

JERSEY / JUDGMENT

Chivers v Da Silva Araujo

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Accident claim [2024]JRC058 Royal Court (Samedi) 13 March 2024 Before : A. R. Binnington, Esq., Commissioner, and Jurats Averty and Entwistle Between Aurelie-Anne Chivers Plaintiff And Eric da Silva Araujo Defendant Advocate M. P. Boothman for the Plaintiff. Advocate D. A. Corbel for the Defendant.

judgment

the COMMISSIONER:

Background

1. At or about 15:12 hours on 23 April 2020 the Plaintiff, whilst riding a pink pedal cycle across a pedestrian crossing ("the Crossing") was struck by a silver VW Golf TDI SE motor vehicle driven by the Defendant, who had driven from La Route de Liberation onto the Esplanade and was travelling westward. 2. The Crossing is traffic light-controlled and facilitates the crossing by persons who wish to cross the west and east-bound carriageways of the Esplanade, St Helier, opposite the Grand Hotel. The Crossing is in two parts, with a dog-leg railing protected paved area separating the west and east bound lanes of traffic. The collision occurred within lane three of the westbound carriageway, being the northerly of the three separate lanes travelling westbound. The area of the Esplanade in which the accident occurred is subject to a 30 mph speed limit. 3. It was not disputed that the front of the Plaintiff's cycle impacted with the front nearside of the Defendant's car. It was also not in dispute that at the time of the collision the weather was warm and sunny with no precipitation and that the visibility was good. The two experts instructed by the parties agreed that there were no known contaminants and no defects with the road surface or layout that might have contributed to the collision. The evidence suggested that neither party saw the other until the moment of impact. 4. The parties had each instructed expert collision investigators, the Plaintiff's expert being Mr Ian Paine ("Mr Paine") and that of the Defendant being Mr Simon G Clarke ("Mr Clarke"). Both experts gave evidence before us. The pleaded claims The Plaintiff's case 5. It is the Plaintiff's case that the accident was caused by the Defendant's negligence in one or more of the following respects: (i) Driving at a speed that was excessive in all the circumstances. (ii) Failing to keep any or any sufficient look out for the presence of the Plaintiff, a vulnerable road user who was well established (in) crossing the westbound carriageway. (iii) Failing in breach of the Jersey Highway Code and/or negligently to stop at a red traffic signal prohibiting him from entering the Crossing.

- (iv) Driving into collision with the Plaintiff whilst she was established on and using the Crossing.
- (v) Failing to brake and/or change lanes and/or slow down and/or stop so as to avoid the collision, having approximately 50 metres from the point the Plaintiff entered the Crossing in which to react to her presence. (vi) Driving the VW Golf when it had defective brakes that would adversely affect this ability to stop and/or avoid the collision. (vii) Failing to have any or sufficient regard for the safety of the Plaintiff. (viii) Driving into collision with the Plaintiff when he ought, by exercise of proper care, to have been able to avoid doing so. (ix) The Plaintiff also relied on the maxim "res ipsa loquitur". The Defendant's case 6. The Defendant, in turn, submitted that the accident was caused or materially contributed to by the Plaintiff in that she: (i) Failed to take any or any adequate care for her own safety. (ii) Failed to wear a cycle helmet. (iii) Failed to stop at the pedestrian crossing when the traffic lights were on green for the oncoming traffic. (iv) Failed to dismount at the pedestrian crossing and use the push buttons.
- (v) Failed, in any event, to carry out any or adequate checks for oncoming traffic having the right of way. (vi) Drove into collision with the nearside front of the Defendant's correctly proceeding vehicle, which had the right of way. Scope of the hearing 7. At the commencement of the hearing, it was agreed that the hearing be treated as the trial of a preliminary issue, confined to: (i) findings of fact relating to the material road traffic accident; and (ii) determining whether the standard of driving of the Defendant fell below the objective standard that could be expected. 8. It was further agreed that if the Court determined that the Defendant had been negligent, the determination of the Plaintiff's contributory negligence (if any), would be decided at a further trial, to include: (i) whether the Plaintiff's conduct, on the decided facts, contributed to the damage she suffered; and (ii) whether the injuries the Plaintiff suffered are likely to have been reduced or avoided if she had been wearing a cycle helmet. The Plaintiff's version of events 9. The Plaintiff gave evidence before us but, as a result of a head injury sustained by her in the collision, she said she had little or no recollection of events immediately prior to the collision, during the collision itself or in the immediate aftermath, her first recollection being that of waking up in hospital.
10. Notwithstanding the difficulties caused as a result of her loss of memory, we found the Plaintiff, when giving evidence, to be somewhat evasive, disingenuous and self-absorbed. She had convinced herself that she was blameless, placing all the blame for the accident on the Defendant, using terms such as 'he used his car as a weapon'. She was reluctant to take any responsibility for the accident despite being faced with evidence to the contrary.
11. The collision took place at a time when the island was in "lockdown" during the Covid pandemic and individuals were only allowed to leave their homes for a 2-hour period of exercise each day. In her evidence before us the Plaintiff said that during lockdown she had been in the habit of cycling from her home address in St Helier, along the cycle track to the Gunsite Café at Beaumont and returning along the cycle track. Accordingly, the Crossing

was one which she had used virtually on a daily basis. In her evidence-in-chief the Plaintiff stated "I know the process of pressing the button at the crossing, waiting for the traffic lights to change and for the green man to start flashing to indicate that it is safe to cross. I have no reason to believe that I would not have followed this process on the day of the incident."

12. We note that given the Plaintiff's loss of memory this was necessarily an assumption made by her based on previous experience and not a direct recollection.
13. A witness, Emma McCarthy, gave evidence before us and in her written statement, taken as evidence-in-chief, she stated that she saw the Plaintiff immediately before the collision, saying that: "I was about 5-10 metres away from the lady as I approached the pedestrian crossing, when she started to ride her bike slowly across the road. She was looking straight ahead of her. She did not seem to look to her right to check for any oncoming traffic. I do not know what the colour of the traffic lights were as I could not see them from where I was positioned. I also do not remember whether the lights at the pedestrian crossing showed a flashing green man which signalled that it was ok to cross." In evidence she added that the Plaintiff "cycled slowly, from a standing start".
14. Both experts refer in their reports to the statement of a further witness, Mr Paul Hyde, who was at the Castle Kiosk, at the South side of the Crossing, with his family. He stated that he saw the cyclist approaching and that "It looked like she was waiting for a gap in the traffic...I think she had waited about 20 to 30 seconds to approach the road. And then she crossed, she cycled across the first two lanes and then she was hit in the third lane." Mr Hyde was not called to give evidence and his evidence was not tested in cross-examination. It is not therefore possible to draw any firm conclusion as to the length of time, if any, that the Plaintiff waited at the Crossing.
15. The issue of whether the light for pedestrians to cross was in the Plaintiff's favour when she crossed the Crossing was an important one and was the subject of some considerable research by the experts. On the basis of information provided to them by Mr Nicholas Kearns, a Senior Traffic Engineer at the Department of Infrastructure, Housing and Environment of the Government of Jersey, they ascertained that the pedestrian crossing lights were synchronised with the lights at the junction between Gloucester Street and the Esplanade.
16. In the light of the information provided by Mr Kearns, and his description of the manner in which the synchronisation worked, the conclusion reached by the experts, in their joint report, was as follows: "If the 'Request Button' is pressed at the crossing, then the traffic lights would have been synchronised (i.e. the display of both amber and red traffic lights) to those at the junction with Gloucester Street following which the pedestrian crossing's 'green walking man' would have illuminated at the same moment that the 'green' traffic lights came on for west bound vehicles crossing over from La Route de la Liberation, the route taken by the VW Golf. The 'green walking man' would have remained on for 7 seconds. That would have been followed by a black-out period of 5 seconds where no 'man' would be displayed,

after which a "red standing man" would be displayed for a further 3 seconds. This makes a total of 15 seconds, and during that entire period of time a 'red' traffic light would be displayed to vehicles approaching the crossing from the east. This information is derived from site visits and examination of the pedestrian crossing equipment located at the scene. As a result, both experts agree that it was highly improbable that the Plaintiff could have started to cross the road with a 'green walking man' being displayed. It is most likely that the Plaintiff would have had a 'red stationary man' against her as she commenced to cross the road. It is agreed however, that at the moment the Defendant reached the crossing it is likely he would have had a 'green' light in his favour."

17. When cross-examined the Plaintiff said that she accepted the opinion of the experts that it was highly improbable that, when she crossed, the pedestrian light was showing green although she stated that she found it "absurd" for her to have done so given her practice on other occasions. The experts agreed that, from starting to cross, the Plaintiff would have taken in the region of 4 seconds to reach the point of impact. The Defendant's version of events
18. We found the Defendant, when giving evidence, to be evasive and disingenuous. He showed no remorse. When answering questions, we had the impression that he was giving the answers that he thought we wanted to hear rather than being entirely honest with the court. For example, when describing how he changed lanes after he had passed through the Gloucester Street junction, the manner of his description of checking his mirror and indicating before changing lanes sounded more like a recitation of the Highway Code than a direct recollection.
19. The Defendant, in his evidence-in-chief told us that on the day in question he had to collect his sister from the General Hospital in Gloucester Street where she had been attending an appointment. At the time he was living with his parents in St Clement. He said that he had taken the left-hand turn from Gloucester Street onto the Avenue with the intention of taking La Route de Liberation (the underpass).
20. He said that he positioned himself in the right-hand lane on La Route de Liberation with a view to heading past Normans Buildings (on his left). He said that he continued around and passed Goodwin's garage on his left. As he passed Goodwin's garage, he remembered that he wanted to collect a phone case and screen protector from the Power House. He said that he asked his sister whether she would mind if he turned around and went to collect it before taking her home. His sister did not object and he therefore pulled into a lay-by carpark on his right, to turn the car around and head back towards the Avenue, in the opposite direction to that in which he had just travelled. After heading back under the underpass, he then approached the first set of traffic lights. At these traffic lights, at the junction with Gloucester Street, he said that the traffic lights were on green and he therefore continued through them. He said that he made his way along the Esplanade, initially in the middle lane, and that he then manoeuvred into the third lane (i.e. the furthest lane from the nearside kerb) as he intended to fork right at the traffic light junction with Victoria Avenue. This would have

taken him towards the mini-roundabout. He noted that before the traffic light junction there were pedestrian traffic lights to allow pedestrians to cross the dual-carriageway. He said that he did not recall there being any cars in his immediate vicinity as he proceeded along the Esplanade. He said that he noticed that there were lots of pedestrians walking along the promenade, with lockdown having just been lifted. He stated that only he and his sister were in the car: he was driving and his sister was in the front passenger seat. He said that he was not in a rush, and was driving calmly, sensibly and within the speed limit for that stretch of road.

21. We have mentioned the detail of the Defendant's account of his movements as he gave a slightly different version of events to the States of Jersey Police when he was interviewed under caution on 19 August 2019, some 4 months after the collision. In that interview he described going to the General Hospital to collect his sister and continued: "My sister got into the car and we had a quick chat then drove off. I needed to go to the Powerhouse. I headed towards the Esplanade, heading in the direction of St Peters. My sister was in the front seat and there was nobody else in the car. The weather was dry and very sunny. The road was dry and the conditions were good, the traffic round me was light to medium and appeared to flow with no congestion. I was on the outside lane furthest away from the kerb, the third lane on the Esplanade going toward Victoria Avenue. I went ... the first set of traffic lights which were green. I approached the second set of traffic lights which were green. However, I glanced up again to double check and they were green, and I proceeded. I approached the traffic lights, crossing suddenly in my left and I saw a shadow and then heard a bang on my windscreen on the passenger side, was smashed...I heard the smashing glass, I put all my weight on the brake pedal of my car and my car stopped."
22. When cross-examined by Advocate Boothman it was put to the Defendant that in his interview he had made no mention of turning left at the Gloucester Street junction, and subsequently turning round to retrace his route nor, it appeared, had he mentioned this to his lawyer given that Paragraph 6.1 of his Answer, dated 27 October 2022, had stated: "The Defendant had travelled down Gloucester Street from the hospital to turn right on to the main sea front road, The Esplanade. He went around the right-hand bend and joined the middle lane, however well before the crossing at Kensington Place he moved over to the right lane intending to turn right at the roundabout at St Aubin's Road."
23. The Defendant's response was that the police had asked him to cut down his description of his journey and that he accepted that he had "got it wrong" when he described it to his lawyer but that he had subsequently corrected it in his witness statement for these proceedings. Advocate Boothman suggested that the reason for the change was that the Defendant had subsequently discovered that his passage through the Gloucester Street junction had been recorded on CCTV cameras. This was denied by the Defendant, his answer being that he had based his account to his lawyer on his witness statement and that he had not regarded the details of the earlier part of his journey as "part of the incident".

24. Advocate Boothman, in his closing statement pointed out that the Defendant had referred in his evidence to the version of events given to his lawyers as his "story" and submitted that the Defendant's use of the word "story" should give the Court concern. We share that concern.
25. In answer to further questions from Advocate Boothman the Defendant agreed that having passed through the Gloucester Street junction on green lights, heading westward, there were no vehicles ahead of him and his view ahead was not restricted, his view being clear. He also agreed that the Plaintiff would have had a clear view of him as he approached but added that she was not crossing as, whilst he had looked up at the crossing lights, for the most part he was looking straight forward. It was put to him that "You should have seen her if she was waiting" to which he replied, "You could say so, yeah" and when it was put to him that "If you were paying proper attention you should have seen someone waiting", he responded: "Yes". He did not however accept that it followed that he was not paying sufficient attention.
26. Whilst the Defendant accepted that his expert had determined that his mean speed through the traffic lights at the junction between Gloucester Street and the Esplanade was 32 mph the Defendant said that he had stated to the police that his speed was 25-30 mph as that would be his usual speed through that junction. He had not regarded it as necessary to reduce his speed at that junction as it was not as congested as the next one but did agree that he had an obligation to slow down approaching pedestrian crossings.
27. The Defendant accepted that he did not brake until the moment of impact when, in his description of the collision, the Plaintiff cycled into the side of his vehicle. The manner in which the Defendant drove
28. Both experts agreed that the speed calculations carried out by the States of Jersey Police to assess the speed of the VW Golf as it travelled through the Gloucester Street junction were reasonable and that the calculated speed of 32 mph was likely, and that, at that speed, it would have taken the VW Golf just over 12 seconds to travel from the junction to the Crossing.
29. The Plaintiff's expert, Mr Paine, was of the opinion that the speed of the VW Golf as it impacted with the pedal-cycle was between 25 and 32 mph, with a most likely speed of 30 mph. He based this conclusion on his use of 'pedestrian throw' calculations, which enables a speed of impact to be calculated from the distance that a pedestrian is thrown when coming into contact with a car.
30. Mr Paine concluded that the criteria for using these calculations had been met and that it was entirely appropriate to use them. He believed that his calculated speed was also entirely consistent with the damage caused to the windscreen of the VW Golf.

31. The Defendant's expert, Mr Clarke, was of the opinion that the speed of the VW Golf as it impacted with the pedal cycle was between 19 mph and 26 mph, with a most likely speed at the upper end of the range provided. This determination was based on 'limited distance' calculations using the known post-impact travel distance for the Defendant's vehicle after the collision with the Plaintiff. In Mr Clarke's view, the criteria for using 'pedestrian throw' calculations had not been met.
32. Mr Clarke based his calculation of the speed of the Defendant's vehicle at the moment of impact on the distance between the point of impact and the vehicle's final position. This took into account that : (i) it was agreed that the Defendant did not see the Plaintiff until the moment of impact and therefore only braked at that point; (ii) the Defendant's reaction time; and (iii) the car's stopping distance. He concluded, taking into account a reasonable range of reaction times (1.36 seconds to 0.64 seconds), that the actual pre-impact speed for the vehicle was likely to have been between 19 mph and 26 mph.
33. Both experts agreed that it would be inappropriate to use the 'pedestrian throw calculations' in circumstances where there had been any "carry" of the Plaintiff, even for just a second, by the vehicle.
34. Advocate Corbel pointed out that both the investigating Police Officer (who had the benefit of physically examining the Defendant's vehicle) and Mr Clarke, who had reviewed the photographs taken by the Police) concluded that there were dents on the roof of the Defendant's vehicle that were consistent with the Plaintiff having landed on it. Mr Clarke explained to us that that would cause a "carry", which would lead to it being inappropriate to apply the 'pedestrian throw calculations'.
35. We were directed to a photograph taken by the investigating Police officer of what was suggested to be a dent in the roof of the vehicle. Mr Paine dismissed this image as showing merely reflection, and it was suggested that he therefore disregarded the opinion of the investigating Police officer who had inspected the vehicle. Under cross-examination, he described what he saw in the image as merely "reflection".
36. Mr Clarke was asked to consider that view during his evidence-in-chief. He pointed out that the reflection of the Grand Hotel (that could be seen on the roof) changed at a certain point from being clear, to being distorted. He opined that that was owing to what he suggested was a clearly visible dent in the roof. Advocate Corbel therefore argued that it followed that, if the Plaintiff landed on the roof (as suggested by the investigating Police and Mr Clarke) she would have been 'carried', even for as brief a time period as one second. It was therefore submitted that that would be sufficient to lead to the use of the 'pedestrian throw calculations' as being inappropriate.
37. Mr Paine accepted that there was some damage to the roof but at its leading edge and that this was caused by the initial impact, not by the Plaintiff being thrown up in the air and landing on the roof and thus being "carried", as suggested by Mr Clarke.

38. Having considered the competing views of the experts we consider, on a balance of probabilities, that the Defendant was driving at or very close to the speed limit of 30 mph.
39. A further area of disagreement between the experts was in relation to the Defendant's view of the road ahead as the Plaintiff began to cross.
40. Whilst both experts agreed that the road ahead of the Defendant was unobstructed, they differed in their conclusions as to the Defendant's ability to see the Plaintiff during the 4 seconds that it took for her to reach the point of impact. They did however agree that when the Plaintiff commenced her crossing of the road the Defendant would have been 54 metres from the Crossing.
41. Mr Clarke emphasised the time that it would have taken for the Defendant to check his rear-view mirror when changing lanes and the time when he checked to ensure that the lights at the Crossing were showing green in his favour.
42. Mr Paine agreed that the lane change was an appropriate manoeuvre and that this would require the Defendant first to check his mirror. However Advocate Boothman pointed out in his closing statement that the Defendant's witness statement made it clear that he changed lane well before the Crossing as he had said: "After I had established myself in my lane and was familiar with what was around me, I made sure to keep a look out for the lights, which I knew I was approaching, and for pedestrians, as sometimes people will run across the road".
43. Mr Clarke emphasised not only the time that it would have taken for the Defendant to check his rear-view mirror but also the time that it would have taken him to glance up at the traffic lights to ensure that they were green. He further suggested that depending on his driving position part of his rear-view mirror could have obstructed his vision although this was not accepted by Mr Paine. However, in cross-examination, the Defendant accepted that at the relevant time there was nothing obstructing his forward view.
44. Although we have concluded that the Defendant's car was travelling at approximately 30 mph immediately prior to the impact we do not regard that as an excessive speed in the circumstances. The road is a three-lane highway, there was little or no traffic in front of him, the driving conditions were good and there was a green light in his favour at the Crossing.
45. Although it was pleaded by the Plaintiff that the brakes on the Defendant's vehicle were defective and that this may have been a causative factor in the accident, the experts agreed that the condition of the Defendant's vehicle's tyres, brakes, steering system, electrical system, miscellaneous issues and the bodywork did not contribute to the cause of the collision and we accept that conclusion. The Law
46. The requirements for the Court to find actionable negligence were not in dispute and are well-settled in Royal Court decisions. One of the leading authorities in the context of a personal injury claim arising out of a road traffic collision is the Royal Court's decision in *Morley v Reed and Motor Insurers' Bureau* [2012] JRC 127A (Clyde-Smith, Commissioner). The law as to negligence (and contributory negligence) as set out in *Morley v Reed* has more

recently been cited with approval by the Jersey Royal Court in the case of *Conceição v Silva Cleaning Services Limited* [2020] JRC 226 (Birt, Commissioner). At paragraph 33 of the judgment in *Morley v Reed*, Commissioner Clyde-Smith had said: "As made clear in *Rudd (nee Lowry) v Hudson* [1977] JJ 2055 at 2062, the essential ingredients of actionable negligence are:

- (1) The existence of a duty to take care owing to the plaintiff by the defendant;
 - (2) Failure to attain that standard of care prescribed by the law;
 - (3) Damage suffered by the plaintiff which is causally connected with the breach of duty to take care."
47. As set out in the third limb of the above legal test, to succeed in her claim, the Plaintiff must establish (to the civil standard of proof) that the loss and damage she suffered was, at least in part, caused by an act or omission of the Defendant, which is found by the Court to have been negligent (and in due course that it is causative of that loss and damage).
48. Whilst the Defendant's primary position is that the Plaintiff is solely liable for her own accident (in other words her accident was caused only by her own negligence) the Defendant has pleaded an alternative case in contributory negligence. Although it has been agreed between the parties that the issue of contributory negligence (if any) will be considered at a further hearing it may be helpful to remind ourselves at this stage of the relationship between claims for negligence and contributory negligence.
49. In Jersey law, a plea of 'contributory negligence' is permissible by virtue of Article 4(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960. As stated by Commissioner Birt in *Conceição v Silva Cleaning Services Limited* (supra), at paragraph 73: "A convenient summary of the law in relation to contributory negligence is to be found in the judgment of the Royal Court (Commissioner Clyde-Smith) in *Morley v Reed* [2012] JRC 127A where the court said this at paragraphs 37-42: "37. Turning to contributory negligence, Article 4(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 provides as follows:- "Where any person suffers damage as the result partly of the person's 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 the damage."
38. Fault is defined by Article 4(9) to mean any "... wrongful act (faute), negligence (negligence) lack of skill (impéritie), breach of statutory duty or other act or omission which gives rise to liability in damages or would, apart from this Article, give rise to the defence of contributory negligence.

39. These provisions enable the Court to reduce the damages in proportion to the degree of responsibility for the accident; and the Court may take into account not only the share of each party in causing the accident, but also the degree of blameworthiness (see *Louis v Troy and others* (1970) JJ 1371 at 1404).
40. In *Hacquoil v Troy & Sons and Harbours and Airport Committee* (1970) JJ 1305, the Court referred (at 1333-1334) to *Halsbury's Laws of England* (Third Edition) to define the test to be applied: " ... the test to be applied is whether the defendant's negligence was nevertheless a direct and effective cause of the misfortune. The existence of contributory negligence does not depend on any duty owed by the injured party sued and all that is necessary to establish a plea of contributory negligence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury. The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself.
41. In *Jones v Livox Quarries* (1952) 2 QB 608 it was established that contributory negligence does not require a plaintiff to reasonably foresee the particular risk to which he succumbs but only that a plaintiff should foresee the general risk.
42. The Court of Appeal in *Jersey Post v Chartier* [2007] JLR 187 at 196 held that: "It is obviously logically impossible for the court making the deduction to do so with mathematical precision. In truth, it is really a matter of impression, the court looking at the conduct of the claimant and of the other person or persons and doing the best it can to be fair. The phrase "just and equitable" is suggestive of a discretion and, as in the case of the exercise of a discretion vested in a lower court, an appellate court should be slow to interfere."
50. Accordingly, it is for the Plaintiff to establish that the Defendant was negligent and that the injuries suffered by her are causally connected to the Defendant's breach of duty. If she fails to establish this then the issue of contributory negligence does not arise. If she does establish a breach of duty then we would go on to consider whether her injuries were caused or contributed to by any lack of care on her part.
51. The relevant standard of care for negligence in the context of a road traffic accident was described by Moore-Bick L.J. in *Goad-v-Butcher and another* [2011] EWCA Civ 158, at paragraph 10, in the following terms: " to take reasonable care to avoid causing injury to other road users whom he should reasonably have foreseen might be affected by his actions. That means he had a duty to act as a reasonably prudent and careful driver"

52. In *Rudd v Hudson* (supra) at page 2063, the Court said: "The driver of a motor car owes a duty to exercise reasonable care and skill towards all persons using the highway, including pedestrians who, in general terms, have an absolute right to be on it. However, pedestrians are not entitled to more than the exercise of reasonable care on the part of drivers, and they must take reasonable care for themselves when using the highway. Moreover, although a driver is not entitled to assume that all other road users will take reasonable care, his duty to take care is based on the normal, so that only when it is known that the abnormal is present is there a duty based on abnormality. Because the defendant alleges that the accident was caused in whole or in part by the negligence of the deceased, and having regard to Article 6 of the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960, in deciding the issue before us, the question which we have to ask ourselves is: What fault or faults were there which caused the injuries suffered by the deceased? Moreover, because the law, as we have stated it is not in dispute, nor is the fact that the deceased sustained his injuries when he was knocked down by the defendant's car, that question requires us to consider whether and to what extent the defendant failed to discharge his duty of reasonable care and skill, and whether and to what extent the deceased failed to take reasonable care for himself."
53. We were referred to a number of decisions relating to accidents involving pedestrians who stepped into the path of oncoming traffic.
54. Advocate Corbel referred us to a decision of the English High Court in *Vincent v Walker* [2021] EWHC 536 (QB) in which the claimant was found to have stepped off the central refuge of a staggered Toucan crossing, which was controlled by automated traffic lights, and into the carriageway. The traffic lights at the time were found to be showing green to oncoming traffic and, after stepping off into the carriageway, the claimant was struck by an oncoming vehicle. The court found that the driver was "unlikely" to have seen the claimant prior to him [the claimant] stepping off the central refuge and into the carriageway. However, the Judge, David Pittaway QC, held (at paragraph 41 of the judgment): "If I am wrong about that issue, I do not see that it would have altered the outcome of the accident. If Mr Walker had observed Mr Vincent on the central refuge, I do not consider that Mr Walker should have reasonably anticipated that Mr Vincent was going to ignore the pedestrian crossing traffic lights and step into the eastern carriageway without looking. In my view, a reasonably prudent driver, driving at a speed of 39 to 41mph in a 50mph limit, was permitted to rely upon an adult pedestrian using the traffic lights and pressing the button before he crossed, or at the very least checked that the carriageway to his left was clear. He could not reasonably have been expected to see Mr Vincent on the western carriageway, head down, purposefully walking ahead without looking. It is only, if Mr Walker had been travelling at a significantly lower speed, suggested by Mr Stride in cross-examination of Mr Walker of about 30mph, that Mr Vincent would have safely reached the other side of the eastern carriageway. In any event, I accept Mr Woodhouse's submission that even if Mr Walker had seen Mr Vincent on the central refuge the accident could not reasonably have been avoided."

55. We were also referred by Advocate Corbel to an earlier decision in *Maranowska v Richardson* [2007] EWHC 1264 (QB) in which the circumstances being considered were similar, in that they involved a pedestrian at a crossing, stepping out into a busy carriageway, against the applicable pedestrian light signal (and when the traffic controlling light signals were showing as green to oncoming traffic). At paragraph 54 of that judgment H H J Seymour stated (after having found that the claimant had stepped out into the path of an oncoming bus and that she was about 6 metres from the front of the bus when she did so - and that at that distance a collision was unavoidable): "The remaining issue is whether Mr. Richardson should have anticipated as he approached the Bus Crossing that Mrs. Maranowska would fail to observe the red man indication that she not cross and also fail to look to see whether a bus was approaching. Mrs Maranowska was at the time of the accident an adult lady of middle years, which is relevant simply because one should perhaps anticipate that elderly people may have some impairment of sight or hearing of which account needs to be taken, but which would not obviously be relevant in the case of Mrs. Maranowska. As I find, and contrary to the evidence of Mr. Nevard, she was not hurrying. She did, however, have her head down. That, and her failure to look towards possible oncoming buses in the Bus Lane, were the only reasons why attention might be drawn to her by a driver. Drivers must proceed with great care, especially in the presence of pedestrians who may be likely to wish to cross in the path of the driver. However, a driver is also entitled, in the ordinary case, to assume that pedestrians will comply with traffic lights, as will drivers. I accept the evidence of Mr. Richardson that his attention was not drawn to Mrs. Maranowska until the time he told me. In my judgment, he was not negligent in not noticing her earlier or in not anticipating that a pedestrian would step out onto the Bus Crossing in contravention of a red indication that it was not safe to do so. The unhappy circumstances of this case, as I find, are that Mrs. Maranowska, perhaps being distracted for some reason, was keeping her head down and not looking out for possible oncoming buses as she simply stepped out onto the Bus crossing, having crossed the Main Crossing. Unfortunately, at the time she stepped out the Bus was so close to her that a collision could not be avoided. However, no blame attaches to Mr. Richardson or to the manner of his driving at the time of the accident, and so this action must be dismissed."
56. Advocate Boothman referred us to a decision of the English Court of Appeal in *Sabir v Osei-Kwabena* [2015] EWCA Civ 1213.
57. The facts of *Sabir*, as taken by the Court of Appeal from the decision of the judge at first instance, were as follows: "At about 12.45pm on Tuesday 27 April 2010 the Claimant was struck by a car driven by the Defendant. She was on foot and crossing Green Lane, Ilford, a busy suburban road lined with shops. The Defendant was driving a Ford Focus on Green Lane, approaching the collision point from the Claimant's right hand side. The Claimant was 30 years old, slightly built, less than 5ft tall and 5 months pregnant. She broke several bones, suffered significant abdominal injuries, and subsequently miscarried the child. Most significantly however she suffered what the medical evidence described as "the worst sort of traumatic brain injury" and she has no recall of the accident. The Claimant was crossing

Green Lane immediately to the rear of a parked Saab motorcar which had stopped at a point where double yellow lines give way to single yellow lines. She was some 19 metres beyond a traffic light-controlled junction where there were pedestrian crossing facilities. She had just alighted from that car and moved to the rear of it before stepping out into the road in order to cross. The judge made no finding that she stopped at the kerbside between alighting from the vehicle and stepping into the road. She was struck by the Defendant's car when she had walked 3.6/3.7 metres into the carriageway, from the Defendant's nearside."

58. Delivering the decision of the Court of Appeal, Tomlinson L.J. said: "As noted by Lord Reed in Jackson at paragraph 26, and as the judge reminded himself in this case, there are two aspects to apportioning liability between the claimant and defendant, namely the respective causative potency of what they have done, and their respective blameworthiness. So far as concerns the former, because a car can usually do much more damage to a person than a person can do to a car, the court imposes upon drivers what Latham LJ in Lunt described as a "high burden." Hale LJ thought, in *Eagle v Chambers* [2004] RTR 9, at paragraph 15, that this potential "destructive disparity" between the parties can be taken into account as an aspect of blameworthiness. Lord Reed in Jackson at paragraph 40 agreed that the potentially dangerous nature of a car being driven at speed should be taken into account when assessing blameworthiness, but observed that "the overall assessment of responsibility should not be affected by the heading under which that factor is taken into account." Lord Hodge seems to have thought, at paragraph 50, that this factor could come into the equation under either rubric, moral blameworthiness or causative potency. For my part, bearing in mind that the 1945 Act speaks of responsibility for the damage rather than responsibility for the accident, I am inclined to think that it is because of the destructive potential of the car driven even at moderate speed 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" - see per Hale LJ in *Eagle v Chambers* at paragraph 16. The proper approach, I would suggest, is that the destructive capacity of a driven car comes into both aspects of the evaluation. Driving a car at even a moderate speed without keeping a proper lookout in a situation in which pedestrians can reasonably be expected to be present in the carriageway, as in Jackson because of the presence of the stationary minibus and here because of the nature of the suburban shop-lined road - points to a considerable degree of blameworthiness."
59. When it was invited to conclude that the Claimant pedestrian in Sabir took a "deliberate risk" in crossing the road, the Court held, at paragraph 15: "15. ... in any event I do not accept the premise that the Claimant here took a deliberate risk. In one sense of course crossing the road in a town or suburban environment always involves an element of deliberate risk taking, unless there is no vehicle in sight and the view is unobstructed for a suitable distance. Even then there is always the risk of slipping or stumbling, or of a vehicle emerging from a side road, and matters of that sort. Deliberate risk taking, in this context, is in my view conduct such as that of the claimant in *Belka v Prosperini*, which the judge there characterised as setting off when, unless the driver took some avoiding action, an accident

was likely. Moreover, it often involves running - a recognition that the orthodox method of crossing the road cannot safely be achieved without waiting, and conduct carrying with it its own inherent risk of misjudgement of running speed and the obviously heightened risk of missing one's footing. The judge here found that the Claimant made a slight misjudgement, not that she had deliberately set out upon an errand which was obviously unsafe unless she could cross at more than her walking pace. The judge expressly rejected the Defendant's evidence that the Claimant was in a bit of a hurry. The Claimant's misjudgement plainly contributed to the damage, as did her failure to pay close attention to the car's approach, which could have led her to alter course or to speed up, and each is to a degree blameworthy. But it is blameworthy in that it betokens a want of regard for her own interests - see per Lord Reed in *Jackson* at paragraph 27. The Claimant did not in any real sense place the Defendant in danger. The Defendant ought reasonably to have seen her in such time as was ample to enable him to take his foot off the accelerator, which would in itself without braking have avoided the collision. It is not a case of a sudden emergence into the road by a pedestrian at the last moment creating a situation of urgency. Of course times such as 1.5 seconds and 1.1 seconds are short. But the former is the average perception response time reasonably to be expected of the Defendant. He should not have failed to see her for as long as 1.1 seconds. She was in his direct field of vision.

16. The causal potency of the Defendant's conduct is much greater than that of the Claimant, not least because he was driving a car whereas she was a pedestrian but also because she in no sense created a situation of urgency. The relative blameworthiness is stark. The Claimant slightly misjudged her own safety. She did not put the Defendant at risk. The Defendant by contrast failed to keep a proper lookout in circumstances where he could expect pedestrians to attempt to cross the road to reach shops on the other side or simply to be in the road in connection with parked vehicles and where he was driving at the maximum speed permitted. He did not just fail to see the Claimant and to react within such timescale as was reasonably to be expected, he failed to see her at all over a period significantly, in the context, longer than that benchmark. 18. In my judgment both the causal potency of the Defendant's conduct and its blameworthiness were very substantially greater than that of the Claimant. It is possible to say of this accident that, whilst the Claimant was unwise to attempt to cross the road when and in the manner that she did, a collision should nonetheless not have happened because it was so relatively easy for the Defendant to avoid it. The judge's assessment of how, justly and equitably, the Claimant's damages should be reduced having regard to her share in the responsibility for the damage was in my view squarely within the range of reasonable decision making. It follows that we should not interfere with it."
60. Advocate Boothman suggested that the conduct of the Plaintiff in the present case, despite not dismounting from her bicycle, should be assessed in the same way as a similarly vulnerable road user, the pedestrian, particularly as she was utilising a pedestrian crossing as a pedestrian would and was riding slowly, directly across the crossing. He suggested that this is not a case of a cyclist moving through a red traffic light at a traffic light-controlled

junction. He submitted that the fact that the Plaintiff was riding on a pedestrian crossing is causatively irrelevant. He submitted that Rule 81 of the Highway Code (which states: “Do not ride across a pelican, puffin or zebra crossing. Dismount and wheel your cycle across”) is likely to be designed to stop pedestrians and cyclists coming into conflict but has no material significance when considering these accident circumstances. Whilst that may well be the case, it may also be the case that a person who cycles across a pedestrian crossing has less ability to turn back than a pedestrian, should they see oncoming traffic. However, given that the evidence suggests that the Plaintiff did not look for oncoming traffic that would not appear to be relevant in the present case.

61. In the passage from the High Court’s judgment in *Vincent v Walker* to which we referred to above the court found that a reasonably prudent driver, not driving at an excessive speed, was permitted to rely upon an adult pedestrian using the traffic lights and pressing the button before he crossed, or at the very least checking that the carriageway was clear and that the driver in that case could not reasonably have been expected to see the pedestrian on the carriageway, head down, purposefully walking ahead without looking. The same might be said of the present case. However, in our view the crucial difference is that the Plaintiff had crossed two lanes of a three-lane carriageway and thus would have been visible to the Defendant, in the opinion of the experts, for some 4 seconds. In light of the fact that the Defendant accepts that he did not see the Plaintiff until the moment of impact he clearly failed to see the Plaintiff for the full 4 seconds during which she was crossing. In our view, given the prevailing road conditions, the Defendant’s failure to see the Plaintiff until he collided with her can only be attributed to a failure on his part to keep a proper look-out, notwithstanding the time taken to check his rear-view mirror when executing the change of lane manoeuvre and to look at the pedestrian lights.
62. Although it is impossible to determine why the Plaintiff crossed against the red pedestrian light the fact that she was crossing three lanes of a carriageway, apparently without looking for oncoming traffic, is also likely to be a relevant factor in determining the degree to which she may be in part responsible for her injury. Our findings
63. We are satisfied that the Defendant owed a duty to the Plaintiff to take care, that he failed to attain the standard of care prescribed by the law and that damage was suffered by the Plaintiff which was causally connected with the Defendant’s breach of duty to take care.
64. Specifically, in relation to the Defendant, we are satisfied that immediately prior to the accident the Defendant had a green light in his favour when approaching the Crossing. We do not regard the speed at which the Defendant was driving as excessive given the prevailing road conditions. We find that the Defendant failed to keep any or any sufficient look-out for the presence of the Plaintiff, who was crossing the Crossing. We do not find that the Defendant’s vehicle had deficient brakes.

65. In relation to the Plaintiff, we find that she cycled across the Crossing against a red pedestrian light, failed to check whether there was any traffic approaching the Crossing before so doing and did not check that there was no traffic approaching as she crossed. We also find, which we note was accepted, that the Plaintiff was not wearing a cycle helmet at the time of the accident. Authorities *Morley v Reed and Motor Insurers' Bureau* [2012] JRC 127A. *Conceição v Silva Cleaning Services Limited* [2020] JRC 226. Law Reform (Miscellaneous Provisions) (Jersey) Law 1960. *Goad-v-Butcher and another* [2011] EWCA Civ 158. *Vincent v Walker* [2021] EWHC 536 (QB). *Maranowska v Richardson* [2007] EWHC 1264 (QB). *Sabir v Osei-Kwabena* [2015] EWCA Civ 1213.

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Prepared on 24 October 2026 · Esheria