



Neutral Citation Number: [2024] EWHC 1123 (KB)

Case No: QB-2022-002394

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 May 2024

Before:

HIS HONOUR JUDGE ROBINSON sitting as a Judge of the High Court

Between:

RTP

**(a protected party suing by his wife
and Litigation Friend, JXP)**

Claimant

- and -

HARDCRETE LIMITED

Defendant

Eliot Woolf KC (instructed by **Anthony Gold Solicitors LLP**) for the **Claimant**

Darrel Crilley (instructed by **DWF Law LLP**) for the **Defendant**

Hearing dates: 14 & 15 February 2024
Judgment circulated in draft 18 April 2024

Approved Judgment

This judgment will be handed down remotely at 10.30am on 10 May 2024 by
circulation to the parties or their representatives by e-mail and by release to the
National Archives

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His Honour Judge Robinson:

1. At the commencement of this trial, I made an Anonymity Order in favour of the Claimant. Accordingly, I shall not refer to him or to his litigation friend by name.
2. On 25 November 2020 the Claimant, then aged 84, was crossing a road at the Sunbury Cross roundabout when he was struck by a cement mixer (“the mixer”) owned by the Defendant and which was being driven by Mr Nicolae Pintilie. The Claimant was knocked off his feet. His head struck the ground. As a result, he has suffered a very serious head injury. He lacks litigation capacity. He brings this claim for damages for personal injuries and other losses by his litigation friend, his wife.
3. The issue of liability was ordered to be tried as a preliminary issue. Mr Eliot Woolf KC has appeared for the Claimant. Mr Darrel Crilley has appeared for the Defendant. I am grateful to both for their helpful opening skeleton arguments.

Witness Evidence

4. I have had regard to the following witness evidence on behalf of the Claimant:
 - (1) The Claimant’s wife, written and oral.
 - (2) Mr Christopher Jamie Carpenter, written and oral.
 - (3) Mr John Rusted, Collision Investigation and Reconstruction Consultant, written and oral.
5. I have had regard to the following witness evidence on behalf of the Defendant:
 - (1) Mr Nicholae Pintilie, mixer driver, written and oral.
 - (2) Mr David Loat, Traffic Accident Analysis and Reconstruction Expert, written and oral.
6. In making findings of fact, I have had regard to the entirety of the evidence which includes materials relied upon. These comprise dash cam footage from cameras located on the mixer, documents which appear in the bundle and a document which was produced during the hearing which it is not necessary to mention further.

The Accident

7. The Sunbury Cross roundabout has a number of what I shall call feeder roads, some of which have separate mouths to permit entry to the roundabout and exit from the roundabout. The M3 motorway bisects the roundabout by way of an overpass or flyover. There are both exit and entry slip roads. The accident occurred on the entry slip road leading to the London bound carriageway of the M3.

8. If one considers the roundabout as a clock face:
 - (1) At the 12 o'clock position, at the north of the roundabout, is Vicarage Road. It has separate mouths for entry to and exit from the roundabout.
 - (2) Moving in a clockwise direction, the next road, at about the 1 o'clock position, is the entry slip road leading to the London bound carriage way of the M3. It is this slip road that the Claimant was crossing.
 - (3) The carriageways of the M3 are elevated, and so the next road leading to the roundabout, at approximately the 2 o'clock position is the exit slip road from the M3.
 - (4) At approximately the 4 o'clock position is the A308 Staines Road East. It also has both exit and entry mouths. It is from this road that the mixer entered the roundabout intending to take the entry slip road to the London bound carriageway of the M3.
 - (5) The next road, at the 6 o'clock position is Green Street, again with separate exit and entry mouths.
 - (6) Next, very close to the entry mouth of Green Street is the entry slip road to the "away from London" carriageway of the M3, followed by the elevated M3 carriageways.
 - (7) After the elevated section of the M3 is the entry slip road to the roundabout.
 - (8) At about the 10 o'clock position is the A308 Staines Road West with both exit and entry mouths. There is a parade of shops to the north of the A308 Staines Road West, but with no frontage to that road. The shops front a minor road with no direct access to or from the roundabout.
 - (9) The next road is Vicarage Road, which is where this description began.
9. Entry onto the roundabout from the entry mouths of the feeder roads is controlled by traffic lights. On the roundabout, at points coinciding with the entry mouths, there are traffic lights controlling the flow of traffic on the roundabout. To prevent "grid lock" in busy times, there is a yellow hatched area ("the hatched box") adjacent to the entry mouths into which traffic established on the roundabout must not enter unless it is possible to clear the hatched box.

10. The mixer entered the roundabout from the mouth of Staines Road East permitting entry to the roundabout. It went into the lane nearest the roundabout. The traffic lights were red at the junction with Green Street. The mixer drove beneath the elevated section of the M3 and moved left into the next lane. The mixer did not enter the hatched box adjacent to the exit slip road because the volume and location of stationary vehicles on the other side of the hatched box meant although there was a gap between the hatched box and the car in front, that gap was too small for the mixer. However, a Fiat 500 motor car travelling to the nearside of the mixer could drive into the gap. The dash cam footage shows the Fiat undertaking the mixer and moving to its offside to fill the gap, just as the mixer was pulling away. The mixer continued to pull away, but it drove back into the lane closest to the roundabout and overtook the Fiat and the car in front. It then moved back into the next lane to the left.
11. The mixer did not have to stop as it passed Staines Road West. The next hatched box was adjacent to the mouth of Vicarage Road giving access to the roundabout. Immediately after that hatched box is the slip road giving access to the London Bound carriageway of the M3. The traffic lights were green in favour of the mixer and so it did not need to stop. It drove through the lights. The mixer was in a lane which permitted turning left into the slip road or continuing clockwise around the roundabout. The slip road comprises two lanes. The natural path of the mixer took it into the offside lane of the slip road. Ahead of the mixer in the same lane was a red Alpha Romeo motor car (“the Alpha”) being driven by Mrs Gill Walker.
12. The Claimant was initially stationary on the nearside kerb of the slip road. His clear intention, as I find, was to cross the mouth of the slip road to reach the paved area going under the elevated section of the M3 on the outer aspect of the roundabout. Just before (so far as I can tell) the Alpha reached what appears to be the intended line of traverse of the Claimant, the Claimant stepped off the nearside kerb and began his traverse of the mouth of the slip road, picking up speed until his movement was described by the experts as “jogging”. The Alpha did not appear to slow down, brake or alter its position in the offside lane. The Alpha passed the Claimant whilst he was still in the nearside lane.
13. The Claimant continued to cross the nearside lane. He was struck by the front nearside corner mixer or just behind that point – it makes no material difference. The mixer came to a halt just before the speed limit changed from 30mph to 50mph.
14. The above description is intended to be neutral, but in any event, I am satisfied it is supported by the preponderance of the evidence.

The Allegations of Negligence against the Driver

15. These are commendably succinct:
- (1) Failed to keep a proper lookout and, in particular, failed to observe or respond to the presence of the Claimant when he was stood on the edge of the carriageway or when he first began to cross the slip road.
 - (2) Failed to take immediate or timely steps to stop steer or brake the vehicle to avoid hitting the Claimant once he had begun crossing the slip road.
 - (3) Failed to sound his horn or take any other effective evasive measures to avoid an impact.
16. Those allegations are denied. In the alternative, in the event that primary liability is established, the Defendant raises allegations of contributory negligence against the Claimant.

Claimant's Wife

17. Her written evidence was, quite properly in my judgment, not subject to cross-examination. In her witness statement she explained that her husband had been walking to the surgery of his GP located in Green Street. He had walked along Vicarage Road to the roundabout. Given the circumstances of the accident, she was able to infer that her husband intended to cross the slip road leading to the London bound carriageway of the M3, walk under the elevated section of the M3 and continue walking around the roundabout until he reached Green Street.
18. There is a pedestrian underpass system beneath some of the feeder roads. The Claimant's wife described the underpass:
- (1) It and the roundabout were constructed a long time ago. By the 1980s the roundabout, and I infer the underpass, had become quite unpleasant.
 - (2) The council had painted the underpass and cut down trees to allow more light to enter the underpass, but that only worked for a time before things deteriorated.
 - (3) In her view the roundabout is and was at the time of the accident "quite menacing".
 - (4) The underpass was used by "rather unsavoury people" together with skateboarders and performers of bicycle tricks.
 - (5) The underpass floods when it rains and remains wet underfoot for a period after it has rained.
19. She described the underpass as "very threatening" and said that she would not use it for fear of something happening to her. She also described the underpass as being "less accessible from our side of the roundabout". There is no entry

point at the location where the Claimant was intending to cross the slip road. The nearest entry point was on the other side of Vicarage Road towards the end of the parade of shops I have previously described. She said that use of the underpass would have been awkward for her husband and would have taken longer for him to walk.

20. She was not surprised that her husband had chosen to cross where he did. She would have crossed there herself. Although that location is not a designated crossing point, she said that you could tell that people frequently cross there because the ground is worn. She correctly observed that there are no guardrails or anything else present to prevent pedestrian access to the slip road. She also described the presence of a short path from Vicarage Road to the crossing point which enables slightly quicker access to it compared to using the pavement.

Mr Jamie Carpenter

21. He worked locally. He was walking back to his place of work having been to the parade of shops. He saw the Claimant about two or three metres in front of him on the same side of the road. He was waiting at the side of the road, “looking and checking for traffic that was coming from his right and preparing to cross the road”.

22. Of the Claimant’s intended crossing point Mr Carpenter said in his witness statement that:

“[The Claimant] was stood in a place commonly used by people to cross the road even though it is not an official crossing. I have seen many people cross the road there and I sometimes do so myself. I was not in any way surprised or alarmed to see another person attempting to cross the road there as [the Claimant] was.

23. Mr Carpenter went on in his witness statement to describe his recollection of the accident:

“8. I had a clear view of the road in front of me and I could clearly see that [the Claimant] was preparing to cross the road himself. There were no obstructions or road signs blocking my view. He was checking and observing for oncoming traffic.

9. There are traffic lights just before the slip road. The lights were green, and traffic was flowing around the roundabout with cars from the left two lanes filtering onto the slip road.

10. [The Claimant] waited for a red Alpha Romeo, which was in the left-hand lane of the slip road to pass him. To my right there was a lorry which was in the right-hand lane. It was in view when [the Claimant] began to cross and continued advancing towards him. I am unsure

whether or not the lorry driver indicated before taking the slip road. [The Claimant] walked out onto the road. He was walking quickly but not running. I recall [the Claimant] checking for oncoming traffic before he crossed.

11. I thought [the Claimant] would make it to the pavement on the other side. The lorry was 3 or maybe 4 car lengths behind the Alfa Romeo but travelling in the right-hand lane. I did not notice that it was travelling particularly fast as it had just come off the roundabout.

12. [The Claimant] was nearly at the pavement on the opposite side of the road, when he looked to his right again. I could tell that he saw the lorry coming towards him because he froze just before he was hit.

13. The lorry driver did not press the horn, but he did apply his brakes. I remember noticing that the wheels of his lorry locked as he pressed on the brakes quickly. I could not say for certain when exactly he pressed the brakes, but he was unable to stop in time.

14. As [the Claimant] stood frozen, the lorry appeared to hit him on his shoulder area, knocking him to the ground. [The Claimant] was hit by the front passenger side of the lorry. I immediately went to try and stop the traffic and I called an ambulance. Others who had witnessed the accident came and helped too, and the paramedics and police soon arrived on the scene.”

24. During cross-examination by Mr Crilley, Mr Carpenter was shown the dash cam footage, which he had not seen before he made his witness statement. He accepted that he was mistaken when he said the Alpha was in the left-hand lane.
25. I also viewed the dash cam footage at the same time. It is clear to me that the Alpha was in the outer of the two lanes. It also appears to me that the driver of the Alpha did not apply the brakes, because no brake lights are seen. I also formed the impression that the Alpha did not noticeably appear to slow down. However, in my judgment, at the moment the Alpha passed the Claimant, there was no danger of the Alpha colliding with the Claimant.
26. Mr Carpenter said that he rarely used the underpass. He often saw people crossing at the same point as the Claimant. He said it was “every morning”. He did not believe he was using a mobile phone when he was returning to his workplace.

27. As to whether the mixer had its indicator lights on, he agreed that, given his direction of travel, he had his back to the mixer and would not have seen if indicator lights were on.
28. Returning to the dash cam footage, and to Mr Cartwright's impression that the Claimant "was nearly at the pavement on the other side of the road" he agreed that it showed the Claimant having got to the far side of the left-hand lane only. That is what I saw as well.
29. He agreed that his impression was that the brakes of the mixer had been applied quickly, and that some wheels of the mixer locked up.
30. He was asked about traffic light phasing. He thought that the lights controlling the movement of the mixer and Alpha immediately before the slip road were green for about 60 to 90 seconds at time. He was asked for what period of time all of the lights controlling the movement of the mixer and alpha and those regulating entry to the roundabout from Vicarage Road were at red, but I found his answer to be inconclusive.
31. The accident or its immediate aftermath must have been seen by the driver of the Alpha looking in her rear-view mirror. The dash cam footage shows the Alpha stopping and the driver getting out and walking quickly to the accident site with a blanket. She spoke to Mr Carpenter and said to him that she thought she was going to hit the Claimant. In my judgment, that belief is not justified by my interpretation of the dash cam footage.

Mr Nicholae Pintilie

32. His country of origin is Romania. English is not his first language, but he appeared to me to have a good understanding of spoken and written English.
33. His written evidence was in two parts. On 9 February 2021 he signed a witness statement which complied with the formalities of Section 9 Criminal Justice Act 1967 which had been prepared by the Defendant's solicitors. His formal CPR compliant witness statement was signed on 12 September 2023. Mr Pintilie exhibited his Section 9 statement, incorporated its contents as part of his CPR witness statement, and added some extra details. In those two statements he described his activities on the day of the accident leading up to the moments immediately before the accident. Where appropriate I have added explanatory detail elicited during cross-examination:
 - (1) He started work at 05:36 hours by collecting the mixer from Bow. In cross-examination he said it was a 15-minute journey from his home to Bow.
 - (2) He drove to the Capital plant in Heathrow to collect a load of concrete, arriving at 07:00. He left at 09:00 with a load of concrete and drove to Sunbury-on-Thames, arriving at about 10:00. It took about half an hour

to unload the concrete, after which he drove back to Heathrow to collect a second load of concrete which he delivered to the same address in Sunbury.

- (3) Having unloaded the concrete, he began to drive back to Heathrow. It was on this return journey that the accident occurred at about 12:46.
34. He described his journey round the roundabout. He said he had taken the route and exit onto the entry slip road of the London bound carriageway of the M3 “on previous occasions for work”. He described the roundabout as “quite a difficult and complicated roundabout to negotiate, with multi lanes”. In cross-examination he agreed he was familiar with the roundabout and that the roundabout was busy but not overly complex.
35. There are indeed, in places, four lanes to the roundabout, but the road markings are very clear. Mr Pintilie made the fair point that it is necessary to be aware of traffic movements in the adjacent lanes, but in my judgment, one must also keep a lookout for all road users, an observation that I do not believe to be controversial.
36. He described negotiating the traffic lights. The fifth set of lights, immediately before the slip road, were green and so he was not required to stop. His Section 9 statement reads:
 - “16. I took the exit onto the A316 slip road and just as I had just passed the junction box on the road, I saw a male step onto the slip road from the adjoining pavement on my near side. I did not see the male look to his right before stepping into the road or as he crossed the road. I immediately applied the brakes and turned the steering wheel to the right in an attempt to create more space between the male and the vehicle.
 17. When I saw the male, I was travelling within the speed limit, which I believe is 30mph.
 18. I heard a noise which came from the area of the passenger's side door and near side front wheel arch. I became aware that the male had collided with the front near side of the vehicle.
 19. I looked in the near side wing mirror and I saw the male lying on the road beside the vehicle.
37. Additional evidence in his CPR witness statement included:
 - (1) The Alpha in front of the mixer did not indicate or brake as it exited the roundabout into the slip road.
 - (2) He told the police he had signalled left.
 - (3) He reacted and did all he could in terms of braking and steering, however there was insufficient time and distance to avoid the collision.

38. In cross-examination he was taken to the dash cam footage and to various still images extracted from that footage, together with various accounts he had given relating to the accident.
39. Dealing with the differing accounts he has given of when he first saw the Claimant:
- (1) In his Section 9 statement, at paragraph 16, he said he had first seen the Claimant “just as I had passed the junction box ...”.
 - (2) In his interview under caution with the police, he said he “stopped at a set of traffic lights before the A316 turning. They had been red, so I was stationary in the left-hand lane for A316. When the lights were green, I pulled away from the traffic light. I signaled left. Just before the hash markings I saw a male. He had been situated on the curb to my left, he had been on the curb about a metre from the lamp post towards me. The male started to run across the road.”. Having been taken to that passage, Mr Pintilie said that he had first seen the Claimant when he was in the middle of the junction box, which I take to be in the middle of the hashed box.
 - (3) In the same interview he said: “The male started to run across the road. ... I pushed the foot brake to its maximum, ... When I braked, I think the male must have been 5 to 6 metres away.” Mr Pintilie said that he was aware that this was wrong once he had seen the dash cam footage. He said he thought he was about 20 metres away when he had first seen the Claimant.
40. He was taken to some photographs in the report of Mr Rusted. The photographs are “stills” taken from the dash cam footage. The photographs are meant to be considered alongside a helpful plan of the relevant section of the road around the roundabout on which is marked the position of the mixer when the still photographs were extracted. There are nine positions which I shall refer to as P1 to P9 respectively.
41. Mr Pintilie agreed that the photograph taken at P2 shows a clear road. Mr Pintilie was asked if anything obscured his view. He said that one had to be aware of traffic and there were some vehicles ahead. In fact, the Alpha can be seen directly ahead in the lane next to the innermost of the four lanes at that point. However, at the top right-hand corner of P2 photograph, the Claimant can be seen. The expert evidence puts the Claimant at about 80 metres from the mixer at P2.
42. The P3 photograph also shows the Claimant at the top of it. The mixer is now about 71 metres from the Claimant. Mr Pintilie said, looking at the photograph, that he had seen the Claimant, but that he had no reason to pay any particular attention to him.

43. He was reminded that in his written evidence he said that he first saw the Claimant when the mixer was in the yellow box, yet the yellow box is still some distance ahead from P3 and, indeed also P4, which was taken about 54 metres from the Claimant. Mr Pintilie agreed with the suggestion that he had not seen the Claimant from position P4 by saying “probably not”. The same was said in relation to the P5 photograph, taken about 45 metres from the Claimant. In that photograph the Claimant can be seen to have started to raise one of his legs as part of the process of moving from a stationary position to moving forwards towards the kerb at the side of the road.
44. In the P6 photograph the Claimant can be seen with one foot off the kerb either on or just above the surface of the road. P6 was extracted from footage taken when the mixer was in the hatched box, about 32 metres from the Claimant. Mr Pintilie said this was the first time he recalls seeing the Claimant.
45. The evidence of Mr Rushton is that at P5, the mixer was 3.7 seconds and about 45 metres from the collision with the Claimant. Mr Loat’s evidence is that at P5 the mixer was 3.6 seconds from the collision point. The agreed evidence from the experts is that the last opportunity for Mr Pintilie to see the Claimant and to react and apply the mixer brakes was when he was 3.2 seconds from the collision. After that, a collision with the Claimant could not have been avoided.
46. Mr Pintilie agreed with the proposition that pedestrians waiting to cross the road were one of the potential hazards to which a driver should be alert. He also agreed with the following propositions put to him:
- (1) If the waiting pedestrian started to move, the driver should stop.
 - (2) The driver needs to start to brake as soon as the pedestrian starts to move.
 - (3) The requirement to brake was even more important if the pedestrian did not “look up”.
 - (4) If the pedestrian was standing by the side of the road and moves to cross the road but does not look up... (the proposition was not completed before Mr Pintilie completed it by saying “need to stop”).
 - (5) If the pedestrian is a child the driver might be more concerned, and if the pedestrian is elderly the driver has to respond as soon as they start to move.
47. It was next put to Mr Pintilie that he had not responded as soon as the Claimant moved. Mr Pintilie responded by saying that he stopped when the Claimant started to move on the road.

The Expert Evidence

48. It is the mark of truly independent experts that there is very little between the expert opinions proffered by the experts. In this case, where there is any difference, it is within the acceptable range of opinions open to experts to reach

on the material presented to them. For that Mr Rusted and Mr Loat are to be commended.

49. Due to the high level of agreement between the experts, oral questioning was limited. Mr Woolf asked a few supplemental questions of Mr Rusted. It is common knowledge to anyone who has taken a driving test that the time to bring a vehicle to a halt comprises two elements: the “thinking time” and the actual braking time. Road traffic collision experts use the term Perception Reaction Time (PRT) to represent the thinking time. Mr Loat referred in his report to a definition of PRT provided by Dr J Muttart in a 2020 publication *Driver Responses in Emergency Situations*. In his report at paragraph 6.5.14 he wrote:
- “According to Muttart, Perception Response Time is the time between the onset of an emergency situation and when a driver begins a measurable manoeuvre. The keyword in his sentence is ‘onset’. Onset refers to when a perception response time was triggered, which must not be confused with when a potential hazard may have been first visible.”
50. Mr Rusted said of that passage that also included in the PRT calculation was a period known as “latency”. By that he meant the period between the act of the driver putting his foot on the brake pedal and the onset of deceleration of the vehicle.
51. Mr Rusted was asked about the opinion of Mr Loat to the effect that the onset of the emergency situation is not when the Claimant starts to move towards the road. Rather, the onset is when the Claimant moves into the road. Mr Rusted said that in his opinion the onset of the emergency situation, or the “trigger”, was when the pedestrian was at the road edge. The trigger is the initial movement or change in movement activity. In the opinion of Mr Rusted, the trigger is the first movement towards the road edge. He thought that the average driver would treat the onset as that first step. This coincides with Mr Pintilie’s evidence.
52. In answer to questions from Mr Crilley, Mr Rusted agreed that the PRT of Mr Pintilie of 1.1 seconds was commendably fast. He also agreed that for this collision to have been avoided, Mr Pintilie would have had to react from the moment of the first movement of the Claimant. He agreed that if Mr Pintilie did not react until the second step taken by the Claimant, the collision could not have been avoided.
53. Mr Rusted was taken to paragraph 6.17 of his report where he opined that the Claimant had been able to be seen at the kerbside by Mr Pintilie when the mixer had been 80 to 85 metres from the collision point. Mr Rusted wrote that the Claimant:
- “... stepped into the road when he was approximately 45 metres away. Consequently, on the balance of probabilities, had Mr. Pintilie reacted to

[the Claimant's] movements into the road promptly and when the vehicle was likely to be 45 metres or more from the collision, Mr. Pintilie would have been able to stop his vehicle before the collision.”

In oral evidence he agreed that the Claimant's first step towards the kerb was taken when the mixer was 3.7 seconds away from the time of the collision.

54. I have already mentioned the still images taken from the dash cam footage and identified by the position references P1 through to P9. At P2 the mixer was approximately 80 metres from the collision point. At P5 the mixer was approximately 45 metres and 3.7 or 3.6 seconds from the collision point. Mr Rusted was asked if the Claimant had moved between the time of the P2 still and the time of the P5 still. Mr Rusted did not think so. It will be recalled that the Claimant can be seen to raise a leg in the P5 still. The point of the question was to demonstrate that there was no relevant movement before the P5 still.
55. Mr Rusted also agreed that Mr Pintilie's view of the Claimant from the cab of the mixer would have been obscured for short periods of time as other vehicles passed the scene, and that the Claimant did not look to his right until “the last moment”.
56. Asked about the requirement of drivers to check their mirrors, Mr Rusted said that there was some research on mirror check duration, but that he was not aware of any such research directed specifically to HGVs.
57. Mr Loat agreed with the proposition put by Mr Woolf that from P2 the Claimant was continually in view from the cab of the mixer. Mr Loat thought that the Claimant's movements were that he took a single pace fully on the footpath, followed by a second pace that was divided into two elements: half a pace to get to the edge of the kerb and half a pace which took the Claimant onto the road surface.
58. Mr Loat was reminded of the oral evidence of Mr Pintilie to the effect that a driver should react to a pedestrian by the side of the kerb at the first sign of movement and should not wait until the pedestrian moves into the road. Mr Loat referred to the Muttart definition and said the reaction should be triggered by the first movement which leads directly to the intrusion, which Mr Loat interpreted as being the moment the pedestrian steps into the road.

Findings on Primary Liability

59. It is important to note that, in this case, the force of the impact between the mixer and the Claimant is of marginal or no relevance. This is because it was not the force of the impact that was causative of the head injury. The head injury

was caused by the Claimant's head making contact with the surface of the road after the Claimant had been knocked off balance.

60. Neither expert criticised Mr Pintilie for not using his horn. They both took the view that the relationship between horn and brakes in an emergency situation was an "either or" choice.
61. It is probable that Mr Pintilie was indicating his intention to turn into the slip road.
62. I accept that it was reasonable for the Claimant not to use the underpass. The point where the collision occurred was a well-used crossing point.
63. I accept that the roundabout was busy and had multiple lanes, but it was not "complex". The road markings were clear, and the traffic lights rendered the roundabout reasonably easy and safe to negotiate.
64. I accept that Mr Pintilie was driving around the roundabout at speeds that were within the 30mph speed limit. As Mr Pintilie accepted, the speed limit is not a target speed, and one should drive at a speed which is safe having regard to the prevalent conditions. Vehicular traffic on the roundabout was not heavy, but there were vehicles in multiple lanes, and I accept that a driver of a vehicle such as the mixer has to keep a lookout for all road users. This, of course, includes pedestrians. In my judgment, the greater the speed, and the larger the vehicle, the more important it is for the driver of such a vehicle to be alert to the occurrence of possible events which require a vehicle to be brought to a stop.
65. It is clear from the still photographs that the Claimant was visible from the location of dash camera lens when the mixer was at the P2 position, that is about 80 metres and 6.8 seconds from the point where the collision occurred. Mr Pintilie's view would have been better than that from the dash camera lens because his seated position meant that his eyes were higher up in the cab than the dash camera lens. It seems to me, and I find, that the Claimant could have been seen by Mr Pintilie at the P2 position.
66. I of course respect the interpretation by Mr Loat of the Muttart definition, but I determine this case on the evidence. In my judgment there are two primary issues. The first is in two parts. Should and would a reasonably competent driver of a vehicle such as that driven by Mr Pintilie have seen the Claimant before the point at which Mr Pintilie saw him? If so, at what point would that driver have seen the Claimant? That is a purely objective test against the backdrop of the traffic and road conditions at the time.
67. The second issue is this: what in fact would Mr Pintilie have done if he had seen the Claimant when the mixer was not later than 3.2 seconds away from the

collision point? There is of course a minimum standard of care, namely that owed by the reasonably careful driver in all the circumstances. But what if the evidence shows that the driver would have exceeded that minimum standard?

68. In closing submissions Mr Crilley asked the rhetorical question: was the acceptance by the Defendant that he would have reacted when the Claimant first moved representative of an objective standard of care? In my judgment that is not the correct way to approach the second issue in a case where there is evidence of what the individual would in fact have done. To the extent that this makes the issue partly subjective, this is an inevitable consequence of determining a case on the evidence, where that evidence shows that the individual driver would have reacted faster than the objective reasonably competent driver.
69. One cannot ignore the fact that the Claimant was there to be seen from position P2 when the mixer was about 80 metres from the collision point. There is no justification for Mr Pintilie not to have observed the Claimant at that point or pretty much immediately thereafter. In my judgment, Mr Pintilie cannot have been paying sufficient attention to the entirety of the traffic in the vicinity of the mixer, and in this context, “traffic” includes pedestrian traffic. Once seen, it behoves the reasonably careful driver of a vehicle such as a mixer to have that pedestrian in mind, and to be aware that such a pedestrian is a potential hazard. Had that been done, Mr Pintilie would have seen the first movement of the Claimant and, on his own evidence, would have started to brake. This would have been before the 3.2 second threshold had been passed, and it follows that the collision would have been avoided.
70. Accordingly, in my judgment, particulars (1) and (2) of the particulars of negligence are proven on the balance of probabilities. Particular (3) related to the use of the horn and, for the reason given above, this is not established.
71. Primary liability is thus determined in favour of the Claimant.

Contributory Negligence

72. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides:

“Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for that damage.”
73. The allegations of contributory negligence made against the Claimant are extensive:
 - (a) Failed to observe the presence and near approach of the mixer.

- (b) Failed to observe the left turn indicator displayed by the mixer upon its near approach to the slip road.
 - (c) Failed to have any or any sufficient regard to the fact that the mixer was positioned, just like the red Alpha Romeo, in a lane upon the roundabout which carried onto the off-side lane of the slip road.
 - (d) Failed to stop and wait until the mixer had proceeded further up the slip road before attempting to cross both lanes of the slip road.
 - (e) Failed to look to his right while crossing the near side lane of the slip road: had he done so he would have been able to stop or otherwise alter his jogging pace / trajectory to avoid coming into conflict with the mixer.
 - (f) Jogged across the road when he knew or ought to have known that he had insufficient time available at 84 years of age to clear the 9 metres of two-lane carriageway.
 - (g) Failed to make any use of the nearby underpass facility provided for pedestrians to navigate this complex roundabout intersection. From the Claimants approach he would have needed to deviate by no more than 50 metres to enter the underpass system and doing so would be neither unduly onerous nor inconvenient.
74. In the cases cited to me involving pedestrians being hit by moving motor vehicles, none has resulted in a finding of contributory fault in excess of 50%. The finding of 50% was in *Jackson v Murray* [2015] UKSC 5. The first instance decision that the pedestrian was 90% to blame was reduced to 70% on appeal and to 50% on further appeal. The child pedestrian, aged 13 years, ran into the road behind a school minibus in fading light. The driver was travelling in the opposite direction and struck the pedestrian. The driver saw the minibus but gave no thought the possibility that a child might run into the road.
75. In *Lunt v Khalifa* [2002] EWCA Civ 801, the trial Judge found the pedestrian one-third to blame. Both parties appealed against that apportionment. The pedestrian argued for 20%. The driver contended for 50%. The Court of Appeal did not interfere with the assessment of the trial Judge, although the Court thought the apportionment was generous to the pedestrian. In that case, the pedestrian entered the carriageway at a pedestrian crossing where the lights were not working. The driver did not see the pedestrian at all.

76. In *Eagle v Chambers* [2003] EWCA Civ 1107, the Court of Appeal allowed the appeal of the pedestrian and varied the apportionment of 60% contributory fault to 40%. In that case the pedestrian was aged 17. She was seen by a number of others to be walking along a carriageway of a dual carriageway highway. She was in an emotional state and had refused the entreaties of others to get off the road. The driver who collided with the pedestrian failed a roadside breath test but at the police station was found to be four microgrammes under the limit. He accepted that he had taken enough alcohol that evening to impair his driving abilities. It was held that the driver should have been able to see the pedestrian if he had been keeping a proper lookout. Hale LJ (as she then was) giving the judgment of the court did observe at paragraph 16 that:

“It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle. That is not this case.”

In my judgment, the case with which I am concerned is also not such a case, because on the evidence the mixer should and would have avoided the collision but for the negligence of Mr Pintilie.

77. Finally, in *Sabir v Oswei-Kwabena* [2015] EWCA 1213, the court upheld, on the Defendant’s appeal, a finding of 25% contributory fault on the part of the pedestrian.
78. It is doubtless for that reason that Mr Crilley argues that contributory fault should be assessed at 50% and no more. Mr Woolf contends for one-third contributory fault.
79. Any motor vehicle has a greater destructive capability than that of a pedestrian – so much is obvious. Equally obvious is the proposition that the destructive capability of a vehicle such as the mixer in this case is greater than that of a family motor car.
80. I have already found that it was reasonable for the Claimant not to use the underpass. That decision by the Claimant does not sound in contributory fault. The other allegations of contributory negligence all stem from an alleged failure on the part of the Claimant to observe or heed the presence or approach of the mixer.
81. It does seem likely, and I so find, that the Claimant did not see the mixer. I find that the reason for this is that he did not look up or look to his right. It is thus obvious that the Claimant must bear some responsibility for the collision. In the language of the cited authorities, this sounds in “blameworthiness”. Had he looked to his right in good time, he ought to have seen the mixer’s approach.

82. Causal potency in relation to the causation of the damage sustained by the Claimant is the next element that must be weighed in the balance. The comparative destructive capabilities are obvious. It is true, as Mr Crilley submitted, that the Claimant created a situation of danger when he stepped into the road when he did. On the other hand, Mr Pintilie was aware that a pedestrian by the kerb side is a potential hazard and, had he seen the Claimant when he should have done, he would have reacted in accordance with the evidence which he gave, and the collision would have been avoided. In my judgment that is an important factor when weighing in the balance the relative contributory factors.
83. In my judgment the just and equitable apportionment is not equal in this case, but it is close. In my judgment the just and equitable apportionment in this case is that the Claimant be held to be at fault to the extent of 40%. Accordingly, there will be judgment for the Claimant for 60% of the amount of damages that would otherwise be awarded in respect of his injuries and other losses sustained by reason of the accident.