



Neutral Citation Number: [2023] EWHC 1193 (KB)

Case No: QB-2020-000697

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19 May 2023

**Before:**

**JONATHAN GLASSON KC**  
**(sitting as a Deputy Judge of the High Court)**

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**Between:**

**MS DEBORAH WOOD**  
**(Widow and dependent of Mr Alain Schmit,**  
**deceased)**

**Claimant**

**- and -**

**FOYER ASSURANCES SA**  
**(a company incorporated in accordance with the law**  
**of the Grand Duchy of Luxembourg)**

**Defendant**

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**Mr Matthew Chapman KC (instructed by Irwin Mitchell) for the Claimant**  
**Ms Lucy Wyles KC (instructed by Weightmans) for the Defendant**

Hearing dates: 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> April 2023  
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**Approved Judgment**

**This judgment was handed down remotely at 10.30am on 19<sup>th</sup> May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.**

## **JONATHAN GLASSON KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT:**

1. The Claimant has brought a claim for damages arising from a road traffic collision which occurred on the Avenue de Luxembourg in the Arlon area in Belgium at about 1825 on 21<sup>st</sup> February 2015. The Claimant is the widow and dependent of the late Mr Alain Schmit, who, at the time of the accident, was driving an Audi car registration no FN5668 (“*the Audi*”). Mr Schmit was aged 53 at the date of the collision. His eighteen-year-old daughter, Ms Amandine Schmit (“*Amandine*”), was a passenger in the Audi, and she was sitting in the front passenger seat at the time of the collision. Tragically, both Amandine and Mr Schmit were fatally injured in the collision.
2. The collision occurred at the intersection between Avenue de Luxembourg and the Chemin de Déle. Mr David Nunes-Azevedo was driving a Mitsubishi Evo registration EVO400 (“*the Mitsubishi*”) which was insured by the Defendant. The driver of the Audi intended to travel west and to go straight over the junction between the Avenue de Luxembourg and the Chemin de Déle. When the Audi pulled across the junction it collided with the Mitsubishi. Annexed to the judgment are two photographs from the expert reports in this case. The photos will help the reader to understand the layout of the junction.
3. The claim was heard over three days and in that time I heard evidence from the Claimant, the parties’ accident reconstruction experts and their respective experts in Belgian law. The Defendant’s experts gave evidence by video link from Belgium whilst the Claimant’s experts gave evidence in person. Neither party called evidence from any individual who could give direct evidence of the collision.
4. At the end of the trial, the parties submitted written notes and they also made oral closing submissions. I am grateful to both counsel for their written and oral submissions.
5. I was presented with a significant amount of documentary material. The trial bundles ran to 4 volumes with an additional authorities bundle. I have considered all of the evidence so far as is relevant and set out in this judgment such of the evidence as is necessary so as to understand my reasons for determining the claim.
6. The judgment is divided into the following sections:
  - a) The applicable law;
  - b) The parties’ pleaded cases;

- c) The Belgian proceedings;
- d) The factual evidence concerning the collision;
- e) The accident reconstruction evidence;
- f) The Belgian law relevant to the claim;
- g) My findings of fact concerning the collision;
- h) My findings on liability and contributory negligence;
- i) The claim for damages pursuant to section 29bis of the Law of 21 November 1989; and
- j) My assessment of damages.

**A) APPLICABLE LAW**

7. This Court has jurisdiction over the claim brought by the Claimant pursuant to articles 11 and 13 of the recast Brussels I Regulation (Regulation No 1215/2012). Under Article 4.1 of the Rome II Regulation on applicable law in tort (Regulation 864/2007), Belgian law applies to the Claimant's claim. Accordingly, Belgian law determines questions of liability, contributory negligence, causation, and the existence, the nature and the assessment of the damages to which the Claimant might be entitled (Article 15(c) of the Rome II Regulation).
8. The Rome II Regulation reserves, by virtue of Article 1(3), matters of procedure and evidence to the law of the forum Court. Accordingly, English law governs matters of procedure and evidence. The issue of the burden of proof is governed by Belgian law (pursuant to Article 22 of Rome II), however the standard of proof is governed by English law, pursuant to Article 1(3) of Rome II (see *Marshall v MIB* [2015] EWHC 3421(QB) per Dingemans J, as he then was, at paras. 24-25).
9. Material propositions of foreign law must be proved by a duly qualified expert in the law of the foreign country and the burden lies on the party seeking to establish that proposition of law: *A/S Tallinna Laevauhisus v. Estonian State Steamship Line* [1947] 80 Lloyd's Rep 99. The task of such an expert is clearly set out in that case: "to convey to the English Court the meaning and effect which a Court of the foreign country would attribute to if it applied correctly the law of that country to the questions under investigation".

**B) THE PARTIES' PLEADED CASES**

10. In paragraph 2 of her Amended Particulars of Claim the Claimant alleged that the collision occurred in the following way:

*“At all material times on 21 February 2015 and at around 1825 hours (local time) Mr Alain Schmit, deceased, was driving a dark blue Audi A6 motor vehicle, registration mark FN5668 (hereafter, “the Audi”), along the Chemin de Déle from Clairefontaine in the direction of Birel in Belgium. Mr Schmit’s daughter, Amandine Schmit (then aged 18 years) was a front seat passenger in the Audi (there were no other occupants of the same). Mr and Ms Schmit both wore their seat belts and, at all material times, the headlights of the Audi were appropriately set to dipped beams. The Audi reached the cross roads junction with the Avenue de Luxembourg and came to a halt where there was a STOP sign (in area 6700 Arlon). Mr Schmit intended to proceed straight across the junction. The Audi was struck by a Mitsubishi Evo vehicle, bearing registration mark EVO400 (hereafter, “the Mitsubishi”), which approached at speed from the right.”*

11. Save that it was denied that Mr Nunes-Azevedo was driving at speed the Defendant admitted paragraph 2 of the Amended Particulars of Claim.
12. The Claimant alleged that the accident was caused by the negligence or fault of Mr Nunes-Azevedo which she particularised as:

*“1. Failing to keep any or any proper lookout;  
2. Failing to heed the Audi;  
3. Driving too fast;  
4. Exceeding the speed limit;  
5. Failing to concentrate;  
6. Failing to stop at the crossroads junction and to ensure that it was safe to proceed (before doing so);  
7. Losing control of the direction and/or speed of Mitsubishi;  
8. Failing so to manage and control the Mitsubishi as to avoid the accident;  
9. Racing another vehicle at speed;  
10. Failing in all the circumstances to exercise reasonable care and skill in driving the Mitsubishi so as to ensure the reasonable safety of Mr Schmit, the deceased.”*

13. The Defendant denied that the driver of the Mitsubishi was negligent:

*“9. It is denied that the accident was caused by the negligence or fault of David Nunes-Azevedo as pleaded in paragraph 9 of the particulars of claim or*

*at all. It is the defendant's case that David Nunes-Azevedo was returning home to Luxembourg with his sister's boyfriend in the passenger seat. The Mitsubishi was a right hand drive car. He was following a car which indicated, braked, and turned right at the crossroads of the Avenue de Luxembourg and Chemin de Déle. He braked and moved to the left to overtake the turning car when the Audi moved out across his path. He tried to avoid the collision, but was unable to do so.*

*10. It is the defendant's case that Alain Schmit had approached the cross roads along the Chemin de Déle. There was an unbroken white line and a STOP sign which meant he had to stop and make sure the way was clear of traffic before crossing the main road. There is evidence from his phone records that he was using the hands free phone in his car for the period of 8 minutes leading up to the collision. His view to the right from the STOP white line was obstructed by signage and limited to 75 – 80 m. He moved away from the unbroken white line into the path of the Mitsubishi.*

*11. The said collision was caused by the negligence and fault of Alain Schmit.*

#### *PARTICULARS OF NEGLIGENCE / FAULT*

- (a) Failing to keep any or any lookout;*
- (b) Using his mobile phone in the car when it was unsafe to do so;*
- (c) Failing to concentrate on the road and the road conditions;*
- (d) Failing to keep any or any proper lookout;*
- (e) Pulling away from the STOP markings and crossing Avenue de Luxembourg when it was unsafe to do so;*
- (f) Failing to heed the presence of the Mitsubishi;*
- (g) Failing in all the circumstances to exercise reasonable care and skill in driving the Audi so as to ensure the safety of his passenger and other road users."*

14. The Defendant also alleged that the question of liability had already been determined by court proceedings in Belgium. Indeed, the Defendant issued an application for strike out /summary judgment which led to the claim being stayed pending the hearing of that application. In the event that application, which had been listed to be heard on 14<sup>th</sup> April 2022, was withdrawn very shortly before that hearing date and the stay was lifted on 13<sup>th</sup> April 2022.

### C) THE BELGIAN PROCEEDINGS

15. The collision was immediately investigated by the Belgian police. At 1925 on 21<sup>st</sup> February 2015 the public prosecutor appointed Mr Benoit Quevrin to investigate the collision in the context of a case against Mr Nunes Azevedo.
16. Mr Quevrin finalised his report on 28<sup>th</sup> July 2016. In relation to the respective speed of the vehicles he concluded that *“As far as the NUNES AZEVEDO vehicle is concerned, both at the time of collision as well as set back from the scene of the accident, it was going at between 92 and 112 km/h. [and] [t]hat the SCHMIT vehicle, at the time of collision, was travelling at a speed of between 15 and 18 km/h.”* A key conclusion of his report was: *“[i]n the knowledge that the SCHMIT driver, in this stopping position, had a field of visibility in the direction of Arlon of around 250 metres, it is clear that the NUNES AZEVEDO vehicle was perfectly visible by the former when it actually turned into Avenue de Luxembourg. We should point out that at the time of the restarting of the SCHMIT vehicle, the NUNES AZEVEDO driver had no reason to react at the time as the SCHMIT vehicle did not constitute an obstacle to its normal progression and he could still come to a standstill in the third traffic lane. In our opinion, the SCHMIT vehicle could only be validly seen by the NUNES AZEVEDO driver as an obstacle when the latter moved to the central lane and observing that he was continuing his journey. When exactly? Hard to determine, depending on each person’s perception of the danger. However, in view of the sideways position of the NUNES AZEVEDO vehicle at the time of impact, it is clear that the latter had realised, at the last second and when he was relatively close, that the SCHMIT vehicle was going to be an obstacle to his normal progression.”*
17. The Claimant was joined as a party to the proceedings before the investigating judge. On 5<sup>th</sup> October 2016 the public prosecutor filed his report in which he concluded that no offence had been committed by Mr Nunes-Azevedo.
18. The pre-trial division of the Luxembourg Court of First Instance decided not to prosecute Mr Nunes-Azevedo on 4<sup>th</sup> November 2016. The Claimant did not file an appeal against that ruling.
19. Mr Nunes-Azevedo subsequently brought a claim for damages against the insurer for Mr Schmit, La Luxembourgeoise. The claim was dealt with at a hearing on 4<sup>th</sup> October 2018 before the Luxembourg Police Court, Arlon division, on the basis of submissions from the parties. No oral evidence was heard. The court upheld Mr Nunes-Azevedo’s claim on the basis that Mr Schmit was liable for the collision. The court stated:

*“On 04 November 2016, the Criminal Pre-Trial Chamber, adopting the terms of the prosecutor’s indictment, decided that there were no grounds for prosecution.*

*Mr NUNES AZVEDO is currently seeking restitution for his harm suffered, invoking the responsibility of the driver insured by SA LA LUXEMBOURGEOISE,*

*Whilst it is true that the judgment in the Pre-Trial Chamber does not have the authority of res judicata either in the civil case or against SA LA LUXEMBOURGEOISE, nevertheless the fact remains that the judgment is a factual element among others on which the judge called to rule in another proceeding may base their ruling.*

*In this case the court found that*

*- the expert appointed by the prosecutors’ office submitted a detailed report in which it is clear that Mr NUNES AZEVEDO did not commit any violations in the context of the accident. It should be noted that Mr NUNES AZEVEDO had the right of way, was driving within the speed limit at the place of the accident, made an attempt to avoid the accident, was not under the influence of alcohol and was not on his mobile telephone at the time of the accident. There are no elements to dispute the conclusions of this report.*

*-SA LUXEMBOURGEOISE wrongly maintain that he was driving at an excessive, inappropriate speed. The report found to the contrary.*

*It should be noted upon reading these objective elements that it was the driver insured by SA LA LUXEMBOURGEOISE who approached the intersection carelessly.*

*Consequently, the claim should be ruled admissible and well-founded.”*

20. La Luxembourgeoise filed an appeal against that judgment. The Luxembourg Court of First Instance, Arlon division, upheld the judgment and rejected the appeal in a judgment handed down on 12<sup>th</sup> November 2019. The experts on Belgian law told me in their oral evidence that the appeal hearing was a rehearing rather than a review of the decision below.
21. At the appeal, the Luxembourg Court of First Instance considered the expert report of Mr Quevrin as well as the expert reports of Mr Somja (instructed for Mr Nunes-Azevedo) and Mr Gruslin (instructed by Mr Schmit’s insurer). Having analysed the competing arguments of the experts the Court concluded:

*“No element makes sufficiently likely the existence of a passing manoeuvre by the driver NUNES AZEVEDO. The fact that he had moved slightly to the left because he was following a vehicle turning right (and which kept to his right) ...does not have a causal link to the accident, which occurred solely because the SCHMIT vehicle suddenly emerged onto the main roadway.*

*The criminal case established that David NUNES AZEVEDO did not commit any violation having a causal link with the accident. It is not credible that his speed contributed to the occurrence of the accident or aggravated its consequences, since the prosecutor’s office expert mentioned a low range of 92 km/h, i.e. just over 2 km/h over the speed limit. The police investigations demonstrated that, at the moment of the accident, he was not under the influence of any prohibited substances and he was not using his telephone. He had right of way. Considering the speed (see above) and the visibility that the driver insured by SA LA LUXEMBOURGEOISE had (approximately 250 metres), the NUNES AZEVEDO vehicle could not represent an unforeseeable obstacle.*

*The expert QUEVRIN appointed by the prosecutor’s office specified that “the NUNES AZEVEDO vehicle was completely visible and foreseeable for (the SCHMIT vehicle) when it actually entered the Avenue du Luxembourg. (...) When the SCHMIT vehicle began to move, the driver NUNES AZEVEDO had no reason to react at that instant since the SCHMIT vehicle did not represent a hindrance to his normal progression and could still stop in the third traffic lane. (...) The SCHMIT vehicle could not be legitimately perceived by the driver NUNES AZEVEDO as a hindrance until the latter was in the central lane and observing that the latter was continuing its trajectory. (...) Considering the oblique position of the NUNES AZEVEDO vehicle at the time of impact, it is clear that the latter realized in the final moments and when he was at a relatively close distance, that the SCHMIT vehicle was going to be a hindrance to his normal progression (...)”.*

*It follows from these elements that David NUNES AZEVEDO cannot be accused of having neglected to use extra caution when approaching the intersection, which he approached travelling normally. Even accepting the existence of such an error, David NUNES AZEVEDO could not expect the SCHMIT vehicle to appear suddenly in front of him. The latter element is what made the accident inevitable and it would have occurred with the same severity even if David NUNES AZEVEDO had been a bit more cautious.*

*All of these considerations prove that the sole fault for the accident results from the violation, by Alain SCHMIT, of his obligation to yield the right of way to the NUNES AZEVEDO vehicle.*



*It is neither demonstrated nor likely that the accident occurred due to an error by David NUNES AZEVEDO or that his behaviour contributed to aggravating the consequences of the accident.*

*Therefore it is appropriate to uphold the disputed judgement and refer the case back to the first judge in accordance with Article 1068 of the Judicial Code. SA LA LUXEMBOURGEOISE shall be ordered to pay the costs of the appeal proceedings, i.e., €1,440 for procedural costs.”*

#### **D) THE FACTUAL EVIDENCE**

22. Neither party called any witnesses who could give first hand evidence of the accident.
23. The Claimant was called and cross-examined by the Defendant, but her evidence was limited to what she was told at the accident scene after the collision occurred. The Claimant was asked about the reference in her statement to being told that at the time of the accident Amandine was speaking with her mother, Delphine, on a hands-free phone.
24. The Claimant was cross-examined about the reference in her witness statement to being told by two members of Mr Schmit’s family, who worked for the Luxembourg police, that “*the accident was David Nunez’s fault*”. I attach no weight to that comment particularly as it was the Belgium police who investigated.
25. The Defendant relied upon witness summaries taken from the police interviews pursuant to CPR 32.9.
26. The most important of those was the summary of the driver of the Mitsubishi, Mr David Nunes-Azevedo, who at the time of the collision was aged 21. He said: “*[f]ifty metres away I saw that a vehicle had stopped at the crossroads of the rue de Clairefontaine. The vehicle that I was following turned right at the crossroads (Clairefontaine and the bridge going towards Messancy). The latter kept to the right. He braked. I moved slightly to the left then I was surprised by the vehicle that was stopped on the rue de Clairefontaine. It had actually started moving. When I saw it, I swerved to the left to try to avoid it, which I didn’t do. I crashed into it.*”
27. The passenger in the Mitsubishi, Mr Bruno Almeida, said:  
  
*“We then got back on the road to Luxembourg and got to around the bridge where we crashed into an Audi Break (sic) that cut in on us when it came from*

*the left and intersected all the traffic lanes. David tried to avoid the vehicle by turning to the left but he couldn't avoid the collision. We ended up on the other side in a field.... At the time of the accident, we were both wearing our seatbelts. I don't know what speed David was going at the time of the collision. .... In reply to your question about what lane David was driving on at the time of the accident, I can tell you that he was on the right-hand side. He doesn't drive fast as his car is limited to 160 km/h and he only had 3 litres of fuel left to do 20 km. I can tell you for definite that there was not much fuel left as David had told me when we started the journey that it was almost empty”.*

28. The witness summary for the driver of the vehicle that was behind the Audi, Mr Luigi Saracino, states:

*“Around 6:30 pm today, I was driving on Rue de Clairefontaine in Arlon and I was behind an Audi. I was more or less 30 metres from the vehicle when I saw it stop at the stop sign, the junction at Route de Luxembourg and head towards the pont du Birel (Birel bridge) (I can't give any further detail on the direction as I don't remember having seen an indicator). I was more or less ten metres from the stop sign when the collision between the Audi and the white car took place. I was a little further downhill because Rue de Clairefontaine is on a slight hill, I don't really know how to explain the exact positioning of the vehicles on the traffic lanes but I can say that the Audi was ready to head towards the Birel bridge and the white car was coming from the Sptez crossroads bound for Luxembourg. The white car hit the Audi on the right-hand side which sent the Audi in the opposite direction and the white car continued its course into the field, on the opposite side. I would like to state that when the Audi started up again at the stop sign and was on the Route de Luxembourg, it hit the brakes (I heard the sound) probably to avoid the white car, but it was all in vain as the collision was unavoidable. To answer your question about whether or not the white car was being followed by another vehicle and it continuing on its way towards Luxembourg after the collision, I must say that I do not know the answer. I didn't see any other vehicle, I was too concerned with the accident.”*

29. The witness summary of Mr Christophe Wauthier stated:

*“Around 6:30 pm I was coming from my house in Waltzing and heading to the “Délit Traiteur” shop. To do so, I took Route de Luxembourg. I took a turnoff at the pont du Birel (Birel bridge) and as I got on to this road, I was surprised to hear the muffled sound of a collision. I stopped and saw that an accident between two vehicles had just happened on Route de Luxembourg-Rue de Clairefontaine. When I got out of my car, I called 112 right away.*

*Several people were already at the scene near the Japanese brand white car and I went straight over to the other vehicle, namely an Audi. I told 112 about the status of the casualties in the Audi and the other casualties in the white car, too. There was a man around fifty years old in the Audi and beside him a young girl who was clearly unconscious. I realised that there was someone on the other end of their hands free kit, I could hear a woman who was continuously asking what had just happened. I spoke to this woman to reassure her.”*

30. The final witness summary served by the Defendant was from an individual called Mr René Weyland. The Defendant expressly disavowed Mr Weyland’s evidence. Although in the Claimant’s trial skeleton argument his evidence was relied upon, by the time of closing submissions Mr Chapman KC resiled from any reliance on Mr Weyland’s evidence. Mr Weyland had said that he had seen two vehicles “*driving at high speed above the authorised speed limit.*” His evidence that the two cars were “*racing*” was investigated by the police who examined CCTV from the evening and could find no corroboration for it. Given that fact and the parties’ stance in relation to Mr Weyland’s evidence I place no weight on it.

#### **E) THE ACCIDENT RECONSTRUCTION EVIDENCE**

31. The Claimant relied upon an expert reconstruction report from Mr Mark Crouch, whilst the Defendant relied upon an expert reconstruction report from Mr Philippe Somja (who had also been instructed in the Belgian proceedings). Both experts produced site plans and photos to help illustrate their reports.
32. The experts were called to give evidence before me, and their evidence was restricted to the points of disagreement following their joint statement.
33. Neither expert visited the scene, and each produced their reports on the basis of the documentary material from the police investigation. As Mr Crouch explained to me, the experts were doing the best they could “*on limited evidence*”.
34. The limitations of their evidence as well as the extent of their agreement was explained in the experts’ Joint Statement:

*“3.1 Both experts are working on second (and third) generation copies of the evidence captured at the collision scene. This limits the degree of analysis possible.*

3.2. *Using this limited evidence, the experts have produced simulations with PC-Crash, a specialist forensic simulation software programme.*

3.3. *This software considers the impact dynamic and post impact movement of the vehicles. This software is sensitive to changes in the input values, and whilst the experts have adopted the same methodology to reconstruct the collision using this software there are some differences in the results obtained.*

3.4. *These differences are not vast and are limited to how far into the turning lane the impact took place and whether or not the Audi had likely come to rest at impact. It does not lead to a material disagreement with respect to vision or avoidance.”*

35. In their Joint Statement, the experts agreed that the Mitsubishi was out of Mr Schmit’s view when he moved from the give way lines on the Chemin de Déle. However, when the “*Audi reached the cycle lane, the Mitsubishi would have been in his field of view. It will remain a matter for the Court to decide when Mr Schmit should have looked*” (emphasis as per Joint Statement).
36. Both experts in the trial before me agreed that the Mitsubishi was speeding. The prosecution expert in the Belgian proceedings, Mr Quevrin, had estimated the Mitsubishi’s speed at impact as being between 92-112 kilometres per hour (“kph”), i.e., at the lower end of the range only just above the applicable speed limit. As noted above, that was a finding that the Belgian courts placed significant reliance upon in their judgments. By contrast, both experts before me were of the view that the Mitsubishi was significantly speeding – Mr Crouch estimated its speed at impact to be 112 kph whilst Mr Somja estimated its speed at impact as being 105 kph.
37. Mr Crouch calculated that the Mitsubishi’s speed at approach would have been between 124 kph and 132 kph if there had been no pre-impact braking. Mr Somja agreed with that calculation but said that it was “*an unproven estimate*” as it depended on whether or not the Court concluded that there had been pre-impact braking by the Mitsubishi.
38. As to the speed of the Audi, there was a difference of opinion. Mr Crouch estimated the speed at impact of the Audi as being 0kph whilst Mr Somja estimated the speed as being 15kph.
39. The experts explained in their Joint Statement that the time that the Audi took to move from the junction was directly related to the speed at which the vehicle was travelling at impact. Mr Crouch said that the time between the Audi moving off from rest to the point of impact was “*at a minimum approximately 4.2s (or longer if the Audi was stationary for any notable*

*period of time, or if accelerated more gently).” Mr Somja did not consider this as part of his original analysis but said in the Joint Report that he was “of the view that the Audi took 6.0s to move from the give way line to the point of impact.” He added that “the time is theoretical as there is no certainty about the manoeuvre.”*

40. In relation to the avoidance of the collision the experts concluded:

*“4.28. Had Mr Schmit waited at the Give Way line then this collision would have been avoided, however, it is important to remember that at the point he began moving from the give way line, the Mitsubishi was out of his view*

*4.29 Had he continued his view as he reached the cycle lane, then there would have been a view of the Mitsubishi approaching in excess of the posted speed limit.*

*4.30 Mr Schmit moved into the left turn lane, but without the Audi encroaching into the southbound lane. Therefore, had Mr Nunes-Azevedo not swerved to the left, the collision would have been avoided, as the Mitsubishi would have passed ahead of the Audi (regardless of whether the Audi is found to have been stationary or not).*

*4.31 Had Mr Nunes-Azevedo been travelling at the posted speed limit, he would have been able to stop behind the turning car ahead of him, without the need to swerve – thereby avoiding the collision”.*

#### **F) THE EXPERT EVIDENCE AS TO THE RELEVANT BELGIAN LAW**

41. The Claimant relied upon the expert evidence of Mr Paul-Henry Delvaux whilst the Defendant relied upon the expert evidence of Mrs Els Koninckx. Both experts gave oral evidence and each of them was impressive. Though Mr Delvaux tended to approach matters from the perspective of a claimant lawyer whilst Mrs Koninckx came at matters from a defendant perspective, each were clearly aware of their duty to the Court and conscientiously strove to be objective. Consequently, there was a substantial measure of agreement between the experts as to the Belgian law in relation to liability. Insofar as there was disagreement between them as to the assessment of damages then I analyse those below.

*The legal basis for a claim in tort*

42. The legal basis to bring a claim based in tort in Belgian law is found in Sections 1382 – 1383 of the Belgian Civil Code. Section 1382 provides that “*Any human act, which causes damage to another, obliges the one by whose*

*fault it occurred to compensate it*". Section 1383 provides that *"Everyone is responsible for the damage he or she has caused by his act, but also by his negligence or imprudence"*.

43. The standard of care is that of a *"normally prudent and diligent person"* in the relevant circumstances.
44. Under section 8.4 of the Belgian Civil Code *"a person who wishes to assert a claim in court must prove the legal acts or facts that support his claim"*. There are exceptional circumstances that permit a court to disapply that rule where its application would be *"manifestly unreasonable"*. Neither party sought to suggest that such circumstances existed here.
45. The experts disagreed as to whether sections 8.5 and 8.6 of the Belgian Civil Code were relevant. Those provisions state that *"evidence must be produced with a reasonable degree of certainty"*. Mrs Koninckx considered that those provisions were irrelevant as questions as to the standard of proof were for the forum court under article 1(3) of the Rome II regulation. I concur with that opinion.
46. The violation of a provision of Belgian traffic provision will be considered a fault which if causative may give rise to a liability finding.

*The Belgian Traffic Code Provisions*

47. The experts did not agree on all of the potentially relevant Belgian Road Traffic Code provisions. They were however agreed that the following were relevant:
48. Section 10.1. of the Royal Decree on the general regulation of the traffic road police (the *"Belgian Traffic Code"*) provides:
  - "1. Every driver must regulate their speed as required because of the presence of other road users and in particular the most vulnerable ones, the climatic conditions, the layout of places, their congestion, the density of traffic, the field of vision, the state of the road, the condition and the load of his vehicle; his speed must not be a cause of accident or an inconvenience to the traffic.*
  - 2. The driver must, taking into account his speed, maintain a sufficient safety distance between his vehicle and the one in front of him.*
  - 3. The driver must in all circumstances be able to stop in front of a foreseeable obstacle"*
49. Section 12.2 of the Belgian Traffic Code provides *"The driver approaching a crossroads should be twice as cautious to avoid an accident."*

50. Section 12.3.1 subparagraph 2 provides: *“However, the driver must yield the right of way to any other driver circulating on the public road or the roadway which he is approaching : (a) when entering a highway or roadway provided with a B 1 signal (pointed triangle) or a B5 sign (stop) (b) when entering from a dirt road or footpath onto a public road with a roadway.”*
51. Section 12.4 of the Belgian Traffic Code provides: *“A driver who wishes to perform a manoeuvre must give way to other road users. (Manoeuvres include changing lanes, crossing the carriageway, (...) leaving or entering a parking space, leaving a neighbouring property, making a U-turn or reversing (...).”*
52. Section 12.5 of the Belgian Traffic Code provides: *“A driver who has to give way may only proceed if he can do so without risk of accident, taking into account the position of other road users, their speed and their distance.”*
53. Section 24 of the Traffic Road Code which provides that:
- “It is forbidden to stop or park a vehicle in any place where it is clearly likely to constitute a danger to other road users or to cause them unnecessary inconvenience, in particular:*
- 1° [1 without prejudice to Section 23.4,] on pavements and, in built-up areas, on projecting shoulders, unless local regulations apply*
- 2° on cycle paths (...) (and less than 5 metres from the point where cyclists and riders of two-wheeled mopeds are obliged to leave the cycle track to travel on the roadway or to leave the roadway to travel on the cycle track)*
- 3° on level crossings;*
- 4° (on pedestrian crossings, on crossings for cyclists and riders of two-wheeled mopeds and on the roadway within 5 metres of these crossings) (...)”*

(Emphasis added)

54. As to section 24 of the Belgian Traffic Code, Mr Delvaux stated in his report that he had found no *“case-law on the specific case of cars having to stop on a cycle path in order to get a better visibility on a crossroad”*. When I asked him whether a Belgian court would conclude that in the circumstances of the collision it would expect a prudent driver to stop in the cycle path so as to obtain a better view, he was certain that that would be a Belgian court’s view.
- How would a Belgian court determine liability in this case?*
55. The experts agreed that a Belgian court would start its analysis by looking at the position of the driver with priority – i.e., the Mitsubishi. They also agreed that the *“obligation to yield the right of way applies generally for so long as the driving manoeuvre lasts and is unrelated to the driver with priority*

*observing traffic regulations. But this does not exclude the possibility that the driver with priority might commit an error that could interfere with the normal expectations of the driver who has to yield the right of way” (see Mrs Koninckx’s report at para 3.1 and the cases cited there).*

56. Although the obligation to yield to the priority driver was the starting point and a factor of importance throughout the experts agreed that a Belgian court would look at all of the circumstances of the accident in issue.
57. The experts also agreed that “[i]n a situation in which the excessive speed of the driver with priority constitutes a case of force majeure for the driver who has to yield the right of way and whose normal expectations are thus interfered with, the obligation to yield the right of way cannot be fulfilled because the driver who has to yield the right of way is placed before an unforeseeable circumstance” (para 3.1 of Mrs Koninckx report).
58. Where however the experts disagreed was the question as to whether the arrival of the vehicle with priority had to be “*totally unforeseeable*”. Mrs Koninckx was of that view, but Mr Delvaux was of the opinion that a Belgian court would take a more nuanced view and not rigidly apply a standard of the arrival being totally unforeseen.

#### *Causation*

59. The experts agreed that in order to consider someone negligent “*his fault has to be in causal link with the damage, so that the harm, as it specifically occurred, would not have occurred, or not to the same extent, without the fault.*” However, whilst the experts agreed on this principle there was disagreement as to whether the causal link had to be “*certain*”.
60. According to Mrs Koninckx, the Mitsubishi could only be held liable if its speed had “*completely caught Mr. Schmit off guard and had thus been an unforeseeable obstacle*”. Mr Delvaux did not agree and emphasised that if the court considered that the Mitsubishi committed a fault which was “*in causal link with the accident*” then the driver of the Mitsubishi would be liable for the accident. The same he said applied to the Audi: if the judge considered that the driver of the Audi committed a fault that was causally linked with the accident then he could also be considered liable for the accident and if the court considered that they both committed a fault that led to the accident then there would be shared liability.
61. Mr Delvaux also relied on section 8.5 of the Belgian Civil Code (referred to above) which he said meant that the causal link between the fault and damage must be of a “*reasonable degree of certainty*”. As I have said earlier, Mrs Koninckx disagreed and stated that that provision was not applicable.



*Contributory negligence*

62. The experts agreed as to the approach taken by Belgian courts to claims for contributory negligence:

*“The experts agree that contributory negligence exists in Belgian law and that this shared liability means that the ‘victim’ of the incident has contributed to the damage, without being the exclusive cause of this damage, by himself/herself committing a fault against the Defendant, that contributed or worsened the damage. In case of shared liability, each party bears a part of compensation that is proportionate to their share of liability in the incident. This is determined by the judge based on his or her assessment of the case.”*

*The decisions of the Belgian courts in relation to the collision*

63. At trial, it was common ground between the parties that the Belgian judgments set out above were not binding on this Court. Indeed, the fact that those judgments do not have the effect of *res judicata* is evident from the terms of the judgments themselves, see above the citation at paragraph 19.
64. The experts agreed that the judgments had “*evidentiary value*” and created “*a rebuttable presumption but the claimant can bring evidence before the English court that counters the previous decisions*”.

**H) MY FINDINGS OF FACT**

65. On the basis of the witness summaries and the accident reconstruction expert evidence I am able to make a number of findings of fact. I make those findings on the balance of probabilities – the standard of proof being that of the forum court.
66. I accept the evidence of Mr Nunes-Azevedo and Mr Saracino that the Audi stopped at the “STOP” sign at the junction between the Avenue de Luxembourg and the Chemin de Déle. The agreed expert evidence, which I accept, was that at that point the Mitsubishi could not have been seen by the driver of the Audi.
67. Amandine, sat in the front passenger seat of the Audi, was speaking on the handsfree phone before the collision. There is no evidence upon which I can conclude that Mr Schmit was speaking on the handsfree phone “*when unsafe to do so*”, as alleged by the Defendant in its Particulars of Negligence/Fault (or indeed speaking on the phone at all).

68. I find that the Audi did not stop in the cycle lane. The agreed expert evidence, which I accept, was that the Mitsubishi would have been visible to the Audi had it stopped in the cycle lane. I also accept Mr Quevrin's evidence (relied upon by both parties in this regard) that when he viewed the site in daytime, he observed that drivers stopped on the cycle path in order to gain maximum visibility in the direction of Arlon. The question as to whether the Audi should have stopped is one that I consider below.
69. I find that the Audi, having stopped at the give way sign, drove across the cycle lane into the Avenue de Luxembourg but did not cross into the southbound lane on the Avenue (in which the Mitsubishi was travelling). I accept the experts' evidence that had the Audi stopped at the Give Way line then the collision would have been avoided. I also find that had the Audi stopped at the cycle lane and waited there the collision would have been avoided.
70. There is no evidence that the Audi stopped in the middle of the carriageway, waiting for the traffic to pass before continuing across the junction (as was claimed in paragraph 26 of the Claimant's trial skeleton argument).
71. I accept Mr Nunes-Azevedo's evidence that he had seen the Audi stop at the junction and that subsequently he saw the Audi just before the collision.
72. The Defendant accepted in its closing submissions that it was difficult to press for a positive finding that the Mitsubishi braked before impact. I agree: I am unable to make such a finding.
73. Equally, I am unable to make a positive finding that the Audi braked before the collision, despite the evidence from Mr Saracino that he heard the Audi brake. In that regard I accept the evidence of Mr Quevrin who commented that Mr Saracino *"did point out that when the SCHMIT vehicle restarted at the STOP sign and was on the Luxembourg road, its driver braked. He could tell that from the noise. We are amazed by this statement. In actual fact, having just restarted, having travelled a short distance and being equipped with ABS, when braking, no noise can be heard. We are amazed that this witness talks about a noise but not about seeing the stop lights which would have allowed him to determine that this vehicle had actually braked."*
74. The speed limit for the Avenue de Luxembourg was 90 kph. The agreed expert evidence was that the Mitsubishi was being driven well above that limit. I accept the experts' evidence and I find that the speed of the Mitsubishi was between 105 kph and 112 kph. The Mitsubishi was speeding well in excess of the speed limit.

75. There is no reliable evidence upon which I can conclude that the Mitsubishi was “*racing another vehicle*” as alleged by the Claimant in her Particulars of Negligence.
76. I accept the accident reconstruction experts’ evidence that when the collision occurred the Audi had not yet encroached on to the southbound carriageway.
77. At the point of collision, the Mitsubishi had veered to the left from the southbound carriageway and into the turning lane. I accept Mr Crouch’s evidence that there was probably one swerve from the Mitsubishi rather than two swerves and that the swerve was at a “*reasonably pronounced angle*”. I also accept his evidence that the swerve was a “*swerve around a vehicle. Not a gentle move out and round.*” The Mitsubishi probably swerved to avoid the car in front of it (driven by Mr Waulthier) as well as to avoid the Audi.
78. I accept the experts’ evidence that “*had Mr Nunes-Azevedo not swerved to the left, the collision would have been avoided, as the Mitsubishi would have passed ahead of the Audi (regardless of whether the Audi is found to have been stationary or not).*” I also accept their evidence that had “*Mr Nunes-Azevedo been travelling at the posted speed limit, he would have been able to stop behind the turning car ahead of him, without the need to swerve – thereby avoiding the collision.*”
79. There is insufficient evidence for me to make a finding that the Mitsubishi was overtaking the car in front of it (driven by Mr Waulthier) immediately before the collision.

#### **H) MY FINDINGS ON LIABILITY AND CONTRIBUTORY NEGLIGENCE**

80. On the basis of those findings of fact I am able to make the following findings on liability. In making these findings I am satisfied that I must first consider the Belgian judgments which I have set out at section C. They create a rebuttable presumption that the accident was caused by the negligence of Mr Schmit (albeit that the parties in those proceedings were the opposite insurer and insured).
81. I cannot accept the Claimant’s argument that the Belgian judgments are of no evidentiary value at all. In my judgment, there is considerable force in the argument made by the Defendant that, in applying Belgian law to the facts of this case, there can be no better guide than the judgments of the Belgian courts that have examined the facts of this very collision. However, that argument only goes so far and is not dispositive for two reasons.

82. *First*, it is common ground that the Belgian judgments can be rebutted by evidence adduced by the Claimant. Here, unlike the Belgian proceedings, the Court has had the significant advantage of accident reconstruction expert evidence which has been tested by way of cross-examination.
83. *Secondly and relatedly*, the accident reconstruction evidence has in my judgment rebutted a significant factual conclusion that the Belgian courts made.
84. There were, it seems to me, two key reasons why the Belgian courts found as they did. The first was a finding that the Mitsubishi was not speeding and the second was that the Audi had failed to keep an adequate look out when he entered onto the carriageway, notwithstanding that the vehicles there had priority. The first of those factual findings cannot stand, given the agreed expert evidence which I have accepted, which is that the Mitsubishi was speeding well in excess of the speed limit. Moreover, I have accepted the expert evidence that had Mr Nunes-Azevedo been travelling at the correct speed limit then he would have been able to stop behind the turning car ahead of him, without the need to swerve, and the collision would thereby have been avoided.
85. In my judgment Mr Nunes-Azevedo was clearly not driving in the way that a normally prudent and diligent person would be expected to in the circumstances. In doing so, he was in breach of section 10.1 of the Belgian Traffic Code. The extracts from the Belgian proceedings which I have set out above make plain that a Belgian court would have regard to a finding of excessive speed by the Mitsubishi in determining whether or not the Mitsubishi was at fault. In that regard, I accept Mr Delvaux's evidence that Mrs Koninckx put the matter too highly in saying that the question would be whether the risk posed by the Mitsubishi was "*totally unforeseeable*" (indeed it is notable that the Belgian judgments dealing with the facts of this collision do not suggest such a high threshold). I am satisfied that a causal link has been established between the excess speed of the Mitsubishi and the collision. That causal link has been established whether the standard of proof is the balance of probabilities or of "*certainty*" (in the sense that I am left in no doubt, as referred to in section 8.4 of the Belgian Civil Code). Accordingly, I find the Defendant to be liable to the Claimant.
86. Nonetheless, in my judgment, the driver of the Audi contributed to the incident by committing a fault that contributed to the damage. No fault attaches to the Audi driver when he reached the junction with the Avenue de Luxembourg. I have found that he stopped at the Give Way line and at that point he would have been unable to have seen the oncoming traffic on the

carriageway. However, I accept Mr Delvaux's evidence that a Belgian court would have expected him to have stopped in the cycle lane so as to gain a better view. There is no evidence that the driver of the Audi stopped there, and I find that he was at fault in not doing so and that if he had he done so he would have seen the oncoming traffic. I am satisfied of a causal link being established to the requisite standard.

87. In making a finding that the Defendant is liable to the Claimant but that the driver of the Audi contributed significantly I am acting consistently with the approach taken by the Belgian courts in relation to the collision. As I have said, those courts placed considerable emphasis on the duty owed by the Audi driver to the cars on the Avenue de Luxembourg that had priority. That is the starting point but, as the experts agreed, the court has to look at all of the circumstances.
88. In closing submissions, the Defendant argued that if I found that the Defendant was liable (contrary to its primary case) then I should make a finding of 75% contributory negligence on the basis that the driver of the Audi was responsible for what Ms Wyles KC called the "lion's share" of the accident. Mr Chapman KC declined to indicate what percentage he thought would be appropriate though did argue that it should be relatively small, particularly given the fact that it may be based on a finding that the Audi driver should have stopped in the cycle lane, contrary to the Belgian Traffic Code.
89. In my judgment it would be wrong to characterise the Audi driver as bearing the "lion's share" of the fault. Equally it would be wrong to conclude that the fault of the Audi driver was "relatively small". The Claimant's expert was quite clear in his evidence to me that a Belgian court would expect the Audi driver to stop in the cycle lane so as to gain a better view of the traffic on the carriageway. I have concluded that the contributory negligence of the Audi driver was significant and assess it as 50% on the basis that both the Mitsubishi driver and the Audi driver were at equal fault.

**D) THE CLAIM FOR DAMAGES PURSUANT TO SECTION 29BIS OF THE LAW OF 21 NOVEMBER 1989**

90. The parties agree that under section 29bis of the Law of 21 November 1989 the Claimant would be entitled to damages for the death of her stepdaughter, Amandine, on a strict liability basis. However, at trial the Defendant denied this claim as being limitation barred as it was only in the amended Particulars of Claim, dated 17 January 2023, that the claim was particularised. The

Defendant argued that the question for the Court was whether the claim was a new claim which had not been made before. If it was a new claim, then it was time barred. The Defendant argued that the claim had not been included in the claim pleaded in the original Particulars of Claim. The Defendant points to the absence of any reference to the strict liability cause of action and that whilst the fact of Amandine's death was pleaded the claim for bereavement was expressly pleaded as resulting for the wrongful death of Mr Schmit.

91. In order to counter those arguments, the Claimant sought to rely on a supplementary report from Mr Delvaux. The report had not been included in the trial bundle and no application was made to rely upon it until Ms Wyles KC very properly objected to it being referred to when Mr Delvaux came to give his evidence on the final day of the trial. By that stage Mrs Koninckx had already given her evidence (the expert evidence being taken out of the usual course for logistical reasons).
92. I made plain at the hearing that the way in which the Claimant dealt with this issue was very unsatisfactory indeed. An application for permission to rely upon it should have been made at the start of the trial on proper notice to the Defendant. Moreover, if the Claimant sought to rely on it then, at the very latest, an application should have been made before Mrs Koninckx gave her evidence.
93. In the event, Ms Wyles KC indicated that she was able to deal with the issues arising and that, if need be, Mrs Koninckx was available to be recalled. On that basis I agreed to hear evidence based on the supplementary report *de bene esse*. I have decided that, having regard to the overriding objective and to the fact that ultimately no prejudice was caused to the Defendant, it is appropriate to admit the supplementary report into evidence and to take the report into account.
94. In his supplementary report Mr Delvaux explained that:  
  
*“In Belgian law, since Mrs. WOOD's claim form dd. 20.02.2020 is broad and mentions Mrs. WOOD's personal injury and damage, this is to be considered as including Mrs. WOOD's personal moral damage caused by the loss of Amandine that is a consequence of this accident, and therefore apart of Mrs. WOOD's damage to which she is entitled to get compensation for and still had to be specified in future documents. Mrs. WOOD also mentions in the claim form that, as a result of the accident, Mr. SCHMIT and Amandine died. In Belgian law, since the claim is broad enough and this damage under Section 29bis of the Law of 21 November 1989 is a part of Mrs. WOOD's damage caused by the accident, this would not be seen, in my opinion, as a new claim and the limitation period would not have an impact on it.”*

95. There was no real challenge to that opinion, and I accept Mr Delvaux's evidence on this point. Accordingly in my judgment the claim under section 29*bis* of the Law of 21 November 1989 is not time barred.
96. I consider below the issue as to the appropriate quantification of that claim.

**J) MY ASSESSMENT OF DAMAGES**

97. In their Joint Statement Mrs Koninckx and Mr Delvaux agreed a number of general principles that would be applied under Belgian law to the assessment of damages:
- (a) Losses should be compensated *in concreto* to reflect the road traffic accident victim's actual losses in order to place her in the position that she would have been in if the accident had not occurred;
  - (b) Belgian law has a system of "*full reparation*" or full compensation for the losses actually incurred (as causally related to the accident);
  - (c) The Belgian Judge would not be bound by precedent in the assessment of losses and is not bound by the "*Indicative Tables*" or Tariffs for the assessment of damages, although such Tables are a common base for all claims for personal injury which a Judge may use depending on the facts of the specific case.
98. With respect to specific heads of damage and loss, the experts agreed that the following are compensable in principle:
- (a) Fatal accident victim's awareness of imminent death;
  - (b) Moral or bereavement damages for loss of a husband and of Amandine;
  - (c) Loss of income (dependency on income), including dependency on pension income;
  - (d) Loss of services (dependency on services);
  - (e) Administrative costs attendant on the death of Mr Schmit;
  - (f) Sexual damage;
  - (g) Clothing costs;
  - (h) Ambulance costs;
  - (i) Travel costs;
  - (j) Funeral expenses;
  - (k) Furniture storage costs; and
  - (l) Medical costs.

99. The claims for funeral expenses, past dependency on services, clothing costs and ambulance fees were agreed. The claim for loss of dependency on income had been abandoned by the time of the trial.
100. The Belgian law experts differed with respect to the amounts to be awarded under the recoverable heads of loss for the remaining claims. In general Mrs Koninckx favoured awards closely mirroring those in the Indicative Tables whilst Mr Delvaux tended to emphasise the exercise of discretion by a Belgian court and the fact that the indicative Tables are precisely that – indicative only.

*Ex haerede damage / pre-death pain and suffering*

101. The *ex haerede* damage is defined by the Indicative Table as “*All the moral and material damages suffered by the victim between the date of the harmful event and the date of death. This damage, the compensation for which constitutes a claim on the inheritants, must not be confused with the damage suffered by relatives. If it is established that the victim was aware of his or her imminent death, compensation of 75,00 euros per day for his or her moral damage may be awarded.*”
102. The Claimant claimed €500 under this head whilst the Defendant allowed for €75. The reason for the difference was that Mrs Koninckx relied on the Indicative Tables whilst Mr Delvaux said that a Belgian court would depart from that sum given that Mr Schmit was conscious after the accident and had the additional trauma of seeing Amandine dying. He said Mr Schmit “*also probably knew he would die soon too. The distress he must have felt definitely justifies increasing this amount of 75,00 € advised by the Indicative Table, that is just a general indication. For this kind of pre-death and suffering, I would advise to set the amount of compensation to 500,00 €.*”
103. I accept Mr Delvaux’s evidence that in the circumstances here it would be appropriate to depart from the rate in the Indicative Table and I award €500.

*Bereavement damages for the Claimant’s loss of her husband and of Amandine*

104. The Defendant relied upon Mrs Koninckx’s evidence that an award of €15,000 for the loss of her husband (based on the Indicative Table) and €3,000 for the loss of Amandine based on the fact that Amandine did not live with the Claimant. The Claimant argued that there were sound reasons to depart from the Indicative Tables. Mr Delvaux referred in his report to instances where Belgian courts have departed from the Indicative Table for bereavement awards. He argued that “*the loss at the same moment of two beloved ones; the impossibility for Mrs. Wood to say a proper goodbye to both of them; the fact that Amandine was her stepdaughter, but living with the couple during*



*weekends and holidays, as if she was her own daughter too; and that 15.000,00 € for the loss of a husband is per se insufficient”* was a basis of an award of €25,000 for the sole loss of her husband and €10,000 for the sole loss of Amandine with an additional increase of €10,000 to reflect the loss of both of them.

105. In my judgment it is appropriate to depart from the Indicative Tables and to make an award reflecting the fact that the Claimant has lost both her husband and her stepdaughter. I accept the evidence given by the Claimant as to the closeness of her relationship with her stepdaughter. In the circumstances I award a total of €40,000 for these two losses.

*Pretium voluptatis/ sexual prejudice*

106. The Indicative Table provides that the sexual damage “*is a very specific damage and must be compensated independently of any other damage*”. The Claimant claimed €5,000 under this head of loss. The Defendant accepted that damages were in principle recoverable but said that there was no evidence in support of this claim. Mrs Koninckx said that section 1382 of the Civil Code was not satisfied as the Claimant “*at the age of 51 years...still has a future ahead, the death of a life partner does not by consequence mean one cannot have any sexual experience anymore*”.
107. Mr Chapman KC argued that there was an evidential basis pointing to paragraphs 25-29 of the Claimant’s witness statement. Those paragraphs indicate the devastating impact of the loss of Mr Schmit (which I have reflected in the award for bereavement damages) but do not go to this particular issue. Consequently, I accept the Defendant’s submissions in this regard, and I make no award.

*Loss of future dependency on services*

108. The Claimant claimed €24, 238.76 under this head whilst the Defendant has argued that the amount should be €20,000. The difference in part relates to whether the discount rate of 1% given in the Indicative Tables is used. The Claimant had argued that it should be 0.8% but in oral evidence Mr Delvaux accepted that 1% was probably more likely to be applied at the moment by a Belgian court. There is also a difference between the parties as to the impact of the fact that the daily figure of €7 per child should not be included as the Claimant’s children are no longer at home.
109. I accept the Defendant’s evidence and arguments on this point and award €20,000 under this head.

*Administrative costs*

110. The Claimant claims €150, and the Defendant contended for €50 which is the lower end of the Indicative Table.
111. Under Belgian law the amount to be awarded depends on the length and complexity of the proceedings and the administrative costs personally incurred by the Claimant in sending out letters and documents.
112. In my judgment an award of €100 is appropriate.

*Furniture storage costs*

113. The Claimant originally claimed €2,366.16, however, when cross-examined, the Claimant accepted that the supporting documents only supported a claim of €445 in any event. The Claimant's expert also accepted that this claim would only be allowed if the losses were a consequence of the loss of dependency.
114. In my judgment the Claimant has not established a sufficient causal link and I make no award under this head.

*Interest*

115. The Claimant argued for Belgian law interest rates to be applied, either on the basis that the Court has a discretion to apply such rates or, alternatively, on the ground that such interest rates formed part of the substantive Belgian law and so ought to be applied by this Court.
116. The Defendant disagreed, arguing that rates of any interest awarded is an issue of procedure and a matter for English law and that interest was therefore in the discretion of the Court under s35A of the Senior Courts Act. The Defendant further argued that there was no evidence to the effect that Belgian interest rates were a substantive matter under Belgian law.
117. In my judgment, assuming without deciding, that the issue as to the appropriate interest rate is a matter of procedural law, I exercise my discretion to apply Belgian interest rates. The argument as to whether interest rates is a matter of substantive or procedural law under Belgian law is therefore academic. It is agreed that as such the rates claimed in the Schedule should be adjusted to reflect the different starting dates applicable to each head of award (see paragraph 52 of Mr Delvaux's report.)

## **DISPOSAL**

118. For the foregoing reasons I find in favour of the Claimant subject to 50% contributory negligence.

## **CONSEQUENTIAL MATTERS**

119. A draft of this judgment was circulated to the parties in advance of its hand down in the usual way. At the conclusion of the draft judgment, the parties were invited to agree an order reflecting the awards made. Agreement was reached in relation to an order, save in respect of an application for an interim payment on account of costs.
120. The Claimant filed brief submissions in support of that application, and I directed that the Defendant file any submissions in response by 4pm on 18 May. Shortly before the expiry of that deadline, Ms Wyles KC emailed the Court and stated that she had no instructions to consent to the application for interim costs and that she did not have any submissions to make on the application. In those circumstances, she was unable to file any submissions in accordance with my direction and asked for the matter to be left to be determined by me.
121. The approved costs budget for the Claimant was £164,121.88. The Claimant applied for an interim payment on account of costs of £55,000. CPR 44.2(8) provides that: “*Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.*” Thus, in the ordinary way an interim payment will be ordered. In my judgment the sum sought is a reasonable sum and there is no good reason for me not to make the order sought by the Claimant.

**ANNEXE**



Photograph above is from Mr Somja's report at p.348.

Photograph below is from Mr Crouch's report at p.290.

