Neutral Citation Number: [2020] EWHC 982 (QB)

Case No: E97YJ821
Appeal Reference: M19Q166

IN THE HIGH COURT OF JUSTICE
LIVERPOOL CIVIL JUSTICE CENTRE
QUEENS BENCH DIVISION

Liverpool Civil Justice Centre,
35 Vernon Street
Liverpool
L2 2BX

Date: 24/04/2020

Before:

MR JUSTICE FREEDMAN

- -

Between:

Brian Lenord	**Claimant**
- and -	
First Manchester Limited	**Defendant**

- -
- -

Mark Lomas (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Christian Taylor (instructed in-house) for the **Defendant**

Hearing dates: 3 April 2020

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Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Freedman:

I Introduction

1. This is an appeal against a decision of Mr Recorder Lazarus ("the Recorder") in the Manchester County Court who ordered on a trial as to liability only that in respect of a road traffic accident that there be judgment for the Respondent as to two thirds of the value of his claim. The Recorder started his judgment by saying that *"The facts of this case are exceptionally straight-forward and the evidence was dealt with in very short order. However, I confess that I have not found this an easy case to decide."* The Recorder had an evaluative judgment to make as to breach of duty and causation with limited materials of which the most important were various video clips of the accident. It is appreciated how sometimes the apparently simplest of cases involve evaluative judgments which are not easy. The Appellant says in his two grounds of appeal that the Recorder was *"wrong to find"* that (1) its bus driver had breached his duty of care in failing to see the Respondent before walking out in front of his bus, and that (2) the Respondent had proved that the breach of duty caused the Respondent's injuries.

II The facts

2. The facts as summarised by the Recorder are common ground. They are as follows:

"2. The case involves an accident that took place on the 28th of June in 2016; over three years ago.

3. The Respondent was at the time walking along King Street to what was effectively a crossroads with Brown Street; with priority for traffic on King Street.

4. The Respondent's intention was to cross over Brown Street where it joined King Street and then to turn right and to cross over King Street so that he could proceed along the part of Brown Street to his right.

5.The accident involved an Enviro400 bus driven by Mr Breadney who is a bus driver with a PCV licence and who is an employee of the Defendant.

6. At the time immediately before the accident, Mr Breadney was approaching King Street from Spring Street. He then turned left into King Street so that he was then proceeding down King Street in the same direction as the Claimant.

7. As the bus approached the junction with Brown Street, another bus, a Stagecoach bus, was driving down King Street in the opposite direction. These two buses needed to pass each other.

8.King Street is a relatively narrow street and there were parked cars on both sides of the road. In order to have enough space to pass safely, the buses used the extra width afforded by the junction with Brown Street. Accordingly, therefore, Mr Breadney veered slightly to the left towards the mouth of Brown Street, and either just touching or just passing over the most proximal white lines on that junction.

9. At about the same time that the bus was doing this, the Claimant was in the process of crossing Brown Street. As he neared the other side of Brown Street the Claimant turned to his right, effectively attempting to cut off the corner of the pavement and, it would appear, to proceed to cross King Street at the same time without pausing. In so doing, the Respondent walked in front of the left nearside of the bus just as the bus was passing the mouth of Brown Street and the two collided.

10. The Claimant was thrown to the street by the accident and suffered a nasty head injury with a fracture of his skull."

3. At the trial, the Respondent gave evidence. He had no recollection of the events in question since the accident caused him to lose his memory of the events in question. The bus driver, Mr Breadney, gave evidence. He did have a recollection, and I shall return to this. There was evidence of a passenger, Mr Lownes, who provided assistance to the Respondent, but whose observations of the incident were limited. As a passenger he was not concentrating on the road prior to the accident and his evidence did not provide any material assistance to the Court.

4. The Recorder found (at paragraph 16 of his judgment) that *"The reality is that this case turns almost exclusively on CCTV footage. The footage is of a very high quality and there were no less than 14 active cameras on the bus, providing both views of the inside of the bus and from various perspectives looking out from the bus. Having viewed carefully all of the relevant footage, it has been possible for me to reconstruct what happened in this case with a high degree of confidence."*

5. The Recorder observed three features, none of which are controversial, namely
(1) "…. when passing the mouth of Brown Street the bus never actually strayed into Brown Street. That is to say that whilst its nearside wheels reached the perimeter of the white lines delineating Brown Street, they never crossed over into Brown Street (paragraph 17)*."*
(2)" …at the point in time in which the bus collided with the Claimant, the Claimant was fully into the carriageway in King Street with both his feet beyond the most distal dotted line demarking Brown Street from King Street (paragraph 18)*."*
(3) "…until the Claimant reached halfway across the mouth of Brown Street it didn't look as if he was doing anything other than walking straight across Brown Street and therefore it looking unlikely that he would come into conflict with the path the bus was taking (paragraph 19)*."*

6. The Recorder concluded that there was no evidence of Mr Breadney looking straight forward when he was on King Street passing Brown Street. He had to negotiate a substantial obstacle, namely the Stagecoach bus coming in the opposite direction, and he never diverted his gaze from that bus. That is apparent from one of the videos which show that his gaze was fixed in the direction of the Stagecoach bus for a crucial 6-7 seconds.

7. The Recorder found that he was right to focus his gaze mainly on that bus, but that he could not fix his gaze entirely on that bus to the exclusion of all other potential hazards. The Recorder said that he had taken into account a warning that a counsel of perfection should not be applied to him, but that *"it cannot be right that he was entitled to focus entirely on the Stagecoach bus to the exclusion of all other potential hazards. In my judgment, he should have been intermittently glancing forward and to his left and, on the basis of the evidence I have seen, I find that he did not, at any material time, do this."*

8. The Recorder found that Mr Breadney turned his bus slightly to the left into the mouth of the junction with Brown Street to make space for the oncoming Stagecoach bus. When he started to turn his back into a more central position in King Street, his bus was then heading towards the Respondent. The Recorder found that *"any experienced bus driver with a simple glance forward at that stage would have identified the Claimant as a very real hazard to be encountered."*

9. He then went on to find that Mr Breadney was driving at less than 10 miles per hour and probably a lot less than that, and that *"there was, if Mr Breadney had been keeping a lookout forward and to the left, sufficient time in which to bring the bus to an emergency stop without colliding with the Respondent."*

10. When dealing with contributory negligence, the Recorder found that the Respondent had been daydreaming with his head in the clouds and was simply not concentrating on the world in front of him. However, he also found in respect of Mr Breadney that *"given the manoeuvre that Mr Breadney was undertaking, he was under a duty to look forward and not just to the right and since he was pulling to the left he ought also to have glanced to the left as well."* This was particularly so since he was driving in his profession a particularly large motor vehicle. This was not an exercise in hindsight, but a judgment as to what should have been done when undertaking a manoeuvre which would take the bus towards the mouth of the junction with Brown Street.

III The law

11. By CPR 52.21, this appeal is limited to *"a review of the decision of the lower court"* and the appeal court will only allow an appeal by review where the decision of the lower court was "wrong" or unjust because of a serious procedural or other irregularity in the proceedings in the lower court." There is a power to hold a rehearing in limited circumstances, but it is not contended that this is required in the instant case. The Appellant does not contend that there was any serious procedural or other irregularity in the proceedings below. The sole issue is thus whether the decision of the Recorder was wrong.

12. The Respondent says that the instant decision was an evaluative decision of the Court from findings of fact as to the outcome of the case in terms of breach duty and causation. By reference to a very different case in respect of intellectual property rights and unfair prejudice, attention is drawn to a recent review of the authorities by the Court of Appeal in *Sprintroom Ltd* [2019] EWCA Civ 932 at paragraphs 68 – 78, and in particular at [76] that *"…on a challenge to an evaluative decision of a first instance Judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the Judge was wrong by reason of some identifiable flaw in the Judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'".* The words in quotes starting with the words *"such as a gap in logic…"* is a quotation from Lord Carnwath in *R (on the application of AR) v Chief Constable of Greater Manchester Police & anor.* [2018] UKSC 47 at paragraph 64.

13. The Court of Appeal also drew attention to the speech of Lord Hoffmann in *Biogen Inc v Madeva plc* [1997] RPC 45 who referred to the expressed findings of a judge being an incomplete statement of the impression which was made upon him by the primary evidence. He referred to what he called "*a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance…"* He then said the following: *"It would in my view be wrong to treat Benmax as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of*

degree, an appellate court should be very cautious in differing from the Judge's evaluation."

14. Finally, in *Sprintroom Ltd*, there was reference to the judgment of Lewison LJ in *Fage UK Ltd & anor. V Chobani UK Ltd & anor.* [2014] EWCA Civ 5 which referred to cases of the House of Lords and Supreme Court *"not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them."* The reasons for this approach include:

"i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

…."

15. The Appellant says that in this case, where the evidence turned *"almost exclusively"* on the CCTV footage (Judgment paragraph 16), the appellate court is in as good a position as the Recorder to assess what occurred. He says that in such a case there is no practical difference between a review and a rehearing. Having seen the video evidence, the appellate court is able to form its view as to breach of duty and causation. If its view were different from that of the first instance court, then its decision would be wrong and should be set aside. When asked where the caution of Lord Hoffmann about differing from the Judge's evaluation should be, the answer of Mr Taylor was that in a case where it was all or almost all on video, the appellate court was simply able to substitute judgment for that of the first instance court.

16. Mr Taylor drew attention to the case of *Manning v Stylianou* [2006] EWCA Civ 1655 relating to an appeal from a judge's finding of fact in a tripping claim. The issue of fact was the location of the "metal stump". The evidence in relation to that stump was contained in photographs. The Court had the photographs. At paragraph 12, Maurice Kay LJ found that the judge was wrong in identifying the culpable metal stump as being on the Appellant's forecourt. At paragraph 13, Maurice Kay LJ stated that *"it is with great hesitation that this court should interfere with the conclusion of a trial judge on such a matter. However, I am satisfied that this is not simply a case of taking a different view: it is a case of the judge being wrong about a crucial finding in the case. It is a matter which, with respect, we are in no worse a position to assess, having before us all the material that the judge had before him and which was so influential upon his decision".* At paragraph 19 Waller LJ repeated this point, that because they were dealing with photographs the appellate court was in no worse a position to assess the facts than was the trial judge. Mr Lomas for the Respondent said that that case concerned a direct and simple finding of fact as to the location of a metal stump which is a different situation. This appeal is not about a finding of fact, but concerns the evaluation of breach of duty and causation. The Court will not readily interfere with a judge's evaluation of what is reasonable in the circumstances: see *Assicurazioni*

Generali SpA v Arab Insurance Group [2002] EWCA Civ 1642. In other words, there is a distinction between being able to see from photographs that there was or was not a metal stump at the locus in quo in one case and an evaluation of breach of duty or causation in another case.

17. There was also a discussion regarding the case of *Ahanonu v South East London & Kent Bus Company Limited* [2008] EWCA Civ 274. Attention was drawn to the judgment of Laws LJ who warned (paragraph 23) against the use of hindsight in assessing whether a bus driver exercised reasonable care which is not a guarantee of the Respondent's safety. That much was common ground. There was also pointed out in that case that where a driver had to concentrate on a particular manoeuvre, the requirement to check in the nearside mirror was a "counsel of perfection" which ignored the realities of the situation (Lawrence Collins LJ at [20] and Laws LJ at [24]). The need to keep an eye on the bus in front in that case was a far more obvious and real danger than the one of looking to the rear of the bus where there was no reason to believe that there would be anyone at the near side rear of the bus. The case was emphasised by Mr Taylor to show that it was not necessarily negligent for a driver not to see a pedestrian. However, Mr Lomas replied that that was a case about a pedestrian coming to the rear of the bus, and very different from the instant case where for reasons described below, even before the Respondent changed direction, the bus was coming quite close to him and he represented a hazard. This is discussed further below.

IV The Appellant's submissions as to why the Recorder was wrong

18. There are the following criticisms identified in the skeleton argument of Mr Taylor for the Appellant, namely
"One matter in evidence that was not specifically commented upon by the Recorder in his Judgment was the crucial fact that the time period elapsing between the Claimant changing direction whilst crossing Brown Street and walking out onto King Street in front of the bus was probably just less than 2 seconds. (paragraph 7)"

19. In the submission of the Appellant, it was reasonable for the driver to have given his exclusive attention to the oncoming bus during those two seconds. Further, had he looked to the left prior to the two seconds, he would have observed the pedestrian *"walking parallel with his bus giving no cause for concern about him coming into conflict with the bus."* This is developed at paragraph 9c that *"he would have seen [the Respondent] walking some metres to his left broadly parallel with the bus…".* It is therefore submitted that if the Recorder had applied the principle from the case of *Ahanonu v South East London & Kent Bus Company Limited* above, he would have found that it was not necessarily negligent for a driver not to see a pedestrian.

20. In the circumstances, it was beyond reasonable care to expect Mr Breadney to have diverted his gaze to the left during this manoeuvre and the Recorder was wrong to have so found. The only real danger with which Mr Breadney needed to be concerned was the approach of the ongoing bus in a tight area on a narrow road once account had been taken of cars parked on both sides. It was reasonable for Mr Breadney to be focussing upon the safe passage of his bus past the oncoming bus. This was much the greatest danger.

21. It was pointed out that this was an area where the pedestrians were not of the vulnerable kind such as near a school or a home for the elderly. This was in the business and

financial centre of Manchester during a weekday at about 11am where pedestrians could be expected to look where they were going. At the relevant junction, it was submitted that the Respondent was crossing Brown Street three or four metres from the mouth of the junction, and in the same direction as the bus, that is from east to west. Had Mr Breadney looked to his left and seen the Respondent, there would have been "no cause for concern." There was no reason to believe that the bus would come into contact with the pedestrian and the accident only occurred because of the wholly unforeseen and unforeseeable change in direction of the Respondent. It was therefore submitted that the Recorder was wrong to find that there had been a breach of duty on the part of the driver.

22. As to causation, it was submitted (paragraph 9) that there was no evidence that Mr Breadney would have been able to stop and avoid the accident. The onus of proof was on the Respondent, and it had not been discharged. There was no evidence adduced by the Appellant to show that even travelling at a slow speed, Mr Breadney would have been able despite the mass of the bus to have stopped and to have avoided the accident. There was no evidence of accident reconstruction and precise measurements of time and distance with a view to proving that the bus could have stopped.

23. It was wrong to find causation because two seconds was insufficient time for Mr Breadney to have seen the Respondent approaching the bus, to have recognised that he was not looking to his right or slowing down, to decide to react by braking or swerving, to implement the evasive action or to allow time for the bus to respond to the evasive action (paragraph 9f-g). It was also submitted that it had not been put to Mr Breadney that he could have stopped the bus and avoided the collision, and so this finding was not available to the Court in a procedurally fair sense. It was said that this mattered because Mr Breadney was therefore unable to give evidence that he would not have been able to stop.

24. The sole cause of the accident was the manoeuvre of the Respondent changing his direction and walking suddenly into King Street into the path of the bus, or as the Recorder put it at paragraph 48, the impression that one gets is that *"the Claimant was daydreaming, that he had his head I (sic) in the clouds and was simply not concentrating on the world around him."*.

V The submissions of the Respondent

25. As to breach of duty, the Respondent submits that by choosing a fluid manoeuvre of using the extra width of the junction of Brown Street, it did not absolve the Appellant from any obligation to monitor the safety of the pedestrians crossing Brown Street. Attention is drawn to the close proximity of the Respondent as the bus was pulling into the mouth of Brown Street. There was a need to monitor the safety of the pedestrians crossing Brown Street, and particularly that of the Respondent. The bus driver was therefore not absolved from the duty to execute the manoeuvre without looking ahead or to his nearside.

26. The Respondent takes issue with the expressions that *"there would have been no cause for concern"* or that *"he would have been seen walking some metres to his left."* As the bus made use of the junction with Brown Street, the bus came close to the Respondent even before the Respondent changed his direction to walk towards and into King Street. There was no precision about how far the Respondent was from give way lines at the

junction. Mr Taylor said that it was about 3-4 metres and Mr Lomas thought that it was about 2 metres. To the untutored eye, it looked closer to Mr Lomas's estimate, but on either view it was close. It is to be borne in mind that the wheels may have got up to the give lines, but the side of the vehicle may have gone slightly further. There was reason for concern about the presence of pedestrians at the mouth of a junction when such a manoeuvre was being undertaken, and especially about the Respondent, given the proximity of the bus to him.

27. It was shown by reference to video 2 that for about 6-7 seconds before and up to the point of collision, the exclusive attention of Mr Breadney was on the oncoming bus and not at all either in front of the bus or on the junction with Brown Street. The Judge was right to find that this exclusive attention on the part of Mr Breadney on the other bus was a breach of a duty of care. The manoeuvre of getting into or towards the junction with Brown Street when there were pedestrians around carried with it significant danger, and it was a breach of duty not to look forward and indeed to the left when carrying out the manoeuvre. The principal concern was to look out for the Stagecoach bus, but not to the exclusion of pedestrians, and particularly when embarking on the manoeuvre at Brown Street.

28. It was also pointed out by reference to the videos that whilst the two buses were close to one another, they were sufficiently apart due to their both using the junctions with Brown Street on both sides of King Street to enable them to pass each other safely. There was still sufficient space for some attention to have been given to movements to the nearside and the front of the bus.

29. It might have been different if Mr Breadney had been simply going down King Street and a pedestrian came into his path. In fact, he was deviating from King Street towards Brown Street. Further, it might have been alright if there had been a moment when his attention was on the oncoming bus, but the video shows that this happened over more than 5 seconds. That combination of factors took the case out of circumstances which might prevail in another case. It was in those circumstances that the Recorder was entitled to find that there was a breach of duty as he found.

30. The above analysis about breach of duty feeds into causation. It is apparent that the Recorder had in mind not only the need to look forward at the time when the Respondent started to veer to the right (Judgment paragraph 29). The Recorder also had in mind the period before that when he was pulling the bus to the left, that he ought to have glanced to the left (Judgment, paragraph 47). This encapsulates that Mr Breadney should have been keeping a proper lookout as he manoeuvred the bus towards the mouth of Brown Street. He then would have had the Respondent in his view as a person who was so close to his bus that he needed to be careful about his movements. On that basis, Mr Breadney ought to have had him in mind before the time well before his turning and walking towards King Street.

31. The finding of the judge in the second sentence of paragraph 37 about having sufficient time to bring the bus to an emergency stop was in this context. It was based on his finding that Mr Breadney should have been keeping a lookout forward and to the left, and doing so both at the time when the Respondent was crossing Brown Street and when the Respondent had shifted his direction towards King Street. The Recorder also emphasised the low speed of the bus in some detail in the section about causation (paragraphs 33-37).

The Recorder would have had in mind the evidence of Mr Breadney that he was covering the footbrake: *"I had my foot on the brake…the foot was on the brake"* (page 20 of the transcript).

32. On this basis, the answer to paragraph 9(g) of the skeleton argument of the Appellant was that the Recorder must have been of the view that there was sufficient time for Mr Breadney to see the Respondent approaching the bus and to recognise that he was moving into his path, and to decide to react by braking and implement the evasive action and for the bus to respond to this action.

VI Discussion

(a) Relevant law

33. The analysis starts by reference to the function of review. This is not a case of reviewing facts, which are not in issue, but the evaluation of breach of duty and causation from those facts. The strictures in the authorities about being slow to interfere with such evaluation of the facts apply here. The quotation at paragraph 76 of *Sprintroom Ltd* referred to above applies including especially the passages cited of Lord Hoffmann in *Biogen* and Lewison LJ in *Fage* all relating to the reluctance to interfere with the evaluation of primary facts. It is not an answer to this to say that in a case where the appellate court was able to see the same evidence e.g. in a video, that if the appellate reached a different evaluative judgment, it must follow that the decision of the first instance court must be wrong and set aside. In such a case, it may be that all that can be pointed is that another judge might have had a different evaluation of the facts.

34. I reject the submission of the Appellant that the function on appeal is, even if the case turned on the video evidence, to consider that evidence, form a view, and if that view was different from the trial judge, to substitute the view of the appellate court for that of the trial judge. I accept the submissions as to law which I have set out above of the Respondent. More specifically, in my judgment, even if this case turned entirely on the video evidence, and in the event I had reached a different evaluation, then absent a gap in logic, a lack of consistency or a failure to take into account some material factor undermining the cogency of the conclusion, the appellate court could not interfere unless it came to the view that the decision was "wrong". It would not suffice that the appellate court might have arrived at a different decision. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47 at paragraph 34:
"… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong."

I also have in mind some of the memorable language of Lewison LJ in *Fage* with his theatre analogy and his reference to avoiding duplication of the judge's role.

35. The matter goes further than this in the instant case. In this case, the decision does not turn entirely on the video evidence, but also on the evidence of Mr Breadney and considering the video evidence alongside his evidence. That was an advantage available to the Recorder, but I consider the evidence of Mr Breadney limited to the transcript.

36. In any event, if there is no gap in logic, a lack of consistency or a failure to take into account some material factor undermining the cogency of the conclusion, the appellate court must therefore be satisfied that it is not simply that it might have arrived at a different evaluation, but that the decision of the judge was wrong. With this in mind, the Court considers the criticisms of the decision of the Judge both as to breach of duty and causation.

(b) Breach of duty

37. The criticism of principle comprises the judge looking for perfection rather than the exercise of reasonable care. The Judge reminded himself about not applying "a counsel of perfection" (paragraph 26). This criticism is therefore not one of principle since the Recorder was alive to the point. It is simply a way of saying that the decision was not an evaluative judgment which the Recorder could make, but was one which can be shown to be wrong.

38. Here too, I agree with the submissions made for the Respondent and disagree with the submissions for the Appellant. More specifically, the submission that it was reasonable for Mr Breadney to fix his gaze on the Stagecoach bus for the critical period of 6-7 seconds is rejected. If that was necessary in order to pass the Stagecoach bus, then the manoeuvre of going towards the mouth of the junction with Brown Street should not have been attempted. In fact, the Recorder found that he should have intermittently glanced forward and to his left (paragraph 27 and 47). It was a breach of duty because of the particular hazards at the junction with Brown Street. It was unsafe having regard to the presence of pedestrians crossing Brown Street for Mr Breadney not to observe them at all. The result was that the bus came so close to the Respondent even before he moved to his right that there was cause for concern for the safety of the Respondent such that it was important for the bus driver to be alert to his presence. It was a breach of duty to make that manoeuvre towards the mouth of Brown Street without doing so. In my judgment, it has not been shown that the Recorder was wrong so to conclude.

39. There was no gap in logic, a lack of consistency or a failure to take into account some material factor undermining the cogency of the conclusion. When the Recorder said that he had not found this to be an easy case, it must have been that the evaluation was not easy. Having looked carefully at the evidence on the appeal, I have not been persuaded that I should arrive at a different evaluation. In my judgment, the Recorder carried out this task in arriving at the evaluation which he did in a manner which was unexceptionable. He took into account all relevant circumstances. He arrived at a conclusion which was available to him on the evidence. It was not "wrong". There is no reason to differ from the judge's evaluation.

(c) Causation

40. As noted above, the decision on causation was closely related to and flowed from the findings of the Recorder about breach of duty. The criticisms of principle identified were that (a) the Recorder did not mention the very short period between the move of the Respondent to the right into the path of the bus, and (b) the absence of evidence entitling the Court to come to the conclusion that Mr Breadney could have avoided the conclusion, and (c) the fact that the Respondent was not asked if the accident could have been avoided.

41. As regards the first criticism, this is to assume that the criticism relates only to the period from when the Respondent turned right towards King Street. The Recorder was not restricting his finding to that period. That is apparent particularly from paragraph 47 where he criticises the failure to look to the left as well as forward. That was because of the manoeuvre that was being undertaken of pulling the bus to the left, that is towards the mouth of Brown Street. This point was developed in the submission of the Respondent as set out above, and it was well made. It meant that it was not a matter of chance when Mr Breadney would first notice the change in direction of the Respondent: the Respondent would have been a very real hazard even before he moved to his left.

42. Further, by the time when there was the change of direction, as was demonstrated by reference to the videos, the oncoming bus was sufficiently apart and had almost completed its passage in the opposite direction from Mr Breadney's bus. Thus, the Judge said: *"any experienced bus driver with a simple glance forward would have identified the Claimant as a very real hazard to be encountered.* (Judgment paragraph 30)*".* This has to be read in the context of the hazard having been there from the earlier stage of making the manoeuvre into the mouth of the junction. This connects with the submission of Mr Lomas that the breach of duty feeds into the finding on causation.

43. This itself feeds into the second criticism. The conclusion in paragraph 37 is in a context of the real hazard having been there from the moment when the Respondent stepped into Brown Street and before he changed his direction towards King Street. The conclusion is also in the context of Mr Breadney's bus going very slowly. Two matters arise from this. First, if Mr Breadney was keeping a proper lookout, he would have seen the Respondent as he was moving out towards King Street and in advance of the collision. Since his foot was on the brake, he would be able to stop the bus very quickly. In fact, the bus did come to a halt very quickly even in circumstances where there was not an emergency stop. This enabled the Recorder to find that had Mr Breadney been keeping a proper lookout forward and to the left, he had sufficient time to bring the bus to an emergency stop without colliding with the Respondent.

44. As regards the third criticism, the failure to ask the question as to whether the bus could have stopped is not fatal to the case of the Respondent. It was put to Mr Breadney that he did not look to the Respondent at all from a time before he stepped out into the mouth of Brown Street. The result of the videos and the cross-examination was that the Judge found that there was no evidence of Mr Breadney looking even straight forward once established on King Street. His gaze was always to the right to the passing Stagecoach bus. In these circumstances, in my judgment, any evidence as to whether Mr Breadney could have stopped would have been based on a hypothesis which did not occur, namely that he apprehended the presence of the Respondent. In my judgment, the failure to ask a question about what would have happened in an event which did not occur is not something which the Respondent was bound to put. Nonetheless, it was still incumbent on the Respondent to prove the case on both breach of duty and causation.

45. None of the criticisms made of the Recorder are sustainable. In the end, it is not a criticism of a gap in logic, a lack of consistency or a failure to take into account some material factor undermining the cogency of the conclusion. The Recorder made an evaluation as to causation. Having looked carefully at the evidence on the appeal, I have not been persuaded that I should arrive at a different evaluation in respect of the ability

to bring the bus to a standstill in order to avoid the accident. In my judgment, the Recorder carried out this task in arriving at the evaluation which he did in a manner which was unexceptionable. He took into account all relevant circumstances. He arrived at a conclusion which was available to him on the evidence. It was not "wrong". Here too, there is no reason to differ from the judge's evaluation.

VII Conclusion

46. Applying the law about the nature of a review and the authorities referred to above, this is not a case where it is appropriate to carry out a fresh evaluation. It is a case to consider the Recorder's evaluation and find out if there is anything on which to take exception. This is not a case like the *Manning* case where there was a demonstrable factual error at the heart of the findings. This was a case which depended on an evaluative judgment, where an appellate court is particularly reluctant to interfere and for good reasons adumbrated above. This Court has considered the reasoning of the Recorder. It has considered also the surrounding circumstances. Based on this, I am satisfied that the judgment of the Recorder was one which was available to him. The reasoning was cogent. There is no reason to challenge the decision. It was not 'wrong'.

47. It is appreciated that in a case which is "not easy", the losing side is likely to be disappointed. However, the trial was conducted entirely properly. The Recorder came to a conclusion based on evaluative judgments which emerged as a result of a careful account of the evidence. It was a conclusion that was available on the evidence as a whole. There is nothing to criticise about the logic, consistency and material factors taken into account. The decision both as to breach of duty and causation are closely interlocked: they are also separate, and the two were considered separately.

48. The Recorder has examined the relevant factors and applied the correct legal tests. He has also carried out well the reasoning process of setting out his reasons for his decision in terms which are clear and easy to understand. The decision to find both breach of duty and causation established was available to the Recorder on the evidence as a whole.

49. The judgment of the Recorder has been well analysed by the parties on the hearing appeal, and there has been an attempt to have a detailed appreciation of the competing notions. Having in that context engaged in an appeal by way of review rather than an appeal by way of hearing, I am satisfied that the Recorder has reached evaluative judgments which were available to him as to both breach of duty and causation. There is no reason for the appellate court to form a different view from that of the Recorder.

50. In these circumstances, an accident occurred for which the Appellant must share a part of the legal responsibility. The Respondent was entitled to have a finding of liability in his favour subject to contributory negligence. There is no challenge against the apportionment of contributory negligence. In the appeal, the Appellant has been unable to show that the decision was "wrong" or unjust because of a serious procedural or other irregularity in the proceedings in the court of first instance. It follows that there is no reason in those circumstances to set aside the order. For all these reasons, the appeal must be dismissed.

Judgment Approved by the court for handing down.