| Neutral Citation No: [2019] NIQB 82<br><br>*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ref:* **MAG10962**<br><br>*Delivered:* **28/06/2019** |
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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**2013 No. 053519**

**BETWEEN:**

**KARL JAMES JOYCE (A PERSON UNDER DISABILITY)**
**BY JACQUELINE CRAIG, HIS MOTHER AND NEXT FRIEND**

**Plaintiff;**

**-and-**

**MATTHEW BRADBURY**
**NORTHERN IRELAND HOUSING EXECUTIVE**
**ARMOURY DEMOLITION AND RECYCLING LIMITED**
**EASTWOOD LIMITED**
**ROBERT RUSH**
**DORAN CONSTRUCTION LIMITED**

**Defendants;**

**-and-**

**HIGHWAY BARRIER SOLUTIONS LIMITED**

**Third Party.**

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**MAGUIRE J**

**Introduction**

[1] In these proceedings Karl James Joyce is the plaintiff. There is a wide range of defendants.

[2] The first named defendant is Matthew Bradbury.

[3] As between the plaintiff and Matthew Bradbury the primary issue to be determined relates to the alleged negligence of the latter as the driver of a Ford

Focus car which collided with the plaintiff, then 17 years of age, at or about 15.52 hours on 29 September 2010, while the plaintiff was in the course of crossing Pound Street, Larne, heading in a northerly direction. As a result of this collision the plaintiff was seriously injured.

[4] There is, however, another aspect to the issue of liability for the accident. This engages the other defendants in the case and relates to the question of whether, at least in part, the accident should be attributed to reduced sight lines for pedestrians and drivers alike at or about the accident location. These reduced sight lines resulted from work which had been going on close to the place where the traffic accident occurred and, in particular, to the erection of a substantial hoarding around a site where a multi-storey block of flats was being demolished. The effect of the hoarding was, *inter alia*, to subsume part of the footpath along the southern side of Pound Street into the demolition site and so to require the directed movement of certain pedestrians, including the plaintiff, across Pound Street in a northerly direction at an uncontrolled crossing point. It was here where the accident occurred.

[5] The identity of the defendants in respect of this part of the claim are:

(1) The Northern Ireland Housing Executive (the second named defendant), hereinafter the "NIHE", which owned the flats which were being demolished.

(2) Armoury Demolition and Recycling Limited (the third named defendant) hereinafter "Armoury", which was the main and principal contractor in relation to the works.

(3) Eastwood Limited, the fourth named defendant, a sub-contractor, which the court will refer to as "Eastwood".

(4) Robert Rush, the fifth named defendant, another sub-contractor, which the court will refer to as "Rush".

(5) Doran Consulting Limited (the sixth named defendant), as designer and co-ordinator of the works, which the court will hereinafter refer to as "Doran".

There is also a third party in the case brought into it by Armoury. It is called Highway Barrier Solutions Limited, hereinafter referred to as "HBS". It is a company whose business is traffic management services.

[6] In Part One of this judgment the court will set the scene in more detail and will determine the following issues: whether the first defendant was in part responsible for the accident; whether the plaintiff was guilty of contributory negligence; and whether the other defendants (and potentially the third party) have a degree of responsibility for the accident because of the factors mentioned above. In Part Two, the court will determine issues of responsibility as between the defendants

and as between the third named defendant and the third party. Finally, in Part Three the court will provide its overall conclusions. In these proceedings Mr McNulty QC and Mr Gillespie BL appeared for the plaintiff; Mr Spence BL appeared for the second, third, fourth and fifth defendants; Mr Hanna QC and Mr Millar BL, appeared for the sixth named defendant; and Mr Campbell BL appeared for the third party. The first named defendant was not represented at the hearing. The court is grateful to all counsel for their assistance and submissions.

**Part One**

**The accident locus**

[7] As already noted the road traffic accident occurred at Pound Street in Larne. Pound Street is close to the town centre and at one point intersects with High Street. It has a mix of residential and business premises. To the east of Pound Street lies the town centre. To the west of it is the Harbour Highway which carries traffic coming to and from Larne Harbour around the town centre. The accident happened a short distance from the point where Pound Street meets the Harbour Highway.

[8] At the date of the accident – 2010 – the southerly side of Pound Street, close to the accident site, was adjacent to a large block of flats, known as Gardenmore House. It was one of a number of similar blocks of flats built in the 1960s[1] on the edge of the town centre. Since the early 1970s, the flats had been owned by the NIHE, which is the second named defendant in these proceedings. Gradually, the flats were being redeveloped. At least one block – known as Shane House – had by 2010 already been demolished and by this date the plan was for Gardenmore House to follow suit. By the date of the accident that plan was far advanced and the process of demolition was about to start.

[9] In preparation for the demolition, in the days before the accident, a hoarding was erected around the proposed demolition site. The hoarding took the form of a barrier made up of chipboard sheeting fixed on a wooden framework. Its height was 2.4 metres. Of relevance to these proceedings, the barrier ran along the southerly side of Pound Street from its junction with High Street going in a westerly direction. Over this stretch it enclosed the southerly footway, in effect, making it part of the demolition site. The hoarding, apart from a recessed access point, ran continuously in a countrywards direction towards the Harbour Highway parallel to the country-wards lane of Pound Street. At a point adjacent to an uncontrolled crossing point on Pound Street, the line of the hoarding moved away from the road edge and, as a result, gradually began uncovering the footway. It then moved sharply and in a straight line away from the road and walk way. This feature was referred to during the hearing as a 'splay'.

[1] There appears to have been three blocks: Gardenmore, Shane and Latharna (which is the only one still remaining in place today.

[10] The uncontrolled crossing point, referred to above, features centrally in this case. The crossing had for long been at this location and was designed to assist pedestrians to cross Pound Street in both directions. Pound Street consists of a single carriageway made up of two traffic lanes. The southerly lane went countrywards whereas the northerly lane travelled townwards.

[11] The crossing point could be identified by three features, in particular. First of all, there was in the centre of the carriageway a traffic island which acted as a halfway house or refuge for pedestrians crossing the road. Secondly, to assist the pedestrian identify the crossing and to travel safely across it, its configuration included dropped kerbs. Thirdly, at the point of stepping off/onto the roadway/traffic island, there were areas of tactile paving[2].

[12] The plaintiff in this case attempted to cross the road from the southerly to the northerly footway. As he approached the crossing point, there were two traffic signs which had been placed ahead of him. One of these bore the word "Pedestrians" and then an arrow pointing to the crossing point. The second bore the message "pedestrians please use other footway". These had been put in place because, due to the effect of the hoarding, the footway on this side of the road for a pedestrian travelling towards the town centre was closed as it had been subsumed into the demolition site.

[13] On the basis of measurements taken by the police just after the accident, what confronted the plaintiff when using the crossing was a traffic lane between him and the traffic island in the middle of the road of 3.2 metres. On the other side of the traffic island, the townward lane was measured at 4.2 metres in width.

[14] A key issue in this case relates to the question of visibility. This involves considering what the pedestrian could see to his right before he left the safe haven of the footway. Concomitantly, it also involved what the first named defendant – the driver of the car involved in the accident – could see in terms of the presence of a pedestrian at or about the uncontrolled crossing point. As noted earlier, the accident occurred as the driver was driving countrywards along Pound Street going in a westerly direction. It also occurred prior to the pedestrian reaching the traffic island, having entered onto the roadway, as will now be explained.

**The accident itself**

[15] The sources of information which the court has about the occurrence of the accident itself are as follows:

[2] The tactile paving was of a different colour to the surrounding surfaces and had a pimpled surface. It is principally aimed at assisting persons who have impaired eyesight but provides a marker for all pedestrians.

(a) It has the fruits of the detailed police investigation into the accident based principally on a detailed examination of the scene on the day of the accident by a forensic scientist, Ms McCormick, who gave oral evidence at the hearing.

(b) It has the account of the first named defendant who was interviewed by the police in the weeks after the accident. He did not give oral evidence in these proceedings.

(c) It has the witness statements of persons interviewed by the police after the accident. None of these persons gave oral evidence.

(d) It has the benefit of no less than six consulting engineers who had been commissioned by the various defendants described above at paragraph [5] and the third party in this case. All but one of these consultants gave oral evidence at the hearing. The one who did not was Mr McKeown.

[16] Notably, however, the court has no detailed evidence from the plaintiff as, due to the injuries he sustained in the accident, he has no memory of it. While he did make a written statement to police, which the court has read, this is, for understandable reasons, uninformative.

**The police investigation**

[17] The 29 September 2010, by all accounts, was a dry and bright day. The accident happened at about 15.52 hours. The police and ambulance services arrived shortly afterwards. Because of the seriousness of the accident, a forensic scientist was called to the scene and arrived at approximately 17.40 hours. As a consequence, a thorough investigation ensued. The court has had the opportunity to consider the fruits of this investigation, which involve a police report on the collision; a detailed statement from the forensic scientist as to the outcome of the investigation; a very helpful scale map of the scene; and some 60+ photographs taken on the day of the accident itself.

[18] While the court has considered all of the above materials, it will confine its description of them to the essentials, building on the description of the accident locus already given, without repeating it[3]. The main points of substance to emerge were as follows:

(i) The speed limit for Pound Street was 30 mph.

(ii) The first named defendant's car – a Ford Focus – prior to the accident had been in reasonable condition and was not defective in any way material to the accident.

[3] The description of the accident locus is largely taken from the "police" materials in any event.

(iii) After the accident there was a range of debris and marks on the roadway. This included a partial tyre mark located centrally on the country bound lane which was generally aligned with the lane. It commenced on the town side of the crossing point and was approximately 4 metres long. Among the debris, primarily found at points beyond the traffic island going in a westerly direction, were a paint flake belonging to the car; glass fragments from the car; some hair and tissue from the plaintiff; blue coloured fibres adhering to the road surface associated with the plaintiff's clothing; a number of the plaintiff's teeth; and a bloodstained area, believed to be in the area where the plaintiff had ended up in the centre of the carriageway.

(iv) The damage to the first named defendant's car was essentially to its front offside. There was diffuse cracking to the offside of the front windscreen; the offside window wiper blade had separated from the car; there was a dent to the offside "A" pillar; and blue coloured fibres were found adhering to the black coloured body trim of the front wrap around bumper.

(v) The forensic scientist, in the light of the presence of the solid wooden hoarding erected around the demolition site, carried out what she described as "scene visibility tests". It is convenient to replicate her findings in respect of the "car approach" (para 8.1 of her written report) and the "pedestrian approach" (para 8.2 of her written report). These approaches were set out by reference to a series of points, all of which were identified by the mapper on his map of the scene and by the photographer in his album of photographs.

Para 8.1 reads:

> "**Car approach**
>
> Point A – Position at which the footpath on the left cannot be seen. This was approximately 40 metres prior to the pedestrian crossing point. Photograph 23 was taken from a similar viewpoint.
>
> Point B – Position at which the angled hoarding allows a partial view of the footpath. This was approximately 32 metres prior to the pedestrian crossing point. Photograph 24 was taken from a similar viewpoint.
>
> Point C – Position at which the angled hoarding affords the full view of the footpath. This was approximately 18 metres prior to the pedestrian crossing point. Photograph 25 was taken from a similar viewpoint."

Para 8.2 reads:

> **"Pedestrian approach**
>
> Point D – position at which a full view of the carriageway to the right was unrestricted by the hoarding at position one and this was measured at approximately 10 metres prior to the crossing point. Beyond position one a partial view of the lane can be seen.
>
> Point E – Position at which a full view of the carriageway to the right was unrestricted by the hoarding at position 2 and this was measured at approximately 13 metres prior to the crossing point. Beyond position 2 a partial view of the lane can be seen.
>
> Point F – Position at which a full view of the carriageway to the right was unrestricted by the hoarding at position 3 and this was measured at approximately 22 metres prior to the crossing point. Beyond position 3 a partial view of the lane can be seen."

(vi) The forensic scientist sought to establish how long it would take for a 17 year old pedestrian to cross the lane of traffic from the footway kerb to the traffic island, a distance of 3.2 metres. Using "typical walking speeds" for a male of the plaintiff's age, she concluded that crossing the lane "would take in the region of 2 seconds".

(vii) An issue tackled by the forensic scientist related to the speed of the car, based on which she described as "pedestrian throw". This involved looking at the distance travelled by the pedestrian from the point of impact to the point of rest and extrapolating from this a range of vehicle speed values with the assistance of calculations derived from data drawn from actual pedestrian/vehicle collisions. Applying this method the forensic scientist concluded (at paragraph 10.0):

> "I was unable to establish the exact point of impact with the pedestrian. However, the paint flake and glass were produced as a result of the damage caused when the vehicle struck the pedestrian and can give an indication of the impact position. These items were located close to the natural crossing point for the footpath and traffic island. In my opinion during the course of the collision the debris and paint flakes would be projected forward and therefore the point of impact would be on the townside of the paint flake and glass (provided they are

not moved subsequent to the collision). The distance between the paint flake and the blood where the pedestrian reportedly came to rest was approximately 17 metres. Assuming that this distance is representative of the distance travelled by the pedestrian then Evans and Smith's approach indicates a vehicle speed range with 95% confidence of 28 to 38 mph and an absolute minimum speed of 28 mph. The area of impact was approximately 0.6 metres lower than the indicated rest position and this would mean that the calculated impact speed may be slightly lower than the actual impact speed but considering the height discrepancy it is likely to be negligible."

(viii) The next matter considered by Ms McCormick was driver timings. In her opinion, the period needed for a driver to perceive and respond to an object, hazard or incident was between 0.75 and 1.5 seconds. This enabled her to provide a helpful table. This showed that, assuming a speed of 28 mph, the distance the car would travel, based on a reaction time of 0.75 seconds would be 9.4 metres and, based on a reaction time of 1.5 seconds, would be 18.8 metres. The same calculations, assuming a speed of 38 mph, produced a distance of 12.7 metres, based on a reaction time of 0.75 seconds, and a distance of 25.5 metres, based on a reaction time of 1.5 seconds.

(ix) The forensic science conclusions can be expressed as bullet points –

- The damage to the car was concentrated to the front offside.
- The pedestrian was upright when struck and had not been travelling at a fast speed across the front of the car.
- The pedestrian was projected from the area of impact towards his rest position which was indicated by an area of blood.
- During this movement, the pedestrian impacted on the ground as indicated by the blue fibre smearing, the area of hair and tissue and the general location of the teeth and blood.
- The area of impact was within the region of the traffic island.
- The distance between tyre marks was approximately 1.5 metres and this was comparable to the track width of the car.
- The location of the tyre marks centrally to the lane and adjacent to the traffic island and the location of the damage to the car suggest that the pedestrian had almost completed the crossing of the lane and that the driver had braked, most likely in an attempt to avoid the collision.
- It is possible he steered marginally to the right.
- The distance between the debris at the traffic island and the rest position of the pedestrian was approximately 7 metres.
- The vehicle impact speed was in the region of 28-38 mph.

- It was likely that the vehicle was travelling at a slightly higher speed than the range indicated at impact as some braking occurred prior to the impact.
- A wooden hoarding had been recently erected around a demolition site.
- In relation to the pedestrian a full view of traffic travelling in the country bound lane (to the pedestrian's right) was severely reduced by the hoarding. When located at the footpath edge, the viewing distance was 22 metres, with a partial view of the traffic beyond this point.
- In relation to the driver, at 40 metres prior to the crossing point the view of the footpath was obstructed by the hoarding. A partial view was possible when 32 metres prior to the crossing point. A full view of the footpath with minimum obstruction by the hoarding was possible when at 18 metres prior to the crossing point.
- The presence and location of the tyre marks suggest the driver has braked just prior to the impact with the possibility of a right steering input to avoid the collision.
- When the collision occurred the pedestrian had almost completed the crossing of the lane.
- It is probable that the Ford car was not in the pedestrian's view when he assessed the traffic on the carriageway.
- The Ford car was being braked during the collision.

**Matthew Bradbury's police interviews**

[19] The first named defendant was interviewed by police officers on two occasions: 5 November 2010 (about 5 weeks after the accident) and on 13 May 2011 (approximately 8½ months after the accident).

[20] The transcript of the first interview runs for 19 pages and the second for 4 pages. In the interests of economy, the court will only summarise the main points.

[21] At the time of the accident there were two people in the first named defendant's car: the first named defendant and a friend – a Mr Kirkpatrick who he was giving a lift to. It appears that Mr Bradbury had travelled along High Street intending to turn left at the traffic controlled crossing into Pound Street heading in a countrywards direction. In his account he was going at "a good speed". He appears to have been aware of the hoarding to his left-hand side and had driven the road on a number of occasions after it had been erected prior to the accident. As he put it early in his interview: "That boy walked out in front of me, didn't give me time to do anything". The driver maintained that he was "observing everything, every detail" He said he was familiar with Pound Street and would drive along it on most days. He said he was travelling between 20 and 25 mph. When asked if he was conscious of the hoarding, he replied he was "very conscious" but he initially said he drove in the same way he would have driven if the hoarding had not been there. In particular, he said that he would not have gone any faster or slower. When

challenged about this, the first named defendant amended what he had said, in an interesting exchange:

> "Q. Well I'm just asking you, you're saying your within the speed limit…I'm just trying to clarify… there is obviously a hazard there you're conscious of …This big hoarding…did you do anything to adjust your driving, road position or anything?
>
> A. Yeah, I drove between 20 and 25 mph instead of doing 30."

When asked when he first saw the pedestrian, his reply was:

> "When he was right at the car, he came just straight walking out and hit the car straight away."

When it was suggested to him that a witness had said the pedestrian was hit "just taking his last step onto that traffic island", he replied:

> "No, no, that's wrong. He was just round a bit here so he was. He wasn't near the other side of the car."

The first named defendant went on:

> "I know for a fact he hit just near the centre of my car."

To this an interviewer asked:

> "You think he was more to the passenger side of the car."

This elicited the reply that:

> "Yeah, yes he was definitely more to the passenger side."

At the end of this exchange, the first named defendant reiterated his view that he had no time to react ("no time at all").

In a later exchange the first named defendant repeated that the pedestrian had walked out and hit the car "not even in the second in it, and he hit the car". This prompted the following exchange:

"Q. Did you see him step out from the side of the hoarding?

A. No. I didn't no didn't see … until like you know when you hit, you hear the thud and then he came up and hit my window screen and fell off.

Q. So you are driving along and the first you see him is in the middle of the road?

A. No, aye yes when I hit him.

Q. … You hadn't seen him come out?

A. Prior to that, no, I didn't no. I couldn't see him, there was no way of me seeing him."

Just to be clear, the interviewer went over this again:

"Q. The first you see of him he is in the middle of the road in front of you?

A. Yeah.

Q. And you didn't see him step out from your left?

A. No, he came straight on out. You see he was wearing earphones …

Q. How did you know he was wearing earphones?

A. Because when I got out of the car, somebody took the earphones out … and somebody was holding his phone or something it was blasting with music."

The first named defendant did not know how far his car had travelled after impact before he stopped and said he did not have time to step on the brakes until after he had hit the plaintiff.

The interviewer returned to the question of whether the injured party had almost reached the traffic island when he was struck.

In a similar reply on this point to that given earlier, the first named defendant said:

> "No, no. You see well if he was doing that there I would have been aware of him being in front of me and I would have time to stop, but I didn't have time to stop."

In the course of the second interview, the interviewers were able to put to the first named defendant information gleaned from the forensic scientist's report.

The first named defendant did not deviate from what he had said at the first interview. He denied that the injured party could have been hit in the region of the traffic island ("that couldn't be true"). He added:

> "If he had of been at the right hand side of the car I would have seen and would have had time to stop as I was going at a slow speed, I was only going between 20-25 mph so that would have given me enough time, if I had seen him coming I would have been able to stop."

The forensic scientist's speed range was wrongly given by an interviewer as 28-30 mph (in fact, it was 28-38 mph). Nonetheless the first named defendant's response was "That can't be right …".

He maintained his position that he did not have time to do anything.

**Witness statements**

[22] The police report included a series of witness statements compiled by the police after the accident. As none of the makers of these statements give evidence in the course of these proceedings these accounts have not been tested.

[23] A Eugene Duncan, who was a front seat passenger in a car travelling in a townwards direction, records that he saw "the man" being hit by a car. "He appeared to be sliding down off the driver's side of the bonnet … he then landed on the road just in front of this car, close to the driver's side." The injured party was on the ground and was not moving or making any sounds. There was blood around his face, arms and ears. The witness noticed the presence of dark coloured wires around the top of his clothing. He assumed these were earphones. He was lying on his back. Mr Duncan offered the view that he did not think the Focus car was speeding from what he had seen. However, he had seen the injured party for around 2-3 seconds before he was on the bonnet of the car. The front windscreen of the car was smashed.

[24] Brendan Kemp was driving his car along Pound Street also in a townward direction. He indicated that at the distance of 20 yards from the uncontrolled crossing he noticed a pedestrian to his right crossing the countrywards lane towards

the traffic island. This witness said he was aware of a car travelling towards him from the town centre direction. He thought the pedestrian was unaware that this car was approaching him. As he took "his last step towards the traffic island" the car struck him to his right side. The pedestrian went up the bonnet of the car and hit the windscreen before being thrown into the car. He was thrown forwards from the car. He did not, however, see the pedestrian land. The witness then stopped his car and got out to go to the scene. He said that he could not estimate what speed the car had been travelling at before the impact.

[25] Ryan McKillop was travelling along Pound Street in the direction of High Street on the afternoon of the accident. He heard a 'big' thud and a smashing sound. He looked to his right. He said he saw a body roll off the side of the car which was 10-15 metres away from him in the on-coming lane. He got out of his car and went over to the body lying on the road. It was a young male. He was lying on his back and had injuries to his head. He saw what he believed to be the young man's mobile phone behind the car and he heard music playing from head phones.

**The evidence of consulting engineers on behalf of the defendants**

[26] A feature of this case is the unusually extensive range of consultant engineering evidence in respect of this accident. The court was provided with the following reports:

(1) Two reports from Mr McLaughlin on behalf of the plaintiff. There was an initial report dated 2 September 2013 and a supplementary report dated 9 March 2018.

(2) A report from J. T. Wright on behalf of Armoury dated 9 April 2014.

(3) A report from Mr David McKeown dated 15 March 2017 on behalf of the fifth named defendant (Eastwood).

(4) Two reports from Mr McQuillan, the first dated 7 September 2017 and the second dated 5 March 2018, on behalf of the sixth named defendant (Doran).

(5) A report from Mr Blackwood of TRL dated August 2018 on behalf of the third party (HBS).

(6) A report from Mr Dixon on behalf of the third party dated August 2018.

[27] All of the above gave oral evidence except for Mr McKeown.

[28] Unlike the evidence of Ms McCormick, the forensic scientist whose evidence has been discussed earlier, all of the above reports were compiled in the interests of a particular client.

[29] Moreover, again unlike Ms McCormick's report, all of the above reports were compiled after the hoarding had been taken down and after the demolition of Gardenmore House had occurred. The earliest of the reports (Mr McLaughlin's first report) was nearly three years after the accident whereas many of the reports had been compiled years after that report. The court also notes that some of these reports were desktop reports only.

[30] As the accumulative length of the above referred expert reports runs into hundreds of pages, while the court has read all of them carefully, it is not practical for the court to attempt a detailed summary of them. For this reason, the court will concern itself with the main thematic aspects of the evidence, rather than every detail, which differs often in small ways from one report to another. To a greater or lesser extent, the reports deal with the question of which of the defendants and/ third party, other than the first named defendant, bears a measure responsibility for the hoarding and the pedestrian arrangements in connection with it. This aspect will be considered by the court at Part Two of this judgment.

[31] On the first day of the hearing, the court was presented with a document which was described as a "Joint Statement" prepared by five of the consulting engineers: Mr McLaughlin, Mr Wright, Mr McKeown, Mr Dixon and Mr Blackwood. This document seeks to summarise the position of the experts on a range of issues arising in the case. Insofar as the summary relates to the road traffic accident itself, the court will set out its terms below. Some other aspects of the Joint Statement will be considered at a later point in this judgment.

[32] The relevant part for present purposes involves five headings and reads as follows:

> "**The view available to Mr Bradbury**
>
> 2. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed that the visibility that was available to Bradbury to the edge of the kerb at the centre of the pedestrian crossing was approximately 40 metres and that there would have been the same sight distance for Joyce from the edge of the kerb at the centre of the pedestrian crossing to a first view of the car. By the centre of the pedestrian crossing we mean on an east west axis, midway along the tactile paving.

**The impact of the hoarding on the available driver and pedestrian views**

3. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed that the presence of the hoarding reduced the sight distance. Prior to the erection of the hoarding it would have been at least 100 metres along Pound Street. Prior to the erection of the hoarding both parties could have seen each other earlier as the pedestrian crossed the footpath to the kerb.

**Vehicle speed**

4. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed that the impact speed was in the region 30-39 mph. There was some pre-braking and this will have increased the initial speed to some degree. Prior to the skid mark being formed on the road there would be a reduction in speed as a result of brake build up.

**Pedestrian movement**

5. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed that Joyce travelled approximately 2.8 metres from the kerb to the point of impact. Based on an average walking speed from research data, it will have taken Joyce some 1.9 seconds to walk 2.8 metres.

6. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed an additional 0.2 seconds would have allowed Joyce to reach the island, giving a total crossing time of 2.1 seconds. The walking speed used in these calculations is 3.3 mph.

7. The engineers do not know what his average walking speed was therefore his time on the road could be greater or less than 1.9 seconds.

**Collision avoidability**

8. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed that based on the impact speed range of 30-39 mph and the estimated time of 1.9 seconds for Joyce being on the road,

calculations show that the car was 26 to 33 metres from the impact point when Joyce was at the kerb. It is agreed that, if Joyce had looked to the right when he was at the edge of the kerb the car would have been visible to him and vice versa.

9. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed that based on published research that 1-1.5 seconds is a typical perception and reaction time for a driver.

10. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed that based on the above 30-39 mph speed range and a perception response of 1-1.5 seconds, Bradbury could have stopped in a distance of 25.8 to 32.5 metres from 30 mph and in a distance of 38.4 to 47.1 metres from 39 mph.

11. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed that based on the 40 metre visibility, a vehicle travelling at 30 mph will take 3 seconds to reach the pedestrian crossing. Based on the previously used walking speed of 3.3 mph, the pedestrian will take 2.1 seconds to cross the lane.

12. Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Blackwood have agreed that on this basis, if the vehicle had been at the 40 metre limit of sight when the pedestrian stepped off the kerb, the vehicle could have maintained a constant speed of 42 mph and not hit the pedestrian."

[33] In broad terms, all of the experts were of the view that the first defendant was driving too fast and all were of the view that his speed probably exceeded the speed limit of 30 miles per hour and that such a speed was well beyond what was appropriate in the circumstances, especially given the presence of the hoarding.

[34] All equally were agreed that the presence of the hoarding did have an impact on the sight lines available to both the driver and the pedestrian. Plainly, prior to the hoarding being erected, the sight lines which driver and pedestrian alike would have enjoyed was in the region of (at least) 100 metres whereas, in the presence of the hoarding, at best, these had been cut down to around 40 metres.

[35] The experts also were substantially in agreement that the plaintiff had himself not been paying sufficient attention when crossing the lane from the south side of Pound Street to the traffic island. This may have been through him being preoccupied or distracted but the use of headphones playing music in his ears will likely have limited his perception of events going on around him.

[36] The main point on which the experts disagreed related to whether the presence of the hoarding was in part responsible for the accident or whether, alternatively, on a correct analysis, it played no part in it.

[37] Those who favoured the first view, apart from Ms McCormick, the Forensic Scientist, who clearly was of this view, were Mr McLaughlin, Mr McKeown and perhaps also Mr Dixon. Those who favoured the second view were Mr Wright, Mr McQuillan and Mr Blackwood.

[38] Mr McLaughlin in his report offered the opinion that the wooden hoarding reduced the sight distance between a pedestrian taking what is believed to be the plaintiff's approach and a motorist taking the defendant's approach very substantially. Without the hoarding the sight lines, he thought, would have been in excess of 100 metres. With the hoarding in place, the sight distance was reduced, at best, to some 40 metres for the pedestrian and some 38 metres for the motorist. Moreover:

> "The 40 metres site distance is only achieved with the pedestrian viewer right at the kerb line. Even in this position all that will be seen of the car when it is 40 metres away is a first glimpse of its front offside corner, and that also assumes that the car is travelling within about 0.6 metres (2 feet) of the road centre line."

[39] The significance of the hoarding was that it took away all the safety factors that can mitigate against motorists exceeding the speed limit and pedestrians not fully maximising their sight distance before they step out on to the road. In his view the hoarding reduced the room for error on both the plaintiff's part and the driver's part. Had the hoarding not been there then there would have been a much greater sight distance and consequently there would have been a significantly greater chance that one of the parties would have seen the other in time to avoid the collision.

[40] Mr McKeown clearly thought that the hoarding, positioned as it was at the time of the accident, and as shown on Doran drawings, presented a hazard for pedestrians crossing the road. Pedestrians, moreover, were invited by freshly erected signage and tactile surfacing on the footway, and the positioning of the central island, to cross at a location where their view town ward and that of motorists' approaching from the town direction was severely restricted.

Mr McKeown thought it notable that after the accident the PSNI asked for the hoarding to be repositioned to increase pedestrian and driver views. He further noted that the alternative safety positions for the hoarding did not adversely affect the work on site.

[41] Mr Dixon offered the view that the site hoarding which had been erected resulted in an obstruction to the sight lines between drivers of west bound vehicles and pedestrians approaching the crossing point from the south side.

[42] In his view the hoarding should have been located further back so that a visibility distance of 50 or 60 metres could have been provided at a pedestrian viewing offset of 2.4 metres to a vehicle positioned in the middle of the traffic lane.

[43] In his view, when designing the site hoarding, the designer should have been aware that visibility distances between pedestrians and vehicle drivers would be compromised at the west corner of the hoarding. In these circumstances there should either have been a different hoarding layout deployed or a different temporary traffic management scheme devised to deal with the displacement of pedestrians.

[44] Mr Dixon thought that professionals involved in the scheme, including the Roads Authority and the main contractor, should have been aware of the restricted visibility when presented with the proposed scheme plans prepared by Doran.

[45] He offered the conclusion that:

> "In relation to the positioning of the hoarding…it remains my opinion that whilst the positioning at the material time reduced the potential for extended pedestrian and driving views, it did not do so to the full detriment of the available times and distances for pedestrians crossing the roadway; nor west bound drivers being offered sufficient time and distance in which to observe and react to a pedestrian as a hazard."

[46] Overall, he thought that the hoarding had little or no part to play in the accident. In his view a pedestrian taking care should have been capable of crossing the road safely, provided approaching drivers were travelling at or around the speed limit.

[47] While Mr Wright conceded that the hoarding does restrict the view of pedestrians and of approaching drivers, on his calculation, if the approaching vehicle had been travelling at 30 miles per hour it would have covered the distance of 40 metres in approximately 3 seconds. If the plaintiff therefore walked normally and assuming that the driver had not been in view before the plaintiff started to

cross, then in his view if no action had been taken at all by the driver the plaintiff should have been capable of reaching the traffic island.

[48] The driver, he said, should have had sufficient time and distance easily to avoid the accident occurring if he had been travelling at 30 miles an hour.

[49] Mr Blackwood's view was similar to that of Mr Wright. While he accepted that the available inter-visibility was reduced by the presence of the hoarding, he maintained that the views available to the driver and pedestrian in Pound Street were reasonable and extended for approximately 40 metres. Based on that distance there was sufficient time and distance, to observe, react, brake and stop prior to the crossing area, whilst travelling at the maximum permitted speed of 30 mph. He also thought that the available pedestrian view of 40 metres provided sufficient time and distance for a pedestrian to cross the west bound carriageway, even if a vehicle was located in view at the 40 metre point and travelling within the permitted speed restrictions.

[50] At paragraph 9.7 of his report he stated that:

> "In relation to the positioning of the sheeting/hoarding, it is ultimately a matter for the court. However, it remains my opinion that whilst the positioning at the material time reduced the potential for extended pedestrian and driver views, it did not do so to the full detriment of the available times and distances for pedestrians crossing the roadway; nor west bound drivers being offered sufficient time and distance in which to observe and react to a pedestrian as a hazard."

[51] Finally, Mr McQuillan's view took issue with the view of Ms McCormick as expressed at the post-accident meeting of 6 October 2010. At that meeting Ms McCormick had expressed the view that the hoarding had contributed to the accident. However, Mr McQuillan in what he describes as a "broad brush appraisal" indicated that "as constructed the hoarding line, as modified by Armoury (by introducing the splay at the west end) was marginally adequate for "normal" conditions. The author thought that "modern braking systems…are more efficient and the stopping distance quoted can be improved on".

[52] In these circumstances he thought the cause of the accident was excessive speed and negligence on the part of the pedestrian. The hoarding was adequate, albeit marginal, in terms of the sight lines in normal dry conditions.

**Assessment of the road traffic accident aspect**

[53] Taking account of all of the above sources of information, the court finds the following facts in relation to the accident itself.

(i) The hoarding, once in place, will have limited both the driver's and the pedestrian's sight line significantly in comparison to the position as it had been prior to the hoarding being erected. Without the hoarding there would have been sight lines in excess of 100 metres whereas with the hoarding in place it was substantially reduced and, at most, was in the region of 40 metres. In the court's opinion what could be seen by the pedestrian at 40 metres looking to his right probably would have only been the extreme right headlight (if even that) of the on-coming car and the court thinks that as a result it is probably an over-statement to state that, in fact, the pedestrian could see the car at 40 metres. On this aspect the court is inclined to give weight to the view of Ms McCormick, the only expert who actually saw the hoarding in place and who stood wholly independent of the parties.

(ii) The court is of the opinion that the existence of the hoarding, on the balance of probabilities, was a factor in the accident. It rejects the proposition that the hoarding had no part to play in the accident. This seems to the court to be an unrealistic and unlikely scenario and the court is satisfied that had the hoarding not been where it was the accident would probably not have occurred as there would have been a much greater opportunity for the driver and pedestrian to see, and avoid, each other. The contrary view, espoused by a number of experts, depends on the court, adopting what even its adherents would view as a marginal form of analysis in which the benefit of the doubt is given in favour of the defendants, other than the first named defendant, on almost every issue *seriatim*. The court believes it would be wrong to accede to this approach.

(iii) The driver of the Focus car was, prior to the accident, more likely than not, travelling at a speed which was too fast in the circumstances. The likelihood, in the court's view, is that he was travelling well in excess of the 30 mph speed limit, notwithstanding the presence of the hoarding (which he knew about) and the limited sight lines available, never mind the requirements of the law.

(iv) The driver, moreover, was paying insufficient attention, as is evidenced by the fact that he appears not to have seen the plaintiff until the very last moment when it was too late to avoid the accident.

(v) The plaintiff was close to the traffic island when the impact occurred and the impact was to the front of the car at a point beyond the mid-point heading in the direction of the traffic island.

(vi) The driver failed to stop in time to avoid the collision and failed to warn the plaintiff of his presence by, for example, bumping his horn.

(vii) The pedestrian was himself not paying due care and attention and was probably distracted. He did not appear to have been keeping a proper look out and was wearing headphones, probably playing music, which would be likely to limit his ability to perceive events as they unfolded. On the balance of probability, it will have taken the pedestrian around 2.1 seconds to cross the road to the traffic island but this cannot be said with anything like certainty.

**Liability in respect of the accident itself**

[54] Given the court's findings of fact, the court is satisfied that the first-named defendant in the ordinary way bears a substantial measure of liability in this case.

[55] In the court's view, the party or parties responsible for the erection of the hoarding, in the configuration in which it was placed, also bear a measure of liability in the case, as do those who arranged for pedestrians, like the plaintiff, to cross at the uncontrolled crossing point by the use of signs.

[56] The court is of the view that the plaintiff was guilty of a measure of contributory negligence in accordance with the court's finding at (vii) above.

**Part Two**

**Responsibility for the hoarding and the management of pedestrians**

[57] In this section of the judgment the court must turn away from the mechanics of the road traffic accident itself and explore the question of the liability of the defendants, other than the first-named defendant, for the erection of the hoarding at the demolition site and the management of pedestrians who were required to cross at the uncontrolled crossing point which, the court has held was, in part, responsible for the accident due to its effect upon the relevant sight lines.

[58] There are five defendants and a third party whose position falls to be considered for this purpose: the NIHE; Armoury; Eastwood; Rush and Doran; and the third party, HBS. On the run of the hearing, the position of Eastwood's and Rush was little discussed, as there appeared to be general acceptance that these sub-contractors played purely functional roles, not involving them in any of the decision making which led to the positioning of the hoarding or its modification or its impact on sight lines, drivers or pedestrians.

[59] It is helpful to trace the evolution of the project and the particular works the court is concerned with. In the interests of economy, the court will do so chronologically.

**The evolution of the works**

[60] Gardenmore House had some 16 storeys and contained some 60 flats. It was built in the 1960s. As far back as 2004, the NIHE made a decision to demolish it. In 2008 the NIHE advertised the position of a consultant with experience in demolition of high rise blocks in confined spaces to take the project forward. A selection process was instituted and, as a result, Doran, was appointed to this role in August 2008. This appointment was not a surprise as Doran had been the consultant to the NIHE in respect of another similar project involving the demolition of a similar block of flats in Larne, called Shane House.

[61] The remit of the appointed consultant was wide. It included the preparation of a condition report; the making of outlined proposals; the production of a scheme design; the consideration of the issue of area clearance; the adoption of a health and safety plan; the provision of post contract administration; and the preparation of tender documentation for a tender process to appoint a main contractor. The consultant was also to appoint its own resident engineer (who was to be at the site on an alternative daily basis throughout the life of the demolition).

[62] In pursuit of these duties, Doran produced two drawings of significance for present purposes. One was described as a "preliminary drawing" which appeared in 2009 and a second, dated July 2010 which was of a similar nature. The importance of these drawings is that they made it clear that the demolition site was to be enclosed within a red line which was to take the form of a 2.4 metre high hoarding. Moreover, the drawings also made it clear that the footpath along a stretch of the southern side of Pound Street was to be subsumed within the demolition site. This related to the footpath discussed at Part I of this judgment in the context of sight lines.

[63] The tender competition to appoint a main contractor took place in 2010. In advance of it, Doran had provided a document called "specification" which was provided to would be tenderers. This dealt, *inter alia*, with the responsibilities of the main contractor. Of significance for present purposes, it contained two paragraphs which may usefully be set out now. These stated:

> "1.8 Access to the site for all construction traffic shall be as shown in the drawings. The contractor shall ensure that his works do not interfere with or disrupt normal public access to adjacent areas. The contractor shall take all measures necessary to ensure the safe passage of pedestrians around the site area …
>
> The contractor shall erect a 2.4 metre high secure temporary timber hoarding around the

> perimeter of the site as indicated in the tender drawings. The hoarding shall be suitable to prevent unauthorised access into the site and shall remain in place for the duration of the contract. Secure gates will be provided at the site access points; the contractor shall maintain strict control of access through the gates at all times."

[64] In June 2010 Armoury was appointed as main contractor and, in line with the contract awarded on behalf of NIHE, Armoury was to take control of the demolition site and begin work on 2 August 2010.

[65] Prior to that date, it is evident that Doran was, *inter alia*, involved in discussions with the Roads Service ("RS") in June 2010 about the necessary paperwork in respect of footway and road closures, permits and the like. The "preliminary drawing" referred to above had been provided to RS and this had produced some discussion about traffic entering and leaving the site *via* an access point on the southern side of Pound Street. This was RS's sole concern. It related to the question of whether the hoarding along the outside of the footway at this point would block visibility for site traffic leaving the site and thus entering on to Pound Street. In an e mail of 25 June 2010 the official dealing with the matter on behalf of RS stated that "consideration [should] be given to how traffic will be able to exit safely onto Pound Street without putting other road users at risk". The concern, therefore, was about traffic sight lines. In respect of this issue, Doran immediately offered reassurance that the main contractor would put in place a safe system of access for vehicles on to Pound Street and indeed it is clear that the step of using a banksman was later put forward by Doran, after consulting Armoury, to deal with the point. However, this discussion is not without note given the events which were to occur later in September 2010.

[66] An important event in the chronology of this matter occurred on 18 August 2010. It involved a meeting on site between a Mr Mills, who worked for Armoury, and Mr Spence, who worked for Doran. In essence, there was a discussion, initiated by the former, about the sight lines created by the hoarding in relation to the southern footpath at Pound Street. The fact that a discussion of this nature occurred plainly indicates that there was some unease about the sight lines but the court lacks precise evidence as to the detail of exactly what was discussed. What it does know is that Mr Mills suggested that at the westerly end of the hoarding on Pound Street a splay should be put in to improve the sight lines. Mr Spence agreed to this and a splay later was put in. This was before the accident with which this case is concerned but the point at which the splay was created was adjacent to the uncontrolled crossing point which pedestrians *via* signage were required to use where the traffic collision, already described, later occurred.

[67] A development of significance occurred on or about 24 August 2010. At this time Armoury entered into discussions in respect of the appointment of a sub-contractor for the production of a Traffic Management Plan ("TMP") which would deal *inter alia* with the requisite signage required on the ground in the light of footpath and road closures. The sub-contractor Armoury approached (probably on that day) was a company called Highway Barrier Solutions ("HBS"). The court has seen no documentation in relation to this approach which suggests it was an oral one only. HBS provided Armoury with a quotation which Armoury accepted on the same day. Also on the same day, HBS produced a TMP which took the form of a drawing. It dealt with the positioning of signs. Notably, the drawing dealt with the pedestrian signage which has been referred to earlier in this judgment (at paragraph [12]) as having been present at the uncontrolled crossing point where the road traffic accident occurred. However, on the drawing, the signs in question are located in a slightly different place about 30 metres closer to the junction of Pound Street and the Harbour Highway. The court is satisfied that these are two different locations.

[68] Another feature of the HBS drawing of 24 August 2012 is that it contained no reference to the demolition site hoarding and it is not shown on it. In this regard, the court has been told that HBS, at the time when it prepared its TMP, was unaware of the presence or forthcoming presence of the hoarding. The court has no explanation as to why this was so, other than that Armoury, as the main contractor who was sub-contracting with HBS, simply failed to brief them about this aspect.

[69] HBS, it seems clear, put the signage on their TMP in place over two days, 7 and 9 September 2010. The latter date coincided with the beginning of the work to erect the hoarding, which was being erected by Rush as a result of a sub-contract with Eastwoods. The erection appears to have been carried out over multiple days concluding on 14 September 2010. However, there is no evidence that HBS will have observed it as it is clear that the hoarding work at or about the uncontrolled crossing in Pound Street was not carried out until 14 September 2010 and indeed the evidence suggests that this was the last phase of the operation to erect the hoarding.

[70] An employee of HBS returned for a short time to the area on 16 September 2010 at the request of the main contractor to deal with a minor issue, itself of no direct relevance to the issues in these proceedings. While at this stage the whole of the hoarding would have been up there is no evidence which suggests that the HBS employee who visited the site on this day noticed this or made any report about it to his superiors.

[71] As the court has already discussed the road traffic accident occurred on 29 September 2010.

[72] After the accident, on 6 October 2010, a meeting was convened by the NIHE to discuss the safety implications of the accident. Present at the meeting were representatives from NIHE, the PSNI (including Ms McCormick, the Forensic Scientist), Doran, the Department for Regional Development (which *inter alia* was

responsible for RS) and the Health and Safety Executive. At this meeting Ms McCormick stated her view that the presence of the site hoarding had contributed to the accident. Doran explained that the object of putting the hoarding in place was to maximise the site area available during the demolition operations, especially as the methodology of the demolition involved the use of a high reach machine and, where possible, it sought to restrict people from walking close to the demolition activities. The representatives of Doran at the meeting indicated that they wanted the site hoarding to be erected to the outside edge of the existing footpath to facilitate these objectives. This had been agreed with RS.

[73] It was agreed at the end of the meeting that remedial steps should be taken and there was a discussion of alternative ways of improving the situation. Ultimately, it was decided to move the hoarding back to the inside line of the footpath and to place low level barriers on the outside line of the footpath.

[74] Works to effect these changes were executed on 8 October 2010. While thereafter there was a delay in the demolition actually proceeding and further changes subsequently were made before the actual demolition took place, there was at no stage any re-instatement of the arrangements with which this case is concerned.

**The Construction (Design and Management) Regulations (Northern Ireland) 2007**

[75] The above regulations were the subject of some general debate in these proceedings. They applied at the date of the accident in this case, having entered into force on 9 July 2007.

[76] The central aim of the regulations, in their operation in the context of construction sites, such as that involved in this case, is to seek to integrate health and safety considerations into the management of a project. This means that all those concerned in the planning and management of projects, from the very start, should work together to identify risks early on so that effort may be targeted towards best achieving the delivery of health and safety objectives.

[77] Technically the project involved in this case was, in terms of the regulations, a "notifiable project" which meant that from an early stage there was an obligation for a Construction Design and Management Co-ordinator ("CDMC") to be appointed. This was attended to and a member of Doran's staff performed this role. As a result members of Doran's staff were performing multiple roles: as consultant designer; as project manager and as CDMC. A further appointment required under the scheme of the regulations, in a notifiable case, was that of a Principal Contractor, and this was attended to at the time when Armoury won the contract. As is often the case, the appointee was the same entity as the Main Contractor. Thus, Armoury, for the purpose of this project was both the Principal Contractor for the purpose of the CDM Regulations and Main Contractor.

[78] Of importance to these proceedings the Regulations contain provisions in relation to:

(i) Duties of the Designer (Regulation 11).

(ii) Duties of Contractors (Regulation 13).

(iii) Additional duties of Designers (Regulation 18).

(iv) Additional duties of Contractors (Regulation 19).

(v) General duties of CDM Co-ordinators (Regulation 20).

(vi) Duties of the Principal Contractor (Regulation 22).

[79] It is doubtful that for the purpose of these proceedings, breaches of the above provisions themselves can be viewed as establishing breach of statutory duty in view of the contents of Regulation 44 which deals with this subject. It states that:

> "Breach of a duty imposed by the preceding provisions of these regulations … shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of a person who is not an employee of the person on whom the duty is placed."

[80] However, there are express exceptions to the above approach, though it is unlikely that these could directly avail the plaintiff in this case.

[81] Nonetheless, the regulations remain important as the practical expression of day to day norms which apply in this sphere. These norms, moreover, are echoed in the Health and Safety Executive's Code of Practice, Managing Health and Safety in Construction, which the court has considered alongside them. A breach of the regulations, it is thought, might also amount to a breach of the common law duty of care[4].

[82] As far as the duties of designers is concerned, the key provision, it seems to the court, is Regulation 11(3). This states as follows:

> "(3) Every designer shall in preparing or modifying a design which may be used in construction … should avoid foreseeable risks to the health and safety of any person—
>
> …

[4] This appears to be the view of the authors of Jackson and Powell on Professional Liability, 8th Edition at para 9-039.

(b) liable to be affected by such construction work.

…

(4) In discharging the duty in paragraph (3), the designer shall—

(a) eliminate hazards which may give rise to risks; and

(b) reduce risks from any remaining hazards,

and in so doing shall give collective measures priority over individual measures.

…

(6) The designer shall take all reasonable steps to provide with his design sufficient information about aspects of the design of the structure or its construction or maintenance as will adequately assist—

(a) clients;

(b) other designers; and

(c) contractors,

to comply with their duties under these Regulations."

[83] As regards the duties of contractors, Regulation 13 at paragraph 2 states:

> "(2) Every contractor shall plan, manage and monitor construction work carried out by him or under his control in a way which ensures that, so far as is reasonably practicable, it is carried out without risks to health and safety."

[84] At Regulation 18 the duties of designers are enhanced where the project is a notifiable one, as was the project in this case. Thus,

> "18-(1) … no designer shall commence work … in relation to a project unless a CDM co-ordinator has been appointed for the project."

Moreover,

> "(2) The designer shall take all reasonable steps to provide with his design sufficient information about aspects of the design of the structure or its construction or maintenance as will adequately assist the CMD co-ordinator to comply with his duties under these Regulations, including his duties in relation to the health and safety file."

[85] A similar enhancement for the duties of contractors where a project is notifiable is the subject matter of Regulation 19. It is not necessary to set out any particular provision.

[86] Regulation 20 refers to the general duties of CDM Co-ordinators. Once the CDM Co-ordinator is appointed among the duties he must perform are to give suitable and sufficient advice and assistance to the client; to ensure that suitable arrangements are made and implemented for the co-ordination of health and safety; to take measures during planning and the preparation for the construction phase; and to provide for liaison with the principal contractor, including in respect of any design development which may affect planning and management of the construction work.

[87] Similar duties fall on the principal contractor in accordance with Regulation 22. In particular, paragraph 1 includes the following provision:

> "(1) The principal contractor for a project shall—
>
> (a) plan, manage and monitor the construction phase in a way which ensures that, so far as is reasonably practicable, it is carried out without risks to health or safety, including facilitating—
>
> (i) co-operation and co-ordination between persons concerned in the project …
>
> (ii) the application of the general principles of prevention in pursuance of regulation 7;
>
> (b) liaise with the CDM co-ordinator in performing his duties …"

[88] The Code of Practice describes the various duties in greater detail.

[89] Interestingly, there is a provision in the Code of Practice dealing specifically with a high risk project involving demolition. This is paragraph 20. It speaks of "a more rigorous approach to co-ordination, co-operation and planning". It goes on to provide that guidance given to CDM Co-ordinators and principal contractors … "gives an indication as to what is needed…The architect, lead designer or contractor who is carrying out the bulk of the design work should normally co-ordinate the health and safety aspects of the design work; the builder or main contractor, if there is one, should normally co-ordinate construction work."

[90] At paragraph 48 there is helpful advice in relation to the subject of the operation of notifiable sites. This indicates that "the 'lead' designer may be appointed as a CDM Co-ordinator under Regulation 14, but the CDM Co-ordinator's duties are wider than just design co-ordination and suitable arrangements must be made to carry out all of the CDM Co-ordinator's tasks."

[91] This is reinforced at paragraph 68 which refers to CDM Co-ordinators being appointed independently of any other role in the project team or alternatively to them combining this work with another role, for example, "project manager, designer or principal contractor …"

[92] On the other hand as paragraph 70 indicates:

> "A principal contractor's key duty is to co-ordinate and manage the construction phase to ensure health and safety of everyone carrying out construction work or who is affected by the work."

[93] Interestingly, at paragraph 84 there is reference to the role of the CDM Co-ordinator as being to ensure proper co-ordination of the health and safety aspects of the design process.

[94] It is with the health and safety aspects of design work that the CDM Co-ordinator is concerned. He/she should co-ordinate and advise on the suitability and compatibility of designs, including in the context of the preparation of the initial concept design (see paragraph 86).

[95] As paragraph 87 puts it:

> "Proper consideration of the health and safety implications of the design for those who built and maintain the structure will make a significant contribution to reducing its whole life cost …"

[96] At paragraph 98 there is reference to the CDM Co-ordinator's legal responsibility in respect of design work. According to this paragraph this only extends to health and safety aspects of the design – checking that the requirements

of Regulation 11 have been addressed. The CDM Co-ordinator's role includes that the different design elements work together without causing danger and it is noted that this can be achieved through design reviews.

**References to the Joint Statement of experts in the context of responsibility for the hoarding**

[97] The court has already commented on the unusually extensive nature of the consulting engineering evidence in this case. It will be recalled that, to assist the court, a Joint Statement was prepared by a number of the consulting engineers. This document has already been discussed in the context of the road traffic accident. The document also discusses aspects of the responsibilities of the different defendants in respect of the hoarding. Unfortunately, much of the content is little more than the expression of the individual views of particular consulting engineers.

[98] Under the heading "Contractual Responsibilities" it is worthwhile setting out six paragraphs from the Joint Statement. These are:

> "**Contractual Responsibilities**"
>
> (13) Mr McLaughlin, Mr Wright, Mr McQuillan and Mr Dixon have agreed that the presence of the hoarding increased the risk to pedestrians.
>
> (14) Mr Wright expressed the view that the Principal contractor's duties were to carry out the works in accordance with the contract documents, wording, specifications, drawings, etc. Mr Wright accepts that under the CDM Regulations the principal contractor has a responsibility to ensure that the works are carried out with regard to the Health and Safety of the workforce and the general public. However, he does not accept that this includes an analysis of the design, which is the sole responsibility of the designers, in this case Doran Consulting. In this particular case, a contractor raised the problem with the detrimental effect that the hoarding had on sight lines and that included liaising with the designers, sub-contractors and the DRD. As a result the hoarding location was altered to improve sight lines. The Principal Contractor, because of traffic issues also engaged experts to produce Traffic Management Plans. There was every opportunity for the designer, who is an expert in the field to assess the risks associated with the hoarding

and to direct whatever measures were required to reduce that risk.

(15) Mr Wright is of the opinion that there is no evidence that Armoury acted in anything other than a reasonable manner. It is also the view of Mr Wright that when the Principal Contractor was engaged, that did not relieve the designer and the project co-ordinator of their responsibilities under the CDM Regulations for Health and Safety on site.

(16) Mr Dixon generally agrees with Mr Wright, however he does not wish to comment on CDM type issues as these do not form part of his instructions. Mr Dixon would point out it seems likely the TTM (Temporary Traffic Management) was erected on 8 or 9 September 2010, on the basis of work diaries and that the hoarding was not completed until 14 September 2010.

(17) Mr Dixon also notes that he has seen no information to show what data was provided to HBS regarding the precise position of the proposed hoarding and which therefore should have influenced the TTM design by HBS.

(18) Mr McLoughlin agrees generally with Mr Wright about the primacy of the responsibility for the line of the hoarding resting with the designer whom he would expect to have expertise in relation to sight line requirements. However, depending on the Principal Contractor's range of expertise, he might also have some responsibility in this regard.

(19) Mr McQuillan states his position:

(i) The hoarding as amended constituted a boundary constraint which was agreed by all parties involved, with the exception of HBS.

(ii) The Principal Contractors, under the CDM Regulations:

- had a statutory duty to produce a Construction Phase Plan based on the defined hoarding location, which it did;

- was solely responsible, once the contract commenced for the Health and Safety of the site and public safety external to the site.

(iii) The designer/CDM Co-ordinator had no input, once the contract commenced into site safety.

(iv) The Principal Contractor employed a specialist contractor HBS to design and obtain approval for the traffic management and signage associated with the hoarding."

**The court's assessment**

[99] Against the backcloth which the court has described and its finding that the hoarding's impact on sight lines played a role in the plaintiff's accident, the court must consider the position in respect of liability of each of the defendants, other than the first defendant who the court has already held to be at least partly liable for the accident. The court must also consider the position of the third party.

[100] It is right to recognise that there are two aspects which fall to be considered in the present context. First, there is the element of where the hoarding was to be placed. In respect of this it seems clear that as designed by Doran it was to be placed on the outside of the southern footpath along Pound Street. However, its initial positioning was later altered by reason of a decision made following a discussion between Armoury and Doran in mid-August 2010, to put in a splay. Secondly, there is the element of the use to be made of the uncontrolled crossing point at the western end of the hoarding. It was to be used to move pedestrians to the northern side of Pound Street who had been intending to use the footpath along the southern side of Pound Street but who couldn't now use it due to the positioning of the hoarding. It was the inter-action of these elements which created the overall circumstances in which the plaintiff's accident occurred.

[101] What brought everyone to the site was the plan of the second defendant, NIHE, to demolish Gardenmore House and to re-develop the site on which it stood. The risk to the public and to, in particular, the plaintiff as a pedestrian, arose from the activity emanating from the site. In this sense the NIHE bears responsibility for the events which occurred[5], even though it is acknowledged that the actual conduct

[5] This may be viewed as part of the liability which attaches to dangerous buildings adjoining the highway where there are potential liabilities in nuisance and negligence. In Charlesworth and Percy on Negligence (14th Edition) at 11.80 the following is stated under the heading "Dangerous Activities adjacent to the highway": "The duty to take care to avoid doing anything which is likely to injure persons on the highway is only part of the wider duty to take reasonable care in doing, either on or

and design of the work was being carried out by others with whom it was in a contractual relationship. It seems clear to the court that the NIHE ordinarily should be able to seek an indemnity or contribution from those who worked for it on the ground, insofar as that work has been carried out negligently and/or in breach of the contract that subsists between it and the contractor or consultant.

[102] To a substantial degree, therefore, the court's assessment which follows is an exercise in the apportionment of NIHE's broad liability.

[103] The court, moreover, can simplify the issues significantly by recognising, as was generally accepted at the time of the hearing, that two of the defendants – Eastwood and Robert Rush – were concerned with the issues in this case only nominally. Originally Eastwood was to have erected the hoarding but, in fact, it sub-contracted the task to Robert Rush, who became the actual erector of it. However it is plain and is uncontested that the erector of the hoarding performed only that role and, in particular, had no responsibility for its design or the route it would follow, or how it was to be constructed. These matters were pre-ordained by others. Nor was the erector responsible for where displaced pedestrians would go or as to whether the hoarding would have any impact on the sight lines of pedestrians or drivers at Pound Street after the erection was complete. In short, the erection of the hoarding was carried out simply in accordance with the specification which the erector had no business to question and which he or it had to treat as an instruction. In these circumstances, no part of the liability in this case can be imposed on either of these defendants.

[104] What this analysis leads to is the following set of questions which court must decide:

(i) Is Amoury in part responsible for this accident because of its responsibility for the hoarding and/or traffic management? If it is, to what extent is it responsible? Must it therefore indemnify or contribute to any liability which falls on the NIHE? Alternatively, is Amoury directly liable to the plaintiff?

(ii) Is Doran in part responsible for this accident because of its responsibility for the hoarding and/ or traffic management? If it is, to what extent is it responsible? Must it therefore indemnify or contribute to any liability which falls on the NIHE? Alternatively, is Doran directly liable to the plaintiff?

(iii) If Armoury does bear a measure of responsibility as aforesaid, can it obtain indemnity or contribution from the third party, HBS?

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adjoining the highway, anything likely to cause danger to persons who are passing along the highway. Thus a person who negligently creates a danger on the road will be liable for any resulting accident". Examples of this include Kane v New Forest DC [2001] EWCA Civ 878 and Yetkin v Newham LBC [2011] QB 827, both sight line cases.

**Armoury**

[105] The court is in no significant doubt that Armoury, as the main contractor and the principal contractor, was responsible, at least in part, for the accident.

[106] It adopts this view for the following reasons:

(a) At the time of the accident, the construction phase of the contract had begun and Armoury had control over the site.

(b) Contractually, the specification upon which Armoury had successful bid for the contract had plainly allocated to the main contractor the obligations found at paragraph 1.8, which has been cited earlier in this judgment: see paragraph [63]. This included the following phraseology:

> "The contractor shall ensure that his works do not interfere with or disrupt normal public access to adjacent areas."

Moreover:

> "The contractor shall take all measures necessary to ensure the safe passage of pedestrians around the site area."

It is the court's view that this language is clear in establishing that it was part of Armoury's job to guard against risk to pedestrians going about their business at or about the site. It was incumbent, therefore, on Armoury to have given consideration to pedestrian safety. This ought to have entailed enquiry into the difficulties pedestrians may be confronted with as a result of the works and then the taking of steps which ought to alleviate those difficulties.

Translated to the facts of this case, it seems to the court that Armoury should have thoroughly inspected the site and its environs and should have anticipated that the presence of the hoarding and its positioning would be likely to have the effect of reducing sight lines dangerously. If this had been established (as it should have been) attention should then have centred on the taking of appropriate remedial measures. The taking of such measures, it seems to the court, would not have been difficult as there were alternative arrangements which could have been (and post-accident were) put in place which would still have enabled the demolition to proceed albeit at some relatively small loss to the overall size of the enclosed site.

Additionally, Armoury, if it had approached its task correctly, should have been able to appreciate that it needed to put in place specific and tailor-made measures to enable pedestrians and vehicle drivers to go about their business without compromise to their safety. While the court appreciates that Armoury say that in entering into a contractual relationship with HBS for the adoption of a TMP it was its intention to achieve the putting in place of such measures and that HBS let them down, the court will postpone consideration of this aspect of the matter until later. What counts at this point is that the measures taken by Armoury on the issues identified (whether it be the fault of HBS or otherwise) were sub-standard and insufficient.

While it is right that the court should acknowledge that Mr Mills of Armoury in mid-August 2010 did notice that there was a problem created by the positioning of the hoarding at the western end of the footpath at Pound Street and that this problem was that of the hoarding affecting the sight lines for traffic, at the hearing no one suggested that the solution Mr Mills and Mr Spence (of Doran) came up with (the introduction of a splay) was sufficient to resolve the problem.

Unfortunately, there is no evidence that either Mr Mills or Mr Spence or their colleagues returned to consider the adequacy of the splay as a solution to the problem after the hoarding was erected (finalised probably on 14 September 2010) and before the accident (29 September 2010). In the court's opinion, this was a surprising omission as common sense surely would dictate that there should have been a further inspection as soon as possible after the hoarding was erected to ensure that the initiative which had been taken was sufficient for dealing with the problem which had been discovered.

(c) It is court's view that steps along the lines just discussed would be consistent with central themes and obligations found in the CDM regulations and with the duties of the principal contractor under those regulations. These themes called for co-ordination of all of those concerned in a project, including a contractor, in a manner which ensures, so far as reasonably practicable, the health and safety of persons affected by the construction work (regulation 6). They also refer to the need for those designing, planning and preparing a project to take account of the principles of prevention in the performance of duties during all stages of the project (regulation 7(1)). The performance of similar obligations is required in respect of those upon whom a duty is placed by the regulations in relation to the construction phase of a project. This would include contractors (regulation 7(2)). The principles of prevention are set out in

Appendix 7 to the regulations and focus on the evaluation of risks and the replacing of the dangerous by the non-dangerous or the less dangerous. The specific duties of the principal contractor are dealt with at regulations 22 and 23 and these regulations are replete with duties which are about identifying, managing and monitoring risk in the interests of health and safety. At regulation 23(1)(b) the court notes that there is an obligation on the principal contractor "from time to time and as often as may be appropriate throughout the project [to] update, review, and refine the construction phase plan". The purpose behind this is to "enable the construction work to be carried out so far as reasonably practicable without risk to health or safety". In a similar vein, is Regulation 23(2) which is concerned with taking all reasonable steps to ensure that the construction phase plan identifies the risks to health and safety arising from the construction work. This duty encompasses the need to include suitable and sufficient measures to address risks.

(d) The court does not accept arguments made on behalf of Armoury to the effect that it was bound to give effect to the requirements stipulated in the specification and lacked the ability to deviate from them. In the court's view, submissions of this sort go against the grain of the CDM Regulations and abrade with common sense. They side line the importance of risk management and the need to seek as far as practicable to promote safety in and around the site. The court is of the clear view, for reasons already advanced, that it would have been practicable for the main or principal contractor to have dealt with the particular problems which arose in respect of sight lines and the management of pedestrians without significant prejudice to their ability to deliver the project and no significant evidence seeking to show otherwise was presented in court to the contrary. The specification may, it seems to the court, be read as building in a requirement to attend specifically to the safe passage of pedestrians around the site area. This obligation necessarily must be read in its proper context to produce a practicable outcome. The difficulty for Armoury, moreover, in seeking to advance an argument of this sort, is that on the facts of the case, it is beyond argument that it was prepared to put safety above the requirements of the specification insofar as it was prepared to deviate from the specification by putting in a splay where hitherto there was none. This strongly supports the view that a main or principal contractor has the ability to alter the specification for safety reasons in a proper case, though there may need to be liaison with the CDM co-ordinator, as there was in this case.

**Doran**

[107] The court is of the opinion that Doran also bears a measure of responsibility for the accident, whether *via* its role as designer or its roles as project manager and, in particular, CDM co-ordinator.

[108] It adopts this view for the following reasons:

(a) It is beyond doubt that Doran designed the project in a way which built in the requirement for a wooden hoarding of 2.4 metres in height to be erected around the site and, in particular, for the hoarding at Pound Street to subsume the footpath into the site. In the court's opinion, this design had the effect of creating the central hazard with which this case has been concerned, *viz* the damage to the sight lines for traffic, including pedestrians, at the southern side of Pound Street. The designer appears to have acted without any or sufficient recognition of what he was doing and unfortunately he appears not to have appreciated that the design in this respect was flawed.

In the court's view, this situation should not have occurred and would not have occurred had reasonable skill and care been taken. What seems likely is that the designer gave too much weight to pressures on him to establish as large a demolition site as possible so as to enable the work therein to be carried out in as large a space as possible to accommodate long reach equipment and insufficient weight to be existence of the gradual left-hand bend in the roadway as the driver advances along Pound Street in a countrywards direction. That driver's view, once the hoarding went up, was significantly reduced, as was the view of any pedestrian at the western end of the southern footpath at Pound Street who sought, for the purposes of crossing the road, to look to his right for on-coming traffic.

A competent designer ought to have been capable of appreciating the danger which resulted from this particular design and ought to have given his or her mind to either removing or managing the risk thereby created.

Moreover, in the court's view, a competent CDM co-ordinator when presented with the original design, wearing his or her hat promoting the need to advance the interests of health and safety, should have been able to discern that the proposed design was faulty and required modification.

This did not occur with the consequence that the design was incorporated into the specification for the main contract.

When the Roads Service queried the site lines at the access point into the site at Pound Street in June 2010, this was an opportunity for Doran to have looked again at the design but this opportunity was not taken. While it is right to acknowledge that Doran did at this stage promptly seek to find a solution to the particular problem raised, it failed to see the wider issue which the Road Service's query gave rise to.

In the court's opinion, the existence of the designer's flawed design and the failure of the CDM co-ordinator to pick up the problem cannot be said to have been cured by Doran's agreement to Mr Mills of Armoury's suggestion to put in a splay at the western end of the hoarding along the southern side of Pound Street. The measure taken, as has already been commented on, was simply not enough to remove the hazard which had been created. Nor, as referred to above, in the context of Armoury, did Doran (wearing any of its hats) specifically check the efficacy of the measure adopted after the splay was put in.

(b) What occurred, moreover, is at odds with the themes and provisions of the CDM Regulations which have already been discussed and which the court will not simply repeat. The court refers to Regulation 6 which deals with co-ordination, Regulation 7 which deals with principles of prevention, Appendix 3 dealing with the same subject, Regulation 11 dealing with the duties of the designers, Regulation 18 on additional duties of designers in notifiable cases, and Regulation 20 on general duties of CDM co-ordinators.

(c) Specifically, the court rejects the argument advanced on behalf of Doran that once the project enters the construction phase duties on the designer and CDM co-ordinator fall away in favour of the various duties falling exclusively on the main or principal contractor.

In the court's opinion, such a construction would be unjust in a case like this where the design failure can be traced to a designer and where the problem brought about by the design had not been cured by the time of the event giving rise to the proceedings, here the road traffic accident.

The duties of the designer, in accordance with Regulation 11, do not end at the point when the construction phase begins and it seems to the court they are not temporally constrained.

Regulation 20 dealing with the general duties of CDM co-ordinators likewise does not, to the court's mind, portray a situation in which the role expires at a fixed point. In particular, there is a continuing duty of liaison with the principal contractor in respect, *inter alia*, of "any design development which may affect…management of the construction

work" (Regulation 20(1)(c)(iii)) and also see Regulation 20(2)(c) and (d)).

(d) The court also rejects any suggestion that a designer, responsible for a design such as that used in this case, should not be expected to have expertise in respect of the effect of site hoarding on traffic sight lines. In this case the designer produced the design in question without any protestation or reservation about his ability and/or competence to do so. In these circumstances for the designer to say now, *post* the accident, that he did not have the competence to deal with the issue which has arisen, is unacceptable and the court dismisses it. The designer purported to have the expertise to draw up the design and the court infers from this that he must be viewed therefore as responsible for it, which includes the recognition that he has the requisite competence for this purpose. In any event, the court finds it difficult to accept that a designer, in fact, would lack competence to deal with an issue of this sort which involves a concept so simple as the preservation of sight lines for road users and pedestrians when there is a proposal to erect a substantial hoarding, as occurred in this case.

(e) The court also rejects the suggestion of Mr McQuillan, a consulting engineer retained by Doran, that the crossing point which should have been used should have been at locations he identified elsewhere in the area rather than at what the court has described as the uncontrolled crossing point at Pound Street. Mr McQuillan's made two particular suggestions. One would have involved a diversion of pedestrian traffic along a path which itself had a steep incline while a second involved a diversion of a considerable distance. These suggestions did not find favour with Mr McLaughlin and Mr Dixon, both on the ground that a 400 metre diversion would not have been appropriate, in one case, and a path with a steep incline would have unsuitable for certain categories of pedestrian, in the other. The court prefers these views.

**Armoury – HBS**

[109] Armoury make the following case. It is their contention that in view of the traffic dimension of closing roadways and footpaths adjacent to the site, it decided to employ an appropriate expert to draw up a Traffic Management Plan ("TMP"). For this purpose, they contacted HBS who provided it with a TMP and dealt, in particular, with issues about what signage should be put in place to direct pedestrians where to go. Armoury, therefore contend that it relied on HBS's expertise so that any liability which would otherwise fall on it in respect of the control of pedestrians should rest with HBS and not it.

[110] HBS deny any such responsibility. In its view, its role was much more limited than that which Armoury suggests it had. At the factual level, HBS say it was

contacted orally by Armoury and that the extent of the arrangement it entered into with it was limited to the provision of a drawing on which the signage it proposed to put in place was depicted and an undertaking to put the requisite signage in place in accordance with it. It was pointed out, on HBS's behalf, that the low level nature of the arrangement HBS made with Armoury can be evidenced by the quotation HBS provided to Armoury; the modest price HBS were receiving for its services; the fact that Armoury declined other services which HBS offered, such as on-going maintenance; and the speed with which the arrangement was made: indeed it appears likely that the drawing referred to above, as well as the quotation, were provided on the same day as the inquiry.

[111] The court has faced a certain impediment in considering this aspect of the case. This arises from the limited nature of the evidence placed before it. In the case of Armoury, this arises from the fact that at one stage it had gone into liquidation and as a result it is alleged that documents were not retained and members of its staff who dealt with the matter cannot be located and have moved on. On the other hand, HBS say it has been disadvantaged by the fact that it was only made aware of the litigation and brought into at a very late stage (February 2017), many years after the event and this is said to have affected the extent to which it will have retained records.

[112] However, all of that may be, the most striking feature of this aspect of the case is that the HBS plan or drawing referred to above contains no reference whatever to the boundary of the project site and, in particular, to the proposal for a 2.4 metre high hoarding around it. HBS maintain that it had no information provided to them about those matters and that as a result the drawing upon which Armoury now place reliance was prepared without reference to or knowledge of them. If this is right, and the court has no reason to believe it is not, the court considers that it must have a significant bearing on the matter. While it would be one thing for HBS to have come up with the drawing it has come up with if it had knowledge of the proposed boundary represented by a high hoarding and knowledge that a substantial footpath was being lost for this reason, it is quite a different matter if, through no fault on its part, its drawing was prepared without any such knowledge. This is so because appreciation of the significance of the abridged sight lines is central to an understanding of the risks which arise in this case. If HBS had not been in receipt of crucial information to its understanding of what it was being asked to do, it may be forgiven for neglecting to make the sort of searching enquiry the court would otherwise have expected it to make.

[113] Of course, if HBS is to be viewed as being able to avail of this line of argument, the court would have to be able to form a view as to where responsibility for its lack of information lies.

[114] In this regard, it is notable that Armoury has not placed any evidence before the court which demonstrates that, in fact, it did communicate the whole picture to HBS, as against simply informing it that it was proposed to direct pedestrians to the

uncontrolled crossing point. It would not have been difficult for Armoury to have provided a full description of the various factors at play. Armoury could have provided HBS with one or more of the Doran drawings but there is no sign it did this. Armoury equally could have provided a full oral briefing to HBS as there is no doubt Armoury staff were well aware of all of the material facts by this time. But again there is no sign it did this. While it is possible there could have been a written or oral briefing which the court is unaware of, this seems unlikely by virtue of the fact that, if there had been, the court would have expected to see some reference to this in the materials produced by HBS *viz* the documentation and the drawing. There is, however, no reference to anything of this nature.

[115] The court, in the circumstances of this case, would look to Armoury, as the party seeking to make use of HBS services to have provided HBS with the necessary information upon which it (HBS) would have based its assessment and would have drawn up its plan. If there is a failure here, as there appears to be, it lies at Armoury's door, on the basis of the state of the evidence before the court. The court can see no reason why the HBS drawing and/or quotation read as they do without reference to the hoarding at all, unless the full picture had not been communicated to it.

[116] The court therefore concludes that Armoury failed to provide key information to HBS and that it was at fault in failing to provide it, as Armoury, as the service seeker, bore the responsibility of properly briefing HBS about the matter.

[117] Interestingly, it also seems to the court that, Armoury as the principal contractor, would have responsibility to furnish a proposed sub-contractor with relevant information as part of the duty of co-operation and co-ordination under Regulations 5 and 6 of the CDM Regulations: see Regulation 22.

[118] As the matter was raised at the hearing, the court will express its view that it rejects the proposition that the onus rested on HBS to have itself elicited the missing information, especially as it will have had little reason to suspect that anything significant was being held back.

[119] For the purpose of determining the issue of whether there was part responsibility on HBS for the plaintiff's accident, the court is of the view that there is not, for the reason it has given. On this aspect, knowledge of the relevant facts is essential to the establishment of responsibility and, in fact, far from having such knowledge, the court concludes HBS lacked it.

[120] While other points arose between Armoury and HBS, in view of the court's finding above, the court can deal with them succinctly.

[121] The court was unimpressed with attempts which were made on HBS's behalf to claim that traffic and pedestrian sight lines were not a matter upon which it would have had competence to pronounce upon. On this point, the court repeats the

point it made earlier to the effect that this subject area involves a relatively straightforward concept and with this in mind it would not accept that a company which specialises in "traffic management", which espouses it "total commit to safety" and which boasts its familiarity with Chapter 8 of the Signs Manual[6], should have any difficulty dealing with this aspect of road safety.

[122] While a suggestion was made on behalf of Armoury that HBS should be fixed with knowledge of the hoarding from the visit of one its staff to the area on 16 September 2010 and that it should have then realised the existence of a problem with the sight lines, and that accordingly liability should arise from this, the court is not attracted to this line of argument. The visit of the member of staff was about a problem with an individual sign, unrelated to any issue about a sight line. The visit was by a single member of the HBS staff. It was not concerned with any more general appraisal of the work which had been done. It was a form of after service in respect of a particular problem. In the court's opinion, this visit cannot be viewed as having the effects which Armoury have contended for and it would be unreasonable for the court to view it in this light.

[123] It was also suggested on behalf of Armoury that even if HBS lacked the knowledge of the positioning of the hoarding at the time when it provided it drawing and signs, HBS must, nonetheless, have known that Armoury was engaged in demolition work and that a demolition site would have to be made secure. HBS, therefore, it was argued, ought to have foreseen that there would be an impact on sight lines due to the presence of some sort of fencing. The court is unable to accept this argument which seems to it to involve speculation and conjecture without any sufficient evidential footing. The information which HBS did not have, on the court's findings, concerns the means by which the site was being made secure.

[124] As already noted, HBS appear to have placed the key signage in the case in a place different to that shown in its drawing (see paragraph [67] *supra*). Armoury suggests that this was redolent of a lack of skill and care on its part. In response, HBS have maintained that the drawing was 'indicative' only and was not to scale. The court considers that there may be some force in HBS's response but, in any event, it is of the view that this issue cannot properly be viewed as altering the court's conclusion that at the time the signage which was present at the date of the accident was being put in place it was probably not known to HBS that a substantial hoarding was going to be erected at or adjacent to this point.

[125] It has been suggested to the court that HBS has not been frank with the court and that the court should be prepared to draw adverse inferences against its interests because of the way it has chosen to present its case. In particular, it has been pointed out that only one of HBS's staff gave evidence, a Mr Dumigan. However, he had not had direct contact with Armoury at the time. Notably, a second member of staff, a Mr Brennan, who on the basis of what Mr Dumigan said

[6] All quotations are from materials on the HBS website.

was in direct contact with Armoury at the relevant time, was not, for any explained reason, called by it to give an explanation in relation to his dealings with Armoury.

[126] This particular argument has not been specifically answered in the closing argument for HBS, but the court is disinclined in any event to accede to it. While it may be that the court would have benefitted from hearing the evidence of Mr Brennan, this is not a case where the court had already before it evidence from Amoury disclosing a particular case on this point for HBS to answer. In fact, Armoury called no witnesses of fact on this point and had not itself established any clear position. In these circumstances the court would not be prepared to draw any adverse inference of the sort which it has been invited to do[7].

[127] Finally, issue has been taken by Armoury as to the language deployed on HBS's behalf in the pleadings before the court. The relevant pleading is the Third Party Defence to Armoury's Third Party Statement of Claim. In this defence HBS admit that they "entered into a contract with the Third Defendant whereby it agreed to design and produce a Traffic Management Plan". It then goes on to say that "The agreed contractual terms entailed the third party designing the Traffic Management Plan…and installing the traffic and pedestrian signage at the side of the works at Pound Street, Larne". Later in the defence there is specific reference to the "Third Party [having] designed a safe and reasonable route for pedestrians around the site" and to the "TMP as [having been] installed at the locus [and providing] a safe and straightforward and reasonable pedestrian diversion". The implicit suggestion appears to be that the Third Party Defence, in effect, concedes that what HBS undertook to do was to produce a full blown TMP of its own design rather than the provision of a TMP which was little more than a single drawing showing where signage was to go. In his evidence, Mr Dumigan said that the position where the crossing points would go came from Armoury and/or RS. It was provided to HBS and acted on by them. The contract, he claimed, was a minor one and Armoury had already begun the process of obtaining the necessary consents from RS.

[128] In the court's opinion, the interpretation given to the terms of the Third Party Defence by Armoury is far from self-evidence, but it seems likely to the court that the reality in this case is that HBS was told where the crossing points were to be and that these were received by it, as a given, from Armoury, which likely was under pressure to have the issue of RS consent finalised. The so-called TMP, in reality a single drawing with signage marked on it, has few of the characteristics of a plan devised from scratch by an expert designer and, for example, is in sharp contrast to work later done by HBS on the same project. Accordingly, the court is inclined to accept Mr Dumigan's evidence of this point.

[129] Overall, the court does not consider that Armoury has made out a case for indemnity or contribution against HBS.

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[7] On this point the court has considered the helpful discussion of this issue found in the decision of the England and Wales Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] P.I.Q.R. 324 at 340.

**The legal repercussions of the court's assessment**

[130] The legal framework has been touched on only lightly in the skeleton arguments which were filed after the close of the evidence, save for that provided on behalf of Doran. However, it seems to the court that there are three important legal points which the court should advert to in the light of its assessment *supra*, albeit briefly.

[131] The first relates to the contractual position as it exists as between the NIHE, which may be described as the general holder of liability[8], and Amoury and Doran respectively, each of which was at the material time in a contractual relationship with it.

[132] To the extent to which in the case of each there has been a breach of contractual responsibility, whether as main or principal contractor in the case of Armoury, or as designer or CDM Co-ordinator in the case of Doran, there ought to be the apportionment of a percentage of the liability by way of contribution. The court does not understand this to be controversial as a statement of principle. Moreover, there plainly was a contract in each case and it would, it seems to the court, be bound to include an express or implied term that the contractor or consultant would use reasonable skill and care in performing its obligations under it.

[133] Secondly, the same outcome may be arrived at between the same parties on the basis of the existence of a duty of care owed by Armoury or Doran to the NIHE. The duty of care owed in each case would be that each must perform its obligations with due skill and care and, insofar as this duty has been breached, the same general consequence should flow, as that which would flow in the case of breach of contract. Given the particular role of Doran, and the particular roles it performed, the court is unaware of any reason why this consequence should not follow, even though the loss to NIHE is purely economic. However, the same issue may not be as clear cut in the case of Armoury as, on one view, it is to be viewed solely as a contractor and it may be suggested that as such it cannot be made liable in tort in this case for pure economic loss. Whether this is right or not, is probably academic given the contractual position described above which may explain why the court has received no submission from it on this aspect. Alternatively, it may be that Armoury, in view of its supervisory responsibilities under the CDM regulations, may properly be viewed as a construction professional and thus may be liable to its client, the NIHE, for resultant economic loss[9]. On this particular point, in respect of Armoury, the court is reluctant to adopt a final position without having heard full argument on it.

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[8] See para [103] *supra.*

[9] On this point there is an interesting discussion in Jackson and Powell on Professional Liability, 8th Edition, at 9-043-9-047 which ends with a similar statement to that found in the text, following a reference to the recent case of Burgess v Lejonvarn [2016] EWHC 40 (TCC).

[134] The third legal point is more difficult. The question which arises is that of whether, independently of the analysis above, there is an additional potential liability to the plaintiff which may be owed by Armoury and Doran in common law negligence. Whether there is so or not depends on whether in the circumstances of this case it can be said that a duty of care to the plaintiff arises in this case and whether it was foreseeable that such a breach of it may result in damage to him.

[135] Insofar as these proceedings may be capable of resolving the issues between the parties without the court ruling on this aspect, the court would be content with that outcome. However, in case that should not be the case, the court will offer its view on this issue. The court will indicate that it is of the view that on the facts of this case Armoury and Doran, without prejudice to the approach which the court has adopted in respect of contractual and/or tortious liabilities as between the defendants, owed a common law duty in negligence to the plaintiff. The damage sustained in this case was is in the form of personal injuries, not pure economic loss, and it is the court's view that in the circumstances of this case a duty of care towards the plaintiff was assumed and that it was foreseeable that each's acts and omissions as they affected the sight lines at Pound Street gave rise to a relationship of sufficient proximity to result in liability for the personal injuries which the plaintiff sustained. Of particular importance, the court would hold that the sort of risk of harm created as a result of the breach or breaches which the court has already discussed included the sort of harm which the plaintiff sustained as there was a clear linkage between the risk which was created in the roads environment to sight lines and the risk of a road traffic collision of the sort which occurred in this case[10] and it was foreseeable that as a result of such a collision serious injury to the person may be occasioned.

**Part Three**

**Outcome**

[136] Applying all of the above, the court will now set out its conclusions in respect of this case.

[137] As it happens, the parties had reached some measure of agreement on two issues which the court will now record. First of all, the value of the plaintiff's claim has been agreed by the parties without dissent at one million pounds[11]. Secondly, the parties have also been agreed that the plaintiff was contributorily negligent to the degree of 15%, so reducing any award to the plaintiff to the figure of £850,000.

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[10] The matter is stated generally in Jackson and Powell (ibid) at para 9-059 where it is stated that: "It has long been held that architects and other construction professionals owe a duty of care not to cause personal injury to those whom they could reasonably forsee might be injured as a result of their negligence". While reference was made in the Doran closing skeleton argument to a later passage in the same textbook (9-091-9-091) the court is of the view that, even if the test therein stated is applied by it, it would not result, on this aspect, in a different outcome as the relationship between the task undertaken and the injury in this case would be sufficiently close, on the facts of the case.

[11] The court notes that the plaintiff is described as a 'Person Under a Disability' which raises the question of whether the quantum aspect of the plaintiff's claim requires approval.

[138] An issue arises as to the extent of the first named defendant's liability as against the degree of liability which ought to be assigned to the other defendants (the second named defendant, the third named defendant, and the sixth named defendant) on the basis of the positioning of the hoarding, its effect on sight lines and the directing of pedestrian traffic to the uncontrolled crossing point where the accident occurred at Pound Street.

[139] In the court's view, the greater share of the liability should rest with the driver as against the other defendants. The court has already documented his failures which are exacerbated by the fact that he had already driven along Pound Street on a number of occasions prior to the accident and was aware (on his own admission) of the presence of the substantial hoarding to his left hand side as he proceeded westward.

[140] In terms of culpability and blameworthiness, the first named defendant should bear the lion's share. The court will hold him responsible for 55% of the liability in the case. This will leave 30% of the liability to be shared out as between the defendants referred to at paragraph [138] above.

[141] In respect of that sharing of liability, the court considers that the main and principal contractor (Armoury) should bear 20% whereas Doran should bear 10%. This division is the product of balancing a number of factors. While the court can see that there is a case for a 50:50 split as between these defendants, ultimately the court considers that it should reflect in its apportionment the fact that Armoury had control of the site at the time and, it seems to the court, had a more pronounced role in respect of not just the issue of the sight lines but also the issue of traffic management.

[142] It follows from the above that in practice NIHE should not bear any financial responsibility on the basis that insofar as it initially bore the broad responsibility on this aspect of the case, the contributions payable by the third and sixth defendant, in accordance with the court's view above, *de facto* cancels out their liability.

[143] The conclusion of the court therefore can be described as follows:

(i) 55% of the liability rests with the first named defendant.

(ii) 20% of the liability rests with the third named defendant.

(iii) 10% of the liability rests with the sixth named defendant.

(iv) The remaining 15% rests with the plaintiff by way of contributory negligence.

[144] The court will hear from the parties as to any issues which arise in relation to the drawing up of an appropriate Order to reflect the above and as to costs, in the event that the latter cannot be agreed.