Witkos would have been aware of (from his previous journeys past the Belfry) and could see potential hazards on the other side of the road. In contrast, in the Muttart research, the driver was expecting a hazard to appear with no indication of where that hazard was likely to appear. I consider that those factors are likely to have increased Mr Witkos's theoretical PRT above the 2.1 second midpoint in the range identified by Muttart. For those reasons I find, on the balance of probabilities, that Mr Witkos's theoretical PRT was, on the basis that he saw the Deceased ahead of the HGV, in the range 2.1 - 2.81 seconds, but I cannot say where it falls within that range.

118. Finally, Mr Marwick put it to Dr Ash that Muttart's research, into the distances at which pedestrians were visible to the drivers of cars, included an element of reaction time and adding PRT to the distances estimated in the Muttart research would include an element of double counting. Dr Ash read the section of Muttart's research to which she was referred by Mr Marwick. Having done so, Dr Ash conceded that it was unclear from that section of the research whether the estimated distances included or excluded reaction time. Dr Ash said however that she had attended a course providing guidance on the use of Muttart's research and the delegates had been told that, when using those estimated distances, PRT should be added to them. I accept that evidence of Dr Ash and I accept, based on that evidence that PRT should be added to the distances at which pedestrians become visible to the drivers of cars, or in this case the HGV.

HOW MUCH TIME OR DISTANCE WOULD BE REQUIRED FOR MR WITKOS TO SWERVE TO AVOID THE DECEASED

119. Dr Ash calculates that, in order to steer the HGV sufficiently to the right to avoid the Impact a distance of 20 – 32 m would be required, she bases her calculations on lateral acceleration calculations for cars in a paper by *Jennings [Swerves and Lane changes, Impact, Summer 1990]* (there being no such calculations, she accepts for HGVs).

120. Mr Boulton's opinion as to how much time Mr Witkos would require to steer the HGV to the right, in order to avoid the Deceased, is based on his own experience as a HGV driver/instructor. There is an issue with this evidence, the parties were given permission to rely upon the evidence of experts in accident reconstruction. Mr Boulton was proffered as such an expert, by the Claimants. There was no permission for the parties to rely upon expert evidence from someone who is an expert in the driving of HGVs, and in particular how much time it would take to steer a HGV a certain distance to the right or left, in an emergency, based upon that expertise. It is unclear what expertise Mr Boulton really has of steering HGV's, in an emergency to avoid a collision, as opposed to just driving a HGV in normal conditions, he did not profess to have any such specific experience. In addition Mr Boulton did not provide a minimum time that he considered it would take to steer the HGV to the right to avoid the Deceased. He initially suggested that .3 of a second was a possibility, but then seemed to accept that it was unlikely that this was achievable.

121. Dr Ash's calculations are based on research by *Jennings* which appears to date back to 1990 and therefore may be out of date (in relation to modern motor vehicles) and it relates to cars not HGVs. There is reason therefore to doubt whether applying the *Jennings* research into lateral acceleration for motor cars in 1990 would be applicable to a HGV apparently manufactured in around 2018.

122. Mr Marwick refers to the Court of Appeal decision in *Ehari v Curry and another [2007] EWCA Civ 120* where the Court of Appeal refused to overturn the decision of the trial judge that 1 second was enough time for the defendant to react and steer to avoid a pedestrian, however: (a) the Court of Appeal did not agree with the trial judge's

finding (it merely decided that there were insufficient reasons to interfere with that factual finding of the judge); (b) the judge in *Ehari* does not appear to have been referred to any research on the issue (at least it is not clear from the Court of Appeal judgment that he was); and (c) each case has to be decided on its own facts and therefore the 1 second that the judge seems to have considered adequate on the facts of *Ehari* cannot simply be read across to the present case. I give no weight therefore to the findings of the judge in *Ehari*, in considering the question in this case.

123. For the reasons indicated above there are difficulties with the reliability of both experts' opinions on this issue, but on balance, I prefer Dr Ash's approach of calculating the likely distance needed for Mr Witkos to steer to avoid the Deceased, because: (a) it is based on a calculation which is subject to objective scrutiny; (b) there are the difficulties I have just noted in paragraph 120 with Mr Boulton using his experience as a HGV driver/instructor to provide expert evidence on this issue; and (c) Mr Boulton would not specify a minimum distance or time needed for Mr Witkos to steer to avoid the Deceased and was equivocal in the view he expressed as to whether .3 of a second was sufficient, first saying it was possible and then that he thought it was unlikely that it could be achieved in that time.

124. I find therefore that the distance needed for Mr Witkos to steer to avoid the Deceased would have been 20 - 32 m.

THE ACCIDENT AND EMERGENCY EXPERTS WHOSE OPINION DO I PREFER ?

125. Ultimately there is little difference between the opinions of Mr Zoltie and Dr Mackenzie, as appears from their joint report. The differences are:

- (a) Dr Mackenzie believes that the Deceased was facing the HGV at Impact. Mr Zoltie's opinion is that the orientation of the Deceased immediately prior to Impact cannot be determined from the Deceased's injuries; and
- (b) Mr Zoltie believes that the Deceased suffered a base of the skull fracture which was the cause of his death. Dr Mackenzie believes that, if a base of the skull fracture had been present it would have been noted during the post-mortem and mentioned in the post-mortem report and therefore there was no base of the skull fracture.

126. The question of whether or not the Deceased suffered a base of the skull fracture was accepted by both experts to be of no relevance to the orientation of the Deceased at the time of the Impact, or to any other matter which would assist me in resolving the issues that I need to resolve, in order to decide on liability. The question of whether or not the Deceased suffered a base of the skull fracture is only therefore relevant to the question of credibility. In my judgement both experts had respectable reasons for coming to their opposing views as to whether or not the Deceased suffered a base of the skull fracture or not:

- (a) Mr Zoltie thought that the force of the impact would cause a base of the skull fracture and given the inadequacies in the post-mortem report, the fact that that report did not mention a base of the skull fracture did not cause him to revise that opinion; and
- (b) Dr MacKenzie noted that, in carrying out the autopsy, the brain of the Deceased was removed and in his opinion any base of the skull fracture would have been visible, following removal of the brain and referred to in the autopsy report. I believe that he accepted that the force of the Impact was at least capable of causing a base of the skull fracture.

127. Given that I have found that the question of whether or not the Deceased suffered a base of the skull fracture is not relevant to any issue I need to determine, their respective opinions can only go to their general credibility. In my judgement, both Mr Zoltie and Dr Mackenzie give compelling reasons for holding their respective opinions and do not cause me to conclude that the opinion of one should generally be preferred to that of the other on matters that are relevant to the issues I need to decide.

128. Mr Zoltie was challenged for not including in his report matters that he subsequently agreed in the joint report with Dr Mackenzie. Those matters were:

- (a) he made no reference, in his primary report, to the CCTV Footage of the Deceased, but in the joint report he agrees that the CCTV Footage shows the Deceased suffering from significant gait ataxia and truncal instability and that he tripped and fell to the ground;
- (b) in the joint report, he agrees that there is no evidence of a major force being applied to the Deceased's chest, abdomen and pelvis, but he does not mention these matters in his primary report;
- (c) he did not mention in his primary report that the Deceased had an abnormal posture at Impact, but then accepts this, in the joint report; and
- (d) in his primary report he says that he could come to no conclusion as to whether the Deceased's head injury was caused by impact with the HGV, or the road, or other hard surface, but in the joint report he agrees that the head injury was caused by Impact with the HGV.

129. As to why he had not dealt with the matters (a) - (d) in his primary report, Mr Zoltie said that:

- (a) he did not consider that the Deceased behaviour, before the Collision was relevant to his assessment of the Deceased's injuries;
- (b) he dealt with the injuries that, in his opinion, were relevant to the cause of death, namely the Impact on the neck causing a base of the skull fracture. He did not deal with the absence of injuries but he accepted that a collision between a HGV and a pedestrian would normally be expected to cause significant injuries to a pedestrian's torso and it was relevant that, in this case there were no such injuries to the Deceased's torso. He went on however to say that he was concerned that the post-mortem report may not be accurate and merely because it did not mention any

injuries to the chest, abdomen and pelvis was not reliable evidence that they were not present;

- (c) as to Mr Zoltie not mentioning (in his primary report) that the Deceased had an abnormal posture at Impact, but then accepting this in the joint report, Mr Zoltie said that he did not consider it relevant to the question he was asked about the orientation of the Deceased, prior to the Impact; and
- (d) finally, Mr Zoltie said that he was not able to conclude, in his primary report, whether the Deceased's injury was caused by impact with the HGV, or the road or other hard surface, but once he saw the accident reconstruction expert reports he was able to come to the conclusion that the head injury was caused by Impact with the HGV.

130. I consider that there is some substance to the criticisms of Mr Zoltie, for not dealing with matters in his primary report which he then agreed with Dr Mackenzie in their joint report (and which Dr Mackenzie included in his primary report). I bear in mind however that these are criticisms of Mr Zoltie for failing to deal with points, rather than criticisms of the opinions he actually expressed in his primary report. I find that some criticism for failing to deal with issues is justified, because:

- (a) the behaviour of the Deceased, as shown in the CCTV footage, is potentially of relevance to his orientation, because Mr Zoltie ultimately agreed, in the joint report, that the Deceased would have been suffering from significant gait ataxia and truncal instability at the time of the Impact and this suggests that the Deceased's movements are likely to have been erratic, unpredictable and clumsy which may be relevant to orientation (at least in the sense that they make orientation more difficult to predict);
- (b) the problem with Mr Zoltie's explanation, that he did not deal, in his primary report, with the absence of injuries to the torso of the Deceased is that if he was concerned that the absence of them being mentioned in the autopsy report was not reliable evidence that they were not present, this is inconsistent with his agreement in the joint report that there were no injuries to the chest, abdomen and pelvis of the Deceased, based upon the autopsy report;
- (c) as to the Deceased's abnormal posture, I accept that posture at Impact may not be determinative of orientation but again, just like gait ataxia and truncal instability, the Deceased's abnormal posture, on Impact may be relevant to orientation and Mr Zoltie agreed that the Deceased had an abnormal posture at Impact in the joint report, with no suggestion that it was irrelevant; and
- (d) finally, in my judgement, Mr Zoltie was unable to explain how the contents of the accident reconstruction expert reports enabled him to conclude that Impact with the HGV had caused the Deceased's head injury (as opposed to the road or other hard surface) which he had been unable to conclude in his primary report.

131. The criticism of Dr Mackenzie, is, in my view minor. Dr Mackenzie said, in his primary report, that the CCTV Footage showed vehicles passing "without incident". Dr Mackenzie accepted that whether or not this was what the CCTV Footage showed was not within his area of expertise. The comment has no relevance to any of his medical opinions and

was a minor criticism which, in my judgement, does not undermine the reliability of his opinions.

132. Dr Mackenzie's primary report was, in my judgement, more comprehensive than that of Mr Zoltie, providing opinions (which Mr Zoltie largely agreed in the joint report) which are of assistance to me in understanding that the Deceased had no material injuries to his torso and what the implications of that might be, for issues I need to resolve, when combined with his gait ataxia and truncal instability resulting from his intoxication.
133. As to the orientation of the Deceased at Impact, Dr Mackenzie expressed the opinion that the Deceased was facing the HGV at Impact and Mr Zoltie is of the opinion that the injuries sustained by the Deceased do not assist in determining the Deceased orientation at Impact.
134. The basis of Dr Mackenzie's opinion, that the Deceased was facing the HGV, at Impact is:
- (a) there were no material injuries to the Deceased's torso, with the principal impact injuries being to the head, face, neck and upper chest. This, says Dr Mackenzie suggests that the Deceased lent or stumbled into the HGV, this leaning or stumbling, accounting for his abnormal posture ; and
 - (b) Dr Mackenzie analysed the characteristics of an abrasion on the Deceased's neck which he said, because; (i) the front of the abrasion was not as deep as the back of the abrasion; and (ii) there was bunching of the skin at the back of the abrasion, suggested to him, based on his clinical experience, that front to back forces were applied in creating the abrasion. Those front to back forces would only be applied if the Deceased was broadly facing the HGV at Impact.
135. Mr Zoltie said that, while there were characteristics of the neck abrasion, of front to back forces, there were other reasonable explanations for those characteristics. When I asked Mr Zoltie whether there were any explanations that were more reasonable than that of Mr Mackenzie, I did not understand Mr Zoltie to say that there were any explanations that were more reasonable or more likely than Dr Mackenzie's opinion that front to back forces were at play in creating the neck abrasion.
136. I prefer the opinion of Dr Mackenzie, that the Deceased was broadly facing the HGV at the point of Impact, for the following reasons:
- (a) Dr Mackenzie has considerable experience in pre-hospital accident and emergency care. That is he goes to the scenes of accidents to provide emergency medical care to casualties. Mr Zoltie accepts that all of his experience is hospital-based. Dr Mackenzie will therefore have experience of seeing injuries that are suffered by accident victims "in situ", where he can see what has caused the injury. That means, in my judgment, that Dr Mackenzie's experience is more relevant than that of Mr Zoltie's to determining whether front to back forces or other factors caused the neck abrasion suffered by the Deceased;

- (b) Mr Zoltie accepted that the application of front to back forces was a reasonable explanation for the pattern of the abrasion on the Deceased's neck. Whilst he suggested that there were other reasonable explanations for the pattern of the abrasion, he did not, when I invited him to do so, identify any explanation which he was prepared to say was more likely. This contrasts with Dr Mackenzie's explanation that front to back forces were the most likely explanation for the pattern of the abrasion; and
- (c) as I have already said, in my judgment, Dr Mackenzie's primary report was more comprehensive than that of Mr Zoltie. Dr Mackenzie considers wider issues than just the injuries suffered by the Deceased, in coming to his conclusions (including the injuries he did not suffer). I consider that that more comprehensive approach is more likely to result in a reliable opinion as to the orientation of the Deceased at the point of the impact, than Mr Zoltie's more narrow approach, at least in his primary report.

137. Three additional matters on which the evidence of the accident and emergency experts might assist me are:

- (a) whether the Deceased was on the carriageway or on the grass verge at the point of impact;
- (b) the likely explanation for the Deceased's abnormal posture at impact; and
- (c) whether the Deceased was stationary or moving.

138. As to those three points, there is little difference between Mr Zoltie and Dr Mackenzie:

- (a) they both agreed that the Deceased was not standing straight upright, but generally upright but with an abnormal posture, which could have been due to him stumbling into the Impact or to his truncal instability more generally;
- (b) Dr Mackenzie thought it more likely that the Deceased was moving rather than stationary, however this opinion was what he referred to as a "lay" opinion, by which I took him to mean that the CCTV footage showed the Deceased generally moving although in an unpredictable manner, prior to leaving the Belfry grounds and that he was likely to have continued moving in such an unpredictable manner, immediately prior to the Impact, rather than becoming stationary;
- (c) Dr Mackenzie said that, in his opinion, based upon the Deceased's injuries, the Deceased would have been on the carriageway at the point of Impact, rather than falling into the HGV from the grass verge or leaning into HGV from the grass verge. Mr Zoltie was not asked this question. I accept the opinion of Dr Mackenzie on this point; and
- (d) Dr Mackenzie said that, whilst in his opinion, the Deceased was in the carriageway at Impact, he could not say if he had previously been on the grass verge, or had been attempting to get back on the grass verge, in either case, immediately before Impact. I accept his opinion on this point.

THE TOXICOLOGY EXPERT

139. As I have already said, Dr Jenkins, the Toxicology expert, was a single joint expert, she was not required by either party to attend for cross examination. I accept Dr Jenkins' unchallenged opinions as to: (a) what the blood and urine samples analysed by her showed, in terms of concentrations in the Deceased's blood/urine of alcohol, cocaine and cannabis; (b) as to the effect of those concentrations upon him; and (c) that the CCTV Footage viewed by Dr Jenkins shows the Deceased acting in the manner that she would expect him to act, given the concentrations of alcohol, cocaine and cannabis that she found in the blood samples.

WHAT DUTY OF CARE DID MR WITKOS OWE TO THE DECEASED IN DRIVING THE HGV AT THE TIME OF THE COLLISION?

140. Counsel agree that the duty of care owed by Mr Witkos to the Deceased at the relevant time was the duty of care of the reasonably competent driver to take reasonable care to avoid loss or injury to others using the highway.

DID MR WITKOS BREACH THE DUTY OF CARE THAT HE OWED TO THE DECEASED?

LEGAL PRINCIPLES – DUTY OF CARE

141. Both counsel refer to the obiter comments at paragraph 39 of the judgment of Smith LJ in **Lambert v Clayton [2019] EWCA Civ 237** where she says:

“The only point I wish to make is that there is a danger of doing injustice if judges make unwarrantedly precise findings of fact. Of course, if the evidence warrants a precise finding of fact (on the balance of probabilities) that makes the judge’s judgment easier. If there are inherent uncertainties about the facts, as there were here, it is dangerous to make precise findings. This may well mean that the party who bears the burden of proof is in difficulties. But that is one of the purposes behind a burden of proof; that if the case cannot be demonstrated on the balance of probabilities, it will fail.”;

142. Mr Marwick refers me to two cases which he says establish important points of principle, to which I should have regard, in determining whether the Claimants have proved, on the balance of probabilities, that Mr Witkos breached the duty of care that he owed to the Deceased at the time of the collision:

(a) **Lunt v Khelifa [2002] EWCA Civ 801** at paragraph 20, in which Latham LJ referred to a motor vehicle being a potentially lethal weapon and that whether or not the

driver of a motor vehicle has breached the duty of care that they owe to the injured party should be considered in that context;

(b) **Stewart v Glaze [2009] EWHC 704** at paragraphs 5 and 8 - 10 in which Coulson J emphasized that the court should not be too reliant upon the expert evidence of accident reconstruction experts, their evidence should be assessed in the context of the evidence as a whole;

143. Mr Jones says that, insofar as the Claimants maintain their pleaded case that Mr Witkos was travelling too fast, notwithstanding that the tachograph in the HGV shows that he was travelling at 43.5 mph, well within the speed limit of 50 mph, the decision of HHJ Charles Harris QC in **Walker v Culina Logistics Ltd (Unreported)** is relevant at paragraphs 15 – 17, where he says:

“In motoring cases, it is often suggested on behalf of the claimant that drivers should never drive faster than the speed which enables them to stop within the limits of their visibility. Mr Parry pointed out, this would mean, if followed to its logical conclusion, that a typical vehicle should never travel at more than 27 mph with dipped headlights on an unlit road in order to be able to stop within the 40 m or so of visibility likely to be available”

It would in my judgment, be quite unrealistic to conclude that on an unlit two or three lane dual carriageway or indeed good open lane roads that no vehicles should drive at night on dipped beams at more than 27 mph lest some unexpected pedestrian might sally into their path.

The standard of care expected of a driver is that exercised by a normally prudent competent and capable motorist. There was no evidence to suggest that HGV drivers or other motorists with these characteristics crawl about the dual carriageways of England at night at no more than 27 mph. To suggest that they should would be to conflict dramatically both in common sense and common practice.”

144. In this case there are significant uncertainties as to what the movements of the Deceased were immediately before the impact. Mr Witkos says he did not see the Deceased before he heard the Impact and that, at first he thought that he had hit an animal. I have accepted that evidence. Both accident reconstruction experts and both Accident and Emergency experts accept that they are unable to say what the Deceased's movements were other than on Impact and immediately before Impact. I bear in mind therefore the obiter comments of Smith J in **Lambert v Clayton** that I should not make findings of fact which are not warranted on the evidence, on the balance of probabilities.

145. In **Lunt v Kheifla** traffic lights and pedestrian lights at a busy crossroads on Kensington Park Road were not working. The Respondent was driving a car at 25 mph, in a 30 mph zone. The accident reconstruction experts agreed that the Appellant stepped two or more paces into the road at the time that the collision occurred, the Respondent said that he had not seen the Appellant.

146. The judge at first instance concluded that the Respondent had failed to exercise due care because: (i) he should have been aware that there were likely to be pedestrians in the area of the junction, particularly because there was a tube station nearby; (ii) he should therefore have kept a sharp lookout when approaching the junction; but (iii) on the balance of probabilities he had not kept a sharp look out because he had not braked and on his own evidence had not seen the Appellant.

147. At paragraph 20 of his judgment Latham LJ said that: “this court has consistently imposed on the drivers of cars a high burden to reflect the fact that a car is potentially a dangerous weapon....”.

148. In *Eagle v Chambers [2013] EWCA Civ 1107* Lady Justice Hale (as she then was) referring with approval to the comments of Latham LJ in *Lunt v Khelifa*.

149. I accept that, whilst the duty of care owed by Mr Witkos is the duty of care of the reasonably competent driver to take reasonable care to avoid loss or injury to other using the highway, because a motor vehicle has far greater potential to cause serious loss or injury than a pedestrian, the care expected of the driver of a motor vehicle is commensurately higher.

150. In *Stewart v Glaze* the claimant pedestrian suffered a catastrophic head injury as a result of colliding with a car driven by the defendant. Coulson J (as he then was):

- (a) at paragraph 5 said that the court had to be wary about holding the defendant to the standards of the ideal driver, rather than the reasonable driver and not be guided with the benefit of 20:20 hindsight;
- (b) at paragraphs 8 - 10 that expert reconstruction evidence is a useful yardstick against which factual evidence and inferences drawn from it can be tested, but should not be elevated to a formula; and
- (c) he did find the expert evidence in that case of some assistance on the issues of “....reaction times, stopping distances and the like...”.

151. I will bear in mind the points made by Coulson J (as he then was) in considering the expert reconstruction and Accident and Emergency evidence in this case.

DID THE CIRCUMSTANCES OF THE COLLISION AMOUNT TO A BREACH OF DUTY BY MR WITKOS ?

Claimants’ case on breach of duty

152. Mr Marwick says that:

- (a) Mr Witkos says that he did not see the Deceased prior to the Impact;
- (b) the accident reconstruction expert evidence is clear that the range of the HGV’s headlights would have been sufficient to enable Mr Witkos to see the Deceased well before the Collision. Dr Ash appears to accept this, she simply puts forward reasons as to why Mr Witkos may not have seen the Deceased;

- (c) Mr Witkos's lack of attention when driving prior to the Collision is borne out by his inaccurate recollection of the circumstances of the Collision (the Police report records him saying that there was a HGV travelling 100 m in front of him and that he thought that his lights illuminated the road for 20 - 25 m ahead, he now accepts that neither of those points is correct);
- (d) (a) - (c) above strongly suggest that Mr Witkos was not keeping a proper look out prior to the Collision;
- (e) Mr Witkos should have switched the headlights of the HGV to full beam when he passed the last of the four HGVs; and
- (f) Mr Witkos was travelling too fast, he should have slowed down on his approach to the Belfry to his right.

Defendant's case on breach of duty

153. Mr Jones says that:

- (a) the toxicology report and Accident and Emergency reports all confirm that the Deceased was suffering from significant intoxication at the time of the Collision, with the consequences that he had significant gait ataxia and truncal instability and his balance, mobility and judgement were all significantly impaired;
- (b) there was a pavement on the northern side of the A446, but no pavement on the southern side, where there was only a grass verge and beyond that bushes, the accident reconstruction experts agree that there was no apparent reason for the Deceased to cross from the northern, to the southern side;
- (c) the reconstruction experts cannot say: (i) what the Deceased's movements were immediately prior to the Collision; (ii) where the Deceased was when he first entered the HGV's headlights; or (iii) how far the dipped headlights of the HGV would have lit the road ahead;
- (d) it is the Defendants' case that the Deceased would only have been conspicuous to Mr Witkos for a short distance, having regard to the factors identified by Dr Ash;
- (e) I should not therefore conclude that Mr Witkos was not keeping a proper look out, merely because he did not see the Deceased before the Collision;
- (f) Mr Witkos should not have switched his headlights to full beam after passing the last of the four HGVs, because: (i) the Highway code says that drivers should not use their lights in such a way as to cause discomfort to other road users; (ii) if he had switched the headlights of the HGV to full beam he would at least have caused discomfort to the driver of the car at or approaching the T Junction to the right ahead of him; and (iii) PC Dumbleton in his report expressed the view that Mr Witkos would not be expected use full beam in the prevailing circumstances; and
- (g) Mr Witkos was travelling well within the speed limit, PC Dumbleton did not criticise the speed at which he was travelling and the comments of Charles Harris QC in *Walker v Culina Logistics Ltd* (see paragraph 143 above) show that the court must take a realistic common sense view of what amounts to driving too fast.

Mr Witkos's Evidence

154. I have accepted Mr Witkos's evidence that he did not see the Deceased before the Collision, the key question therefore is whether he ought to have done so.

Accident Reconstruction Experts

155. Mr Boulton and Dr Ash, agree the following points relevant to the circumstances of the Collision all of which I accept:

- (a) the Deceased was last seen on the CCTV Footage approximately one minute and 15 seconds before the Impact walking in a south-westerly direction along the A446 on the same side of the A446 as the T Junction, apparently on an asphalt footpath;
- (b) four HGVs travelling South East along the A446 (in the opposite direction to Mr Witkos) leave the CCTV Footage between 19 and 11 seconds before the HGV driven by Mr Witkos enters the CCTV Footage. Those four HGV's will have subsequently travelled past the point of Impact, past the Deceased and past Mr Witkos's HGV. The last of those HGV's will have passed Mr Witkos's HGV around 3 seconds before the Impact;
- (c) the Deceased was hit by the front nearside corner of the HGV, a short distance from the verge of the A446;
- (d) there is no evidence that the HGV mounted the curb;
- (e) The HGV was travelling at 43.5 mph; and
- (f) Mr Witkos started to brake about 31 m beyond the first area of bodily fluids, at 43.5 mph it would take approximately 1.6 seconds to travel that distance, both experts agreed that the first area of bodily fluids is likely to be a little beyond the initial point of the Impact.

156. Mr Boulton and Dr Ash disagree about:

- (a) the range of the HGV headlights. They agree that the actual range of the HGV's dipped headlights is unknown and that separate ranges for the nearside and offside are appropriate, but Mr Boulton suggested that 45 m was the consensus; and
- (b) at what distance the Deceased would have been visible to Mr Witkos.

Accident and Emergency Experts

157. Mr Zoltie and Dr Mackenzie agree the following points relevant to the circumstances of the Collision (I accept points (b) - (h) below):

- (a) they defer to the Accident Reconstruction experts on the circumstances of the Collision, nature of the collision, Impact speed, movements of the Deceased and the HGV and magnitude and direction of forces;
- (b) the Deceased is likely to have been experiencing the issues of significant gait ataxia, truncal instability and impairment of balance, mobility and judgement, shown in the CCTV footage immediately prior to impact;

- (c) the post-mortem report provides no evidence of thoracic, abdominal or pelvic injury;
- (d) the Deceased was relatively upright at Impact with the most severe forces being applied to his upper chest, neck, face and head;
- (e) some injuries may have been caused by secondary impacts;
- (f) it is not possible to be certain if the left lower limb fracture was caused by contact with the HGV or bending or twisting forces or impact or landing on the ground;
- (g) the injuries are not typical of a pedestrian struck directly by a HGV travelling at 43.5 mph, more chest, abdominal, pelvic and spinal injuries would be expected; and
- (h) the Deceased's body did not fully engage with any part of HGV at Impact suggesting it had an abnormal posture at Impact.

158. Mr Zoltie and Dr Mackenzie disagreed about whether the injuries suffered by the Deceased gave any indication of his orientation at the time of the collision. Mr Zoltie did not consider that any conclusion could be drawn. Dr Mackenzie believed that, on the balance of probabilities that the Deceased was facing the HGV at Impact. I have preferred Dr Mackenzie's opinion.

Toxicology

159. Dr Jenkins was the single joint Toxicology expert, her report is unchallenged and I accept it in its entirety. It follows that the following points, as to the Deceased's condition at the time of the Collision are accepted by me:

- (a) the Deceased had a blood alcohol level of 192 mg%, which is five times the legal driving limit;
- (b) the Deceased had 43 ng/M1 of cocaine in his bloodstream which is over four times the legal driving limit of 10ng/M1 and 368 ng/M1 of Benzogleganine which is over seven times the legal driving limit of 50 ng/M1;
- (d) the Deceased had almost two times the legal driving limit of cannabis in his blood sample; and
- (e) in the CCTV Footage, the Deceased showed significant signs of intoxication, suffering from poor balance and coordination and being unaware of his surroundings (including stepping onto the road in the Belfry grounds, unaware of the presence of two cars that needed to take evasive action to avoid him). In short, from 12:54 am, the Deceased was acting, as Dr Jenkins would expect him to act, based on her analysis of his blood and urine samples.

160. Based upon the matters agreed between the experts, the content of Dr Jenkins's toxicology report and where the Accident Reconstruction and Accident and Emergency experts disagree, my own findings, I make the following factual findings as to the circumstances of the collision (bearing in mind the guidance given in paragraph 39 of the judgment of Smith LJ in *Lambert v Clayton* about not making findings of fact that are not warranted by the evidence):

- (a) the Deceased travelled from the T Junction South-East along the asphalt footpath, that runs alongside the A446 on the same side of the road as the Belfry golf complex. The Deceased went out of the range of the CCTV cameras 1 minute and 15 seconds before the impact (these timings are agreed by Mr Boulton and Dr Ash from the CCTV Footage);
- (b) at some point before the Collision, 1 minute and 15 seconds later, the Deceased crossed the road to the South-West bound carriageway of the A446, which does not have a footpath next to it (this is uncontroversial and follows from the agreed fact that the Collision took place on the North-Western bound carriageway);
- (c) I find on the balance of probabilities, that the Deceased crossed the A446 sufficiently before the first of the four HGV's travelling South-East along the A446 which passed Mr Witkos before the Collision, not to come into conflict with it. I find this because:
 - (i) the four HGV's were a total of only 8 seconds apart when they crossed the T Junction going South-East along the A446, it is unlikely that they were materially less or further apart when they passed the Deceased (see paragraph 36 (b) above);
 - (ii) if the Deceased had crossed immediately in front of the first of the HGVs that would be likely to cause some reaction from its driver which Mr Witkos would be likely to see;
 - (iii) there would not, in my judgment, have been time for the Deceased to cross between any of the HGV's, particularly given the difficulties he was experiencing with gait ataxia, mobility and balance. I asked Mr Boulton and Dr Ash about this and they both agreed that it was unlikely that the Deceased had crossed the road between the HGV's. Further, had the Deceased crossed between any of those HGV's it would be likely to cause some reaction from the driver of the HGV in front of whom he crossed which, again, Mr Witkos would be likely to see; and
 - (iv) I find that the Deceased did not cross the road after the last of the four HGV's passed him, but before the Collision, because the reconstruction experts agree that the last of the four HGV's will have passed the Deceased around 3 seconds before the Collision. The Deceased would have to cross three lanes in order to get to the nearside corner of the HGV cab, in 3 seconds and without Mr Witkos seeing him cross the last lane immediately in front of the HGV, while suffering from the significant gait ataxia, mobility and balance issues which I refer to next;
- (d) I find that, at the time of the Collision, the Deceased was suffering from significant gait ataxia, impairment of balance, impairment of mobility and impairment of judgement, as a result of the alcohol, cocaine and cannabis that he ingested shortly before leaving the grounds of the Belfry Hotel. I find this because: (i) in her first report Dr Jenkins concludes, based upon the Deceased's blood and urine samples analysed by her, that the Deceased had ingested significant quantities of all three and she provides details of what the effects of ingesting those quantities on the Deceased were likely to be and the longevity of those effects: (ii) having reviewed the CCTV Footage, Dr Jenkins concludes that, at 10:50 pm the Deceased was not showing signs of intoxication, but, at 12:54 am he showed significant signs of intoxication, suffering from poor balance and coordination and being unaware of his surroundings (including stepping onto the road in the Belfry grounds,

unaware of the presence of two cars that needed to take evasive action to avoid him); and (iii) Mr Zoltie and Dr Mackenzie agree that the Deceased is likely to have been suffering from the significant gait ataxia, truncal instability and impairment of balance, mobility and judgement, shown in the CCTV footage immediately prior to the Impact;

- (e) I am unable to say what motivated the Deceased to cross the road. I find however that, crossing the road, when there was no footpath adjacent to that side of the road and when the accident reconstruction experts can suggest no reason as to why the Deceased may have done so, leads me to conclude that the Deceased had no good reason to do so and that his judgment, in deciding to do so was affected by being intoxicated as noted in (d) above;
- (f) I find that the Deceased was in a relatively upright position at the point of Impact and that the point of Impact on the HGV cab was the front nearside corner, consistent with the opinions of both the accident reconstruction experts and the accident and emergency experts;
- (g) I have preferred the evidence of Dr Mackenzie to that of Mr Zoltie as to the orientation of the Deceased immediately prior to Impact. It follows that I find that the Deceased was broadly facing the HGV cab at Impact;
- (h) I find that the Deceased was in the carriageway at the point of Impact, he did not stumble from the grass verge directly into the Impact with the HGV and nor did he lean out from the grass verge into contact with the HGV (this was the opinion of Dr Mackenzie (see paragraph 138 (c) above, which I have accepted). I cannot say for what period prior to the Impact the Deceased was in the carriageway; and
- (i) the Deceased either stumbled or was in an abnormal posture (I cannot say which) so that the dominant Impact was the left side of the head, neck and upper chest, but not the torso (this was the opinion of Mr Zolties and Dr Mackenzie which I accept. I cannot say what direction the Deceased was travelling in and accept Dr Mackenzie's evidence (and the evidence of the CCTV Footage) that the Deceased's movements were unpredictable and I would say lacked any logical explanation (given that he had walked in both directions along the A446, from the T Junction and crossed the road for no apparent reason prior to the Impact and his gait ataxia and truncal instability).

Should Mr Witkos have switched the Headlights of the HGV to Full Beam ?

161. I have accepted that Mr Witkos did not breach his duty of care by not switching the headlights of the HGV to full beam (see paragraphs 98 - 102 above).

Should Mr Witkos have slowed down ?

162. Mr Marwick suggested to Mr Witkos that the entrance to the Belfry to Mr Witkos's right, as he approached it, represented a hazard that meant that Mr Witkos should have slowed down. Mr Witkos appeared to accept that the entrance to the Belfry did justify him slowing down and he suggested that he had done so, before eventually conceding that he could not recall whether he had done so or not. I have already concluded (see

paragraph 67 above) that Mr Witkos's evidence as to the circumstances surrounding the Collision is unreliable, the tachograph clearly shows that he was not slowing down. I find that Mr Witkos's apparent acceptance that the entrance to the Belfry represented a reason to slow down is equally unreliable as at times, during his cross examination (and this is one of those occasions) Mr Witkos appeared too willing to accept suggestions made to him by Mr Marwick without thinking about whether the suggestion really represented his own view or recollection. Mr Witkos was travelling at 43.5 mph, well within the speed limit of 50 mph. PC Dumbleton did not suggest in his report that Mr Witkos was travelling too fast for the prevailing conditions and I am not satisfied that he was. The apparent hazards represented by the Belfry, to Mr Witkos's right were not on his side of the road, other than the car either stopped at the T Junction or approaching it very slowly which, at that point represent only a theoretical hazard (if it were to turn right into the path of Mr Witkos without seeing the HGV and there is no indication that that appeared at all likely).

Should Mr Witkos have seen the Deceased?

163. I have accepted Mr Witkos's evidence that he did not see the Deceased prior to the Impact and that he heard, but did not see the Impact. The Claimants have to prove, on the balance of probability, that Mr Witkos breached the duty of care that he owed to the Deceased by not keeping a proper look out prior to the Impact. That is, as pleaded in the Particulars of Claim, that Mr Witkos: - "failed to observe the presence of the Deceased as a pedestrian on the carriageway, or alternatively in the vicinity of carriageway" or "Failed to have any or any sufficient regard for pedestrian traffic that was or might reasonably be expected to be in the vicinity of the entrance to the Belfry Hotel."

164. No witness, other than Mr Witkos has given any factual evidence that can assist me with this issue.

165. I have found that, subject to what I say in paragraph 166 below, the Deceased would have been visible, if the Deceased entered the area of light cast by the headlights of the HGV, at a distance of:

- (a) 41 - 59 m, if the Deceased was ahead and to the nearside of the HGV; and
- (b) 28 - 44 m, if the Deceased was ahead and to the offside of the HGV.

166. The range at which the Deceased would have been visible to Mr Witkos would have been reduced slightly because I have found that Mr Witkos's eyes will have been slightly affected by glare from the headlights of the four HGV's that passed him, the last of them passing him about 3 seconds before the Collision. Mr Witkos's eyes would take a short time to adjust to the darkness of the unlit road, after the last of the four HGV's had passed him. I do not consider, however, that this is a reason to alter the ranges I have specified in paragraph 165, it may merely tend to increase the distance at which the Deceased was visible to Mr Witkos, within those ranges.

167. I am unable to say at what point the Deceased would have first appeared in the area of light cast by the HGVs headlights, on the offside or nearside or whether, when he did so, he was on the carriageway or on the grass verge to the nearside of the HGV.
168. Dr Ash and Mr Boulton agreed that the HGVs headlights are biased towards the nearside. Dr Ash said that the HGV's headlights would illuminate an area which included approximately a car's width ahead and to the nearside of the HGV (that is they would illuminate just under one car's width of the grass verge ahead of the HGV for a distance of 41 - 59 m). I have accepted Dr Ash's opinion.
169. I have found that the Deceased was in the carriageway at the point of impact with the nearside corner of the HGV's cab (he did not stumble from the grass verge straight into the Impact and did not lean into the Impact, from the grass verge).
170. I find, on the balance of probabilities that that Mr Witkos did breach the duty of care he owed to the Deceased by not keeping a proper look out prior to the Impact, for the following reasons:
- (a) the Deceased would have been visible to Mr Witkos, at some point prior to the Impact. This follows inevitably, in my judgment, from the following:
 - (i) my finding that the Deceased was hit by the HGV when he was on the carriageway and the HGV was travelling towards him at 43.5 mph prior to the Impact;
 - (ii) to the nearside of the HGV, the headlights of the HGV will have illuminated not just the carriageway, but just under a car's width of the grass verge ahead of the HGV. Dr Ash accepted that the area ahead in which the Deceased would be visible to Mr Witkos (a minimum of 41 m) would include the grass verge which was illuminated by the HGV's headlights. Whilst I cannot say, if the Deceased was on the grass verge, that he was within a car's width of the carriageway at a distance of at least 41 m ahead of the HGV and would therefore have been visible to Mr Witkos at that distance, if the Deceased was on the grass verge, in getting onto the carriageway before the Impact the Deceased will, in my judgment, have been visible to Mr Witkos in the lights of the HGV for a period when he was on the grass verge and a period when he was on the carriageway once he was within 41 m of the HGV (subject to (iv) below);
 - (iii) if the Deceased was on the carriageway ahead of the HGV at least 41 m ahead of the HGV if to the nearside and 28 m if to the offside of the HGV, then he would have been visible to Mr Witkos at the latest at those distances (subject to (iv) below);
 - (iv) whilst I have accepted that Mr Witkos would have been effected by glare from the lights of the four HGVs that passed him before the Collision and his eyes would have taken a period of time to adjust from the brightness of the lights of the HGVs to the darkness of the unlit road Dr Ash did not suggest that the period of adjustment would be anything other than a very short period. I have in any event already said (see paragraph 91 (b) above) that any adverse effect of glare upon Mr Witkos's ability to see the Deceased has already been taken into account in the ranges at which I have found that the Deceased would

have been visible to Mr Witkos (41 m - 59 m to the nearside and 28 m - 44 m to the offside);

- (b) when the Deceased was first visible to Mr Witkos, Mr Witkos would have seen the Deceased, if the Deceased was at that time in Mr Witkos's field of vision and on the balance of probabilities, the Deceased would have remained visible to Mr Witkos from that point until the Impact, if the Deceased remained within Mr Witkos's field of vision, for that period;
- (c) Mr Witkos could reasonably expect that any hazard was much more likely to come from the Belfry side of the road, than his side of the road (particularly the car at or approaching the T Junction). This may have caused Mr Witkos to concentrate on that side of the road, rather than his own side of the road. I find however that Mr Witkos should not have allowed the greater potential for hazards on the Belfry side of the road to distract him from concentrating sufficiently on the road ahead on his side of the carriageway to notice obstructions in it and if he did not do so, then he breached his duty of care;
- (d) although I cannot say when precisely the Deceased will have become visible to Mr Witkos, I am satisfied, on the balance of probabilities, that he will have become visible to Mr Witkos a sufficient period of time before the Collision to mean that, if Mr Witkos was exercising reasonable care to look out for obstructions in the road ahead, on his side of the carriageway, he would have seen him. I find this because:
 - (i) if, as seems less likely, the Deceased was to the offside of the HGV, when first visible to Mr Witkos he will have had to walk from the offside in front of the HGV from right to left to get to the nearside corner of the HGV cab at Impact, immediately before the Impact. In that event Mr Witkos could not have failed to see the Deceased if he was keeping any sort of look out on the road ahead;
 - (ii) if on the other hand the Deceased was to the nearside of the HGV, the area of road and grass verge in which the Deceased would have been visible to Mr Witkos would be greater, a minimum of 41 m. Mr Boulton calculates, in his table in the joint report that it would take the HGV around 2.1 seconds to travel 41 m and on the balance of probabilities I find that the Deceased would have been visible to Mr Witkos for around 2 seconds because:
 - if he were in the carriageway 2.1 seconds before the Collision he would have been well within the area lit by the HGV's headlights;
 - if he was on the grass verge he would still have been within the area lit by the HGV's headlights because it is implausible, in my judgment that, in his intoxicated state the Deceased could, in less than 2.1 seconds have travelled from an area of the grass verge outside the range of the HGV's headlights and got down into the carriageway in sufficient time to Impact with the nearside corner of the cab;
 - although I have accepted that glare may have meant that Mr Witkos's eyes took a short period of time to adjust, Dr Ash did not suggest that the period of adjustment would take more than a fraction of a second; and
 - on the basis that the Deceased will have been visible to Mr Witkos for approximately 2 seconds prior to the Collision, he should, in my judgment, have seen the Deceased if he had been keeping a proper look out ahead.

WAS MR WITKOS'S BREACH OF DUTY A SUBSTANTIAL CAUSE OF THE COLLISION ?

171. Mr Boulton and Dr Ash agreed that, even if Mr Witkos had seen the Deceased, at the first opportunity, before the Collision, Mr Witkos would not have had sufficient time to avoid the Collision, merely by braking. However Mr Boulton suggests that Mr Witkos would have had time to steer the HGV to the right, in order to avoid the Impact with the Deceased. Dr Ash disagrees.

172. Mr Boulton provides, in the joint report, a table showing how long Mr Witkos would have had available to him to take evasive action, had he seen the Deceased prior to the Collision. The table shows the total time that Mr Witkos would have to react and complete evasive action, if the Deceased became visible to him, for the first time at 39 m, 45 m and 59 m. Mr Boulton then shows, in the table, what time would be left for Mr Witkos to take evasive action if Mr Witkos's theoretical PRT, from the Deceased becoming visible to him was 1, 1.5 and 2 seconds. Mr Boulton's table shows for example that, at the agreed speed of the HGV of 43.5 mph, based on a PRT of 1.5 seconds, Mr Witkos had the following times to take evasive action (according to when the Deceased first became visible to Mr Witkos): (a) .5 of a second at 39 m; (b) .8 of a second at 45 m; and (c) 1.5 seconds at 59 m. Mr Boulton says that Mr Witkos would only have to steer a metre to the right and it would be "highly probable", that he would have avoided the Collision by doing so. Dr Ash does not disagree with the calculations in Mr Boulton's table.

173. Dr Ash says, in the joint report:

- (a) Mr Boulton suggests a lower range of PRT than the Krauss and Muttart research suggests;
- (b) based upon Mr Boulton's table, only if Mr Witkos's PRT was 1 second and the Deceased became visible to him, for the first time, at 59 m, would Mr Witkos have as much as 2 seconds to take evasive action and a 1 second PRT is outside even the quickest of the PRT times suggested by the Krauss and Muttart research and is unrealistic, given the prevailing conditions;
- (c) 2 seconds or less would, in Dr Ash's opinion leave little time for Mr Witkos to steer in order to avoid the Impact; and
- (d) Mr Boulton has produced no calculation of how long it would take to steer to the right in order to avoid the Collision. Mr Witkos would have had to move the HGV sufficiently to the right for the rear of the HGV trailer (16.5 m long) to miss the Deceased and in Dr Ash's view the time left to Mr Witkos to steer the HGV, to avoid the Impact, had he seen the Deceased, would have been insufficient to enable this to be done.

174. Mr Boulton says:

- (a) the Krauss and Muttart research was looking at reaction times in cars, not HGVs;

- (b) the trailer of the HGV would clear the Deceased, if the cab did; and
- (c) if the court accepts that the headlights lit the road for 45 m and a PRT time of 1.6 seconds then, at 43.5 mph, the HGV would travel 31 m, in 1.6 seconds, leaving 14 m to steer to the right and avoid the Deceased.

175. In cross examination, Mr Boulton said:

- (a) Mr Witkos only had to steer slightly to the right to avoid the Deceased and not completely change lanes and so lateral acceleration calculations are not relevant to the manoeuvre that Mr Witkos had to perform;
- (b) he accepted that a PRT of 1 second would be extremely quick and said he was not suggesting that Mr Witkos's PRT would be 1 second, he was simply providing a calculation, in his table, of the time available to Mr Witkos to steer to avoid the Deceased, had his PRT been 1 second;
- (c) he agrees that, if Mr Witkos's PRT was 2 seconds, then, if the Deceased first became visible to Mr Witkos at 39 m, this would not leave Mr Witkos sufficient time to swerve to avoid the Deceased;
- (d) he could not give a minimum amount of time that it would take Mr Witkos to swerve to avoid the Deceased. At first Mr Boulton said that he thought that it was possible, if Mr Witkos had 0.3 of a second to avoid the Deceased, by swerving, that he could have done so (which would apply if Mr Witkos's PRT was 2 seconds and the Deceased was first visible to Mr Witkos at 45 m) but ultimately, Mr Boulton conceded that Mr Witkos would be unlikely to be able to avoid the Deceased if he only had 0.3 of a second to do so. Mr Boulton based his view on his experience as a HGV driver and instructor;
- (e) he does not consider that he did rely, in his primary report, on the Deceased moving right to left across the HGV, when expressing his opinion, in that report, that Mr Witkos would have been able to steer to avoid the Deceased; and
- (f) he accepts there are many variables that would determine whether or not Mr Witkos could have steered to avoid the Deceased, had he seen him, he cannot say whether all of those variables or sufficient of them would have definitely "lined up" to allow Mr Witkos to steer to avoid the Deceased.

176. Dr Ash said in cross examination:

- (a) she did not deal with, Mr Witkos's ability to steer to avoid the Deceased, in her primary report, because it was unclear where the Deceased was, immediately prior to the Collision;
- (b) the formula required to calculate lateral acceleration for lane changes does not literally mean that a full lane change must be achieved, merely that the whole of the vehicle must move out of the way of the hazard;
- (c) she accepted that she has no HGV driver qualifications but says she has driven HGVs occasionally;
- (d) she accepts that the trailer of the HGV would have tracked inside the cab, if the cab turned to the right and therefore, on the face of it, if the cab missed the Deceased, the trailer would have done so as well, but she said that the full length of the trailer would still have to be moved out of the way of the Deceased;

- (e) she calculates, using formulas contained in the *Jennings* paper, that, if Mr Witkos had 20 m left to steer around the Deceased, this would require a lateral acceleration value of 0.4 g which she considers is the limit of what would have been possible. If Mr Witkos in fact only had 0.3 seconds (equivalent to 6 m) to steer round the Deceased, that would require a lateral acceleration value of 0.78 g which she considers to be significantly more than would have been achievable; and
- (f) she accepts that *Jennings's* research related to cars and not HGVs but considers the calculations of lateral acceleration nonetheless to be applicable to the HGV.

The Claimant's case on Causation

177. Mr Marwick says that:

- (a) but for Mr Witkos's breach of duty, in failing to keep a proper look out, he would have seen the Deceased and been able to avoid the Collision by steering to the right;
- (b) it is reasonable to infer that, had Mr Witkos kept a proper look out of the road ahead:
 - (i) he would have seen the Deceased between 45 and 59 m ahead of the HGV;
 - (ii) Mr Boulton believes that at those distances, there was between 2.3 and 3 seconds for Mr Witkos to react to the presence of the Deceased by steering to the right;
 - (iii) Mr Witkos's theoretical PRT would have been 1 - 1.5 seconds, leaving 1 - 1.5 seconds for Mr Witkos to swerve to the right, which would have been sufficient time to swerve to the right and avoid the Deceased. In *Ehari* the Court of Appeal upheld the decision of the trial judge that, on the balance of probabilities, a collision would have been avoided by a swerve, where the driver had only 1 second to react and steer away from the collision, supporting the conclusion that 1 – 1.5 seconds would have been sufficient; and
 - (iv) on the balance of probabilities it is reasonable and safe to infer that Mr Witkos would have avoided the Collision, if he had been keeping a proper look out.

The Defendant's case on Causation

178. Mr Jones says that:

- (a) the reconstruction experts agree that, even if Mr Witkos had seen the Deceased at the earliest opportunity he would not have had time to brake in order to avoid the Collision. The Claimants therefore argue that Mr Witkos should have steered to the right to avoid the Collision;
- (b) Mr Boulton has carried out no calculation as to whether the time left to Mr Witkos to steer in order to avoid the Deceased, would have been sufficient, he could not say what the minimum time required for Mr Witkos to steer to avoid the Deceased was. He only described 0.3 seconds as a possibility. Dr Ash was clear that 0.3

seconds required a lateral acceleration of 0.78 g, which in her opinion was clearly not achievable;

- (c) if Mr Witkos had seen the Deceased, prior to the Collision, the court cannot be satisfied on the balance of probabilities that he would have had sufficient time to steer to the right to avoid the Collision:
- (i) Mr Boulton's opinion in the Joint Report was that "Mr Witkos could possibly have steered right and avoided Mr Jones, and if he saw him at the first opportunity, it is highly possible he could..". That equivocal language is consistent with the many variable factors involved and which, in Mr Jones's submission, would have prevented Mr Witkos from swerving to avoid the Deceased, if he had seen him; and
 - (ii) in contrast Dr Ash is clear, in her opinion, that Mr Witkos would not have had time to steer to avoid the Collision, which is consistent with the conclusion of PC Dumbleton in his Police Investigation Report, at paragraph 6.1 that: "Due to the unlit road and the limited cast of the vehicle's dipped headlights, the driver of the Mercedes would have had little advance warning to the hazard of the pedestrian in the carriageway and little time to react to or avoid the impact with the pedestrian.

Discussion and Decision on Causation

179. I have found that Mr Witkos breached the duty of care that he owed to keep a proper look out ahead on his side of the carriageway for obstructions and hazards. I now need to decide whether, if Mr Witkos had not breached his duty of care and had as a consequence seen the Deceased, prior to the Impact, the Claimants have proved, on the balance of probabilities, that Mr Witkos would have had sufficient time to steer to the right to avoid the Impact (Dr Ash and Mr Boulton agree that Mr Witkos could not have avoided the Collision by braking and Mr Witkos could not have steered to the left to avoid the Collision because the Impact was between the front nearside corner of the cab and the Deceased).

180. Dr Ash and Mr Boulton agree that there was sufficient room for Mr Witkos to steer sufficiently to the right to avoid the Impact without coming into conflict with any other road user. This is because the carriageway is three lanes wide at the point of Impact and there was no vehicle coming in the opposite direction at the time of Impact, which Mr Witkos might have come into conflict with by steering to the right to avoid the Collision. The question therefore is whether the Claimants have proved on the balance of probabilities, that Mr Witkos would have had sufficient time to avoid the Collision from the point in time at which he would have seen the Deceased, had he complied with his duty to keep a proper look out of the road ahead.

181. In concluding whether Mr Witkos could have avoided the Collision, if he had seen the Deceased ahead of the HGV, I will draw together the conclusions I have already reached as to: (a) when the Deceased ought to have become visible to Mr Witkos, in the lights of the HGV; (b) Mr Witkos's theoretical PRT, had he seen the Deceased before the Collision; (c) I will then apply those values to the table produced by Mr Boulton in the

joint report to arrive at an approximation, so far as I can, of the time that would have been available to Mr Witkos to steer the HGV so as to avoid the Collision; and (d) I will conclude whether the time available to Mr Witkos would have been sufficient, on the balance of probabilities, to enable Mr Witkos to steer the HGV so as to avoid the Collision.

182. I have found that the Deceased would have been visible to Mr Witkos (see paragraph **90** above): (a) 41 - 59 m ahead of the HGV if the Deceased was located broadly straight ahead and to the nearside of the HGV (on the nearside this visibility includes an area of approximately a car's width 41 - 59 m ahead and to the side of the cab); and (b) 28 - 44 m ahead of the HGV, if the Deceased was located broadly straight ahead and to the offside the HGV. I am unable to say whether the Deceased would have been located to the offside or the nearside of the HGV, when he first became visible to Mr Witkos. The Accident and Emergency experts agree that the Deceased was on the carriageway to the nearside of the HGV at Impact and immediately before the point of Impact, but they cannot say and neither can Dr Ash/Mr Boulton where the Deceased was before that and in particular when he first came within the beam of the headlights of the HGV and would have become visible to Mr Witkos.

183. I have found that Mr Witkos's theoretical PRT would have been in the range 2.1 - 2.81 seconds, from the moment that the Deceased became visible to Mr Witkos, but that I am unable to say where within that range (see paragraph **117**).

184. I have found that the distance that it would have taken Mr Witkos to steer to avoid the Deceased is in the range 20 – 32 m (see paragraph 124 above)

185. In my judgment, in order to prove on the balance of probabilities that Mr Witkos would have been able to avoid the Collision, had he complied with his duty of care, the Claimants would have to show that at the figures least favourable to the Claimants' case on causation, in the ranges I have identified, Mr Witkos would have been able to steer to avoid the Deceased, if he had complied with his duty of care to keep a proper look out ahead. I will start however, by considering whether, at the times and distances in the ranges that I have accepted which are most favourable to the Claimant's case on causation, Mr Witkos would have had time to steer to the right to avoid the Deceased if he had complied with his duty of care. If at those times and distances (most favourable to the Claimants) Mr Witkos would not have had time to steer to the right to avoid the Deceased, then it follows that the Claimants cannot establish, on the balance of probability, that Mr Witkos would have had time to avoid the Collision by steering to the right at the point in time at which he would have seen the Deceased, had he complied with his duty of care.

186. As to the times and distances within the ranges, which are most favourable to the Claimants:

- (a) the maximum distance at which the Deceased would have been visible to Mr Witkos is 59 m (see paragraph 182 above);

- (b) Mr Witkos's minimum theoretical PRT is 2.1 seconds (see paragraph 183 above); and
- (c) the minimum distance that it would have taken Mr Witkos to steer to the right to avoid the Deceased would have been 20 m (see paragraph 124 above).

187. The table produced by Mr Boulton in the joint report of Dr Ash and Mr Boulton shows that, at 43.5 mph it would have taken the HGV 3 seconds to travel 59 m. Deducting the minimum PRT of 2.1 seconds from the 3 seconds leaves Mr Witkos .9 of a second to steer to avoid the Deceased.

188. On the basis that it took the HGV 3 seconds to travel 59 m it would take HGV slightly longer than 1 second to travel 20 m. It follows that, even applying the figures in each range which are most favourable to the Claimants, Mr Witkos would not have had sufficient time to steer to the right to avoid the Deceased.

189. Whilst taking the figures in the range most favourable to the Claimants suggests that Mr Witkos would very nearly have had sufficient time to steer to the right to avoid the Collision, had he complied with his duty of care, applying the mid-point in each range would leave Mr Witkos almost no time to steer to avoid the Deceased and certainly insufficient time, in my judgment:

- (a) the midpoint of the range of distances at which the Deceased would have first been visible to Mr Witkos is 50 m (the midpoint of 41 - 59 m);
- (b) the midpoint of the range of Mr Witkos's theoretical PRT would be 2.45 seconds (the midpoint of 2.1 - 2.81 seconds); and
- (c) the midpoint of the range of distances required for Mr Witkos to steer to the right to avoid the Impact would be 26 m (the midpoint of 20 - 32 m).

190. Applying the figures in paragraph 189: (a) Mr Witkos would travel 50 m in approximately 2.6 seconds; (b) Mr Witkos's theoretical PRT would be 2.45 seconds; (c) this would leave Mr Witkos .15 of a second to steer to the right to avoid the Deceased; and (d) Mr Witkos would require 26 m to steer to avoid the Deceased which would take approximately 1.5 seconds, nearly 1.5 seconds more than he would have had. Applying the figures in each of the three ranges which are most favourable (or even slightly more favourable) to the Defendants' case would result in Mr Witkos having no time at all to avoid the Collision.

191. The Claimants have not therefore proved, on the balance of probabilities, that Mr Witkos would have had time to avoid the Collision, had he complied with his duty of care and the claim fails on that basis.