PIBA

NORTHERN CIRCUIT CONFERENCE

15 NOVEMBER 2025

WAY FORWARD MEETINGS

HENRY VANDERPUMP

St John's Buildings

WFM – The modern art of warfare

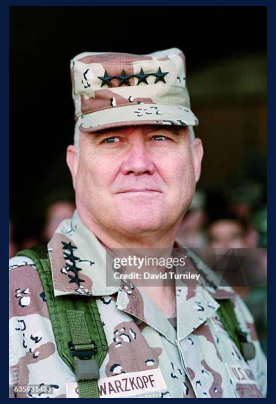
“ The supreme art of war is to subdue the enemy without fighting“ – Sun Tzu, The Art of War

Henry Vanderpump

SJB

What is a WFM?

“The more you sweat in peace, the less you bleed in war."
- General Norman Schwarzkopf, U.S. Army



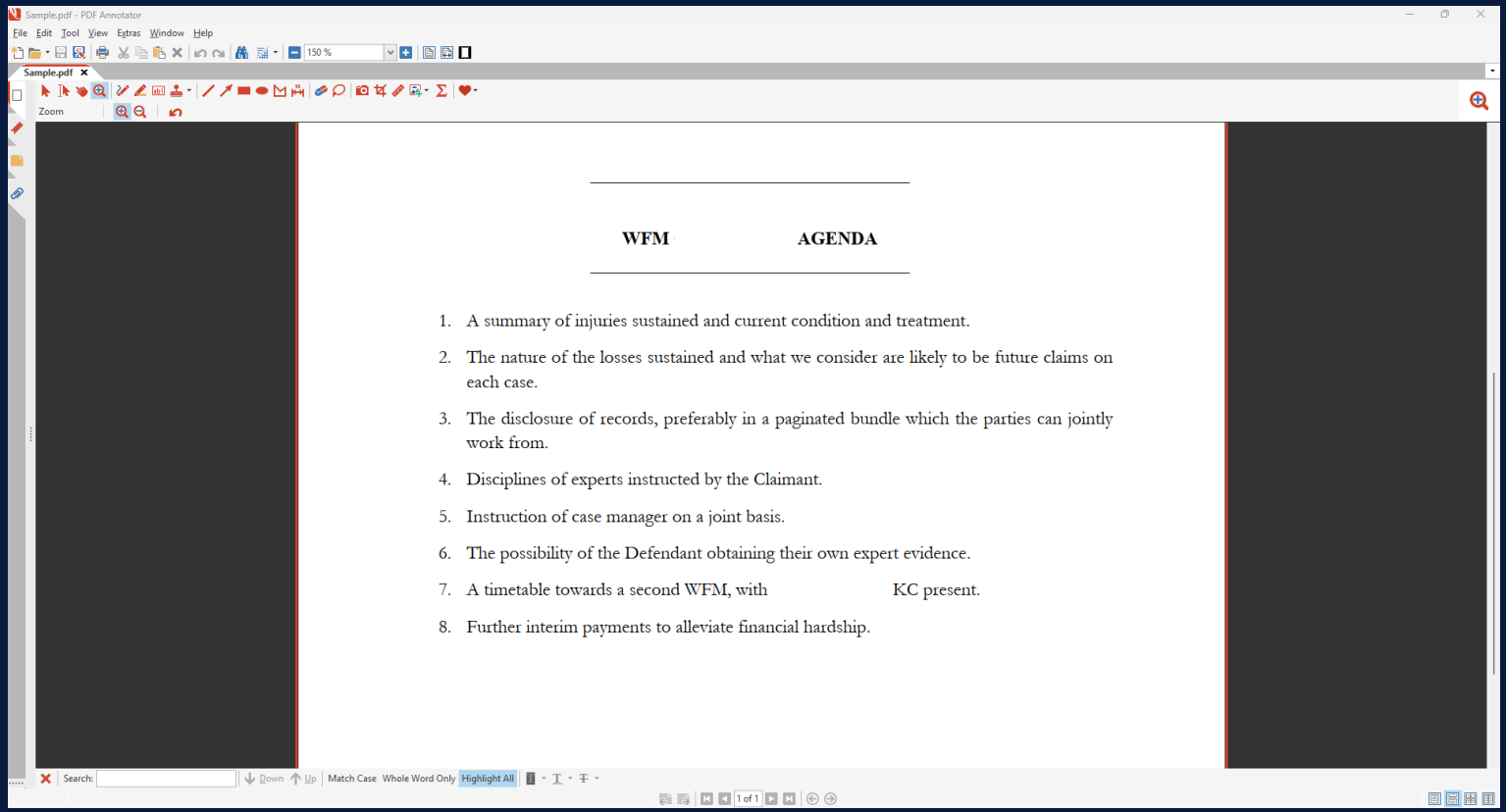
- Without prejudice discussion
- Attended by Counsel, Solicitor, Insurer, Case Manager (if involved), generally not client
- Prior to issue of proceedings, usually early in the litigation
- In person, remote or hybrid
- Purpose - to agree steps towards settlement and avoid litigation

How to prepare

"There are no secrets to success. It is the result of preparation, hard work, and learning from failure."
- Colin Powell, former U.S. General,
Secretary of State, and National Security Advisor

Send a draft agenda to the Defendant:

- Topics - Liability, Disclosure, Experts, Rehabilitation/Case Management, Capacity, Interim Payments, Offers, Proceedings, Timetable, Costs on Account, Next Meeting
- Bundle of up-to-date treatment records, latest clinic letters, maybe from clients' NHS app
- Early medical reports that you are prepared to disclose
- Police records, inquest material, hospital investigation, HSE
- Schedule of costs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WFM AGENDA
1. A summary of injuries sustained and current condition and treatment.
2. The nature of the losses sustained and what we consider are likely to be future claims on each case.
3. The disclosure of records, preferably in a paginated bundle which the parties can jointly work from.
4. Disciplines of experts instructed by the Claimant.
5. Instruction of case manager on a joint basis.
6. The possibility of the Defendant obtaining their own expert evidence.
7. A timetable towards a second WFM, with KC present.
8. Further interim payments to alleviate financial hardship.
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How to prepare continued

Decide how much you will say. You are likely to be asked -

Claimant:

- Which medical experts have you instructed? When are the appointments?
- What is the situation with work, accommodation, care and treatment?
- If capacity is in issue, what evidence do you have of a lack of capacity?
- Have you appointed a Deputy?

How to prepare continued

Defendant -

- What is your position on liability?
- Will they make an interim payment?
- If no general interims, what will they/won't they fund under rehab code?
- What experts have they instructed and do they propose to instruct?
- **Techniques** to avoid giving away too much information

Facts likely to affect the the WFM

"I am not afraid of an army of lions led by a sheep; I am afraid of an army of sheep led by a lion." – Alexander the Great

- Is liability in issue?
- Is there a significant contributory negligence argument?
- Will the Claimant succeed at an interim payment application?
- Is this a short life expectancy case or one where the prognosis very clear?
- Accommodation needs cannot be satisfied at an interim stage
- Trial of the care package is unnecessary or undesirable at this stage
- Level of support from statutory services

What does C want to achieve?

“An army marches on its stomach.”
— **Napoleon Bonaparte**

- Access to interim sums to reduce hardship and continue to fund the situation
- Obtaining records, investigating liability, obtaining medical evidence, is commonly taking 18-24 months
- In the meantime, your client requires possible treatment/diagnosis, rehabilitation and financial support
- Your client may also require care and case management
- If you do not reach out to the Defendant, your client can become increasingly frustrated with lack of progress in the case

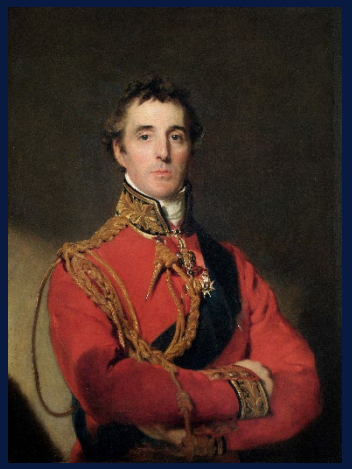
What does C want to achieve continued

- Ideally, the Claimant wants funds to instruct a case manager unilaterally. In the alternative, a case manager can be jointly instructed
- Do not let the Defendant get ahead of you in terms of medical evidence. Danger with neuropsychology, need for delays between neuropsychological testing of 6 months
- Is the Defendant prepared to hold off from making Part 36 offers whilst you collaborate on rehabilitation?
- You can lay the groundwork for arguments such as PPO and provisional damages. If you give warning that these issues are red lines for you, the insurers can prepare and acclimatise

What does D want to achieve?

"All the business of war, and indeed all the business of life, is to endeavour to find out what you don't know from what you do."

- **Duke of Wellington**



- **Intelligence gathering**
- **Disclosure of records, hospital, GP, physiotherapy, DWP, employer, HMRC**
- **Ideally, agree to rolling disclosure of medical records or, even better, ask for a mandate**
- **Opportunity to find out the present condition and treatment**
- **Intelligence gathering allows you to set a sensible reserve and maybe make an offer**

What does D want to achieve continued

- **Are they working, if so, doing what?**
- **Where are they living and with whom, how are they managing?**
- **What medical disciplines are being instructed and when?**
- **Will facilities be provided so that the Defendant can examine the client?**
- **You know where the Claimant will be and when - surveillance and investigation?**

Further WFM

"He who defends everything defends nothing"
– Frederick the Great

- If you agree a case manager on a single joint basis at the 2nd WFM expect the case manager to be there, probably remotely. What will you ask them?
- Anything they have not considered you want them to? Accommodation, support workers, specific therapies, and lack of engagement?
- Will the ongoing recommendations be funded, or will only certain aspects be funded?
- By the 3rd WFM offers may arrive, be ready to deal with them

Scenario A: Liability admitted infant claim

- Negligence in the delivery of a baby has caused grade 3 diffuse axonal injury, left third nerve palsy, evolving asymmetric spastic tetraparesis and visual impairment. Liability admitted claim. By the time of the admission and involvement of solicitors the child is 4.
- Feeding difficulties lead to the insertion of a gastrostomy tube. The child is fed via this tube. Medications include Lansoprazole, Leviteracetam, Laxido, and Baclofen. The child has suffered seizures caused by the brain injury, which are managed with medication.
- Fully dependent on adults for mobility and transfers. Does not have any independent, useful movements. Unable to reach out to grasp objects. Does not have any babble or speech. The child only cries if in pain. Parents feel the child may recognise familiar voices and enjoy music and songs. The child is more relaxed in the water. At school, the hydrotherapy pool is used. The child is in nappies through the day and night.
- Life expectancy is reduced to age 30 as a result of cerebral palsy and associated disabilities. The mother is resistant to accepting carers. The current care regime is provided via the local authority, which pays a sum to the mother, who pays her carers directly. The child also receives support from a specialist school. The child lives in an adapted downstairs room, in a tall house with 3 floors. She has 3 siblings of various ages.

Scenario B: Liability disputed adult claim

- Pedestrian versus car, liability denied. Young male aged 18 at the time of the accident. The accident caused traumatic brain injury requiring frontal craniotomy. He also suffered a complex open-book pelvic fracture. Before the accident, he worked in retail and attended college. He was a below average student.
- Two years after the accident, he suffered from pelvic pain. He had developed frontal lobe dysexecutive function.
- He lives in a small upstairs flat with his mother, father, brother and sister. He struggles with temper outbursts. He is mobile with breaks but lacks the confidence to go out and engage in society and socialise by himself. He is no longer receiving any significant treatment from the NHS. He is on benefits and feels unable to return to work.

Scenario C: Contributory Fault

- Innocent driver and passenger, primary liability admitted. Both sustain mild traumatic brain injuries and polytrauma.
- Hospital treatment failed to resolve significant hernias in one Claimant, and the other had a fractured wrist hindering recovery.
- Seatbelt issue still live.
- Historical lack of engagement with Defendant, previous offers of rehabilitation had been ignored.
- No interim payments had been paid.
- First conference over 2 years post accident.

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"In every treaty, insert a clause which can easily be violated, so that the entire agreement can be broken in case the interests of the State make it expedient to do so" – Louise XIV

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NORTHERN CIRCUIT CONFERENCE

15 NOVEMBER 2025

CHILD PEDESTRIAN RTA CLAIMS

RHIANNON JONES KC

Rhiannon Jones KC

Claims Involving Child Pedestrians

Byrom
Street
Chambers

The Standard of Care

Summarised in ***AB v Main [2015] EWHC 3183***

“The standard of care is that of a reasonably careful driver, armed with common sense and experience of the way of pedestrians, particularly children....."

"If a real risk of danger emerging would have been reasonably apparent to such a driver, then reasonable precautions must be taken; if the danger was no more than a mere possibility, which would not have occurred to such a driver, then there is no obligation to take extraordinary precautions."

"The driver is not to be judged by the standards of an ideal driver, nor with the benefit of 20/20 hindsight."

Drivers must always bear in mind that a car is a potentially dangerous weapon."

Drivers are taken to know the principles of the Highway Code.

BUT HOW MANY DEFENDANTS ACTUALLY KNOW?

Rule 125: The speed limit is the **absolute maximum** and does not mean it is safe to drive at that speed irrespective of conditions.

Rule 146: **Do not treat speed limits as targets**.

Three Observations of Dame Janet Smith

1. **COMPARISON WITH THE FACTS OF OTHER CASES RARELY HELPFUL!**

   Then why are Judgments so long containing details of other cases.
   We all do it.
   Sense check.

2. ***Lambert v Clayton [2009] EWCA Civ 237***

   Judges should **avoid making findings of fact of unwarranted precision** when not justified by the evidence.
   Where there are inherent uncertainties about the facts, dangerous to make precise findings.
   The party who bears the burden may be in difficulty; that is the purpose behind the burden of proof.

3. She accepted that the driver's duty to take reasonable care for the safety of a pedestrian **might appear to be an exacting burden on a motorist who is driving very close to a young child.** (***O'Connor v Stuttard [2011] EWCA Civ 829)***

Factual Evidence

Assess the quality of each piece of factual evidence.

- Circumstances it was obtained. Time. Place. Stressed. Injured.
- Who else had the witness spoken to before giving account?
- Where there are disputed accounts, which is likely to be accurate?

Expert Evidence

Caution needs to be exercised not to elevate experts' admissible evidence about reaction times, stopping distances etc

"into a fixed framework or formula, against which the Defendant's actions are then to be rigidly judged with a mathematical precision."

Stewart v Glaze [2009] EWHC 704

Highway Code

- Hierarchy of road users with introduction of new responsibilities towards more vulnerable road users. H rules.

- Rules 204-206

  In particular:

  Drive carefully at road junctions: **you should give way to pedestrians who are crossing or waiting to cross the road into which or from which you are turning.**

  Approaching pedestrians who have started to cross ahead. **They have priority when crossing at a junction or side road so you should give way (H2)**

- Rule 207: **At 40mph your vehicle will probably kill any pedestrians it hits, at 20mph there is only a 1 in 20 chance of the pedestrian being killed.**

Causation

Where collision would still have occurred at a safe, non-negligent lower speed.

Phethean Hubble v Coles [2012] EWCA 349

Burden on D to establish that C's injuries would have been of similar severity had D driven at a safe speed.

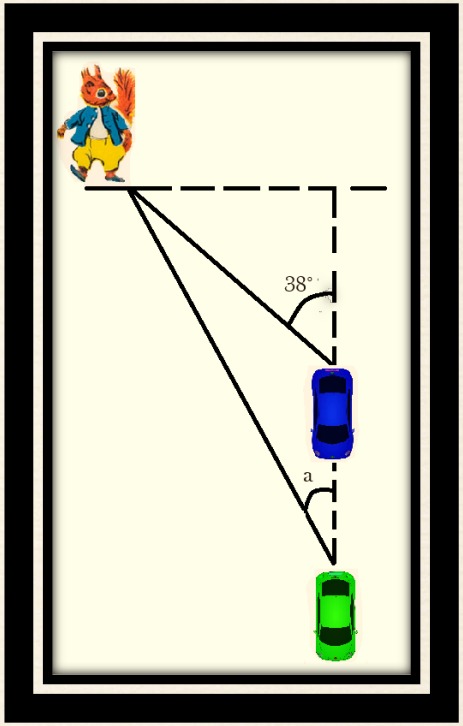
Evidence:

1. Accident reconstruction expert evidence
2. Medical evidence.

Hammond v Gibbon [2023] EWHC 2550 (KB)

- A rolling tyre injury to the head is survivable.
- The wider the angle-the eccentricity-of an object from the ordinary line of sight, the greater the PRT.

  PRT increases by 0.3 seconds for every 10 degrees of eccentricity.



Contributory Negligence

Law Reform (Contributory Negligence) Act 1945 section 1(1)

"Where any person suffers damage as the 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 the damage."

Jackson v Murray [2015] UKSC 5

Damages are reduced having regard to the Claimant's share in responsibility for the damage (not the accident)

QUESTIONS

1. Was C at fault?
2. Was C's fault a cause of his damage?
3. To what extent is it just and equitable to reduce C's damages?

As to 3:

- Key factors are causative potency and blameworthiness. ***(Stapley v Gypsum Mines Ltd [1953] AC 663 Lord Reed at 682)***

- Quirky point taken by Paul Rees KC in ***Gul v McDonagh***. If C is at fault and fault was the cause of his damage, might it not be just and equitable to reduce damages in some circumstances.

Application of the Principles to Children

A child's conduct is not judged by the same standard as an adult.

Exercise of ordinary care means that degree of care which may be expected of a person in C's situation.

For a child, blame is often substantial, but causative effect little compared to the driver.

Relevant factors:
- C's age.
- Circumstances of accident.
- Knowledge on the part of the particular child of the dangers which D's negligence has exposed him/her to.

Age

Gough v Thorne [1966] 1 WLR 1387 Denning LJ

- Is he or she of such an age as reasonably can be expected to take precaution for his/her own safety?
- Does blame attach to him/her?

Royal Commission 1978: CN should not be pleadable where a child is under 12.

AB v Main [2015] EWHC 3183 HHJ Stephen Davies: Finding of 20% CN against an 8 year old. An "outlier" according to Yip J in ***Ellis***

Ellis v Kelly [2018] EWHC 2031 Yip J *"momentary misjudgement"* of an 8 year old did not warrant finding of CN.
A finding of CN against an 8 year old ***"uncommon"***

Phethean-Hubble v Coles [2012] EWCA Civ 349 Trial judge reduced a 50% finding of CN to 33% on account of C's age (16 year old cyclist). With older children there may be no good reason to apply a different standard to that of an adult.

The test is not entirely subjective because the question is whether an ordinary child of C's age could be expected to have done any more than the Claimant.

An ordinary child is neither a paragon of prudence nor scatter brained. (Salmon LJ in ***Gough***)

In practice, exercise is artificial and imprecise.

Eagle v Chambers [2003] EWCA 1107

"15. A car can do so much more damage to a person than a person can usually do to a car. The potential 'destructive disparity' between the parties can readily be taken into account as an aspect of blameworthiness.....

16. We also accept that this court is always reluctant to interfere with the trial judge's judgment of what apportionment between the parties is 'just and equitable' under the 1945 Act. But a finding as to which, if either, of the parties was the more responsible for the damage is different from a finding as to the precise extent of a less than 50% contribution. There is a qualitative difference between a finding of 60% contribution and a finding of 40% which is not so apparent in the quantitative difference between 40% and 20%. 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. The court has 'consistently imposed upon the drivers of cars a higher burden to reflect the fact that the car is potentially a dangerous weapon."

(Morales v Eccleston: a case where Trial Judge was well on the wrong side of 50%)

Can any unifying principles be drawn?

Starting point: is this a case where CN should be less than or more than 50%?

CN > 50%

- Reserved for those cases where the child runs into the road giving the driver either no or very limited opportunity to avoid the accident (e.g. by failing to sound the horn) and **where the driver does little else wrong.**

- Usually no criticism of the driver's speed. (The corollary being **where there is a finding of excessive speed, the percentage of contributory negligence usually falls below 50%.)**

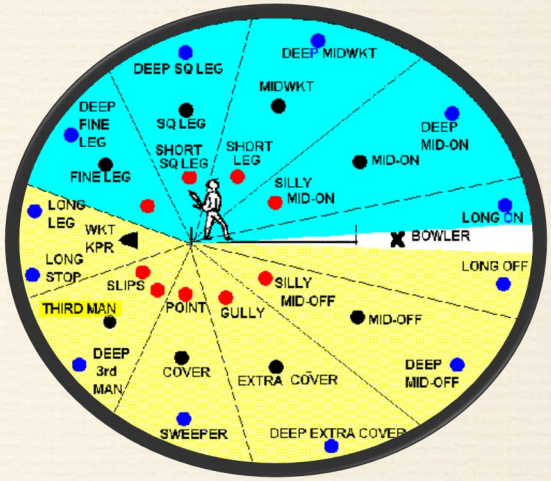
Where the child can be seen in or on the road then a high degree of blame attaches to the driver if he has not taken all reasonable precautions. **Contributory negligence ranges between 20 and 40% in these cases depending on whether the child was walking or running.**

Common strands

Groups of children	**Willbye, Rainford, Rowe, Grant, Armstrong, Melleney, Toropdar, Honnor , Gadsby**
Children's activity: Playing, ball games	**Foskett, Morales, AB, O'Connor, Ellis**
Other foreseeable distraction	Going to fair **Jones,** ice-cream **M v Rollinson**
C's behaviour	**Eagle v Chambers**
Proximity of school	**Rowe, Howell-Williams, Atkinson, Gadsby, MW**
School buses	**Rainford, Miller**
Emergency vehicles:	**Smith**
Presence of crossing point (whatever colour of lights).	**FLR, Alabady**
Headphones/phones	**Probert** and **Gul**
Dark clothing/lack of illumination of pedestrian:	**Probert**
Child walking or running. Speed.	
Actions of others: Driver beckoning child:	**Gough** Would have been viewed differently if an adult. **Alabady**
Dearth of 66% and 30% CN cases.	

Tactical Considerations

- ? Value of disputing primary liability even if likely to lose just so that the focus is actually on both C and D's conduct and culpability rather than just on C's.
- Even a minimal risk on liability to C is still a tangible risk.
- A means of managing access to IPs.



Contribution proceedings: ALMOST CERTAINLY NOT

Appeals: UNPREDICTABLE OUTCOMES PROCEED WITH CAUTION

Claims involving Child Pedestrians

Rhiannon Jones KC

1.1 The standard of care

The standard of care was succinctly summarised by HHJ Stephen Davies in *AB v Main* [2015] EWHC 3183 drawing on strands from other cases:

> "The standard of care is that of the reasonably careful driver, armed with common sense and experience of the way of pedestrians, particularly children, are likely to behave in the circumstances such as were known to the defendant to exist in the present case, that there was a possibility of danger emerging, to avoid which he would slow down or sound his horn or both." [1]
>
> "If a real risk of danger emerging would have been reasonably apparent to such a driver, then reasonable precautions must be taken; if the danger was no more than a mere possibility, which would not have occurred to such a driver, then there is no obligation to take extraordinary precautions." [2]
>
> "The driver is not to be judged by the standards of an ideal driver, nor with the benefit of 20/20 hindsight" [3]
>
> "Drivers must always bear in mind that a car is a potentially dangerous weapon." [4]
>
> "Drivers are taken to know the principles of the Highway Code." [5]

All of these principles have most recently been summarised by Clare Ambrose sitting as a Deputy High Court Judge in *Gadsby v Hayes [2024] EWHC 2142*

In *O'Connor v Stuttard* [2011] EWCA Civ 829 whilst the Court of Appeal approved the approach of the trial judge in reminding himself that a driver's duty is to take reasonable care for a pedestrian's safety, not to guarantee it, Dame Janet Smith emphasised what she accepted might appear the *"exacting burden"* on a motorist who is driving very close to a young child.

Comparison with the facts of other cases is rarely helpful.[6]

In *Lambert v Clayton* [2009] EWCA Civ 237, Smith LJ cautioned trial judges against making findings of fact of unwarranted precision when that was not justified by the evidence, because treating what could in truth be no more than *"guestimates"* as if they were secure findings of fact could easily lead to an unjust result either way. At [39] she said:

> "If there are inherent uncertainties about the facts, as there are here, it is dangerous to make precise findings. This may well mean that the party who bears the burden of proof is in

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1 *Moore v Pointer* [1975] RTR, per Buckley LJ

2 *Foskett v Mistry* [1984] 1 RTR per May LJ.

3 *Stewart v Glaze* [2009] EWHC 704 per Coulson J.

[4] *Lunt v Khelifa* [2002] EWCA Civ 801 per Latham LJ at [20].
[5] *AB v Main* [2015] EWHC 3183 at [8]
[6] *O'Connor v Stuttard* [2011] EWCA Civ 829, per Dame Janet Smith at [12]

difficulties. But that is one of the purposes behind the burden of proof; that if the case cannot be demonstrated on the balance of probabilities, it will fail."

Judges must avoid considering a driver's conduct in a vacuum, without reference to the actual circumstance of the accident.[7]

1.2 Factual evidence

In *AB v Main* HHJ Stephen Davies highlighted the danger of placing undue weight on the current recollections of witnesses about the precise circumstances of an accident which occurred many years ago. A Judge should exercise caution before placing significant weight on anything other than contemporaneous evidence, including the accounts given contemporaneously to the police investigator. In *MW v Wilkinson and RSA Ltd [2025] EWHC 2300 (KB)* HHJ Howells observed that "it has long been recognised by these courts that memory can play tricks." There is a long exposition on the correct approach to judicial fact finding by Dexter Dias KC in *FLR v Chandran* 2023 EWHC 1671 at [16].[8]

1.3 Expert evidence

Trial Judges should exercise caution in relation to the evidence of accident reconstruction experts. In *Stewart v Glaze* [2009] EWHC 704*,* Coulson J at [5], warned of the danger of such experts giving opinion on matters beyond their expertise and acting as advocates seeking the usurp the role of the judge and elevating their admissible evidence about reaction times, stopping distances and the like into a "fixed framework or formula, against which the Defendant's action are then to be rigidly judged with a mathematical precision".

1.4 The Highway Code

The latest edition is 2023/2024 which contains new rules on the hierarchy of road users with the introduction of new responsibilities towards more vulnerable road users, to keep them safe on the road. These are known as the 'H' rules. In addition, at junctions, drivers now need to give way to pedestrians crossing or waiting to cross a road which a vehicle is turning into. As regards children, the following rules may be relevant:

Rule 112

The horn. Use only while your vehicle is moving and you need to warn other road users of your presence. Never sound your horn aggressively. You **MUST NOT** use your horn

- while stationary on the road
- when driving in a built-up area between the hours of 11.30 pm and 7.00 am

except when another road user poses a danger.

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7 *Sam v Atkins* [2005] EWCA Civ 1452 per May LJ

8 Including evidential basis, inference, survey range, contextual evaluation, process iteration, decisiveness, binary truth values, forensic yardsticks, memory, probability/improbability, contemporaneous documents, cross-relevance, non-determinativeness and demeanour!

Rule 125

The speed limit is the absolute maximum and does not mean it is safe to drive at that speed irrespective of conditions. Driving at speeds too fast for the road and traffic conditions is dangerous. You should always reduce your speed when:

- the road layout or condition presents hazards, such as bends
- sharing the road with pedestrians, particularly children, older adults or disabled people, cyclists and horse riders, horse drawn vehicles and motorcyclists
- weather conditions make it safer to do so
- driving at night as it is more difficult to see other road users.

Rule 146

Adapt your driving to the appropriate type and condition of road you are on. In particular

- do not treat speed limits as a target. It is often not appropriate or safe to drive at the maximum speed limit
- take the road and traffic conditions into account. Be prepared for unexpected or difficult situations, for example, the road being blocked beyond a blind bend. Be prepared to adjust your speed as a precaution
- where there are junctions, be prepared for road users emerging
- in side roads and country lanes look out for unmarked junctions where nobody has priority
- be prepared to stop at traffic control systems, road works, pedestrian crossings or traffic lights as necessary
- try to anticipate what pedestrians and cyclists might do. If pedestrians, particularly children, are looking the other way, they may step out into the road without seeing you.

Rule 204

The road users most at risk from road traffic are pedestrians, in particular children, older adults and disabled people, cyclists, horse riders and motorcyclists. It is particularly important to be aware of children, older adults and disabled people, and learner and inexperienced drivers and riders. In any interaction between road users, those who can cause the greatest harm have the greatest responsibility to reduce the danger or threat they pose to others.

Rule 205

There is a risk of pedestrians, especially children, stepping unexpectedly into the road. You should drive with the safety of children in mind at a speed suitable for the conditions.

Rule 206

Drive carefully and slowly when

- in crowded shopping streets, Home Zones and Quiet Lanes (see Rule 218) or residential areas
- driving past bus and tram stops; pedestrians may emerge suddenly into the road
- passing parked vehicles, especially ice cream vans; children are more interested in ice cream than traffic and may run into the road unexpectedly
- needing to cross a pavement, cycle lane or cycle track; for example, to reach or leave a driveway or private access. Give way to pedestrians on the pavement and cyclists using a cycle lane or cycle track
- reversing into a side road; look all around the vehicle and give way to any pedestrians who may be crossing the road
- turning at road junctions; you should give way to pedestrians who are crossing or waiting to cross the road into which or from which you are turning
- going through road works or when passing roadside rescue and recovery vehicles, as there may be people working in or at the side of the road
- the pavement is closed due to street repairs and pedestrians are directed to use the road
- approaching pedestrians on narrow rural roads without a footway or footpath. Always slow down and be prepared to stop if necessary, giving them plenty of room as you drive past
- approaching zebra and parallel crossings as you **MUST** give way to pedestrians and cyclists on the crossing (see Rule 195)
- approaching pedestrians who have started to cross the road ahead of you. They have priority when crossing at a junction or side road so you should give way (see Rule H2)

Rule 207

Particularly vulnerable pedestrians. These include:

- children and older pedestrians who may not be able to judge your speed and could step into the road in front of you. At 40mph (64km/h) your vehicle will probably kill any pedestrians it hits. At 20mph (32km/h) there is only a 1 in 20 chance of the pedestrian being killed. So kill your speed.

…….

Rule 208

Near schools. Drive slowly and be particularly aware of young cyclists and pedestrians. In some places, there may be a flashing amber signal below the "School" warning sign which tells you that there may be children crossing the road ahead. Drive very closely until you are clear of the area.

1.5 Causation

Assuming breach of duty is established, the issue of causation falls for consideration. A claim will only succeed if, but for the Defendant's negligence, the damage would not have occurred or the Defendant's negligence materially contributed to the Claimant's injuries. The issue arises in the context of pedestrian claims when a Court finds that at a safe, non-negligent lower speed, a collision would still have occurred. So, in order to give context, an accident occurs in a 30mph speed limit at 30mph, which a Judge finds to be too high a speed. If the collision would still have occurred at 20mph (deemed to be a safe speed) what is the position with regard to causation and where does the burden of proof lie? Although the point was not fully argued in *Phethean-Hubble v Coles* [2012] EWCA 349 and the reasoning of the Judgment is not convincing, the judgments of Tomlinson and Longmore LJJ suggest that the Claimant would still succeed on causation because in such circumstances the burden is on the Defendant to prove that the Claimant would have sustained injuries of comparable severity had he been travelling at a safe non-negligent speed. Tomlinson LJ said at [89]:

> "The material before the judge did not persuade him, the burden being on the Defendant, that the Claimant's conduct was such that he would have sustained injuries of similar severity even had the Defendant been driving at a safe speed."

Along the same lines, Longmore LJ said at [90]:

> "The critical facts were (1) that the defendant was travelling at 35mph, a speed which was not just in excess of the speed limit but also in excess of what has been held to be a safe speed in the circumstances of 26/27mph and (2) that the accident occurred while the defendant was travelling at that excessive speed. The injury which occurred was injury of a kind likely to have been caused by that breach see Clerk & Lindsell, Torts 20th ed. Para 2-07. In these circumstances I do not consider that it is necessary for the claimant to prove positively the negative proposition that the accident would not have occurred if the defendant had been going at a safe speed; realistically it should be for the defendant (who has already been found in breach of duty) to show that even if he had been driving at a non-negligent speed, the accident would still have occurred. The judge was not satisfied that that was the position and neither am I."

If a Defendant wants to challenge on causation, expert medical evidence will be required to establish that injuries of comparable severity would have been suffered. Accident reconstruction experts can point to papers including generic evidence on severity of injury at various speeds but it will require expert medical evidence to establish precisely what would have happened in the actual accident mechanism at a safe speed.

1.6 Lessons from a recent case: *Hammond v Gibbon* [2023] EWHC 2550 (KB)

In this case, a 4½ year old boy ran at moderate speed into a residential street from behind a VW Passat, which was parked half on and half off the pavement and into the path of a Land Rover Freelander from its nearside. The VW obscured the boy before he emerged. The speed at impact was 10mph because the Land Rover was accelerating away from a speed bump. The Land Rover driver and passenger never saw the Claimant. Only the Claimant's head might have been visible once he emerged. Two alternative mechanisms of impact were proposed:

- The Claimant was struck by the nearside front corner of Land Rover, somehow emerging from beneath the rear nearside wheel.
- The Claimant got as far as the middle of the Land Rover, stopped and then tried to turn around and go back before being run over by the wheels.

In the first scenario, the Claimant was potentially visible for 1 second. In the second, far longer.

The Claimant sustained crushing injuries imparted over a relatively short period of time. Expert evidence was deployed. It was contended for the Claimant that he would not have survived, still less without significant lasting physical disability if his head had been run over by the wheel; he must have gone between them. A literature search showed that children have been run over by rolling tyres-applying their forces gradually, rolling on and off and survived with little physical injury. If the Court could be persuaded of this, the first proposed mechanism of collision was plausible. HHJ Bird, sitting as a Judge of the High Court found at [35]:

> "It is now common ground that the head injuries, soft tissue injuries and fracture may have been caused by a wheel of the Land Rover moving over Jake's head and upper body. Whilst this scenario appears to be inherently unlikely and contrary to common sense, a number of research papers have been produced by Mr Macfarlane which provide examples of such events. Duhaine and others explain (see "Crush Injuries to the Head in Children" published in Neurosurgery vol 37, no 3 in September 1995) that the extent to which the brain remains undamaged in crushing injuries is "remarkable" and "greater than might be anticipated."

The learning point from this case is that a rolling tyre injury to the head is survivable. On this basis the first mechanism of impact was preferred. The driver had only a second to perceive the Claimant and react. A marginal case became an impossible one, notwithstanding the fact that the driver had not seen the Claimant.

A further point of general importance emerged. Where a car is travelling at some speed, it will be a fair distance back up the road when the child emerges. The effect is that the child, whilst emerging from the nearside is still relatively central in the driver's vision at the moment of emergence. The slower the car is going, the closer it will be to the point of impact and the pedestrian will be at a greater angle to the nearside when emerging. Given that the Land Rover was travelling so slowly, the Claimant's head was at a substantial angle to the ordinary line of the driver looking ahead. This was calculated at 38 degrees. The wider the angle-the eccentricity-of an object from the ordinary line of sight, the longer it takes for a driver to perceive it and the perception reaction time ("PRT") is therefore greater. On the facts of this case, this had the effect of increasing the PRT from 0.75 seconds to about 2 seconds. PRT increases by about 0.3 seconds for every 10 degrees of eccentricity.[9] With 20mph speed limits in many built up areas, impacts at slower speed may become the norm. If so, vehicles will be closer to emerging pedestrians, with a corresponding increase in eccentricity and PRT. So this could be good news for Defendants potentially dealing with slower impact speed cases.

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[9] See [61] of the Judgment.

1.7 Contributory negligence

The Law Reform (Contributory Negligence) Act 1945 section 1(1) provides:

> "Where any person suffers damage as the 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 the damage."

This provision was enacted to alter the common law rule under which contributory negligence could defeat a claim entirely.

In *Jackson v Murray* [2015] UKSC 5, Lord Reed at [20] emphasised that damages are to be reduced having regard to the Claimant's share in responsibility for the damage (not responsibility for the accident). This was a distinction which caused some confusion in the causation discussion by the Lord Justices in *Phethean-Hubble v Coles*.

Three questions arise when considering whether a reduction should be made to the Claimant's damages.

(1) Was the Claimant at fault?
(2) If so, did the Claimant suffer damage (partly) as a result of his fault? Or in other words, was the Claimant's fault a cause of his damage?
(3) If so, to what extent is it just and equitable to reduce his damages.[10]

As to the first question, fault does not mean breach of a legal duty owed to someone else, it simply means that the Claimant failed to take reasonable care as he should have done for his own safety or property.

> "Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to *others*. Contributory negligence is a man's carelessness in looking after *his own* safety."[11]

As to the second question, it is sufficient if the Claimant's fault is one of the causes of the damage, as Denning LJ stated in *Davies* at 322:

> "The legal effect of the Act of 1945 is simple enough. If the plaintiff's negligence was one of the causes of his damage, he is no longer defeated altogether. He gets reduced damages."

As to the third question, there are two aspects: causative potency and blameworthiness. [12]

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10 *Gul v McDonagh* [2021] EWCA Civ 1503

11 *Froom v Butcher* [1976] QB 286 at 291 per Lord Denning MR. Also *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2KB 29, *Jackson v Murray* [2015] UKSC 5 at [27].

12 *Stapley v Gypsum Mines Ltd* [1953] AC 663 per Lord Reid at 682.

In *Gul v McDonagh* [2021] EWCA Civ 1503 the Court of Appeal avoided having to decide the question that if the Claimant was at fault and the fault was the cause of his damage, it might not be just and equitable in any event to make a deduction from his damages by holding that the Judge had not erred in making a 10% reduction.[13]

The decision as to apportionment is to be approached in a *broad, jury-like and common sense way*[14] with consideration being given to the relative blameworthiness of the parties and the causal potency of their respective conduct.[15]

The conduct of a child contributing to an accident is not necessarily judged in the same light as similar conduct by an adult because the exercise of ordinary care means that degree of care which may be expected of a person in the Claimant's situation.

The degree of blame to attach to children is often substantial compared to that of the driver. However, the causative impact of less egregious negligence on the driver's part acts as a counter-balance to the less causative but more blameworthy negligence of the child.

In considering whether a child has taken reasonable care for his own safety, regard must be had to the age of the child, the circumstances of the case and the knowledge by the particular child of the dangers to which the Defendant's negligence has exposed him.

In *Gough v Thorne* [1966] 1 WLR 1387 Lord Denning MR said that a very young child cannot be guilty of contributory negligence. An older child may be, but it depends on the circumstances.

> "A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably can be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense not the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy." [16]

The Royal Commission on Civil Liability and Compensation for Personal Injury Cmnd.7075 [1978] Vol 1, para 1077 recommended that where is child is under 12 contributory negligence should not be pleadable.

Theoretically there is no age below which it can be said that the child cannot be guilty of contributory negligence, but in practice it is unreasonable to exact a high standard. In *Ellis v Kelly* [2018] EWHC 2031 (QB) Yip J found that an 8 year old who ran into the road in a *momentary misjudgement* set against reckless conduct on the part of the Defendant motorist did not warrant a finding of contributory negligence. A finding of contributory negligence against an 8 year old according to Yip J was *uncommon*.

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13 Nugee LJ at [41]

14 *Badger v Ministry of Defence* [2005] EWHC 2941 (QB)

15 *Stapley v Gypsum Mines Ltd* [1953] AC 663, per Lord Reid at 682.

16 Page 1390.

Compare this with the approach of HHJ Stephen Davies in *AB v Main* [2015] EWHC 3183 (QB) where he found an 8 year old to be 20% contributorily negligence. Yip J in *Ellis* considered *AB v Main* to be an *outlier*.

In *Phethean-Hubble v Coles* [2012] EWCA Civ 349 a 16 year old cyclist who turned from the pavement into the road in front of the Defendant's car was found to be 50% contributorily negligent, the Court of Appeal holding that the Trial Judge was not justified in reducing an initial assessment of 50% contributory negligence to 33%, on account of the Claimant's age. With older children there may be no good reason to apply a different standard to that of an adult but if the conduct of the Defendant is really egregious, the Court may elect to reduce an adolescent's damages by a small percentage if the child is struck by the Defendant's car whilst crossing the road.

The test is not entirely subjective because the question is whether an *ordinary child* of the Claimant's age could be expected to have done any more than the Claimant. An ordinary child is neither a *paragon of prudence* nor *scatter brained.* (per Salmon LJ at 1391 in *Gough).*

In *Mullin v Richards* [1998] 1 WLR 1303 the Court of Appeal held that the standard of care to be applied to a 15 year old schoolgirl was whether an *ordinarily prudent and reasonable 15 year old schoolgirl* would have appreciated the risk of harm. Hutchinson LJ cited the Australian case of *McHale v Watson* [1966] 115 CLR 199:

> "The standard of care being objective, it is no answer for him [that is the child] any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow witted, quick tempered, absent minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as a characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective not a subjective standard." (Kitto J at page 213-214)

1.8 The assessment in practice

Realistically how can a Judge go about assessing reasonable conduct of an ordinary 10 year old, compared to a 12 year old, compared to a 15 year old, particularly given the huge variability in behaviour with age bands (e.g. an irresponsible and young for their age 12 year compared to a careful mature 12 year old)? Similarly, can they recall their state of understanding of road safety at a particular age to provide something to compare a Claimant's conduct with. The exercise is necessarily artificial and imprecise.

1.9 *Eagle v Chambers* [2003] EWCA Civ 1107: the benchmark case.

The Court of Appeal reduced a finding of 60% contributory negligence to 40% in a case where the 17 year old Claimant, in an emotional state and wearing light coloured clothing, had been walking unsteadily along the white line in the middle of the dual carriageway and subsequently the offside of the carriageway at night, when she was struck by the Defendant (who himself was just below the legal alcohol limit) driving at 30-35mph needlessly in the offside lane. Hale LJ said:

"15. A car can do so much more damage to a person than a person can usually do to a car. The potential 'destructive disparity' between the parties can readily be taken into account as an aspect of blameworthiness. …

16. We also accept that this court is always reluctant to interfere with the trial judge's judgment of what apportionment between the parties is 'just and equitable' under the 1945 Act. But a finding as to which, if either, of the parties was the more responsible for the damage is different from a finding as to the precise extent of a less than 50% contribution. There is a qualitative difference between a finding of 60% contribution and a finding of 40% which is not so apparent in the quantitative difference between 40% and 20%. 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. The court has 'consistently imposed upon the drivers of cars a higher burden to reflect the fact that the car is potentially a dangerous weapon."

The challenge is therefore to fit the facts of any case being considered around *Eagle v Chambers* with the added dynamic of a child being involved. Practitioners are warned against seeking comparable cases because each turn on their own facts. (See Dexter Diaz KC in *FLR v Chandran* [2023] EWHC 1671 who said: *Therefore I judge the term "factual precedent" to be in these circumstances essentially oxymoronic.)* Notwithstanding that, the table attached could be a useful sense check to any assessment!

Can any unifying principles be drawn? The following points are tentatively proposed.

(A useful first question might be: is this the sort of case where contributory negligence should be less than or more than 50%?)

- Findings of contributory negligence exceeding 50% appear to be reserved for those cases where the child runs into the road giving the driver either no or very limited opportunity to avoid the accident (e.g. by failing to sound the horn) and where the driver does little else wrong.

- In cases where contributory negligence exceeds 50%, there is usually no criticism of the driver's speed, the corollary being where there is a finding of excessive speed, the percentage of contributory negligence usually falls below 50%.

- Where the child can be seen in or on the road then a high degree of blame attaches to the driver if he has not taken all reasonable precautions. Contributory negligence ranges between 20 and 40% in these cases depending on whether the child was walking or running.

The commonly expressed perception is that Courts treat children more leniently than adults when it comes to the application of the contributory negligence doctrine. However, one study has found counter-intuitively that in practice, children falling in the 10-19 year old category age

range were more likely to have a finding of contributory negligence made against them than adults and at a higher rate.[17] The authors raise the question as to whether Judges are in fact holding children to an adult standard. Surely a more likely rationale is the likelihood that teenagers are less risk averse and so tend to take less care for their own safety which is then reflected in the deduction for contributory negligence.

1.10 Contribution proceedings

In *Ellis v Kelly* [2018] EWHC 2031, the 8 year old Claimant had been allowed to use a playground without adult supervision before the accident. Primary liability was admitted by the driver who struck the Claimant who was driving too fast but contribution proceedings were brought against the mother for failure to supervise her child.[18] The Claimant's mother had told the children to stay together and expected the Claimant to stay with the cousins he was playing with.

Yip J found that she had been entitled to regard the lane as a safe play area and had taken reasonable precautions by giving the Claimant road safety instructions; restricting where he went and telling the children to stay together. Holding her responsible would impose far too high a standard on an ordinary parent making ordinary decisions in the course of parenting as to how to keep a child reasonably safe while gradually being allowed more responsibilities and freedoms. Natural sympathy for a parent of a child who had been catastrophically injured could not stand in the way of finding legal responsibility in such cases. However, it was undesirable to expand the law so as to routinely attempt to regulate decisions on actions arising in the course of normal daily parenting. Parents were not reasonably able to secure insurance to guard against the risk arising out of their parenting generally. Further, if parents were to be routinely joined to litigation such as in the instant case, there would be a real risk that that would encourage an over-cautious approach interfering with parents' assessments of when it was appropriate to allow children some freedom to foster growth and independence. It would also impact on the course of litigation in that in the instant case, the parent who was best placed to act as the Claimant's litigation friend could not do so. Real caution should be exercised by courts that considered claims against parents and by insurers in decision whether it was appropriate to join parents and close attention should be paid to the circumstances. In this case it would have been wholly wrong to find the Claimant's mother blameworthy.

Consider the following scenario: the Claimant child is from a financially and socially deprived family with inadequate parenting. He is not supervised properly when out playing, crosses a road and is seriously injured. The Claimant's mother witnesses the immediate aftermath of the accident. The Defendant driver is at fault. The Claimant is of an age where there is no finding of contributory negligence. 100% liability is established. Interim payments are provided with the result that the Claimant and his family are re-housed in significantly better conditions than they were in before the accident with extensive support. The Claimant's mother collaterally

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17 J Goudkamp and D Nolan "Contributory negligence in the 21st Century: An Empirical Study of First Instance Decisions (2016] 79 MLR 575. (368 first instance decisions in England and Wales between 2000 and 2015) and J Goudkamp and D Nolan "Contributory Negligence in the Court of Appeal: An Empirical Study" (2017) 37 LS 437.

18 [63] onwards.

benefits from these improved circumstances. She brings her own claim for damages for psychiatric injury as a secondary victim. Can/should her initial fault in failing to supervise the Claimant be relied upon to try to limit/defeat the secondary victim claim?

1.11 Options and tactics for Defendants in borderline liability cases

The Claimant's advisers are likely to be taking a close look at primary liability and the risks on that before committing to proceedings. There may be delay as the case is passed between various solicitor's firms before a decision is taken by one to proceed. Is it necessarily a good option for the Defendant for liability to be crystallised at an early stage?

In *Toropdar v D* [2009] EWHC 567 (QB), the Defendant, seeking clarity on liability, forced the matter by issuing an action in the Defendant driver's name for a declaration that he was not liable to D at all. Clarke J declined to make such a declaration because he found that the driver had been negligent. The matter proceeded to a separate hearing to consider the degree of contributory negligence. So, the insurer enjoyed a pyrrhic victory, succeeding on the procedural point but there was no knockout blow because of the finding of liability. These tactics have not been adopted by insurers in borderline liability cases since. Declaratory proceedings give rise to some procedural issues involving funding of counterclaims etc. Moreover, Clarke J warned:

> "I should not be understood to be saying that insurers are, generally speaking, entitled to seek negative declarations in personal injury claims. Such a course is and should be unusual. The decisive question is whether or not, at the time when the matter is put before the court, it is right to allow the action for a negative declaration to proceed."

A key factor in this case was that a claim had been canvassed by the pedestrian's advisers in correspondence. There are clearly risks as to whether the Court would entertain the application for negative declaratory relief which has rightly discouraged insurers from taking this course. There are likely to be more pragmatic reasons for insurers avoiding this strategy. Is it really in an insurers best interest for there to be an early determination of primary liability given that it will trigger entitlement for interim payments for rehabilitation which so often causes insurers frustration due to limited gains achieved and very significant expense incurred? Some uncertainty over the likely extent of contributory negligence could cause Claimant's advisers to be less sanguine about the percentage recovery and less *gung-ho* over expenditure of interim payments.

1.12 Appeals

To challenge a first instance decision regarding contributory negligence, there must be *a real prospect of success* on an appeal, meaning realistic as opposed to fanciful.[19] Appellate courts are reluctant to disturb a determination of a trial judge on the issue of contributory negligence.[20] In a similar vein, Lord Reed in *Jackson v Murray* [2015] UKSC 5 stated that apportionment:

> "is inevitably a somewhat rough and ready exercise and since different judges may legitimately take different views of what would be just and equitable in particular

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[19] CPR 52.3(2) and CPR 52.3(6) and *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311 [21] Brooke LJ

[20] *Grant v Sun Shipping Co Ltd* [1948] 2 All ER 238, per Lord du Parcq at 246.

circumstances, it follows that those differing views should be respected, within the limits of reasonable disagreement."[21]

An appellate court should intervene with respect to an apportionment decision only where it is "satisfied that the apportionment made by the court below was not one which was reasonably open to it."[22] So, proceed with caution.

1.13 Tufty Club Table

[21] [28]

[22] Ibid and *G v G* [1985] 1WLR 647

Case	Judge	Facts	C's age	D's speed	Causation	Other allegations of negligence/ comment
No Liability						
James v Fairley [2002] EWCA Civ 162	CA	C was struck by D as he crossed the second of two lanes on an A road.	8			No negligence at first instance upheld on appeal. When C was standing on the pavement before crossing, she had not been behaving in a way which would have alerted the prudent driver to the possibility of anything untoward occurring. CA held that the Judge was entitled to find that D would not have seen C before he collided with her even though she had crossed one of the two lanes of the road.
Miller v C&G Coach Services Ltd [2002] EWHC 1361	QB	C got off the school bus and passed behind it to cross the road when she was hit by D's coach.	15			D's case was that he had no reason to expect passengers to run into the road, he slowed down and the accident was caused by the C's negligence in not checking it was safe to cross. C could not prove D was negligent. His speed was appropriate and he did not see C until the moment of impact.
Goundry v Hepworth [2005] EWCA Civ 173	CA	C attempted to cross the road with a number of adults. C was in the middle of the road when two cars approached. The first passed by. C ran out into the path of the second car.	4			At first instance D was liable because she should have stopped or slowed down to let C cross. Overturned on appeal. If D was obliged to stop or slow down, so was the car in front.

Case	Judge	Facts	C's age	D's speed	Causation	Other allegations of negligence/ comment
Chan v Peters and Advantage Insurance Co Ltd [2021] EWHC 2004	Cavanagh J	C was crossing the road outside his school in Sheffield when he was struck by the front nearside of D's car. He was standing in a parking bay between a bus and a car. D did not see C until he moved out in front of the car 0.6 seconds before impact. D adopted a line close to the white line in the middle of the road to give the car and bus a wide berth. D did not cover the brake and did not slow down but stopped within 1 sec of impact.	17	25 mph in a 30 mph limit		25 mph was an appropriate speed in the vicinity of a school but it was not the start or end of the school day. Obiter: Had he found D to be negligent he would have reduced C's damages by 75% for CN.
Barrow v Merrett [2022] EWCA Civ 1241	CA on appeal from Richard Hermer KC sitting as a Deputy High Court Judge.	C was crossing the road from D's right and was struck just to the nearside of the centre line on D's side of the road. No damages awarded to C who ran into the road as on the facts, there was no negligence on the part of the driver who struck him. Two different factual accounts of the manner of C's crossing	11	30 mph		Judge's factual findings not overturned on appeal. Illustrates how difficult it is to overturn a trial judge's factual findings. Consideration of 'Gestmin' factors. *"It seems to me that most, if not all, of Mr Weir's submissions were designed to show that the Judge could have made different findings on the evidence, rather than to show that the findings which he did make were wrong."* [90]
Hammond v Gibbon [2023] EWHC 2550 (KB)	HHJ Bird	C ran at moderate speed into a residential street from behind a VW Passat parked half on and half off the pavement into the path of a Land Rover Freelander from its nearside. VW obscured the boy before he emerged. Speed at impact 10 mph. D never saw C, nor did his passenger. Only C's head might have been visible once he emerged.	4½	10 mph		See paper. - rolling tyre injury to the head is survivable. - wider the angle of eccentricity, the longer the PRT

Case	Judge	Facts	C's age	D's speed	Causation	Other allegations of negligence/ comment
Atkinson v Kennedy and Grab and Deliver Ltd [2024] EWHC 2299 (KB)	HHJ Freedman	C, A and her mother stopped at a junction about 70m away from school at the end of the school day. D was turning his LGV left in the junction where the pedestrians had stopped. He did not see them. There were parked cars and other pedestrians in the vicinity. C and A ran into the junction and C was struck by the nearside of the LGV and was trapped under the third rear axle.	7	11.2-11.8mph in a 20mph "School Safety Zone" signs and red stripes painted on road.		There was no impairment of visibility; D had a good opportunity to see C and other pedestrians on the footpath before turning and vice versa. Unusually D alleged CN despite C's young age. Judge indicated he would have rejected this contention had he made a finding of liability. Interesting comment at [20] re: approach to opinion evidence given by factual witness as to culpability. C argued that D should either have stopped or reduced speed to 5mph before turning. The contention had two strands: • An audible warning *"stand clear, this vehicle is turning left"* comes on the LGV at 5mph. C alleged that D should have travelled at a speed slow enough to activate the audible warning. • Rule 170 of the Highway Code (in force from 29 January 2022) requires drivers to *"give way to pedestrians crossing or waiting to cross a road into which or from which you are turning. If they have started to cross they have priority, so give way."* Judge placed reliance on 5 factual witnesses who did not criticise D's speed. There was no obligation on D to stop had he seen C; this would place too high a burden on him.

Case	Judge	Facts	C's age	D's speed	Causation	Other allegations of negligence/ comment
Gadsby v Hayes [2024] EWHC 2142 (KB)	Ms Clare Ambrose sitting as a Deputy High Court Judge	At a pedestrian crossing a 15 minute walk away from a school at the end of the school day, C was struck by the front nearside of D's car having just emerged from the nearside pavement on a pedestrian crossing found to be showing green in the car's favour. There were a large number of teenagers in the vicinity.	12	15-20mph in a 30 mph limit.		Huge factual disputes which required accident reconstruction evidence to evaluate. Trial 10 years post accident. Delay in obtaining statements. Significant weight accorded to contemporaneous statements. Judge not satisfied that the setting required a reasonable driver to proceed at 10mph or less through a crossing with lights on green in her favour. Reasonable precautions required D to keep a look out for children and reduce her speed to 20mph or less even if the lights were in her favour, as she did. [119]

Case	Judge	Facts	C's age	D's speed	Causation	Other allegations of negligence/ comment
W v Wilkinson and Royal and Sun Alliance Insurance Ltd [2025] EWHC 2300 (KB)	HHJ Howells	M and his twin sister E collected from school by their 15 y/o brother, Ryan at 3.40pm-20 mins after end of school day. Ryan and E stopped to talk to a teacher for 5-10 mins. M crossed to the other side of the road. The teacher left. Ryan told M to stay where he was. M decided to re-cross and was struck by offside front bumper of D's car. Accident and trial 11 years apart.	Nearly 6	20mph in a 30mph limit with 20mph school advisory sign.		C alleged excessive speed and lack of observation. Initially alleged D should have been travelling at 20mph, in closing 10-15mph and had D attained this speed M's injuries would have been avoided or significantly reduced. D contended that his speed was reasonable, that M emerged from behind a parked car and even at a lower speed M's injuries would not have been prevented. Very careful analysis of factual evidence. D was driving at "no more than 20mph." Judge not satisfied that the presence of M on the pavement as an unaccompanied child was such, on the facts of this case to require him to be identified by the reasonable careful driver as a hazard such that avoiding action needed to be taken. [Para 48] "A careful driver cannot be expected simply because they see an unaccompanied young child on the pavement to significantly reduce their speed." [Para 49] Finding in context of driver doing 20mph in a 20mph advisory limit and a 30mph speed limit. Having made factual findings, expert evidence became irrelevant.

75% Contributory negligence						
Foskett v Mistry [1984] RTR 1	CA	C ran out onto an open road from adjacent sloping park land into the nearside pillar of the car about 10 feet from the kerb. D had not seen C before he ran into the car.	16½	D's exact speed not clear		No liability at first instance. No allegation of speed. D should have glanced at the open parkland on his left and should have seen C when he emerged into his view and sounded his horn. 75% CN substituted by CA.
Morales v Ecclestone [1991] RTR 151	CA	C, who was initially on the opposite side of the road followed a ball into the road at 5.15pm on a May afternoon in rush hour. The ball crossed over the centre line of the road and C was hit by the front offside of D's car. C had been bouncing the ball and had gone into the road twice previously to bring it under control.	11	20 mph in a 30 mph limit		At first instance: 20% CN. CA: D had no more than 2 seconds in which to see C. There was some evidence that D was not keeping a proper lookout. However C showed *"reckless disregard for his own safety and must bear a higher proportion of blame for the accident than D"*. 75% CN substituted.
Willbye v Gibbons [2003] EWCA Civ 372	CA	A group of boys were jostling on the pavement on D's approach to the accident scene. D sounded his horn and stopped for cars in the opposite direction to pass. D saw a child moving between parked cars. He then saw C on the right hand kerb poised to cross the road looking in his direction. D had accelerated to 25 mph over 20-25 yards from where he was stationary to where the collision occurred.	12	25 mph		No liability at first instance. D failed to pay proper attention; he should have seen C cross. He should also have accelerated less rapidly. Had he accelerated more moderately he could have braked and sounded his horn and the accident would not have occurred. 75% CN substituted,

Paramasvian v Wicks [2013] EWCA Civ 262		C was with a group of friends. He threw an ice-cream at a friend and then ran off across a pavement, a parking bay and the northbound carriageway of the road and into the path of D's car. D did not see the group of boys or C before the impact.	13	25 mph	CA held that if evidence was required as to the effect a lesser impact would have had on his injuries this could be deferred to the second part of the split trial.	At first instance, Judge found that D should have been travelling at 15 mph. 50/50 liability split. CA: D's only fault had been failing to respond as he should have done in the briefest of moments. The suggestion that he should have been travelling at 15 mph was unrealistic and a counsel of perfection. The group of boys were quite a long way away from D and there was nothing to suggest any of them were about to leave that safe area and run across the road. C was old enough to understand roads. He had created the hazard by doing something entirely unexpected and careless.
70% Contributory negligence						
Curry v Ehari [2007] EWCA 120	CA	C crossed Brentford High Street from behind the rear of a car and was hit by the nearside wing mirror of D's truck travelling at 20 mph. D's passenger saw C only a fraction before impact. D did not see C before impact, even though she was in front of him for about 1 second.	$13^{3}/_{4}$	Speed not an allegation		Trial Judge had said D's driving was *"beyond criticism except for his momentary inattention."* CA: *"A driver exercising reasonable care could not be expected to focus his attention in a number of different directions when driving in a busy high street, but he could be expected to look ahead towards an obvious source of danger."* *"A driver aware of the presence of children on the pavement as under an obligation to keep a careful watch at that point, all the more so when he had previously had to stop to let children cross."* D's negligence lay in failing to spot C although she was in front of him for only a second and failing to swerve to the offside.

66% Contributory negligence						
Lunt v Khelifa [2002] EWCA Civ 101	CA	C, an adult who was 3.5 times over the drink drive limit, stepped out from the central refuge when D was 20-25 yards away. C created the danger.	Adult	25 mph in 30 mph limit		CA commentated that Judge might have been generous to C but did not interfere with a 66% finding of contributory negligence.
50% CN						
Rowe v Clark [1993] 10 WUK 665	CA	C was in a group of boys hurrying back to school. 2 boys crossed the road and 3 remained on the pavement. D did not keep a close eye on them. C crossed the road onto D's side and was hit.	$14^2/_3$			D should have anticipated the boys crossing and slowed to a low speed because it was a clear danger zone.
Phethean- Hubble v Coles [2012] EWCA Civ 39	CA	C, a cyclist turned from the pavement into the road in front of D's car.	16		See paper.	At first instance, 33% CN. CA held that the trial judge was not justified in reducing an initial assessment of 50% CN to 33% on account of C's age. *"There was no reason to treat C as if he were anything other than an adult"."* 50% CN substituted.
Rainford v Lawrenson [2014] EWHC 1188	QB	C was crossing the road with her sister to get her bus to school at 8 am. Her older sister saw D's car approach and stepped back but C did not. C crossed from D's nearside and was struck about 1/3 the way across the width of the vehicle.	14 years 8 months	34 mph in a 60 mph speed limit which was reduced to a 40 mph limit after the accident.		Primary liability disputed. Judge accepted that D's speed was not negligent but she should have been alert to the prospect that children might cross the road. D should have repositioned herself closer to the centre line and/or reduced her speed and/or covered her brakes and sounded her horn and had she done so, her PRT would have reduced to a minimum of 0.5 secs.

Jackson v Murray [2015] UKSC 5	SC	In fading light, C crossed a rural road from behind a stationary school minibus without looking. D driving too fast in the opposite direction struck C as she crossed in front of him.	13	50 mph in a 60 mph limit		D saw the bus but made no allowance for the fact that a child might attempt to cross in front of him. He was not keeping a proper lookout and did not see C but was going too fast to have stopped in time, even if he had seen her. If he had been driving at a reasonable peed and keeping a proper lookout, he would not have hit her. A reasonable speed would have been 30-40 mph. CN 90% at first instance, 70% on first appeal, 50% on second appeal. **Ehari v Curry** (70% CN) distinguished because in that case the speed of the car was reasonable.
40% Contributory negligence						
Grant v Dick [2003] EWHC 441	HHJ Peter Clark	C was part of a group of 10 youngsters trying to cross a dual carriageway. Some had already crossed and were gesticulating to the others to cross. D saw the group of youngsters but carried on at the same speed. C ran across the dual carriageway and was struck by D.	14½	44 mph in 60 mph limit		D ought to have reduced his speed on seeing two boys dart across the road and sound his horn, A major part of the blame fell marginally on the driver wo had fair warning of what was likely to unfold and had failed to exercise proper care. Judge pointed out that C was a 14½ year old child and not a child of 11 or 12 who had created a hazard. *"It was an act of folly for her to set off across the dual carriageway with heavy traffic."*
Eagle v Chambers [2005] EWCA Civ 1107	CA	C who was upset and emotional, was walking on the offside lane of a dual carriageway. She ignored warnings to stop. D was just below the legal limit for alcohol.	17	30-35 mph		CN less than 50% justified because car is potentially a dangerous weapon, 40% CN substitute for 60% CN at first instance.

FLR (by MLR) v Dr Chandran [2023] EWHC 1671	Dexter Dias J	C entered the road via a pedestrian crossing when the light was green for vehicular traffic and was struck by D.	12	28 mph in a 30 mph limit		D drove at excessive speed and failed to pay sufficient attention to hazards and other road users. 20 mph would have been a reasonable speed given the darkness, the wet road, the presence of two bus stops and the substantially residential area.
33% Contributory negligence						
Amstrong v Cottrell [1992]	CA	C was one of a group of girls attempting to cross a busy dual carriageway. D had seen them from 400m away *"hovering"* at the nearside of the 3 lane carriageway. D decelerated from 65-70 mph to 18-20 mph when 100 yards away from the girl.	12¾	60 mph limit		D should have slowed down much earlier which would have involved moderate braking over 400m and sounded her horn. *"But in my judgment, in all the circumstances of this case, the culpability of the plaintiff is not to be realistically compared with the culpability of the defendant driver. I regard the driver as very much more to blame, when one bears in mind that she was driving a motor vehicle."* Per Russell LJ.
Melleney v Wainwright CA 3/12/1997	CA	C was one of three boys who ran across a main road in Milton Keynes with a single carriageway. D decelerated to 30 mph when he saw the first boy run across the road and covered his brake. C darted out when D was all but level with him.	11	30 mph in 60 mph limit		Initial finding of 33% CN upheld on appeal. D negligent in not sounding horn and not slowing down more substantially when he could and should have anticipated the danger ahead. D had actually foreseen that C might cross the road. VC *"I do not think it can be overstated that when motorists are driving near to a group of young children and especially young boys, a very high standard of caution indeed is required… the risk of him doing something silly in order to rejoin them ought to have been foreseen as a very high risk."*

Toropdar v D [2009] 567 QB and [2009] EWHC 2997 (TCC)	Clarke J	Cable Street, East London on a sunny, late Saturday afternoon in June. Cable Street was an inner city street in a residential area where pedestrians, among them children, might well be present. It was a narrow one way street including a two way cycle lane. It was on a bus route and there was an Education Centre. C was playing a hide and seek game with 3 other boys age 9-11 near the steps of the Education Centre. C ran out without stopping from the side of the road in front of the stationary bus and was struck by the car. D had a limited view of the steps where the boys were playing. At 27.5 mph his potential view was 1 second. Friends shouted a warning to D. Front NS of the car struck C when he was 3.8-4m from the kerb.	10	27.5 mph in 30 mph limit, subsequently changed to 20 mph after accident	With precautionary braking or a speed of 25 mph, C would have cleared D's path or injuries would have been minor. At 20 mph no accident.	Judge found that at a speed of 27.5 mph as D passed the bus there was nothing he could have done to avoid the collision even if he had been covering the brake. D's speed of 27.5 mph was negligent, A reasonable speed would have been 25 mph. *"To drive at a speed close to the legal limit on a street and in a location in the street, such a this on a summer Saturday afternoon falls, in my judgment, short of the standard of the careful driver, who needs to drive with the safety of children in mind at a speed suitable for the conditions, particularly when driving past bus stops."* No negligence as regards failure to observe.
Smith v Chief Constable of Nottinghamshire [2012] EWCA Civ 161	CA	C was on a night out with friends in Nottingham. She was crossing a 4 lane main road when she was struck by a police car responding to an emergency call which went through a red light. C had crossed two lanes and the impact occurred in the middle of the third lane.	16	45-50 mph with no slow down on approach		D was required according to the Police Response Policy to consider the prevailing traffic conditions when responding to an emergency. He knew there were a large number of pedestrians around, some of them drunk. He could expect pedestrians to cross without using a crossing. At 40 mph his arrival at the emergency he was responding to would only have been delayed by 30 secs. He was driving too fast. C should have seen D's flashing lights and was more to blame than she would have been had it be a civilian car.
25% Contributory negligence						
Wells v Trinder [2002] EWCA Civ 1030	CA	C was hit by D when crossing the road. C's mother had just dropped her off, saw D's car approach and shouted to warn her daughter.	Young adult			Finding of 100% liability at first instance. CA: D had approached the scene too fast and did not have his full lights on, If C's mother had seen D, C should have. 25% CN substituted. C's age not relevant to CN assessment.

20% Contributory negligence						
Honor v Lewis [2005] EWHC 747	Silber J	C was struck by D's car as he **walked** across a busy road on his way to school with other children and not having seen D's car. D failed to see C despite having an unobstructed view of 47m and did not slow down at all. Collision occurred when C was two-thirds the way across the road which was relevant to the time which D had to observe him.	12	30 mph		Judge found the following factors to be relevant. • High burden on car owner. • School about to start. • Road busy with children each side. • Children playing tag shorty before the accident. • D could and should have stopped/slowed down when he saw C. • Risk of injury greatly reduced at 20 mph. • Failed to moderate speed. • Failed to keep a proper lookout. • Failed to use horn.
AB v Main [2015] EWHC 3183 (QB)	HHJ Stephen Davies	C was one of two boys who were playing at the side of the road close to the perimeter fence of Liverpool Airport, who ran into the road into the nearside of D's car. D was aware of the presence of the boys playing. She did not brake at any point from 25-20 mph. She *"wasn't expecting them to run into the road."*	8	30 mph in 40 mph limit	There was medical evidence on causation. At a speed of around 20 mph a serious head injury would have been avoided. Judge concluded that but for the negligence, serious injury would not have occurred.	Primary liability was disputed and CN raised. • D failed to recognise that the children's conduct was such as to present a real, significant and increasing risk. • Failed to keep the children under proper observation. • Failed to cover brakes. • Failed to sound horn. *"I am satisfied that given C's age and experience it would be quite wrong to reduce his damages to anything like the same extent that I would have had he been an adult."*

BSC v TGL [2022] EWHC 394 (QB)	Master Davison	**<u>Approval only</u>** C struck by a taxi on Chiswick High Road. Taxi was in the inside lane reserved for taxis and buses. Slow moving/stationary traffic in right hand lane. Taxi was travelling at 30mph. His view of pedestrians was obscured by cars and van in outside lane. C crossed an uncontrolled pedestrian crossing on a scooter, successfully navigated the offside lane and was then struck by taxi as he entered the inside lane.	11	30mph in a 30 mph limit subsequently reduced to 20mph		Suggested reduction of 30% for CN was too much. Inference 20% might be more appropriate.
10% Contributory negligence						
Gul v McDonough [2021] EWCA Civ 1503	CA	C, wearing headphones was crossing a residential road in Shepherd's Bush when struck by D who was engaged in a criminal enterprise and was convicted of causing serious injury by dangerous driving. D's driving agreed to be *"appalling, reckless, furious or atrocious".* C crossed c 3.5m to POI and only needed 30 more cm to clear the car. C had a clear view of D for 42m	13 years 8 months	40 mph in a 20 mph limit	Accident would have been avoided at 15 mph and 20 mph.	Safe speed for D would have been 15 mph. C should have been aware that D was driving much faster than usual and waited for him to pass. It is incumbent on someone wearing headphones to take particular care before crossing. CA: *C's culpable misjudgement cannot be wholly ignored.*" Initial finding of 10% upheld on appeal.
100% recovery: no contributory negligence						
Prudence v Lewis 1966	QB	C ran out onto a crossing whilst mother dealt with other children.	2.9 years			
Gough v Thorne [1966] 1 WLR 1387	CA	Lorry stopped for C and her two brothers aged 10 and 17 and waved her across. She did not check for other traffic and was struck by D who drove past lorry at speed.	13½			One-third CN at first instance substituted for no CN. Denning J *"Question was whether an ordinary child of 13½ could be expected to do more than she did."*

Jones v Lawrence [1969] 3 All ER 267	QB	C, who was on his way to a funfair ran out from behind a parked van into the road and was struck by a motorcycle.	7 years 3 months	40 mph in 30 mph limit		C had been taught and understood road safety but his conduct was normal for a boy of his age in forgetting the perils of crossing the road when something else was uppermost in his mind (i.e. getting to the fair).
M (A Child) v Rollinson [2003] 2QB 14	York County Court Judge Ibbotson	C struck by a car when she walked out in front of an ice cream van in a residential area whilst father paid for an ice cream. D was aware of C and her father.	5	15 mph		D should have driven past the ice cream van even more slowly.
Puffett v Hayfield [2005] EWCA Civ 1760	CA	C was struck by D on a street on which they both lived. It was dark but the streetlights were on, C emerged from between two parked cars, one of which was a van into the path of D.	6			D's speed was excessive. Liability established at first instance and upheld on appeal.
Howell-Williams v Richards Brothers and anr [2008] EWCA Civ 1108	CA	C was being driven home from school in a minibus. The driver (1D) stopped the bus on the opposite side of the road to the child minder. C stepped off the bus and ran across the road, whereupon he was struck by a car driven by 2D.	5			At first instance liability apportioned: 1D: $^{2}/_{3}$ 2D: $^{1}/_{3}$ Apportionment upheld on appeal. 1D was negligent in failing to keep the children on the bus despite seeing 2D approach and created a foreseeable risk of danger. He should have waited for the child minder to cross the road to the bus.
Richardson v Butcher [2010] EWHC 214	QB	C ran across the street and was struck by D's car. Liability denied on the basis that D had not seen C until he was immediately in front of her and had insufficient time to stop.	8			Held: D failed to keep a proper lookout, she had a 50m uninterrupted view of the road ahead with good visibility. There was no good explanation for not seeing C sooner. She had sufficient time to react.

O'Connor v Stuttard [2011] EWCA Civ 829	CA on appeal from HHJ Armitage QC	Accident in a quiet street in Oldham. C was playing a wall game with a football in the street. D was familiar with the street and knew that children played there. C and his friends were on the RHS of street. D moved to LHS and was driving close to the kerb. C ran across the road in front of him chasing a ball. Judge found that C must have seen the car approach. C reached the LH kerb and carried on playing with the ball and was not looking at the car. His left foot was overhanging the kerb. D continued to proceed close to the kerb and struck the back of C's foot.	9	10 mph		HHJ Armitage QC found that C was not negligent, even though his actions would have been negligent as an adult. CA: D was in effect driving through a playground. The duty upon him was accordingly high. D should have made sure C was aware of his presence and stopped if necessary.
Probert v Moore [2012] EWHC 2324	QB	C was walking in dark clothes on a narrow, single lane country road with her back to the traffic and wearing headphones at 5pm in December. D pulled close to the nearside to avoid the oncoming traffic and struck C.	13	50 mph in a 60 mph		C's decision to walk home without bright clothes or a torch was ill-advised but not culpable.
Rehman v Brady [2012] EWHC 78	QB	C's mother started to cross the road and C lagged behind. Her mother turned and beckoned her across the road. C was already crossing. Neither saw D's approach. C was killed.	7	20 mph speed limit and traffic management measures in place		Failure to observe despite D's relatively low speed.
Ellis v Kelly [2018] EWHCF 2031 (QB)	Yip J	C, who had been using a playground without adult supervision ran out into the road near a pedestrian crossing when he was struck by a car which was travelling along the road too fast.	8	31-40 mph in a 30 mph limit		Balancing C's momentary misjudgement against D's reckless conduct, it would not be just or equitable to find contributory negligence in those circumstances. Contribution claim against the mother failed.

Alabady v Akram [2021] EWHC 2467	HHJ Bird KC	C war crossing Princess Parkway Manchester at a light controlled crossing with her mother and 3 cousins aged 25, 11 and 9. C was at the front of the group. The red man was showing on the crossing indicating that pedestrians should not cross. It was dark. D had a clear view for 150m. C was more than halfway across the middle of three lanes at impact.	9 years 2 months	33 mph in a 30 mph limit		Primary liability admitted. The only issue was at to CN. C was not at fault, but in the alternative, any reduction in her damages would be de minimis. No finding of CN.

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NORTHERN CIRCUIT CONFERENCE

15 NOVEMBER 2025

Educational Psychology in Child Brain Injury Claims

Assessing Uninjured Potential, Evidencing Need & Increasing Rehabilitation Value

Dr. Jude JOUGHIN

Educational Psychology in Child Brain Injury Claims. *Assessing Impact, Evidencing Need, Increasing Value*

Dr Jude Joughin | Educational Psychologist Neuropsychology Specialism

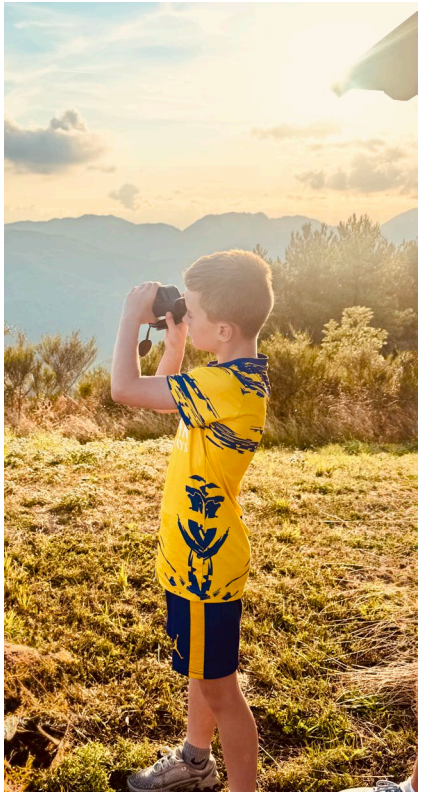
PIBA Northern Circuit Conference 2025

Overview of session

- Quick overview of brain injury.
- Why Educational Psychology matters. What we assess and how we assess it
- Where EP impacts claim value
- Strengthening your case with EP input
- Practical examples from real cases

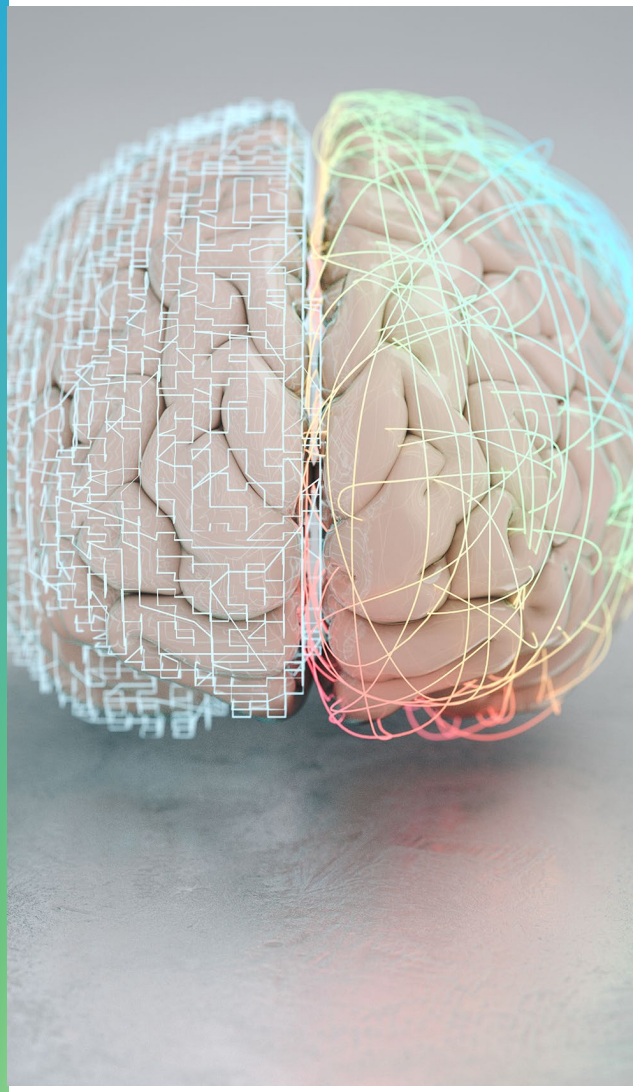
Meet Daniel

- Typical pregnancy. Normal birth. Typical development. Primary school - exceeding ARE
- Professional family. On a learning journey with BI.
- Mild TBI at age 9 (fairground) – short hospital stay, no visible impairment
- Returned to mainstream schooling – “doing fine” academically
- By Year 08: declining stamina, anxiety, and a drop in grades.
- Some poor behaviour – stealing, truancy.
- Fluctuating mood; masked well by teenage years
- Disengaged, low motivation, poor consequential thinking. At odds with the school & family environment.
- No EHCP. Hidden needs.



Introduction to Ellie

- Severe brain injury at 3 months (RTA)
- Father also injured physically.
- Cognitive, visual, and emotional consequences
- Appears “fine” in class but relies on constant 1:1 support, personalised curriculum and individual classroom.
- Family traumatised. Lots of TBI input.
- Cocktail party speech
- Extreme behaviour which challenges outside of school.
- EHCP – 32 hours (highest level)
- MLTN will require lifelong support



Quick overview of ‘subtle’ brain injury

Many children “look fine” after brain injury — ‘s/he is walking, talking, and is sociable’

Cognition and learning:
- Slowed processing and poor working memory
- Reduced attention and flexibility
- Gaps in comprehension, sequencing, reasoning

Emotion and behaviour:
- Emotional volatility, impulsivity, poor self-regulation
- Fatigue and frustration

Social and daily life:
- Social naivety, reduced awareness of risk
- Disorganisation and loss of independence

The child appears “recovered” — but struggles are daily and cumulative

Behaviour and brain Injury

Brain injury in a developing brain is different — it interrupts the building blocks of attention, learning, and self-control

Behaviour is the visible symptom of neurological injury

- Common post-injury patterns:
  - Impulsivity / poor inhibition
  - Emotional dysregulation
  - Social naivety
  - Anxiety and withdrawal
  - Fatigue masking as defiance
- EP evidence links these to brain function, not personality
- Behaviour = key to functional need → cost → claim value

The Role of Educational Psychology in Litigation

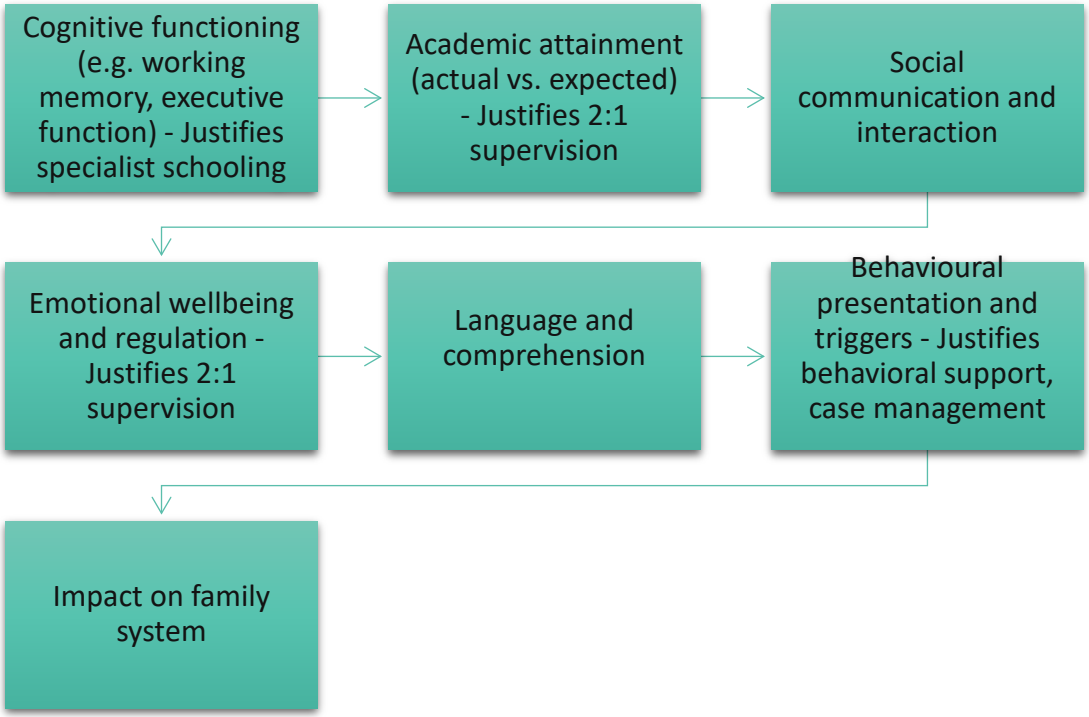
Bridge	Bridge between medical information and educational function
Translate	Translate invisible needs into the visible
Identify	Identify barriers to learning, participation, and independence
Distinguish	Distinguish injury from 'bad parenting' or 'difficult child' - critical for causation
Specify	Specify lifelong education and support costs with evidence-based justification
Shape	Shape realistic support and rehabilitation plans across settings

What Does an EP Assessment Involve

1. Standardised cognitive and attainment testing
2. Observations in school or home
3. Interviews with parents, teachers, and child
4. Review of records (school, medical, therapy)
5. Behavioural and emotional rating scales
6. Functional and adaptive behaviour analysis
7. Report typically 30-40 pages with costed recommendations
8. Timeline: 6-8 weeks from assessment to report

EP evidence bridges the gap between diagnosis and quantifiable educational/care provision

What Do EPs Assess?



Evidencing Need

- Translate assessment outcomes into impact
- Specify *what*, *how often*, *by whom*, and *with what intended outcome and cost*
- Link classroom support with therapy, care, and family strategies
- Establishes trajectory loss (pre vs. post injury)
- Provide measurable, cost-transparent recommendations

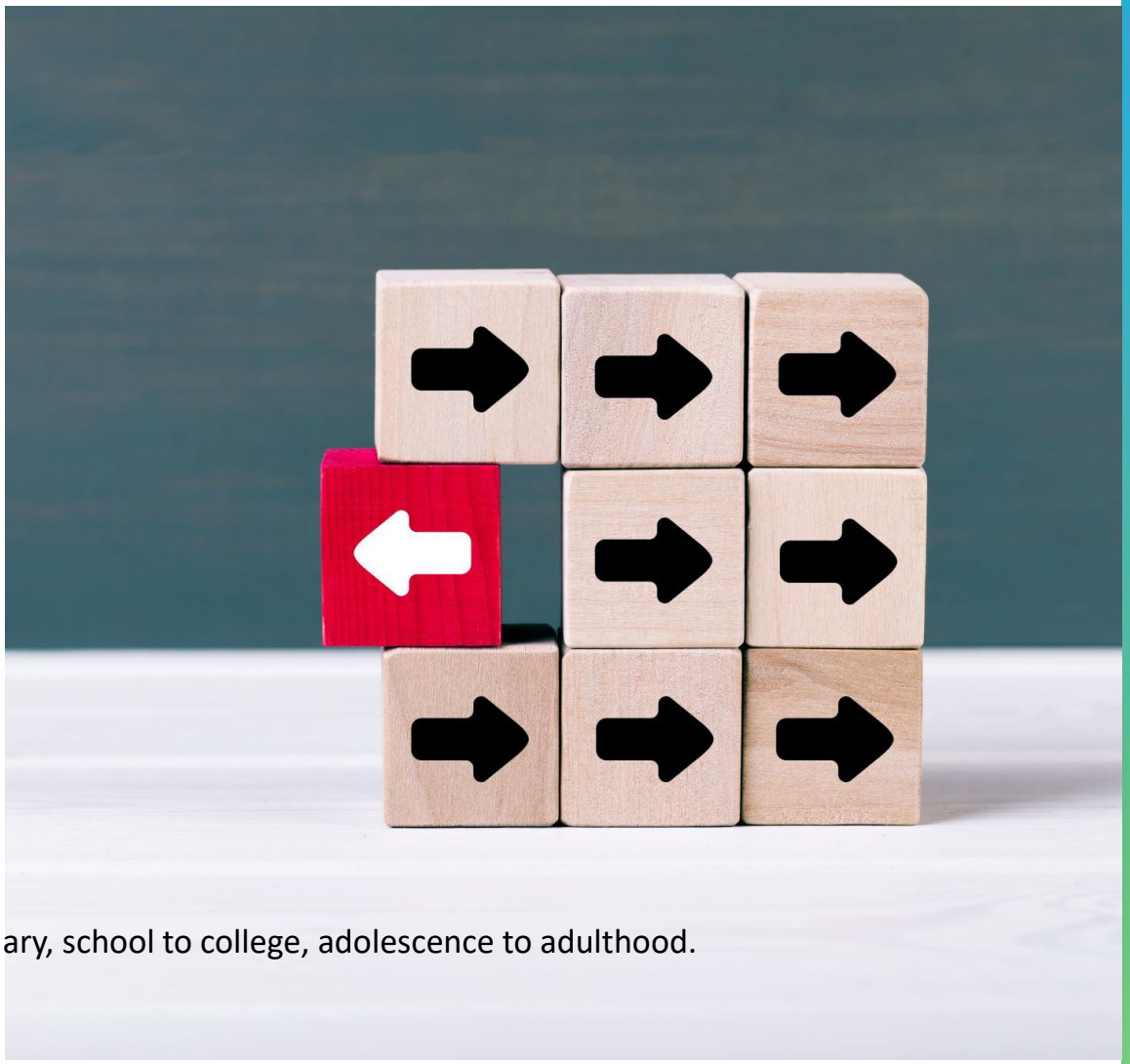
Functional Impact & Daily Life

Every daily-life limitation — fatigue, supervision, emotional volatility — translates into educational and care costs that persist into adulthood

- What does the profile mean for everyday life?
- The walking talking injured child - Barriers to independence and self-care
- Supervision needs in school and community
- Emotional regulation and risk
- Thinking ahead: employment, relationships, independence

Future Planning – From Functional Needs to Outcomes

- EPs assess likely impact of current needs into adolescence and adulthood
- Specify provision to reduce long-term risk and increase future independence
- Educational planning tailored to realistic employment and life goals
- Supports future costed provision and transition planning



Transitions are risk points — primary to secondary, school to college, adolescence to adulthood.

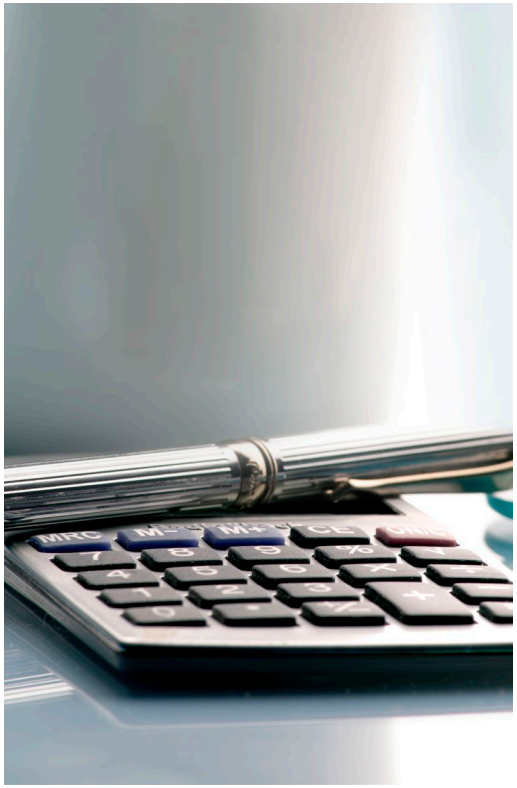
Claims

Brain injury impacts every domain of functioning — cognitive, emotional, social, and educational

Typical costs:
- 1:1 or 2:1 supervision (£30k–£70k/year)
- Specialist education (£70k–£100k/year)*
- Therapies (SALT, OT, psychology) (£10k–£20k/year)*
- Transport, technology, and access adaptations (£5k–£15k+)

Funding split:
- Local Authority (EHCP / statutory duty):
  - Core education, school staffing ratios, and SEN support written into the EHCP
- Claim (compensatory / private provision):
  - Above statutory entitlement – e.g. 2:1 care, case management, private therapy, parental respite, specialist equipment, home programmes, or missed education due to injury

Key point:
EP evidence defines what is educationally necessary (LA) versus what is clinically or functionally necessary (claim).



The Masking Phenomenon

- Child appears “fine” at school → meltdown at home
- Why: using all cognitive/emotional energy to hold it together
- Why schools underreport: they don’t see fatigue or distress
- Why it matters: defence uses “no concerns” reports to argue no injury
- How EP reveals it:
  - Detailed parent interview
  - Home observation
  - Behavioural rating scales (parent vs. teacher discrepancy)
- Functional capacity assessment
  - Financial impact: a child “coping” in school but needing home support

When to instruct an EP

Consider EP input when a child post-injury shows:

- Behavioural change, anxiety, or emotional volatility
- Drop in grades or inconsistent performance
- School exclusion, reduced timetable, or refusal
- Parental reports of fatigue or meltdowns at home
- Mismatch between medical data and school report
- Need to establish pre-injury trajectory or future independence

What I need

- Pre-injury evidence: school reports, assessments, attendance
- Post-injury records: SEN documents, exclusions, academic data
- Medical records: discharge summaries, therapeutic input
- Parental account: development, functional changes, aspirations
- Video evidence: pre- and post-injury footage shows impact

Thanks and questions

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15 NOVEMBER 2025

CROSS-EXAMINATION OF EXPERT WITNESSES

SARAH PRITCHARD KC

Cross Examination of expert witnesses

PIBA North November 2025

Sarah Pritchard KC

Kings Chambers

KINGS CHAMBERS

Back to Basics (and back yourself)

- You know how to prepare a case
- You know how to cross examine a witness
- End of talk
- Or the beginning ……..

Why are experts different ?

- The usual rules
- The rules for experts
- The reality of experts

Section 3 Civil Evidence Act 1972

- *"(1) Subject to any rules of Court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence …*
- *(3) In this section "relevant matter" includes an issue in the proceedings in question."*

What are you trying to achieve?

Loveday v Renton [1990] 1 Med LR 117

"the court has to evaluate the witness and the soundness of [the expert] opinion."

- The reasons given by the expert for their opinions and the extent to which they are supported by the evidence.
- The internal consistency and logic of the expert's evidence.
- The care with which the expert has considered the subject and presented the evidence.
- The precision and accuracy of thought as demonstrated by the answers to questions.
- The nature of the response to searching and informed cross-examination.
- The extent to which the expert faces up to and accepts the logic of a proposition put in cross-examination or is prepared to concede points that are seen to be correct.
- The extent to which an expert has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or alternatively demonstrates a flexibility of mind which may involve changing or modifying opinions previously held.
- Whether or not an expert is biased or lacks independence.
- The expert's demeanour in the witness box.

TOP FIVE – Tips and Tricks

- Preparation
- Obtaining concessions that support your case
- Challenging / casting doubt on expert's qualifications / true expertise
- Casting doubt on expert's objectivity
- Demonstrating no sound basis for expert's opinion

PRE MATCH PREP

- Good foundations
- Practical issues
- Use your experts
- Structure

Playing Nice

- Personal style
- When to adopt this approach
- What can be achieved

Playing not so nice ……

- Don’t assume
- Be aware of the inflated CV
- Practical experience
- Over qualified

Going in studs up

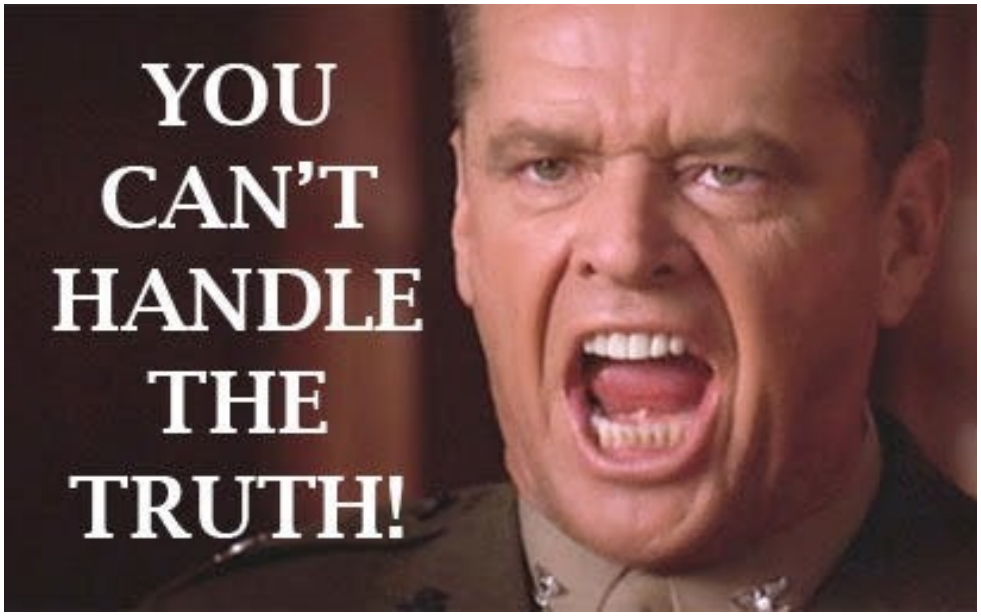
- Objectivity is key
- Be alive to any opportunity to demonstrate issues with objectivity
- Let them

Straight red

- Build towards
- Use of literature
- Need to be fearless

Playing the game

- Some experts play
- Control / composure
- Timing / pace



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NORTHERN CIRCUIT CONFERENCE

15 NOVEMBER 2025

Advocacy & Alternatives to the Court Process

HH Mark Gosnell

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Advocacy Tips and Alternatives to the Court Process

By His Honour Mark Gosnell former DCJ of North and West Yorkshire

My first and last days as a Judge

KINGS CHAMBERS

Advocacy tips for Interim hearings

- Know what you want to achieve
- Tailor your submissions to the tribunal
- Structure your thoughts in a logical fashion
- Remain agile in case you are interrupted
- Avoid petty point scoring with your opponent
- Keep an eye on the clock
- Make it easy for the Judge

Advocacy tips at trial

- Skeleton Arguments are important but not too much meat on the bone !
- Try to avoid starting the trial with irritating minor skirmishes about procedure
- What is the worst possible outcome for your client and how to avoid it
- The importance of knowing when to sit down
- Most trials turn on two or three essential points

The cake and the dog turd

The cake is your killer argument

The dog turd

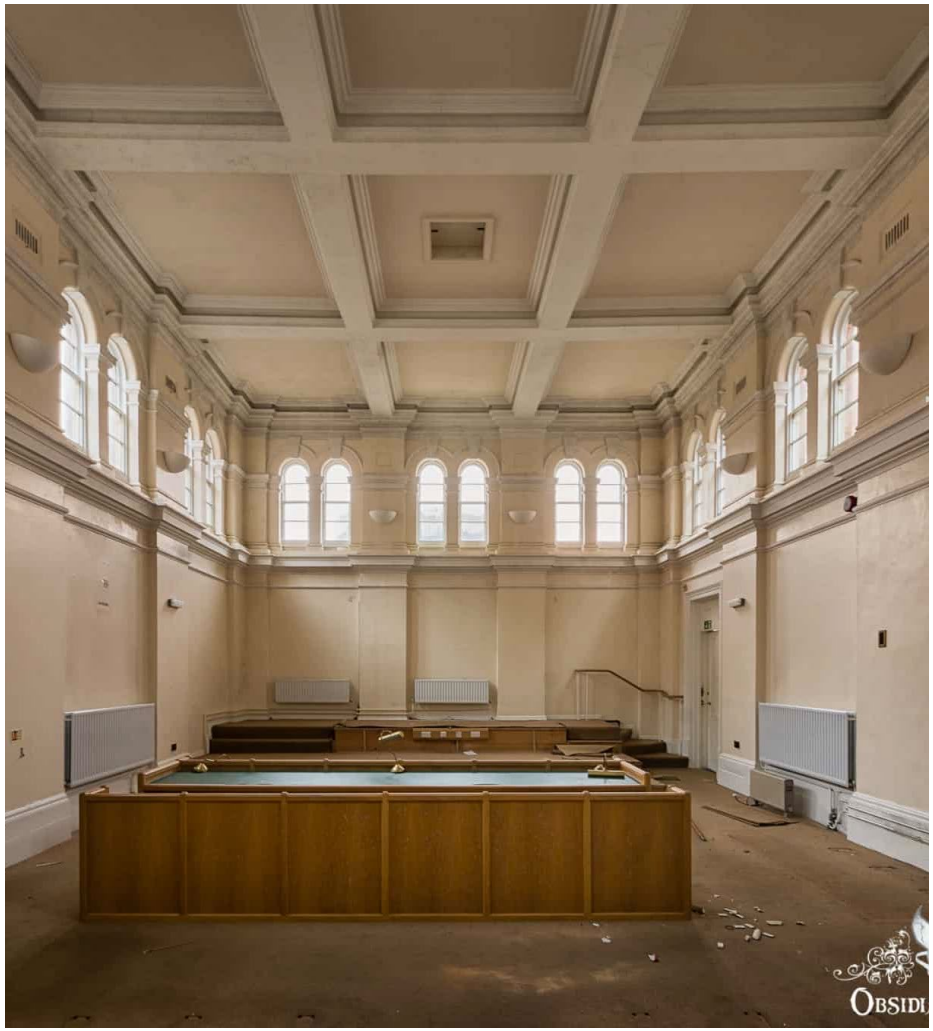
Is the point some blowhard in chambers said was your killer argument but clearly isn't

Or worse still, it was your Instructing Solicitor's bright idea!

What happens when you put them together ?

The current state of play in the Civil Courts

- The Reform Programme
- The Court Estate
- Court Fees
- The Service Centres
- Listing delays
- Last minute cancellation of hearings



Judicial encouragement of ADR

- Halsey v Milton Keynes General NHS Trust [2004] EWCA civ 576
- Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416
- Elphicke v Times Media [2024] EWHC 2595 (KB)
- Ivey and others v Trust Inheritance Ltd [2025] EWHC 2325
- Civil Procedure Rules 1.1 (f) and 1.4 (e)

What happens if you refuse to mediate ?

- PGF II SA v OMFS [2013] EWCA Civ 1288
- Conway v Conway [2024] EW Misc 19 CC
- Ellis v Ellis [2025] EWHC Ch 2609
- Chassy v Left Shift IT Ltd EWHC 1701 KB
- Assensus Ltd v Wirsol Energy [2025] EWHC 503 KB

Mediation and other forms of ADR

What are the advantages of Mediation compared with court proceedings ?

- Usually quicker
- Usually significantly cheaper
- Some mediators can offer evaluative as well as just facilitative mediation
- [pause to let the last point sink in!]
- The psychological advantages of a consensual settlement
- Deals can be done involving provisions which a court could not order

Thank you for listening

What about the future ?

Sorry , this is just my future …….