



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 14

PD45/18

OPINION OF LADY CARMICHAEL

In the cause

DOUGLAS CASSELLS AND ANOTHER

Pursuer

against

DAVID W ALLAN, trading as ALLAN'S GROUP, AND ANOTHER

Defender

**Pursuer: Young QC and L Thomson; Digby Brown
First Defender: McMillan (sol adv); Brodies
Second Defender: Charteris; BLM**

12 February 2019

Introduction

[1] Mrs Rachel Cassells died on the evening of 4 April 2015 as a result of injuries she suffered when a bus collided with her at her place of work at about 6.30pm that day. She had been working as a general catering assistant for the second defenders at the Trossachs Woollen Mill in Kilmahog, near Callander. Brian Alexander was driving the bus, in the course of his employment with the first defender. It was a single decker coach carrying tourists on the homeward leg of a day tour of Scotland. The Trossachs Woollen Mill was the final stop on the route back to Edinburgh.

[2] Mr Alexander turned left from the main A84 road into the car park at the premises. The coach bays in the car park face the entrance to the car park. In order to reverse into the coach bays, a coach has to drive across an area which was at the time marked with faded yellow boxes. Mr Alexander needed to turn his bus around so as, broadly, to face the entrance of the premises in order then to reverse into a coach bay. He had turned the bus sufficiently to the left that it was facing in the direction of the gable end of the weaving shed building at the premises, although a little way further into the car park. He stopped the bus. His intention was to turn the bus further to the left while moving forward, with a view then to reversing into a parking bay. As he moved the bus forward again, it struck Mrs Cassells. None of that was in dispute.

[3] The quantification of damages to be awarded in the event of a finding of full liability was the subject of agreement.

Summary of decision

[4] What was in dispute was whether Mr Alexander and/or the second defenders was or were negligent. In issue was the extent, if any, of Mr Alexander's opportunity to observe Mrs Cassells and act to avoid the collision. Within that issue the question arose as to whether Mrs Cassells had already fallen, and was prone on the ground, when the bus started moving.

[5] The second defenders submitted that there was no reason for Mrs Cassells to be in the car park and that welcoming buses in the car park was not one of the duties of her employment.

[6] I was asked also to determine whether Mrs Cassells contributed to the occurrence of the accident by her own negligence, and also, in the event that I found both defenders liable, to apportion liability between them.

[7] I found it established on the balance of probabilities that Mrs Cassells was upright when the bus started moving, and that had Mr Alexander been exercising reasonable care he would have seen her and been able to avoid the accident.

[8] I found that the second defenders knew of, permitted, and, to some extent at least, encouraged Mrs Cassells's practice of greeting buses in the car park. They failed to take reasonable care for her safety in respects which I set out below, and their failure was a material cause of the accident.

[9] I therefore found the defenders jointly and severally liable to make reparation to the pursuers in the sums detailed in the joint minute. I assessed Mrs Cassells' own contribution to the loss, injury and damage sustained by the pursuers at thirty per cent. I apportioned liability between the defenders with an apportionment of sixty per cent to the first defender, and forty per cent to the second defenders.

The location of the accident

[10] The site is bounded to the south by the A84 Stirling road, which runs approximately east to west. The part of the site containing the car park and buildings is irregularly shaped, but very broadly speaking has four boundaries, with the two longest being the one that lies along the A84 and the boundary that is parallel to it and to the north. Other than to the south, the area containing the car park and buildings is surrounded by fields.

[11] Immediately to the left of the entrance from the road is a hexagonal or octagonal building. The main entrance to the shop is in that building. Further buildings extend to the

west roughly along the line of the A84, and there are more buildings along the western boundary. The buildings nearer the entrance to the car park are for retail use, and those further away house catering facilities and toilets. In the car park, parallel to the line of the A84 and slightly to the west of the hexagonal building, is the weaving shed. Its location in the car park means that there is not sufficient space in the car park for buses to circulate in the part of the car park where it is located. The bus parking spaces are, and were at the material time, located along part of the northern boundary, towards the east. West of those, along the northern boundary, were car parking spaces. There are, and were, car parking spaces along the eastern boundary.

Joint minute of admissions

[12] Parties produced a joint minute of admissions. It included agreement as to the accuracy of copies of police statements and extracts from police notebooks in relation to statements taken from Brian Alexander, Stanley Edwards, David Ross, James Turnbull, Graeme Paterson, and John Steven McLaren. On the first day of the proof soul and conscience letters were tendered in respect of James Turnbull, David Ross, and David McCurdy, who had been cited as witnesses. There was no agreement as to the truthfulness or accuracy of any of the accounts recorded in the statements taken by the police.

Pursuers' case

[13] The pursuer led evidence from Brian Alexander, PC Stephen Softly, Julia Jung, Sergio Campise, Stanley Edwards, John McLaren, Claire Muir and Barry Seward. Ms Jung, Mr Campise and Mr Edwards gave evidence by video link from, respectively, Sweden, Italy and the United States.

Brian Alexander

[14] Mr Alexander, at the time of the proof, had 20 years of experience in driving coaches, and worked full time as a coach driver. At the time of the accident he drove only part time, for perhaps 10 or 15 hours a week, and also worked full time as a farm manager. The bus involved in the accident had three nearside mirrors, a main mirror, a wide angle mirror and a curved side mirror. The main mirror could be adjusted electrically by the driver from the driver's seat, and the other two mirrors could be adjusted manually by the driver standing on the step at the entrance to the bus. The main mirror was intended to show as much as possible of the length of the side of the coach, during routine driving. The wide angle was to assist when pulling out on the motorway, and the top mirror was for the front end of the bus. He would adjust the main mirror so as to see as much as possible of the side and back end of the coach. He described it as a bit of a "footer" (ie, an awkward task) to adjust the wide angle mirror. He needed to sit in the driver's seat, then get up to give the mirror a tap or a push, and then sit back down. In adjusting it he knew how much he could see, and thought about where a car was liable to be "hiding", and where there might be blind spots. He said, "You try to guess as best you can where it needs to be".

[15] After the accident he had met Christina Holland (an expert witness instructed by the first defenders) who had asked him to adjust the mirrors to where they were on the day of the accident. He had done so to the best of his ability and memory. She had moved items around outside the bus, including a tennis ball and a pole, and her own feet, and had asked Mr Alexander what he could and could not see at various different points. She also carried out a test that involved looking out the side window of the bus.

[16] Shortly after the accident, at about 1940 hours on the day of the accident, Mr Alexander gave a statement to a police officer. He said to the officer that the sun was low, and obscuring the mirror with glare. Mr Alexander said in evidence that he had not explained matters well to the officer. The sun was not striking the mirror, but was coming directly through the front windscreen. The sun had been low and coming over the weaving shed roof and striking the top 6 or 7 inches of the main windscreen. He had to move his head below that 6 or 7 inches in order to see the mirrors. He had been confused when he was speaking to the officer. He did not know if he had told a member of the second defenders' staff, "It was a total accident, the sun was blinding me as I turned in."

[17] Mr Alexander said he had no idea where Mrs Cassells was immediately before the collision. One of the first defender's buses had already come into the car park. Three of the first defender's buses were undertaking the particular tour. He turned left into the car park and turned the bus to the left to try to do a large U-turn in order to get into position to reverse into the coach bays. He did not complete the U-turn manoeuvre because there were passengers from the other coach moving in the car park. He had to stop to allow them to move across. Some of the passengers were viewing highland cattle behind the bus, and others were crossing in front of the bus. He decided to move forward again, and was turning the steering wheel to the left. He checked his nearside mirror, then the offside mirror and side window, and then again checked his nearside mirror. When edging forward he would normally look at the front, and at the nearside mirror as he started to move off. The front nearside of the bus was the area of greatest danger. He was moving at "a snail's pace". At no point during this manoeuvre did he see Mrs Cassells. He first became aware the bus had struck someone when Jamie (James Turnbull), the tour guide, who was seated to Mr Alexander's left, said "Brian, back up", or words to that effect. He

was able to stop more or less instantly. His foot was still on the brake and he had not touched the throttle.

[18] He was aware that there could be blind spots on the near side of a bus, and described them as inevitable. He agreed that the purpose of adjusting the mirrors was to minimise the blind spots. Mr Young suggested that knowing that blind spots are inevitable, it would be sensible to put out a banks person as a guide. Mr Alexander responded that Mr Turnbull had been there as a tour guide, not a banks person. He acknowledged, with the benefit of hindsight, that it would have been helpful to have another pair of eyes. He acknowledged also that a banks person could speak to pedestrians and warn them about movement of the bus. He was shown risk assessment 6/4/9 of process. It was headed "Risk Assesment [sic] Coach Travel Allan's Coaches", and was not dated. It included reference to a hazard "vehicle reversing", with the people at risk described as "public and passengers". The risk control in relation to that hazard was "Allan's Coaches vehicles are fitted with reversing cameras and loud beepers to advise the presence of a reversing vehicle". Under the heading "Further Action" was this: "Where possible a third party will assist with guiding the manoeuvre in limited or difficult spaces." Mr Alexander said that he had not seen the document before. He had not thought about enlisting Mr Turnbull to guide him in the manoeuvre. Even after the accident he did not see Mrs Cassells in the mirrors. He first saw her when he opened the bus door. Ms McMillan objected to reference to the risk assessment, and I allowed reference to it, subject to competency and relevancy. The objection was renewed in submissions.

[19] In cross-examination Mr Alexander explained that he was 5 feet 8 inches in height. He had a certificate of professional competence as a bus driver. He had carried out reversing manoeuvres many times, and many times at the second defenders' premises,

where the accident happened. He would regard the space there as a very open space. He had not been in situations where he had a banks person on board. Asked about how he felt when he spoke to the police shortly after the accident, he said that at the time he told everyone that he felt fine, but that, looking back, he could not remember “half of the things that had happened”. He agreed that he had been very upset. He did not know where Mrs Cassells had come from. He was not expecting someone to be approaching the door of the coach as he was manoeuvring. He was completely unaware that there was anyone there. He would describe himself as a cautious driver.

PC Stephen William Softley

[20] PC Softley was involved in road policing in the Stirling area between 2014 and January 2018. He had 13 years police service, and was an authorised advanced police driver with training in pursuit management, the examination and testing of vehicles, and the testing of heavy vehicles. He had completed a road policing course which included tacographs and impairment testing. He had only obtained a qualification relevant to buses after the incident with which this action is concerned, and had no training in accident reconstruction.

[21] He was called to the incident with a colleague at about 1850 hours and got there 20 or 30 minutes later. Other emergency services were already there. Mrs Cassells was already in an ambulance. He took a statement from Mr Alexander at 1940 hours. He did not recall whether he asked Mr Alexander what he meant when he said that his mirror had been obscured by glare. It was possible that he was indicating a limitation in what he could see because of the glare of the sun. He checked the tarmac for anything that could have caused Mrs Cassells to trip, but did not see anything that was obvious to him.

[22] He had carried out some tests with his colleague with one of them sitting in the driver's seat of the bus, and the other walking down the nearside of the bus in order to find out what could be seen using the mirrors. When PC Softley was sitting in the seat he used a combination of the mirrors and the windows in order to see the surrounding area, as he would have done if driving. Using this form of testing they found a blind spot in the nearside mirror. It occurred when his colleague was lying on the ground. If he was within 5 feet 5 inches of the bus he was visible, measuring outwards from the wheel. Beyond that he was not visible. PC Softley confirmed that he was 5 feet 10 inches in height and his colleague somewhat taller.

[23] In response to questions from Ms McMillan, PC Softley stated that he had undertaken these investigations on 10 April, in a different location from where the accident had occurred. Mr Alexander was not present. PC Softley had not adjusted the mirrors and did not know whether they had been adjusted since the accident. He explained further about the experiment he undertook with his colleague, that his colleague lay with his feet at the wheel, perpendicular to the bus. He moved away from the bus until he was no longer visible. It was when his feet were 5 feet 5 inches away from the bus that they disappeared from view. Mr Alexander had offered the information about the glare, and he could not remember whether he had asked him to clarify further about that. Mr Alexander had been very upset when he gave the statement, and had been shaking and almost tearful.

Julia Dora Jung

[24] Ms Jung is 32 years of age. She is a laboratory technician and lives in Sweden. She gave evidence with the assistance of an interpreter who was present with her in Sweden.

[25] At the time of the accident she was on holiday in Scotland with her mother. She took a bus excursion with her mother. Two buses were travelling around the country together. She was a passenger in the "other" bus – the one that was not involved in the accident with Mrs Cassells. When the accident happened, the bus Ms Jung was in was behind the bus that was directly involved. The bus she was on was positioned so that there was a building to the left and a paddock to the right and in front. I understood her to be saying that the bus she was on was positioned as if it had driven straight into the premises and had stopped without turning. The bus involved the accident was at right angles to the bus she was in. She was sitting quite far forward in the bus, in an aisle seat on the left hand side of the bus looking from back to front. She remembered the instant before the accident happened. The lady had been to the left hand side of the bus. She had a "still image". The lady was standing on her left leg with her right leg raised as if she was going to take a step forward. Her body was slightly inclined to the right. The upper parts of her arms were parallel to her body and the lower parts of her arms were forward at right angles to her body. Ms Jung's view was of the back of the lady. She was in the left part of the front of the bus. Ms Jung estimated that the lady was half a metre, and certainly no more than a metre, from the side of the bus. The wheel of the bus was turning to the left as Ms Jung saw the lady, as if turning towards the lady.

[26] She assumed that she believed that there was going to be an accident, because she looked away, screamed, and covered her face with her hands. She did not see the bus hit the lady. She did not remember seeing the lady lying on the ground before the bus went over her.

[27] Ms Jung was asked about having given a statement that the lady had seemed to be pushed by the left hand side of the bus. She said she did not remember that, so could not explain it.

[28] Ms McMillan asked Ms Jung about her police statement. The statement said that the lady had fallen on her left, and that Ms Jung saw her lying on the ground. Ms McMillan asked whether Ms Jung remembered that, and she said that she did not.

Sergio Campise

[29] Mr Campise is 65 years old, and a lawyer. He lives in Italy. He gave evidence with the assistance of an interpreter who was in Edinburgh. Unfortunately the process of taking his evidence was hampered by the poor quality of the video link. His evidence was of very little assistance in determining the matters at issue and I record its terms only briefly.

[30] He was a passenger on the bus that came into the car park behind the bus involved in the accident. He was sitting on the left hand side of the bus in the second or third seat from the front. He could see the left hand side of the bus that was involved in the accident. There was a lady lying on the ground, perpendicular in relation to the front wheel. He had not seen the accident but heard others talking about it. He said it would seem that the lady was walking and that the bus would have hit the lady. He was told that the bus hit her, and caused her to fall to the ground. He had taken a photograph which he had provided to the police and which was a production (7/2/2). Under reference to that photograph, he agreed that it showed the lady lying parallel to the bus.

[31] Mr Campise's photograph shows the sun bright and low in the sky, and coming from beyond the weaving shed.

Stanley Edwards

[32] Mr Edwards is 61 years old and is employed as a finance manager. He lives in California. He was a passenger on the bus involved in the accident. He was sitting on the left hand side of the bus about halfway back. The bus pulled into the car park. There was activity. A few people were walking in the parking lot. Another bus was pulling in, and one was pulling out. He understood it was the final stop on the route. He thought there could have been as many as fifty people. The bus he was on came into the car park in a left turn, and made a partial "U" turn as it had to back up into a "stall". It made another left turn to get ready to back up. It had stopped between the first turn to the left and the further partial left turn.

[33] He had seen the lady who was killed. He saw her walking out of a building, which he described as a gift shop. He had speculated that she was in a fair hurry, directing the driver as to where to park. He clarified that he had not actually seen her leaving a building. She was already outside when he first saw her, but fairly close to the building. She was walking fast. She came quite close to the bus. He saw her walk towards the bus, but close to the bus he lost visibility. He had been able to see to within 5 or 10 feet of the bus, then lost sight of her. She had been approaching the bus from the left hand side, at the window where the tour guide was seated. She had come from an angle, at the side of the bus rather than the front. It was neither a 45 degree angle nor a 90 degree angle, but from an angle heading towards the front mirror at the left hand side of the bus. She had walked about 30 yards.

[34] He did not see any collision. He heard the noise of the bus "when it hit the woman" and there was a commotion in the parking lot. There had been the sound of the bus hitting the woman and then something like a jolt or a speed bump. He initially said he thought that

the bus was reversing, but accepted that he had told the police that it was moving forward, and said that that was more likely to be the correct account.

[35] Mr Edwards recalled that both the tour guide and the bus driver had been commenting about people walking in front of the bus as it was pulling in. They had been saying that people needed to watch where they were walking and pay attention. They were commenting on how busy it was in the parking lot, although he could not recall their exact words. He had seen the lady make a gesture with her hands, and he had surmised that she was trying to get the bus driver's attention and tell him where to park.

[36] Asked questions by Ms McMillan he agreed that he thought the explanation for what he recalled was that the bus had been moving forward, had hit the lady, and then reversed. Asked questions by Ms Charteris, he confirmed that he had not seen the lady coming out of a building, but only from the general direction of a building. He accepted that when he saw her gesturing, he did not know what she was doing or what was her purpose.

Steven John McLaren

[37] Mr McLaren is 50 years old and is the second defenders' catering manager. He has worked for them for 20 years. He explained that until shortly before the accident, Mrs Cassells had worked in retail. She had, however, recently moved to work in the catering department. He agreed that she had moved to that position on 14 March 2015. He described her as a good colleague: friendly, helpful, obliging and always there when needed. Nothing was ever a problem for her. She was very hard working.

[38] Normally in April the premises closed at 5.00pm, but on the day of the accident it had been agreed that they would stay open later, because they were expecting the first defenders' tour to arrive later. He described the tour as a "reverse tour". Tour companies

who were regular customers could contact the second defenders and make such arrangements. Mrs Cassells was working with him in the catering part of the premises. When he last saw her, she was "in the kitchen side", as he was doing paperwork before the coaches came in. He did not see her go outside. He said she would usually tell him where she was going, but had not done so on this occasion. He came to know of the accident when Mrs Kyle from the shop asked him to help, because Mrs Cassells had been hit by a bus. His first reaction had been one of disbelief, because he thought she was still inside the premises.

[39] Mr McLaren had spoken to Mr Alexander, who had asked him whether Mrs Cassells was a member of staff. When he responded that she was, he said he was sorry, and that when he came in the sun was blinding him, and he could not see. When Mr McLaren spoke to the police about the matter a week later, he had related, in relation to Mr Alexander, "He said it was a total accident, the sun was blinding him as he turned in."

[40] He was not aware that Mrs Cassells had had a practice of going out to greet coaches when she worked in the retail area. He explained that those working in the coffee shop, like himself, could not see what staff in retail were doing. He said he would not be able to dispute that it was normal for Mrs Cassells to come out and tell visitors where things were. He was shown 6/30, a risk assessment bearing to relate to the premises. He said it was more directed towards the retail side of the business. He was not aware of the second defenders' having prohibited staff from greeting buses, but said that anything of that nature would relate to the retail side of the business. He also said, however, that there was no practice of greeting coaches.

[41] He was aware of changes that the second defenders had brought in after the accident including a prohibition on staff going into the carpark, a requirement that if they did go out they must wear high visibility clothing, the repainting of pedestrian and vehicle routes on

the carpark surface, and the introduction of new vehicle and pedestrian routes. There had been training as to what staff could and could not do in relation to the car park, called, "Be safe, be seen". He was shown 6/4, page 90, a risk assessment dated December 2015, and referred particularly to two sections headed control. The first related to the hazard "Cars and coaches entering, parking and exiting" and the risk "Car/coach collisions". Pedestrians being hit by moving vehicles. The controls listed were:

"Clearly marked traffic routes; Clearly marked pedestrian routes, pedestrian crossing; Designated parking spaces for disabled parking with easy access to PPE; Hi viz to be worn by any staff working in the car park; Training on car park safety provided (be safe, be seen document)."

The second related to the hazard "Traffic entering/exiting car park" and the risk "Vehicle collision". The controls listed were:

"Good road/Car Park markings. Directional signage; speed limit – 5 MPH; Good lighting in Car Park and external pedestrian/customer areas; Bus coach company advised to have a Banks person; Clearly marked traffic routes and parking bays; Hi viz to be worn by any staff working in the car park; Training on car park safety provided (Be safe, Be seen document)."

He said that all of those controls had come into effect since the accident and had been in operation. All of the staff, including the catering staff, had been trained in those matters.

[42] Shown 6/17, a photograph of the premises taken on 1 May 2015, he agreed that there was a yellow barrier at the edge of the footway adjoining the carpark in front of the main entrance to the shop. It ran across the entrance of the shop and blocked what would otherwise have been access from the entrance of the shop to a zebra crossing. The zebra crossing was at that time only faintly marked. The photograph reflected the state of affairs at the time of the accident. The presence of the barrier meant that if someone came out of the main entrance they would have to turn to left or right and go round the barrier in order to get into the car park.

[43] Mr McLaren was asked about a statement he gave to Michael Kibaris, a local authority health and safety inspector. This was initially the subject of objection on the basis that the document contained a precognition. After the witness explained that he had had an opportunity to review and sign the statement he had given to Mr Kibaris further objection was taken on the basis that what was in process (6/4, page 40) was not the signed statement but a typed document. I allowed the evidence to be led subject to competency and relevancy, and the objection was not renewed in submissions. It was recorded that Mr McLaren said to Mr Kibaris, "I am aware that Rachel may have greeted customers at the car park but this was when she was working at the retail section but that was not often that she did it." He maintained that in saying this he had meant to convey that Mrs Cassells came to the entrance of the shop to greet customers, not that she entered the car park to do so.

[44] Asked questions by Ms McMillan he described Mr Alexander's demeanour as one of "total disbelief at what had happened", and said that Mr Alexander "couldn't speak". He agreed that Mr Alexander had said that it was a total accident and that the sun had been blinding him as he turned in.

[45] Asked questions by Ms Charteris he explained that, before moving to the catering department, Mrs Cassells used to help out there when they were short staffed. When a position became available, she chose to move. Her job as a food service assistant involved making coffee, serving customers, clearing tables and working the tills. It involved working in the kitchen and dining areas. He clarified that when he had spoken in evidence in chief about Mrs Cassells saying where she was going, he was referring to her doing things like going to the wash room, taking rubbish out, and going up to the stock room. He did not know what she had been doing in the car park. She had not been in the habit of going out

during the period she had been working in the catering department. He had seen her in the car park if she was coming in from the wash rooms and toilets or if she was out at her car.

Shown 7/2/2, the photograph taken by Mr Campise, he said that Mrs Cassells was lying parallel to the door of the coach with her head towards the front of the bus.

[46] Mr McLaren remembered Claire Muir, a manager. Ms Charteris asked him about some things that she expected Ms Muir to say in evidence. He was asked whether all staff were expected to go out in the car park to greet the coaches, and responded that that was not true. He was asked whether, as a matter of fact, all staff did go out, and he responded that if that were the case, there would be no-one in the store. He was asked whether everyone took a turn to greet the coaches, and he responded, "Not to my knowledge". He himself had never done so. The café was at the "top end" of the premises. The buses came in at the "bottom end" so he would not know they were coming in. Asked whether all the staff knew "fine well" that Mrs Cassells went out into the car park, he said that as far as he was aware, that was not true. He denied that Ms Muir had asked all staff to sign a job description for the role of "coach champion". He had spoken to Ms Muir shortly after the accident. He said he could not recall the conversation. It was suggested to him that he had said to Ms Muir that "Rachel was out there, doing her usual", in describing the circumstances of the accident. He denied having done so. He said that nobody knew why Mrs Cassells had gone out, but he thought she must have used the exit from the café rather than the front door of the shop, as someone would have seen her had she used the front door.

[47] He agreed that the same coach drivers and guides tended to come "day in and day out"; that was why arrangements such as late opening came to be made – they were for the regular coach drivers. He was asked about 6/28, which was a job description for a general catering assistant. It included the following: "Ensure that every customer receives a warm

and friendly welcome – greet customers and serve them in a professional manner at all times.” He said that the greeting of customers in that context was to take place at the counter when they came into the coffee shop.

[48] So far as the manner of parking buses was concerned, in the sense of the particular manoeuvre the drivers would have to carry out, nothing had changed since the accident, although new traffic routes had been introduced and the markings of the routes in the car park repainted.

[49] In re-examination he was asked whether Mrs Cassells was the sort of “difficult” employee who would deliberately flout rules. He responded that he would say “the exact opposite”.

Claire Muir

[50] Ms Muir was formerly general manager for the second defenders. She worked for 5 years as general manager of their branches at Kilmahog and Trossachs. The two branches were near to each other. The one where the accident happened was properly described as the Trossachs branch. She left her position about three weeks before the accident. The branch was regarded in the second defenders’ organisation as a “destination site”, of which the second defenders had twelve. They were branches which relied to a large extent on coach tours. They were “coach and tourist market-driven”, and carried products directed to tourists, rather than domestic customers. Each destination site had some special attraction. At the Trossachs there was a weaving shed where visitors could see a weaving demonstration, and there was a highland cow that visitors could feed.

[51] She provided information about the layout of the premises by reference to an aerial photo, 7/4/37. Some of what she said about the site I do not understand to be controversial,

and I have included in my description of the location above. She explained that the highland cow was kept in a field to the east of the site. To see it visitors had to go to the right hand side of the car park as viewed on the aerial picture. The right hand side of the car park was usually packed with people trying to see the cow. The views of the landscape were impressive and many people took photographs. The allocated spaces for coaches were not sufficient to accommodate all of the coaches that came to the premises. Buses would have to park to the west of the coach spaces, in the car parking spaces, and on the eastern boundary, again where there were car parking spaces.

[52] The second defenders had a “coach champion”, Heidi Davidson, who worked in their head office, but who also visited the destination sites. Ms Davidson’s job was to encourage the coach trade to those sites. Many coaches would visit without any arrangement to do so, but others would contact the second defenders in advance where visitors wanted to see a specific demonstration or to have a guided tour. Generally they just turned up. When they were asked to stay open late for a particular day trip, they would do so.

[53] Ms Muir had worked with Mrs Cassells throughout her time at the Trossachs store. She described her as bubbly, outgoing, and friendly. Mrs Cassells loved to chat to customers, and was “just generally good at her job”. The only issue had been that sometimes Mrs Cassells would spend what Ms Muir regarded as too long speaking to a customer when Ms Muir needed her for some other task. If she gave Mrs Cassells an instruction, she would trust her to carry it out.

[54] Ms Muir confirmed that she was the author of 6/30/1, a risk assessment for the Trossachs premises. It was in her handwriting. Unless something new arose, risk assessments were prepared annually in February. She prepared the risk assessments and

then carried out a training session so that the staff understood what was in them. She did not understand why the name of Peter Innes, the manager who had filled her position when she left, was on the risk assessment. The risk assessment related to the activity “Entering and exiting the store”. Under the heading “Key tasks” was

“Managing car + coach parking, welcome coaches
Cars, coaches, customers + staff entering + exiting store”

[55] She said that welcoming coaches was something that staff did. In some destination sites there was a specific job role. Most sites had someone whose job it was to meet and greet the customers and ensure that coach passengers and drivers were treated well. The Trossachs store did not have a designated coach champion. It was up to staff to carry out the role. Ms Muir said that she had created a job description for that role and had caused all staff to sign it, and to understand the duties. The training given was to meet and greet the staff in the car park. If there had been enough time, the role would have been to go on to the coaches and tell the visitors about the promotions in the store, but she never had enough manpower to do that. There was sufficient manpower to greet visitors in the car park. Mrs Cassells carried out that task. She loved to go out to speak to the drivers and the visitors and it was normal for her to do that. Ms Muir was happy for her to do so. There was no prohibition on doing so, and staff greeting coaches was what was meant to happen. The task would take 5-15 minutes. In that context Mrs Cassells’s approach would sometimes annoy Ms Muir, which I understood to be a reference to her taking a long time talking to customers. Ms Muir said she could not really criticise Mrs Cassells, however, because what she was doing was a “good thing”. It was not always possible to spare staff to welcome coaches when the premises were very busy and there were queues of customers.

[56] Returning to the risk assessment, she confirmed that it set out that there was a risk of injury from “slips, trips + falls due to pot holes”. The assessment recorded that staff and head office were aware, and awaiting quotations. She explained that the car park was run down. There were pot holes, and the white lines painted on the surface of the car park were faded. A small zebra crossing had pretty much disappeared. She wanted the car park repaired and repainted, but her request for that was declined because it was too costly. She had asked the site handyman to repaint the lines using a stick and masonry paint, but the task proved more difficult, and required more paint, than she had anticipated. She obtained her own quotation for the work and sent it to head office, but heard nothing further.

[57] She accepted that she had not identified in the risk assessment the risk of someone being hit by a coach. She said she had meant it to be encompassed by the reference to falls. She said that she accepted that it was obvious that one hazard was being hit by a bus. She said she had been “meaning that”, but had not written it down in the risk assessment.

[58] She was shown 6/30/2, another risk assessment, again bearing Mr Innes’s name. It was largely typewritten. She said that about a year before she left, the second defenders’ head office issued pre-printed and pre-prepared risk assessments because there was not a uniform approach across the business. She had been happy with her own handwritten risk assessment, which was store specific. She was shown 6/4/74 which was dated December 2015 which bore to be from the second defenders’ Risk Assessment Manual and was headed “Draft schedule of work activities retail”. She confirmed that a similar pro-forma document like that had been circulated before she left. She was unable to say whether 6/30/2 had been in place before she left. A handful of printed forms had come through but she could not say whether it was one of them. She initially said that she had not had training in carrying out risk assessments, but only an overview of risk assessments in

the course of a meeting. She accepted, on being shown 6/4/66, that she had attended a full day of training on 15 April 2009. She could not recall any other relevant training.

[59] Ms Muir gave evidence that staff did not need to wear a high visibility jacket when greeting coaches. There was no specific training about how to keep safe in the car park. She said that the car park could get “insanely” busy. Sometimes she would stand outside to smoke, and she found it amazing that the coach drivers could carry out three point turns with all the “bodies” around. She described the car park as “really mobbed”.

[60] Ms Charteris asked Ms Muir why she had not responded to correspondence from the second defenders’ solicitors asking her to give a statement. She said she had responded to letters from the pursuers’ solicitors, and had not realised that more than one firm was trying to contact her. She did not accept the suggestion that she had an unhappy relationship with the second defenders. When asked if she had left their employment on an unhappy note, she responded that it had been a “small issue”. She had been keen to move to working in supermarkets, had just bought a house, and was thinking of her long term future. She accepted, however, that she had been accused of gross negligence and breach of trust, and that she had resigned the day before a disciplinary hearing was due to take place. The allegations against her were allegations of dishonesty. Relevant correspondence was lodged as 36/1-3. Ms Muir wrote to the second defenders stating, “I do not agree with the allegations but I do feel that this has made my position with the company unattainable [*sic*] therefore I would like to tender this my resignation.” She had been suspended in January 2015. When asked how she felt towards the second defenders she said, “I felt like it was fabrication. The last thing I am is dishonest. I had been there a long time. I decided not to work for someone who thought I was dishonest.” She had not taken the matter

personally. She thought a new manager was exercising a new style of management with a view to “shaking everyone up”. She had had other things in the pipeline.

[61] Asked about other members of staff, she said that so far as Mr McLaren was concerned, there were “some negatives”. She did not know Myra Kyle or Elaine Allen or Kerr well and did not offer an opinion of either of them.

[62] It was suggested to her that the reason why the risk of being struck by a bus was not mentioned in 6/30/1 was that staff did not go out. She responded that staff went out to feed and water the highland cow. She said she had completed a risk assessment relative to risk of injury from the horns of the cow. She repeated that she was uncertain as to whether she had seen 6/30/2 before.

[63] She confirmed that she had allowed Mrs Cassells to go out to greet the coaches. When asked whether she was concerned about her doing so, she said, “In the risk assessment I was concerned about the movement and volume of traffic and people generally.” She said that “in her head” she was concerned about that, and when training staff she said she was concerned about that matter. The main dangers of going out were the coaches moving around, doing three point turns with “people all over them”. She said that she had presented a training course on the “coach champion” role. Her instructions to staff had been to go over towards the coach bay. The bus would sometimes be moving as they approached. She would not do anything if she saw a member of staff approaching as a bus was moving or in mid-manoeuvre. She had seen staff talking to the driver as the driver reversed. The aim of that exercise was to keep good relationships with the drivers, so that they chose to stop at the premises. She insisted that all staff including Mr McLaren, Myra Kyle and Elaine Kerr had carried out the role of coach champion. She had created a separate job description for the role, which included meeting and greeting the coaches,

welcoming the drivers, making sure that the visitors knew about the special offers, and that they got appropriate discounts for meal vouchers, and generally ensuring that they were welcomed and looked after. They would enter visitor groups into the computer system and allocate a “spend” against each group. She was surprised by the suggestion that the role of coach champion, where it existed, consisted of signing in the drivers, and did not involve going into the car park. She thought that Mr McLaren had signed the coach champion job description.

[64] Ms Muir said she thought she might still have a text from Mr McLaren telling her that Mrs Cassells had been “doing her usual” and saying hello to the coaches on the occasion of the accident. She suggested that in denying that he had communicated with her in those terms he was lying to protect his employment.

[65] It was suggested to her that various other witnesses or potential witnesses had said or might say that they did not know what Mrs Cassells was doing in the car park. Ms Muir responded, “I think everyone knew. We were closed. It was a late coach. She would have said I am going out.” Mrs Cassells would have said to the driver, “Hurry up and get in here, I need to get my tea. She would have pointed to her watch in jest.”

[66] Ms Charteris asked about Ms Muir’s profile on LinkedIn, which included the following “Also turning 2 EWM sites from making a loss to making a profit year on year, the Manager with the highest percentage of profit in the Region.” She asked Ms Muir if she wanted to adhere to that representation. She responded that she had been told at an annual review that she had taken home the highest ever figure in “bottom line profit” in her first couple of years at the site. Kilmahog and Trossachs were viewed as a single site for that purpose. Ms Charteris suggested that Paul Stirling might say that Ms Muir had no effect on either site and that Kilmahog was always loss-making. She acknowledged that Kilmahog

made a loss, but explained that her financial manager told her that if she achieved a sum of £250,000 (it was not clear whether this was profit or some other measure) he would be pleased, and she had achieved £264,000.

[67] In re-examination she denied that she was making up evidence that Ms Cassells regularly went out to meet the coaches because of ill feeling towards the second defenders. When asked if she had given training which was focused on the role of coach champion, she replied that she had done so along with other duties of running the store. People greeting the coaches would tend to come from the retail side of the business, rather than the catering side.

Peter Neil Innes

[68] Mr Innes is aged 58 years, and now works as a postman. He worked for the second defenders between 1994 and 2015. He had worked at various of their branches, including the Deer Centre at Cupar, and at Aberfoyle. He spent most of his career, about 18 years, working at the Antartex Village at Alexandria. He moved to the Trossachs and Kilmahog premises in February 2015. He worked there for about 8 weeks.

[69] He was shown the pro-forma documents relating to risk assessments dated December 2015 at 6/4/67-73, and said that templates of that sort were available at the Antartex Village during his time there. During the time he spent at the Trossachs branch before the accident, a period of about 5 weeks, he had not had the opportunity to carry out health and safety training with staff. In relation to 6/30/1 he explained that he had carried out an annual review after the accident. One had been due in February but not actioned. He had added his name to the document after the accident. At the time of the accident the document had been in the same terms, but had had Ms Muir's name on it. He said he had

produced 6/30/2 after the accident. He was asked to compare it with 6/4/90 and 92, which were templates dated December 2015. Production 6/30/2 had "welcome coaches" listed as a key task, where 6/4/90 did not, although both related to the activity "Movement of vehicles/customers in car park". That produced at 6/4/90 included the controls, "Good road/Car park markings; "Bus/coach company to be advised to have a Banks person; Clearly marked traffic routes and parking bays; Hi viz to be worn by any staff working the car park; Training on car park safety provided." He accepted that this indicated that 6/30/2 was drawn from an earlier template. It included the risk "Customers being run over", and the control, "Banks person at very busy times."

[70] He said that 6/30/2, to which he had put his name, was a document that was already being "enforced". He had produced it after the accident, but it was based on a template that predated the accident.

[71] He had produced a further risk assessment, relating to the car park at the Trossachs branch, 6/4/111. It included the description, "New 21-4-15". It was partly typed and partly handwritten. He had written the content, and recognised his own handwriting, but did not recognise the date as being in his writing. He would have taken at least some of the typed content from a pro forma or template. In relation to the hazards "Cars and coaches parking", under the heading "Do you need to do anything else to control this risk", was "The Car park requires to be relined; Pedestrian walkways are to be extended; More signage is to be put up to ensure a clear demarcation of car parking bays and coach parking bays. Directional arrows are to be re-painted." His concern about the lining of the car park was that it was "tired". The pedestrian walkways were to be "redefined". Shown photographs in 6/17 he accepted that the marked walkway could do with upgrading. The risk assessment at 6/4/111 contained an entry in relation to slips and trips. Mr Innes

explained that before the accident car parks were checked monthly, and after the accident there were daily or weekly checks. He had recorded that the safety and directional markings were not in place, describing them as faded, and that pedestrian walkways were not clearly marked, describing them, too, as faded, in a form dated 10 May 2015 headed "Car Park Weekly check".

[72] Mr Innes was asked about a risk assessment relating to the Trossachs branch car park dated December 2015 (6/4/104-106), and the risk management measures noted as being in force at that time, namely that high visibility clothing was to be worn by any member of staff in the car park; and a prohibition in the following terms: "No member of staff ever meets and greets coaches and visitors to the site in the Car Park". He said that neither of these measures had been in force before the accident.

[73] In relation to Mrs Cassells's move to the catering department, he explained that he and his deputy, Elaine, had met with staff to get to know them shortly after his arrival. In light of their discussion with Mrs Cassells, they had asked if she would like to move to the restaurant. It needed support at the time, and the catering manager needed a "right hand person". Mrs Cassells had experience in the restaurant, and liked it. Mr Innes saw her as someone whose strengths were in dealing with the customers, rather than specifically in retail. That was why he had discussed the possibility of her doing what she was good at, namely talking to customers. He felt someone like that was needed in the restaurant.

[74] He had been at work on the day of the accident. The business was opening late. Mr Innes said that the first defenders apparently had a record of coming in on the Easter weekend, and had agreed in previous years that they would come to the Trossachs site on returning from a trip to Loch Ness, and the site had stayed open for them. It was extra trade. They were expecting two coaches, and the site would have been officially closed, but

remaining open for the coaches with a skeleton staff. He did not see Mrs Cassells go out to the car park, and did not know that she was going out. He had never seen her go out before. He did not see the accident. Most of the staff would know the bus drivers, as they were regular drivers.

[75] As regards the role of coach champion, there had been such a role at the Antartex Village. The employee did not, however, go into the car park. She signed the drivers in and took responsibility for the drivers' club, and looked after their welfare. There was a separate room for the drivers at Antartex. That was only one aspect of the employee's job, and she did other things in addition to these duties regarding the coach drivers. No-one carried out a similar role at the Trossachs branch.

[76] Cross-examined by Ms Charteris, he said that there were not many staff at the Trossachs branch. They were all familiar with the drivers, and would be welcoming towards them inside the building while working in their own roles. Most of the coaches arrived between 0930 hours and 1100 hours and it was just a "mad rush" with people coming through the door. It was very early in the season, and the "big rush" had not yet started, but during that time span everyone on duty was inside the building, on a till or in the restaurant dealing with customers. That included Mr Innes himself working on a till. He did not recall seeing any documentation at the Trossachs branch relative to the role of coach champion. He saw no evidence of staff going to meet and greet coaches. It would not be practical to have staff leaving the building to greet coaches. He was aware that Mrs Cassells had a good rapport with the drivers and the tour guides. Asked whether he was aware of her having a special rapport with a David Ross, he replied, "She knew him like she knew quite a few people".

[77] He was asked again to explain what 6/30/2 was. He said it was a general document from head office, and that “you would use it as a guidance for your own site assessment. It went to all sites and was generic. He was asked whether it was relevant to Mrs Cassells’s job, but he answered with a further question as to whether counsel intended a reference to her job as a catering assistant.

[78] In re-examination, regarding the arrangements at the Antartex Village, he explained that there were concession or standalone shops in the complex as well as the second defenders’ shop. There was a shared car park for all the shops.

[79] I sought to clarify further with him the status of 6/30/2 by asking him how it had come into being with his name on it. He said it would already have been in the onsite health and safety manual, and was a general template. It was for all sites. When he carried out a risk assessment he took his analysis from that document.

Barry William Seward

[80] Mr Seward is 64 years of age. He is a consultant forensic collision investigator for Viewpoint Investigative Services. His curriculum vitae is 6/38 of process. He was an officer of Avon and Somerset Constabulary for 30 years, and served as a road traffic officer for 24 years. By the end of his service he was the sergeant in charge of the Avon and Somerset collision investigation unit, dealing with 300 serious or fatal accidents each year. In that capacity he investigated the sight lines from mirrors on large vehicles on several occasions, and had done so on 40 or 50 occasions in private practice. He started his own business in 2005, which he operated until 2013, stopping for health reasons, and started working again in 2016.

[81] Mr Seward gave evidence by reference to his own report, 6/33, but much of his evidence in chief was given by reference to 7/4, a report by Mrs Christina Holland, instructed by the first defenders' solicitors. He acknowledged that Mrs Holland had enjoyed certain advantages in preparing her report. She had visited the Trossachs premises, and she had seen the bus. He had been unable to examine the vehicle because it had been sold on by the time he was instructed. He had used scale models in order to consider sightlines. It was impossible to reconstruct views from mirrors in that way. One had to be in the vehicle with the mirrors properly set. The proper procedure was to have one person in the vehicle in the driver's seat and another person outside. Cones could be placed around the vehicle with a view to taking measurements to record the sight lines.

[82] Mr Seward took no real issue with most of the data used by Mrs Holland. The areas of dispute between Mr Seward and Mrs Holland were relatively restricted. The process of Mr Seward giving his evidence largely by reference to Mrs Holland's report was very helpful in focusing the areas of difference.

[83] By reference to his own report, Mr Seward explained that he had had access to witness statements. There was reference to a suggestion that Mrs Cassells fell before she was run over. It was no part of his role to suggest whether it was more likely that she was standing or prone when struck. That was a matter for factual evidence.

[84] Mr Seward had been able to obtain photographs of the coach, and one was reproduced at pages 15 and 16 of his report. The enlargement at page 16 focused on the different parts of the nearside mirror. He described the components of the nearside mirror as follows. The bottom section was a long mirror, which was a standard width normal driving mirror. Above that there was a smaller wide angle mirror directed sideways and downwards. It was convex and gave a wider angle both downwards and outwards. The

top mirror he referred to as a proximity mirror. It gave a view immediately downwards alongside the front door and back towards the front nearside wheel. Mrs Holland referred to the top mirror as the kerbside mirror. There were various terms for it, but it was designed for coaches specifically to cover the area around the front corner of the vehicle and back to the wheel, so that when they were stationary in towns and cities to pick up passengers the driver could see what was there close to the kerb. It should be the last mirror checked by a driver before moving away, so as to check that no-one had stepped forward towards the front corner part of the vehicle. Most buses had identical mirrors at the offside.

[85] Drivers of coaches would be concerned about particular dangers to the nearside. A difference between a car and a coach or bus is that the front wheel of a coach would generally be behind the driver. When a driver of a car turned a steering wheel, the result was a turn in a gradual curve, because the wheels were in front of the driver. That was not the result when a coach was turned. The front corner of the bus moved or twisted almost sideways as the bus moved off. The "nose" of the bus took a tighter turn than the front of a car would. The main dangers on the nearside would be anything in the area that a bus was going to turn into, whether pedestrians or objects, fairly close into the bus where the bus was turning to the left.

[86] Figure 9 at page 19 of his report had been produced using a scale model. So far as visibility through the passenger door of the bus was concerned, the design was such that there was a solid lower section of the door which was lower at the front and higher at the back. His measurements were that it was 1.6 metres from the road surface at the front and 1.8 metres from the road surface at the back. To the left hand side of the diagram was a diagram meant to represent a view of the coach from the front, and what the driver could see using the window in the door. Using the view available at the back, higher, part of the

window, he could see a point on the ground 9.6 metres from the side of the coach. Using the view through the front, lower, part of the window he could see a point on the ground 5.2 metres from the side of the coach.

[87] He went on to describe what the driver could see of someone standing 1 metre away from the bus. He would be able to see nothing below a height of 1.3 metres.

[88] He was asked about Mrs Holland's report at page 41. It contained diagrams where a green cone shape was used to show the area visible through the passenger door window at a height of 1.65 metres. The top of the cone shape was sharply angled. That showed that at the left hand point close to the coach (the tip of the cone) Mrs Cassells would have been visible when close to the door. To the right on the diagram – that is further towards the rear of the coach – she would not have been visible until slightly further away from the side of the coach. The further she went away from the coach, the greater the areas she could be in and be visible through the passenger door window. In order to measure this area an investigator would put herself in the driver's seat. She would ask someone outside the bus to position cones on the road surface and she would say which cones she could and could not see, so that measurements could be recorded. He himself would have taken photographs from the driver's seat to make an additional record, using a lens that reflected as closely as possible the driver's eye view.

[89] He explained that the tour guide would be in a jump seat which was just inside the passenger door, and lower than the driver's seat. It was a flip up seat, and the feet of the guide when he was seated would be in area of the steps used by passengers to access the bus. If investigating a case where there was any issue about whether the driver view was affected by the presence of a person in the jump seat he would want to take photographs

showing the available view. He did not know whether the presence of a tour guide would in fact affect the driver's view.

[90] Section 6.3 of his report dealt with the angle of the sun. The sun would have been ahead of the coach at the material time. If the driver of a bus found his vision affected by the glare of the sun he should not move, or should check before moving. He could use a variety of means to check. He could move his head, shield his eyes or get someone outside to check whether it was safe to move. Section 6.4 included information from a guide produced by the Driving Standards Agency and issued to bus drivers who were about to take their test. It was similar to the theory test manual for drivers of cars. It contained particular advice about blind spots and mirrors, reproduced at pages 28 and 29 of his report. It was inevitable, he said, that there would be a blind spot. The mirrors had to be adjusted precisely so as to minimise blind spots. Each driver had to adjust the mirrors, as differences in driver height, or even weight, given that pneumatic seats were sometimes used, would necessitate alterations. Mirrors properly adjusted should clear up probably 99 per cent of the problem, leaving only small areas of blind spots.

[91] Counsel asked what a driver ought to do if he had come to a halt part way through a parking manoeuvre and was stationary and intended to move forward slightly to the left before reversing into a parking space. Mr Seward said that the driver needed to check particularly his nearside, because he was moving toward the nearside. He could not ignore the offside. He would have to check no-one was walking so as to go in front of the bus. He would, however, concentrate on the nearside. He would look at the normal, driving mirror, and at the wide angle mirror. In this situation the most important mirror was the proximity or kerbside mirror. It would be the last one the driver looked in. It was the one that would provide cover for the blind spot. As soon as the driver moved the wheel, the front of the bus

would move sideways before the wheel. If the driver knew that he would be moving forwards very slowly for a few feet, his eyes, while he was actually moving, should be on the area into which the coach was moving. He would be using the kerbside mirror and using his peripheral vision to see what was in front. The mirror was not so high as to preclude the use of his peripheral vision in that way.

[92] Mr Seward had read Mrs Holland's report, and nothing in it had altered the views he expressed at paragraphs 7.9, 7.10 or 7.11 of his own report. A close proximity mirror would probably show the area down to surface level around the front corner of the bus and beside the passenger door. If Mrs Cassells approached the bus directly towards the passenger door, the top of her head would probably have been visible when she was one metre or more from the side of the bus. If the bus driver had conducted proper observation in all the mirrors before commencing the manoeuvre, Mrs Cassells would probably have been visible either standing or lying on the ground. She would have been visible standing or lying down in the close proximity mirror right down to the road surface. With the other mirrors it would depend how far forward she was.

[93] The remainder of his evidence in chief concerned Mrs Holland's report. Figure 3 was a diagram showing the views available at ground level from the main and wide angle mirrors, assuming that these were properly adjusted so as to provide the view they were designed to produce. A red section showed the view from the main mirror, near to the side of the bus, and wider at the back than the front, and a blue section showed the view from the wide angle mirror, much more extensive than the red section and again wider at the back than the front. Figure 4 reflected the measurements taken on the day of Mrs Holland's investigations and showed that the mirrors were not so adjusted on that day as to give the view they were designed to. They were adjusted so they showed less than they ought to

have. That page also showed an area to denote what was visible from the kerbside or proximity mirror and an additional area described as the estimated additional area visible at ground level in that mirror. He did not know what the latter area was. He would expect such a mirror to cover the area as far back as the front wheel. The two areas marked by Mrs Holland, taken together, extended to about the middle of the front wheel.

[94] There was some explanation at paragraph 2.3.6 of her report. Mrs Holland had plotted the visible area with Mr Alexander in the driver's seat, and then she had sat in the driver's seat herself. It looked as if she had been able to see more than Mr Alexander had told her he could see, and that accounted for the additional area marked on the diagram. Mr Seward thought it probably reflected error on Mr Alexander's part, not Mrs Holland's. Page 7/4/64 showed a close up photograph of the nearside mirror. A box shape had been superimposed on the proximity/kerbside mirror, and an arrow indicating a side repeater light. He had difficulty interpreting that part of the photograph. Figure 5 showed the views of what was visible using each of the three mirrors and the passenger door window, at a height of 1.65 metres from the ground. Figure 5 only showed what was observed on the day of Mrs Holland's investigation, not what would be shown with the mirrors adjusted to show what they were designed to show. The views would have been more extensive than those shown if the mirrors had been properly adjusted. In particular the view available from both the main mirror and the wide angle mirror would have extended to a point further forward on the bus than that shown, although Mr Seward could not say by how much. He would not have used a figure of 1.65 metres above the ground, as the post mortem report relative to Mrs Cassells recorded that she was 1.7 metres in height. The diagram did not include the "estimated additional area" of view from the kerbside/proximity mirror shown on Figure 4.

[95] Figure 6 contained two diagrams aimed at showing the view from the main and wide angle mirrors. They showed that a person measuring 1.65 metres in height would be seen in the main mirror when standing beside the wheel, but not when towards the rear of the passenger door. Such a person would not be seen in the wide angle mirror when standing in either position. Mr Seward's conclusion was that in relation to a person measuring 1.7 metres, the top of the head would be visible in the wide angle mirror when the person was standing towards the rear of the passenger door. He thought the views shown on Figure 6 showed the views according to measurements taken on the day of Mrs Holland's investigations. Neither diagram related to the view from the kerbside/proximity mirror. That mirror showed a view for half a metre out from the side of the coach. If a person was close to the side of the bus they would be visible in the kerbside mirror. If they were further away they should be visible out of the passenger door window.

[96] Figure 7 was attempting to show the movement of the bus with the wheels steered full lock to the left. Figure 8 demonstrated that if Mrs Cassells had taken a particular route she would have managed to avoid being visible in the main mirror, in the wide angle mirror, or through the passenger door window. It aimed to show the angle at which the bus had stopped. Mr Seward thought that the angle shown was incorrect. The bus should be moved slightly clockwise so as to point more towards the back of the car park. He had reached this view by examining 7/2/16 which was a photograph taken by police officers on the day of the accident. It showed where the coach had come to rest relative to a faded yellow box marking line on the surface of the car park. That line came towards the back wheel of the coach. If one turned the bus slightly clockwise all of the visible areas identified by Mrs Holland on Figure 8 slightly clockwise would also move clockwise. The estimated path identified by Mrs Holland or parts of it would come into view.

[97] On the basis of what Mr Seward now knew about the presence of a barrier across the door of the shop, the estimated route marked would not be a likely one, as Mrs Cassells would have had to come from the left or right of it. The views shown from the mirrors were the views at ground level on the assumption that the mirrors were adjusted to show what they were designed to show. While in relation to areas some distance from the bus using ground level would be acceptable, it would not reflect the visibility as regards someone of 1.7 metres in height as they came closer to the vehicle. The green cone showing the view from the passenger door window would be affected if the driver moved his head, by inclining his head forward relative to his body and looking to the side to the extent that a move of that sort would increase the available view.

[98] Mr Seward did not dispute Mrs Holland's estimate that Mrs Cassells would have taken 10-13 seconds to cover the ground, although it might have been less had she been running.

[99] Counsel asked Mr Seward whether his view about the visibility of Mrs Cassells using the mirrors would change if she had stumbled and fallen within a few feet of the bus. He said that it would change in relation to the main mirror and possibly the wide angle (convex) mirror. The latter did however angle down sharply and it was possible that she would be seen in it if she was prone on the ground by the wheel. He referred to Figure 6 of Mrs Holland's report.

[100] Counsel asked whether, if a bus driver was aware that there might be blind spots and he was about to drive forwards towards the near side, there were other simple options open to him to minimise the risk. Mr Seward responded that the onus was on the driver to be sure. If the passenger door was open he perhaps could see more. He could have someone outside to assist. While a banks person would have to be trained if he or she was,

for example, organising traffic around roadworks, that would not be necessary if he or she was simply helping someone to park safely.

[101] Cross-examined by Ms McMillan he acknowledged that he had become aware by reading information that post-dated the accident that buses did not require to follow the directional markings in the car park. He had not examined the vehicle involved in the accident, or a like for like vehicle. He had used statements available to him in forming his conclusions about whether Mrs Cassells would be visible to the driver using the mirrors. He had initially had poor quality photographs but had more recently been provided with better quality photographs of the scene and of the coach. He had taken the dimensions of the coach from the specifications provided by the manufacturer of the coach. He had used those at Figure 9 in his report.

[102] Ms McMillan noted a discrepancy between Mr Seward's measurements of the passenger door window (1.6 metres from the ground at the front, and 1.8 metres from the ground at the back) and those taken by Mrs Holland (1.65 metres and 1.85 metres) he accepted that this might be accounted for by a black rim on the perimeter of the window 5cm wide. He had not known Mr Alexander's height or how his seat was adjusted. He was asked about the position of the tour guide. He referred to a photograph 7/2/54 which showed the tour guide's folding seat. He had not had it when he prepared the report, but said that it showed that the tour guide's seat was lower than the driver's. He did not know the height of the tour guide.

[103] Referred to paragraph 6.2.10 of his report he agreed that it was his conclusion that if Mrs Cassells had been immediately adjacent to the coach the top of her head may have been visible at the front of the window. He agreed that if she was 1.65 metres tall that would be 5cm of her head at most. Referred to a suggestion, deriving from a statement given by

David Ross, that she was 2 feet from the side of the coach, and his conclusion at paragraph 6.2.11 as to her visibility in that position, he agreed that those figures would change slightly if Mrs Holland's measurement of the door rather than his was correct. He had thought Mr Ross was describing Mrs Cassells in a standing position.

[104] He had not examined the coach with the sun in precisely the position it was in at the time of the accident. It would be very difficult to do so. He agreed that if the sun was coming through the windscreen and the driver turned to the nearside mirror, the sun should not obscure his view. He agreed that there would be blind spots with any vehicle. He was asked several questions directed to the proposition that Mrs Cassells may not have been there to be seen in the mirrors. While he acknowledged that possibility, he laid stress on the short distance travelled and the need to use the mirrors while traversing it. She had been hit near the front near side.

[105] He was asked why the "regulation" figures that indicated the view that the mirrors were designed to give had not been used by Mrs Holland in relation to the kerbside mirror. He explained that the kerbside mirror was an "add-on", rather than a requirement. He acknowledged that the position of the vehicle when it first moved was not known.

[106] He agreed with Mrs Holland's view that if Mrs Cassells was more than half a metre from the side of the bus she would not be visible in the kerbside mirror. Asked whether if she was visible in the other mirrors for only short time, if at all, he said that everything was very dynamic in a situation of that sort. A driver had to check everywhere. In his opinion, from the moment the driver started at a very slow speed, his concentration should have been on the near side. If she was more than 50cm from the side of the coach she would not be visible in the downward (kerbside) mirror. If she was struck by the coach and knocked down by the coach, he would expect her to be seen in the kerbside mirror.

[107] Ms Charteris asked how the checking of blind spots in the manner familiar to the driver of a car might translate to coach driving. Mr Seward said that it was not possible to check blind spots simply by looking over the driver's shoulder. He would be relying on the mirrors, apart from the view available through the passenger door. Research showed that each mirror check would take about a second, but in this case, because of the way the coach was moving forwards for a very short distance to the nearside, then once the checks to the front and right had been done, he should have been concentrating on all three nearside mirrors.

First defenders' case

[108] The first defenders led evidence from PC Gordon McColl and Mrs Christina Holland.

PC Gordon McColl

[109] PC McColl has been a police officer for 28 years, and involved in road policing for 17 of those. He was not a collision investigator, but was an advanced driver, an advanced driving instructor and held a diploma in road policing. He and PC Softley attended the scene of the accident. He took a statement from David Ross. Mr Ross was the guide on the bus that was not involved in the accident. Mr Ross had gone through where the tour had gone: up north to Glencoe, and they were returning to Edinburgh. The final stop was at Kilmahog. He knew Mrs Cassells from previous visits and could name her. It was a common occurrence for her to come out and advise passengers where to go into the mill. PC McColl had not had a chance to review his notebook before giving evidence because it had gone missing. It had been taken for a Fatal Accident Inquiry and never returned to road policing at Stirling.

[110] He was shown 6/31, which was agreed to be a true and accurate copy of an extract taken from his notebook. What he had recorded was:

“I was sitting in the courier seat of my bus. My bus went to the right hand side of the car park. Coach 2 turned across the car park and then he would reverse back into a coach bay. I saw Rachel come out the doors at the woollen mill and she started walking across the car park towards coach 2.”

He was referred to a further passage:

“Rachel started walking alongside the coach toward the door at the front. In my opinion I think she thought the bus was going to stop and let the passengers off before reversing and that is why she walked forward. I then saw Rachel stumble and she put her hands out as she fell to the ground and she kind of rolled over on her back just as the wheels were turning on the bus. The front nearside wheel rolled up onto her legs.”

He agreed that he had not recorded Mr Ross saying that the bus was moving when she fell.

[111] Ms Charteris asked whether PC McColl had asked Mr Ross where Mrs Cassells had come out from. He said, “No, he [Mr Ross] obviously knew Mrs Cassells well and that was her normal practice.”

Christina Holland

[112] Christina Holland is a forensic engineer and has worked for Hawkins and Associates in that capacity for 9 years. She was previously a senior design engineer in the automotive industry, and then worked in the field of robotics. She has an honours degree in mechanical engineering and is a chartered member of the institute of mechanical engineers. She regularly attends courses and crash test days. She has written over 100 collision investigation reports.

[113] Her report contained aerial views of the car park at around the time of the accident, and after the second defenders had carried out alterations to it. She visited the car park in

November 2017, after those alterations had been carried out. She examined the coach at the first defenders' premises, also in November 2017. She had taken about 148 photographs of the coach, and 60 or 70 of the scene, but most of them were not reproduced in her report.

[114] Mrs Holland explained that the design and capability of the main and wide angle mirrors were subject to regulation by virtue of Directive 2003/97/EC on the approximation of the laws of the Member States relating to the type-approval of devices for indirect vision and of vehicles equipped with these devices. The kerbside mirror was not covered by that Directive, and was an additional mirror to assist the driver when close to kerbs and walls. She had taken a photograph (7/4/64) of the nearside mirror from the driver's seat. In the photograph the reflection in the kerbside mirror was of the ground around the front nearside corner of the coach, and some of the front nearside of the coach itself. There was a side repeater light on the coach which was reflected and blocked part of the view. She explained the additional area she had marked on the diagram relating to the view from the kerbside mirror as indicating there was some visibility in the area.

[115] She had asked Mr Alexander to sit in a normal driving position with the mirrors adjusted in the way he would normally have them, and he directed her while she marked out the areas of road surface that he could see through the mirrors. She used a marker pole 1.65 metres in height, and got him to direct her to where he could only just see the pole. She had marked out the relevant areas and measured them. She had used 1.65cm as the average height of a woman in the United Kingdom, although she had learned that Mrs Cassells was 1.7 metres tall. By reference to Figure 5 she confirmed that the shaded areas in it would be slightly larger had she used a 1.7 metre pole. There would be visibility closer to the front of the coach using the mirrors, and closer to the side of the coach through the passenger door window. She described the difference as being in the region of a few centimetres.

[116] She was the same height as Mr Alexander. She had observed a greater area of visibility in the kerbside mirror than Mr Alexander had. There was a small area where the ground could be seen around the edges of the side repeater light. The nearside mirror was designed to be operated electrically, but the switch was broken and the mirror could not be adjusted on the day of her examination. The other two mirrors had been adjusted manually. She had not seen Mr Alexander adjusting them but understood that he had done so. When she examined the coach the sun was low in the sky directly in front of the coach and to her left as she sat in the driver's seat. It did not affect her view in the nearside mirrors. The mirrors were in a casing facing away from the sun and were shaded by the casing. On the day of her investigations the mirrors were not adjusted to show all that they were designed to show. They should have been angled further downwards. If they had been, that would have increased the available view towards the front of the bus.

[117] Depending on the height and seating position of the tour guide, he could obstruct the view through the passenger door window. The DSA document reproduced in part in Mr Seward's report did not mention the use of a third party to assist.

[118] Mrs Holland explained that the figure she had used in Figure 6 was meant to represent a person 1.7 metres in height. She had selected the positions of the figures to show the furthest rearward position in which the person was not visible in either of the main or wide angle mirrors. She had based her estimates of the distance covered by Mrs Cassells on statements from Mr Ross and Mr Turnbull. She had estimated speed on the basis of a range of typical speeds for a pedestrian of Mrs Cassells' sex and age in published research.

[119] Figure 8 was designed to show the bus in its rest position, which Mrs Holland had estimated from police photographs. If the bus were angled more by turning it clockwise on

Figure 8, there might be more chance that Mrs Cassells would have come into the edge of the view of the wide angled mirror.

[120] If Mrs Cassells had been adjacent to the passenger door window, she would not have been visible in “either mirror” regardless of how far she was from the side of the coach. She would have needed to be 0.55 metres to 1.33 metres from the side of the coach to be visible through the passenger door window. The lower figure would be if she was at the front side of the door, where the window came lower down, and the higher if she was at the rear side. If she was within 50cm of the side of the coach she might be partially visible in the kerbside mirror. Mrs Holland had assumed, on the basis of witness statements she had read, that Mrs Cassells was between 0.6 metres and 1 metre from the side of the bus.

[121] Mrs Holland suggested that she could deduce from the circumstance that Mrs Cassells was perpendicular to the bus in the photograph taken by Mr Campise that she had been walking along the side and had fallen before she was run over. If she had been standing and was hit, she would have been perpendicular to the bus, having been pushed sideways.

[122] There was guidance that suggested that a driver should check the nearside mirror last before moving off, if moving towards the near side. If Mrs Cassells had been lying on the ground, more than 50cm from the side the coach and in front of the wheel, then she would not be visible in any mirror. She must have been to the front of the wheel, otherwise she would not have been hit.

[123] Mrs Holland’s evidence was that the Health and Safety Executive advised against the use of a banks person unless the banks person had training and safety equipment. Safety equipment would include at least a high visibility vest, and sometimes fluorescent batons or a radio. It would not have been practical for Mr Alexander to open the bus passenger door

to get a better view because he would have to close it before moving off, and things could change in the time taken to close it. The only evidence she was aware of in relation to timing was from a statement by the tour guide to the effect that the time between Mrs Cassells leaving his sight and his being aware of the accident was five seconds. If that were right Mrs Cassells might have been visible for only a second or two.

[124] Ms Charteris asked Mrs Holland about the statement given by Mr Alexander to police that the sun was coming over the weaving shed roof and obscuring the mirror with glare. She accepted that if what he said to the police was correct, the glare must have been coming from somewhere other than the sun, which was directly in front of him.

Mrs Holland accepted that the glare must have been coming from some other surface, for example a metallic surface or a window round about the driver. Mrs Holland thought it might have been a reference to an interior mirror, but accepted that there could have been reflection from another shiny surface.

[125] Cross-examined by Mr Young, Mrs Holland accepted that she did not have any qualification, in the sense of having been tested and certified, in accident reconstruction, although she explained she had attended in-house and external courses. She had no specialist driving credentials in relation to buses or lorries. She had not initially been provided with Ms Jung's statement by those instructing her, although she had seen it a week or two before the proof. She did not find it necessary to amend her report having seen it. She was not concerned that she had not seen it earlier. She had not been provided with a statement by a Mr Konkel, or with the post-mortem report, but had been told Mrs Cassells's height.

[126] She had not seen Mr Alexander adjusting the mirrors on the day of her investigation. Her instructing solicitors told her that he had done so. She assumed he had adjusted them

electronically. She realised that the main mirror could not be adjusted electronically. There was a mounting on the back of the mirror screwed in from the back of the housing that prevented it moving. It could not therefore be correct that Mr Alexander had adjusted all three mirrors on the day of her investigation. She accepted that if he had said in evidence that he had adjusted them using a mixture of electronic and manual means, he must be mistaken.

[127] Asked about Figure 4, she agreed that it showed that the mirrors as adjusted by Mr Alexander created a poorer view than the mirrors were designed to give when properly adjusted. When she had asked Mr Alexander to describe the view from the kerbside mirror his view had not extended as far back as the rear edge of the passenger door. She had been able to see an additional area that extended part of the way along the front wheel.

Photograph 9 in her report showed the additional area in a dotted box. She identified the area obscured by the side repeater light. She had carried out most of her examination with the wheel of the bus steered to the left. It was not shown on photograph 9, so she assumed that it was obscured by the side repeater.

[128] Mrs Holland had used a 1.65 metre pole when carrying out her investigations. She had not recalculated on learning that Mrs Cassells was 1.7 metres in height. Speaking about the green cone shape on her diagram denoting the view of the driver from the passenger door she accepted that the cone shape would move forward and back with the equivalent movement of the driver's head. She seemed reluctant to accept that a driver in the ordinary course of events would necessarily move his head in such a way to increase the available view.

[129] In relation to Figure 5, she said that she had not shown what was visible at 1.65 metres above the ground by reference to the mirrors adjusted to show what they were

designed to show. That would not be possible to calculate from the information in the standard relating to mirrors. She accepted that it could have been done by adjusting the mirrors to show what the standard indicated they should be able to show and taking measurements, but she had not done that. If she had carried out such an exercise the view would have extended further towards the front of the bus. The omission of the additional area visible using the kerbside mirror from Figure 5 was an error. She could not comment on how the angle of the sun on the day of her inspection compared with the angle of the sun on the day of the accident. Although her report suggested that the tour guide would have a greater field of view than the driver in all directions. She accepted however that the driver would have a better view to the left because he was further forward and higher up than an individual who was seated close to the window of the passenger door. She had taken a photograph of the driver's view from the passenger door window, but it was not included in her report. She was not sure whether she had taken a similar photograph relative to the view of the tour guide.

[130] Mrs Holland accepted that if Mrs Cassells were standing somewhere around the wheel, 50cm to 1 metre from the side of the bus, she would be clearly visible in the wide angle mirror, and the driver would see almost all of her. If she were in position 2 on Mrs Holland's Figure 6, that is beside the wheel, he would be likely to see her head and shoulders in the main mirror. She would not, however be visible in the main mirror or the wide angle mirror if she were positioned at the passenger door, towards its rear (position 1 on Mrs Holland's Figure 6). In that latter position she would have been visible in the kerbside mirror if she had been close enough to the side of the bus. Figure 6 did not show the view from the kerbside mirror. Mrs Holland accepted that if Mrs Cassells had been trying to speak to the bus driver or tour guide she would more likely have been facing

forwards towards the passenger door than with her right hand side to the passenger door, as shown in Figure 6. A 1.7 metre tall woman positioned very close to the door would not be visible in the wide angle or main mirror, but would be visible in the kerbside mirror if she was within 50cm of the side of the bus. If she had taken a step or two back she would not have been visible in the kerbside mirror, but would have been more visible using the passenger door window.

[131] Counsel suggested to Mrs Holland that the “extreme” position she had selected in Figure 6, placing Mrs Cassells to the rear of the door, rather than in a more central position, was unfair. Mrs Holland responded that the diagram was designed to show where the “worst blind spot” was. She acknowledged that paragraph 5.1.4 contained an error insofar as it related that only Mrs Cassells’ feet and lower legs would have been visible in the kerbside mirror if she was less than 50cm from the side of the coach. All of her body would have been visible. She conceded that if Mrs Holland had been standing, the view of her in the kerbside mirror would not have been obscured by the side repeater light, as that light was below her height.

[132] As to the dimensions of the window rim, Ms Holland had not measured it, but had assumed it was 5cm broad, as that was a standard dimension.

[133] Considering a scenario where Mrs Cassells was found to have fallen before she was run over, Mrs Holland had not carried out any tests to assess what the height above the ground of a prone body would have been. Had she been prone, part of the view in the kerbside mirror would have been obscured by the side repeater light, because she would have been lying below that light.

[134] If Mrs Cassells was standing between 0.5 metres and 1 metre away from the nearside wheel, she would have been visible in at least two of the nearside mirrors. Even if she had

been 2 or 3 metres away, she would probably have been visible in one or other of those mirrors.

[135] In relation to Figure 8 in her report, Mrs Holland accepted that Mr Seward's method of assessing the resting position of the bus was "possibly" a fair one. The green marking showing the view from the passenger door window related to the view recorded using a 1.65 metre pole. The marking showing the views from the wide angle and main mirrors were those showing the "minimum permitted" views from the mirrors at ground level. She accepted that it would have been more appropriate to show the views relative to a person 1.7 metres in height, which would have shown available views further to the front of the bus. She had not shown the view available from the kerbside mirror because the route she estimated that Mrs Cassells had taken did not go close enough to the bus for the kerbside mirror to be relevant. She had not considered plotting an alternative route that brought Mrs Cassells right up to the door of the bus.

[136] In estimating Mrs Cassells's route for the purposes of Figure 8, she had not been aware that at the time there had been a barrier in front of the door of the shop which, had Mrs Cassells used that door, would have forced her to enter the car park to the left or right of it. She was not aware whether there were other exits from the premises that Mrs Cassells might have used. She accepted that if Mrs Cassells had used one of two exits on the buildings shown to the left of a white van on photograph 5 in her report, the route would have been different.

[137] Counsel asked Mrs Holland whether in Figure 8 she was seeking to show that on the estimated path taken by Mrs Cassells she simply could not be seen. Mrs Holland responded that she would prefer to say that Mrs Cassells could have approached without being seen.

There was a difficulty with using an estimated path, which Mrs Holland now accepted was incorrect in any event.

[138] He suggested that Mrs Holland had carried out an exercise to show that it was theoretically possible for Mrs Cassells to have travelled from the woollen mill to where the accident happened without it being possible for Mr Alexander to see her. Mrs Holland denied that she had done that. She had estimated the position of the coach as best she could, and then Mrs Cassells's route, using police statements. She had then overlaid the diagrams showing visibility from the window and the mirrors. She could not say that any of the component parts of that exercise was "one hundred per cent precise." She accepted that if the bus moved slightly clockwise, it was likely that Mrs Cassells would have been visible on the edge of the view from the wide angle mirror. She accepted also that, even on the estimated route, Mrs Cassells would have been visible in the wide angle mirror over part of that route. The view shown on the diagram did not reflect the view available of a person measuring 1.7 metres in height. The position of the bus on Figure 8 was intended to show its resting place. That would not be identical to its position before it started moving, although it might be close to it.

[139] If Mrs Cassells came from the left side of the diagram, she might have cut across the section showing the view from the passenger window depending on how close she went to the coach. If she had passed nearer to the weaving shed, she would have been visible out the front window.

[140] Mrs Holland maintained that if Mrs Cassells had fallen, Mr Alexander would not have seen her as the accident happened or shortly after, had he been using his mirrors properly. She said it was not possible to view the three mirrors simultaneously. She did not agree with Mr Seward that the driver should concentrate on the mirrors when edging

forward to the nearside; the driver would need the view through the windscreen in case something moved in front of the bus.

[141] As to the significance of Mrs Cassells on the ground after the accident, Mrs Holland maintained that it was within her expertise as a mechanical engineer to give an opinion that if Mrs Cassells had been knocked down, it was more likely that she would have been resting at right angles to the bus. She said it came “down to the laws of physics”. Although a bus running over her and then reversing would drag her to some extent, it would not rotate her 90 degrees. Asked about her expertise as to how a body would be moved by a bus in that situation, she said that she had seen accident reconstructions, and blood, tissue and clothing marks showing where a body had been pushed by a wheel.

[142] Turning to the topic of a banks person, her opinion, recorded at paragraphs 5.3.7 and 5.4.1 of her report, was that the accident would probably have been avoided had a properly trained banks person been provided. She accepted that a banks person could not only have assisted the driver, but warned pedestrians. The risk assessment prepared by Allan’s Coaches indicated that a third party might assist. For Mr Turnbull to have assisted, however, would in her view have been to contravene health and safety guidance, which was not restricted to major construction and road works. Counsel suggested that she was catastrophising in suggesting (paragraph 5.4.2 of her report) that the presence of multiple banks persons at the site could cause confusion and accidents. She responded that it would depend how busy the site was. There were different methods of communication between drivers and banks persons. The banks persons needed to be familiar with the site they were on, who else was on the site, and what the risks were. To have banks persons coming to the site who were not familiar with the layout and with who was there would not be practical, and she did not think that it was what was generally done. If a third party was to be used,

as seemed to be envisaged in the risk assessment, that person would have to be trained in order to comply with the Health and Safety Executive guidance.

[143] Mrs Holland had suggested in her report that Mrs Cassells might have been able to assess by looking in the mirrors whether or not Mr Alexander was able to see her. She explained that she was not suggesting that Mrs Cassells should have done so, but that she might have. In relation to the suggestion that the driver could have kept the door open when manoeuvring, she said that it would be risky, and that someone could fall out. He would be relying on the tour guide to keep his seat belt on.

[144] In re-examination she explained that it would not be possible for the driver to look in all three mirrors at once. It was difficult to interpret an image in a mirror when driving in a car park. It took concentration, and the driver needed to be able to see clearly what he was looking at. The area of peripheral vision was not as clear as was often thought. Whether Mrs Cassells was visible depended on where she was at the time when Mr Alexander checked his mirrors. She was unsure how much of the additional area of view from the kerbside mirror the repeater light took up. She had not asked Mr Alexander to clarify what he could see in the kerbside mirror, following her own observations, as he had left by that point in her investigation.

Second defenders' case

[145] The second defenders led evidence from Myra Kyle, and Elaine Kerr, previously known as Elaine Allen.

Myra Kyle

[146] Mrs Kyle started work with the second defenders as a sales adviser in October or November 2014. She knew Mrs Cassells. Mrs Cassells trained her in relation to the use of the stockroom, and where to go and not to go. She instructed her not to go out into the car park, but to meet and greet customers at the front door. The weekend of the accident was a busy one. The bus involved in the accident and another were doing what she referred to as the “backward run”, and coming in after 6.00pm. She saw the coaches come in. She heard a scream and went to the front door. The first thing she noticed was Mrs Cassells’s pale lilac fleece, which was worn as a uniform. She explained that coaches coming from the north would make a semicircular manoeuvre and then reverse into the coach bays. The bus involved in the accident was in position to reverse into a bay. She went to alert Mr McLaren. He had not been aware that Mrs Cassells was outside.

[147] At the time of the accident Mrs Kyle was working in a sales area near the front door. She was not aware before the accident that Mrs Cassells was outside. She had not passed Mrs Kyle, who had been at or near the front door. There were two other possible exits, the approximate location of which Mrs Kyle identified using photographs. Both were to the west of the main entrance. She did not know why Mrs Cassells was in the car park. She had not seen her go outside before, other than to feed the cows.

[148] Generally the earlier part of the day was the busiest, as the Trossachs store was the first stop on coach routes. Each coach spent about half an hour at the site. Ms Muir had not provided Mrs Kyle with training as a coach champion. Mrs Kyle did not sign a job description relative to that role. Ms Muir did not tell her to go out and greet coaches when they arrived.

[149] Cross-examined, she explained that her training had consisted of spending a week or two following Mrs Cassells around. After Mrs Cassells moved to catering, she did not see her during busy periods. The work uniform at the time consisted of a lilac top with a checked shirt, and navy or black slacks. On the day of the accident Mrs Cassells was wearing a clog style slip on black shoe, with a wedge-type heel. After the accident there was a clear prohibition on going out to meet and greet coaches, but before that staff had not done that. She did not accept that the second defenders tolerated Mrs Cassells going out.

Elaine Allen or Kerr

[150] Ms Kerr is a part-time insurance adviser who formerly worked for the second defenders as an assistant manageress. She started working for them in January or February 2015 and left their employment in August of the same year. She got to know Mrs Cassells through a colleague at work. She became aware of the accident when she heard a "dull scream" and ran to the front door. She saw passengers "holding their faces and heads". She did not see Mrs Cassells go out. She had been working at the cash desk in the retail section. She had never seen Mrs Cassells in the car park before, and had not seen her greeting coaches as they arrived. She had never seen a job description for the role of coach champion. It was official policy to welcome customers at the front door if they were coming into the shop.

[151] She acknowledged in cross-examination that at the time of the accident she had worked for the second defenders only during a quieter time of year. She was asked whether at the Fatal Accident Inquiry she had given evidence of having heard from others that Mrs Cassells did go out to meet and greet coaches. She could not remember whether she had given evidence to that effect. She was asked whether it was possible that Mrs Cassells

had walked past her to go out, or whether Mrs Cassells must have used a different exit. She said that Mrs Cassells must have gone out “up at the restaurant end”.

Submissions

[152] All parties provided written submissions. I summarise them below. Both the pursuer and the first defenders made reference to hearsay evidence in the form of statements to the police which were agreed to be accurate records of the statements given. I have reproduced the passages on which those parties relied, as they are not narrated elsewhere in this Opinion.

Submission for pursuers

[153] The case on record against the first defenders was that (a) Mr Alexander ought not to have manoeuvred the bus until the car park area was clear of pedestrians, (b) he ought not to have manoeuvred his bus when his vision was obscured due to weather conditions, (c) he ought to have seen Mrs Cassells approach the bus, and (d) he ought to have asked his tour guide to act as a banks person under reference to the “first defender’s own risk assessment”.

[154] The pursuers relied on Ms Jung’s evidence as the best evidence of Mrs Cassells’s position immediately prior to impact. Ms Jung’s evidence was largely unchallenged by the first defenders in cross-examination. I should conclude that Mrs Cassells was upright when she was struck. If Mrs Cassells was standing around the front nearside wheel then she would have been visible in the nearside mirrors – that was apparent from Figures 3 and 6 in Mrs Holland’s report. None of the witnesses who gave evidence described Mrs Cassells falling before being struck. PC Softley had examined the car park and had not found any obvious tripping hazard.

[155] David Ross and James Turnbull each gave two statements to the police. In one statement (7/1/9-10), James Turnbull, the guide on the bus involved in the accident, said that Mrs Cassells was directly adjacent to where he was sitting and that she was trying to speak to himself and the driver. She disappeared from view, and one to two seconds later the bus moved off. He assumed she had walked off:

“She was standing directly adjacent to where I was sitting but obviously much lower down than me. I just thought she was out trying to greet us as she sometimes does. Only 1 or 2 seconds later, after stopping, the bus continued to move forward as the people had moved away. I couldn’t see Rachel any longer but assumed that she had just walked off.”

In a second statement (7/3/1-2 and 7/3/17-21) he placed her 3 feet back from the coach door and said that she walked towards the rear of the coach at an angle:

“She was about 3 foot back from the coach and started to walk towards the back of the bus at an angle (away from it).”

David Ross, in his first statement, said “I then saw Rachel stumble and she put her hands out as she fell to the ground and she kind of rolled over on her back just as the wheels were turning on the bus”. In his second statement he said he saw Rachel “stumble and fall forwards, she fell awkwardly and ended up on her back”. It was not clear from David Ross’s recorded accounts whether what he said was inconsistent with Ms Jung’s evidence.

[156] Mr Young asked me to reject Mrs Holland’s evidence insofar as she purported to give an opinion that the position of Mrs Cassells after the accident supported the proposition she had been prone when struck by the wheel. She was unable to give evidence about experimental research bearing on the question, and had no personal expertise in the matter by training or experience.

[157] The evidence demonstrated that Mrs Cassells was standing or walking alongside the nearside front wheel and was visible in both the main and wide-angled mirrors. Mr Seward's evidence was that the front nearside was the point of greatest danger. Mr Alexander's attention should have been focused on the nearside mirrors. Although he said he had checked his mirrors carefully, the "inevitable conclusion" fell to be drawn that he had not checked his mirrors carefully. As to Mr Alexander's statement to PC Softley, he may either have been making a dishonest excuse for a failure to check his mirrors, or he may have been conveying that sunlight affected his vision, whether that was sunlight directly in his eyes from the front, or sunlight reflected into his mirrors from an object behind the bus. The pursuers criticised Mr Alexander's evidence in relation to his explanation for the statement he made to the police; the circumstance that his evidence about his adjusting the mirrors on the day of Mrs Holland's examination could not be reconciled with her account of the functioning of the mirrors that day; and the circumstance that he had reported a range of views from the mirrors which was less than that recorded by Mrs Holland when she made observations herself.

[158] I should conclude that Mrs Cassells was standing or walking alongside the nearside front wheel and was visible in both the main and wide angled mirrors.

[159] In relation to the case based on Mr Alexander's negligence, causation was straightforward. His own evidence was that he was able to stop the bus almost instantly. It was moving very slowly. If he had seen Mrs Cassells any time before the wheel started to go over her, the accident could have been avoided. In relation to the case made on the basis of the absence of a banks person, Mr Young referred to 6/4/9, which he said was the first defenders' own risk assessment. It referred to the use of a third party to assist in reversing in limited or difficult spaces. The space in question was difficult because of the number of

pedestrians milling about. Mr Alexander could have asked Mr Turnbull to act as banks person. It was not necessary, having regard to Mr Seward's evidence, that the banks person have training – what was required was another pair of eyes. If Mrs Holland was correct that a trained banks person was required, that begged the question as to why the first defender recommended the use of a third party, in "their" risk assessment, but failed to provide a suitably trained person. David Ross's evidence, in his police statement, was that he would have acted as a banksman if required. He, like Mr Turnbull, was normally a driver.

[160] The pursuers made a number of criticisms of Mrs Holland's evidence. She had no qualifications in road accident reconstruction. Her training amounted to the attendance at in-house and external seminars and training events. While Mr Seward agreed with much of her investigation, the first defender did not properly set up Mrs Holland as an expert who could give relevant evidence. It was of concern that she had not been provided with Ms Jung's statement, or that of the officer who took it. Her report entered into advocacy at times, as demonstrated by particular uses of language. In the analysis section, she said that Mrs Cassells "would not" be in view of Mr Alexander, but in relation to a situation where she would have been in view, used the word "might". Figure 6 did not demonstrate the view from the kerbside mirror which would have shown Mrs Cassells in position 1 if she had been sufficiently close to the side of the bus. On figure 5, Mrs Holland used the actual view rather than the view that the mirrors were designed to give from which to assess the view at a 1.65m height. That did not accord with her general statement at paragraph 5.1.2 that she would use minimum standard views for her analysis. As to figure 8, she accepted that the bus position might be marginally wrong; that it did not show the view from the kerbside mirror; that the blue/red shading was at ground level (green is at 1.65m level) and it would have been better to show what was visible at 1.65-1.7m above the ground; and that

the line of Mrs Cassells' route could be correct. The evidence of the second defenders' staff tended to support the view that Mrs Cassells emerged from the staff or café entrances so she would have had a very different route from that shown. Even if the main door had been her exit, the presence of the yellow barrier shown in 6/17/1 challenged Mrs Holland's starting point. The fundamental criticism of figure 8 was that as soon as any of the factors are varied, it no longer demonstrates that Mrs Cassells could have reached the side of the bus without being in Mr Alexander's vision. Mrs Holland had used a 1.65m height to test visibility but Mrs Cassells was least 1.7m tall. If wearing clogs with a thick sole, her height would have been greater. Mrs Holland failed to measure the height of the door of the bus. She failed to take photographs from the viewpoint of the driver and tour guide out of the side of the bus. She was wrong at paragraph 2.3.9 of her report in suggesting that the tour guide had a greater view in all directions than the driver. She accepted in cross examination that the driver had a better view out of the side window towards the rear of the bus as he is further forward. She accepted in cross examination that she could not properly compare the angle of the sun in November 2017 with April 2015.

[161] The pursuers made submissions as to the approach I should take were I to have found as fact that Mrs Cassells was already on the ground before the bus moved. Given my conclusion as to her position at the relevant time, I do not set these out in detail. The submission was that if she were on the ground at the relevant time, she would have been visible in the kerbside mirror.

[162] The case on record against the second defenders was based on their failures (a) to devise and implement a safe system of work, (b) to devise and implement a safe system of traffic routes for employees and vehicles in the car park, (c) to properly train Mrs Cassells, (iv) to provide a hi visibility vest, (v) to implement control measures identified in

pre-accident risk assessments, and (vi) to provide a banks person. Reference was made to various statutory regulations as informing the common law duties pled. In relation to risk assessment, reference was made to regulation 3 of the Management of Health and Safety at Work Regulations 1999, and in relation to the need for designated traffic routes, to regulation 17 of the Workplace (Health, Safety and Welfare) Regulations 1992. The pursuers submitted that risk assessments required positive thought by employers as to the risk posed by their operations. The assessment was the blue print for action to manage risk, and the starting point of any analysis should be the suitability of the risk assessment. Reference was made in support of those submissions to *Threlfall v Hull City Council* [2010] EWCA Civ 1142, Smith LJ at paragraph 35; *Allison v London Underground* [2008] EWCA 71, Smith LJ at paragraph 58; and *Kennedy v Cordia* [2016] 1 WLR at paragraph 89.

[163] I would require to determine whether Mrs Cassells was employed to meet and greet coaches in the car park. Counsel acknowledged that there were contradictions in the available evidence on this matter. The two tour guides had spoken to the police about the matter. David Ross said, "It was normal practice for Rachel to come out and greet the passengers from the buses as she told everyone where everything was in the centre." In his subsequent statement, David Ross is recorded as saying:

"Rachel has approached the buses a lot of times to meet and greet the passengers and crew. She didn't always do it but it wasn't uncommon. I've been going there for 5 or 6 years. She's the only person to do this except Linda, who done it a couple of times last year, but she has moved on."

James Turnbull stated "She has come out before to have a bit of banter and a laugh and to greet us as we arrive." His subsequent statement contradicted this, as he said, "Rachel has never come out into the carpark or up to the bus." Mr Young acknowledged in oral submissions that Ms Muir was a witness whose credibility and reliability I would require to

consider carefully. He did not seek to place reliance on the passage of her evidence relating to the role of coach champion. That there were apparent contradictions in the evidence of those witnesses who gave evidence on oath relevant to this matter is obvious from the terms in which I have narrated their evidence, and I do not reproduce in full the submissions made to me about how I should approach those contradictions. The pursuers submitted that the evidence supported the proposition that Mrs Cassells understood that it was part of her job to meet and greet coaches in the car park. There was nothing in the second defenders' documentation prohibiting her from doing so. There was no evidence that any superior told her not to do so, and there was evidence from Ms Muir that she was permitted and encouraged to do so. Even after the accident, the initial updated risk assessments did not prohibit the practice.

[164] The pursuers submitted that both 6/30/1 and 6/30/2 were risk assessments which were in force in relation to the Trossachs branch on the day of the accident. The former referred to "welcoming coaches" and appeared to relate to the car park (as well as other areas) as potholes were identified as a hazard. The latter dealt with potential accidents in the car park area and identified "key tasks" as "manage car and coach parking; welcome coaches; cars buses and pedestrians entering and exiting". The control measures included (i) "clearly marked traffic routes" (ii) "clearly marked pedestrian routes, pedestrian crossing", (iii) "banks person at very busy times". The risk assessments did not prohibit staff access to the car parks in relation to welcoming coaches, which appeared as a task on both risk assessments. There was no staff training identified. No equipment was prescribed to minimise risks to staff. There was no evidence that a banks person was provided.

[165] The further risk assessment dated 21 April 2015 concentrated on the state of the car park, by requiring clearly marked lines and weekly checks. The generic template risk

assessment for car parks as at December 2015 was 6/4/90 & 92. The control measures included (i) clear traffic routes, (ii) clear pedestrian routes, (iii) hi viz jackets for staff, (iv) training in car park safety, and (v) bus/coach company advised to have banks person. The final relevant risk assessment was 6/4/104-106, dated 15 December 2015. It contained the statement "No member of staff ever meets and greets coaches and visitors to the site in the car park". This was the first written prohibition in those terms.

[166] As to the state of the traffic routes in the car park, police photographs taken on the day of the accident (7/2) and photos taken by the pursuers' solicitors on 11 May 2015 (6/17) showed that the markings were worn, and in particular that the pedestrian route that went through the centre of the car park was badly worn away. There was no clear differentiation between areas for vehicles and areas for pedestrians. Ms Claire Muir gave unchallenged evidence that she had obtained quotations for re-lining and had asked for funding from head office but that it never came through. She had eventually obtained some masonry paint and arranged for the lines of the coach parking area to be re-touched.

[167] The pursuers submitted that the evidence established that the second defenders breached their general common law duties to provide a safe system of work and a safe place of work. Mrs Cassells was permitted to go into a relatively dangerous area with no training or equipment. She was not protected via any traffic route directions.

[168] There was no basis in the evidence for a finding of contributory negligence.

Mrs Cassells was carrying out her duties as an employee. She had been given no training or instruction as to how to approach buses. She was not on a public footpath or road. The driver could have had no proper expectation of having right of way. Mrs Cassells's decision to approach the bus was not open to criticism. David Ross was recorded as saying that he thought that Mrs Cassells believed the bus had stopped to let off passengers before

reversing. Mr Campise's evidence was that his bus had stopped (albeit not in the parking bays for buses) and that some people had started to get off the bus. That supported the proposition that passengers might leave while the buses were not in the official coach parking places. Ms Muir's evidence was that she had seen staff speaking to drivers even while they were slowly moving in the car park. The driver's fault was of a high degree in that he omitted to check his mirrors or had only a cursory check on his mirrors despite knowing that pedestrians were in the vicinity of his bus.

[169] The driver of a large coach was responsible for an exceptionally large and dangerous vehicle. Mrs Cassells had not created a sudden emergency by running into the path of a moving vehicle. No, or very little, blame could be attributed to Mrs Cassells. Mrs Holland appeared to suggest that Mrs Cassells could have discovered that she was in a blind spot by looking at the bus's nearside mirrors. She was not in a blind spot given her position next to the front wheel. It was in any event unrealistic to suggest that a pedestrian could be faulted for not "reading" the mirrors of a vehicle which she was not trained to drive. I should have regard to the relative causative potency and blameworthiness in relation to responsibility for the damage sustained in considering contributory negligence, and it would be rare for a pedestrian to be more responsible than a motorist: *Eagle v Chambers* [2004] RTR 9.

Submission for first defender

[170] The pursuers had failed to prove that Mrs Cassells was there to be seen by Mr Alexander. It was not clear where she came from. Mr Ross' statement indicated she had fallen. There was no evidence that she was standing at the passenger door, other than the reference in Mr Turnbull's statement to her being "adjacent" to him. It was possible that she had not been visible to Mr Alexander at any time. Ms Millan placed some weight on the

difficulties that there might have been with the driver's view from the passenger door window, given the presence of Mr Turnbull, the height of Mrs Cassells relative to the door, and the need for Mr Alexander to have been looking out through that window at a particular moment. If she had fallen, as Mr Ross' statement seemed to indicate, she would not have been visible through that window. She submitted that Mr Edwards' evidence placed Mrs Cassells outside the area visible using the nearside mirrors. Ms McMillan indicated that she accepted the pursuers' position regarding causation: Mr Alexander would have been able to stop instantly had he seen Mrs Cassells. Nothing of significance turned on any of the criticisms of Mr Alexander's evidence identified by the pursuers. Mr Alexander had not been prosecuted. He could not be criticised for not using a banks person; Mrs Holland's evidence supported the proposition that if a banks person were to be used, he or she required to be trained.

[171] The first defender renewed an objection taken to reliance on 6/4/9. The pursuers' case was based on the failure of Mr Alexander to use Mr Turnbull as a banks person, and not on the failure of the first defender to provide a banks person. The risk assessment was not the subject of agreement, and no-one had spoken to its provenance. I decided to repel the objection, and considered the evidence for such value as it had. It seemed to me that it was legitimate to ask Mr Alexander about the document. If he had recognised it and acknowledged it as a risk assessment of which he was aware, that would have supported the case based on his failure to use a banks person. The terms in which the objection was taken, however, did highlight the line of defence to this branch of the case against the first defender, and I deal with that further below.

[172] I ought to make a finding of contributory negligence, and as regards the second defenders, I should find them, as Mrs Cassells' employer, as bearing the greatest share of responsibility for the accident.

Submission for second defenders

[173] The second defenders adopted the pursuers' case against the first defender. So far as the liability of the second defenders was concerned, their submissions focused in the first instance on the question of whether Mrs Cassells was carrying out a duty of her employment. I should not regard Ms Muir as a credible and reliable witness, essentially for the reasons highlighted in the second defenders' cross-examination of her. Much of her evidence could not be reconciled with that of Mr McLaren, Mr Innes, Mrs Kyle and Ms Kerr.

[174] The pursuers had not proved their case against the second defenders, if Ms Muir's evidence were rejected. There was in any event no evidence to support the proposition that the presence of clearly marked traffic routes would have made any difference to the occurrence of the accident. The route taken by buses at the site remained the same, although the marking of routes in the car park had been improved. There was no evidence that a high visibility jacket would have made any difference. It must be doubtful that it would have, given that the sun was low, and bright in the sky, as demonstrated on the photograph taken by Mr Campise.

[175] The risk assessment at 6/30/2 was a company-wide generic risk assessment. It was specifically adapted to the site in 6/30/1 which identified only the risk of slipping, tripping and falling due to potholes. There was no evidence against the second defenders in relation to any failure to provide a banks person. The need for a banks person was only mentioned at 6/30/2 in the generic company risk assessment.

[176] The correct approach to section 69 of the Enterprise and Regulatory Reform Act 2013 which amends the Health and Safety at Work etc Act 1974 was set out in *Cockerill v CXK Limited and others* [2018] EWHC 1155 (QB) at paragraphs 15 – 22. Not all breaches of the statutory regime would be negligent. In relation to the question of apportionment of blame, authoritative guidance was given by the Supreme Court in *Jackson v Murray* [2015] UKSC 5. The key aspects were causative potency and moral blameworthiness. Taking those into account, the greater share of liability should be allocated to the first defenders. There was also scope for a not insignificant finding of contributory negligence. Common sense dictated that care should be taken in approaching a bus which was evidently in the middle of carrying out a parking manoeuvre. Mrs Cassells had worked at the site for years and would have been familiar with the process which coaches went through to park.

Discussion

[177] I deal with the case against the first defender and that against the second defenders separately, except in relation to the cases made on the basis of failures respectively to use and to provide a banks person. I deal with those under a separate heading.

Case against the first defender

[178] The case against the first defender is based in part on the question of whether Mrs Cassells was there to be seen by Mr Alexander, if he was exercising reasonable care. In considering that question, the first issue is whether Mrs Cassells was upright when she was struck, or whether she had already fallen before she was struck. For the following reasons, I have concluded, on the balance of probabilities, that she was upright when she was struck.

[179] In reaching that conclusion, I have attached considerable weight to the evidence of Julia Jung. Ms Jung gave evidence on oath. She was a careful witness who thought for some time before answering the questions put to her, and who was making a real effort to be as precise as possible in conveying her recollection. Ms Jung gave evidence that she saw Mrs Cassells with at least her lower arms out. She seems to have appreciated at that point that an accident was imminent, as she covered her face and screamed. That suggests to me that what she appreciated was imminent was a collision between the bus and Mrs Cassells, not Mrs Cassells stumbling.

[180] There is evidence, which I accepted, from Ms Jung that Mrs Cassells was close to the side of the bus, and in front of the wheel of the bus. The hearsay evidence, such as it is, from Mr Turnbull, in the form of his statements to the police, places Mrs Cassells adjacent to him, that is beside the bus door, one to two seconds before the bus moved off. He also said she was 3 feet from the bus and that she moved towards the rear of the bus. Mr Edwards described her as approaching the bus from the left hand side, at the window where the tour guide was seated.

[181] It is not entirely clear from the hearsay account of David Ross's evidence whether the bus was moving when Mrs Cassells, as he is recorded as having put it, "stumbled". He has not given evidence on oath on the point, and there has been no opportunity to clarify the matter or for him to be cross-examined. The statement "I then saw Rachel stumble and she put her hands out as she fell to the ground and she kind of rolled over on her back just as the wheels were turning on the bus" is not in my view necessarily inconsistent with her falling because of the impact of the collision.

[182] I accepted PC Softley's evidence that he had examined the surface of the car park and had not found any defect there on which Mrs Cassells might have tripped or stumbled. I

did not find the evidence as to the experiments he and his colleague had carried out of any real assistance in determining liability.

[183] I placed no weight on Mrs Holland's opinion that it could be inferred from Mrs Cassells's position on the ground parallel to the bus that she had been prone rather than standing when she was struck. The wheel ran over her and then the bus reversed.

Mrs Holland had not investigated and did not obviously have expertise in relation to what effect the motion of the wheel forward and backward would have on the position of a person relative to the side of the bus.

[184] I turn then to consider, whether, on the basis that Mrs Cassells was upright when the bus started to move and immediately prior to impact, Mr Alexander should, if exercising reasonable care, have been able to observe her presence and avoid colliding with her.

[185] Figure 8 in Mrs Holland's report informed my understanding of what Mr Alexander would have been able to see using his main and wide angle mirrors and the passenger door window. It is flawed, for reasons I go on to discuss. Even as prepared by her, however, it demonstrates quite extensive areas visible by those means. It excludes a path that Mrs Holland estimated to have been taken by Mrs Cassells. That trajectory lies over a relatively limited area not visible to the driver. I am satisfied that the path estimated by Mrs Holland was not the path taken by Mrs Cassells. Figure 8 shows a route directly from the front door of the shop. If Mrs Cassells had come from that door, she could not have come directly from it, because of the barrier in front of the shop door. She would have had to go round the barrier and enter the car park from one side or other of the barrier. I am in any event satisfied on the balance of probabilities, on the evidence of Mrs Kyle and Ms Kerr, that Mrs Cassells did not come out of the front doorway of the shop. She must have come

from another exit. I do not know which exit she took, but it must have been one to the west of the hexagonal shop building.

[186] Figure 8 proceeds on the basis of ground level measurements. None of Mrs Holland's diagrams shows both the view from the mirrors when properly adjusted in order to operate according to their design specification and the view available at 1.65 metres above the ground. The view shown should have been that available at 1.7 metres above the ground, to reflect Mrs Cassells' height. Because of this, every diagram shows visibility less extensive than the view that would have been available using properly adjusted mirrors, in relation to a person of Mrs Cassells' height who remained standing. I accept Mr Seward's evidence that the bus's resting position was slightly clockwise of that depicted on Figure 8. He explained clearly why he had taken the approach he had by reference to a photograph of the bus's resting place relative to markings on the car park surface. Mrs Holland did not take issue with this approach.

[187] I cannot make a positive finding on the evidence as to what path Mrs Cassells took. I can make a positive finding that she did not take the path identified on Figure 8. The pursuers' case, however, as focused in submissions, was based on propositions about the position of Mrs Cassells immediately before impact, and her visibility in the main and wide angled mirrors at that time, rather than on the proposition that the driver should have seen her as she approached from a greater distance, or that he should have seen her through the passenger door window. Both Mr Seward and Mrs Holland gave evidence that if Mrs Cassells was level with the front nearside wheel, she would be visible at least partly in the main mirror, and the whole of her body would have been visible in the wide angle mirror. That was demonstrated on figure 6 in Mrs Holland's report. Figure 3 of her report showed that the wide angled mirror, properly adjusted, showed a view at the nearside wheel out to

about 4.5 metres from the side of the coach at ground level. According to Mr Seward's evidence, which I did not understand Mrs Holland to dispute, that view would have been available in relation to points further forward on the bus, were the view at 1.7 metres above ground level to be taken into account, although the extent of the extension forward was not quantified by either Mrs Holland or Mr Seward. That extension forward is apparent also from figure 6 – the line showing the limit of the view from each of the mirrors demonstrates that there would be some visibility of a person measuring 1.7 metres at points significantly further forward than the middle of the nearside wheel, particularly so far as the wide angled mirror is concerned. Mrs Holland's figure 6 places someone of Mrs Cassells' height outside the range of both the mirrors only at a position where she was facing the front of the bus, and with her back roughly level with the rear part of the passenger door, or further forward than that position. Anywhere to the rear of that position at least part of her would be visible in the wide angle mirror.

[188] It is not easy to ascertain on the available evidence exactly where Mrs Cassells was when the bus started to move or immediately prior to impact. She cannot have been further back than the front part of the front wheel, as the evidence indicates that the wheel ran over her when the bus was moving forwards. It follows that she must have been to some extent in front of it. In positions forward of the rear part of the passenger door she would not be visible in the main or wide angle mirrors. In positions between there and the front of the rear wheel, at least parts of her body would have been visible in the wide angled mirror. Ms Jung placed Mrs Cassells 50cm to 1 metre from the side of the bus, to the left of the bus, with the wheel of the bus turning to the left as if towards her. This places her forward of the front nearside wheel. The evidence in the form of Mr Turnbull's statements, although it is untested and I therefore accord less weight to it than to Ms Jung's account, is consistent with

this. Mrs Cassells was adjacent to him, but disappeared from his view 1-2 seconds before the bus moved. She moved towards the back of the bus. Even if Mrs Cassells had been standing by the passenger door of the bus at the point when the bus started to move – and I think it is probable she was further towards the wheel than that, looking at the evidence of Ms Jung and the accounts recorded from Mr Turnbull – as the bus moved slowly forwards she would necessarily have come into view had Mr Alexander been concentrating on the view in his nearside mirrors. It was common ground that he could have stopped the bus instantly, as he was able to do once he was made aware of the collision, given his evidence that his foot was still on the brake, and he had not touched the throttle. I cannot conclude, as the pursuers asked me to, that Mrs Cassells was standing or walking alongside the front wheel – she must have been in a position where it could run over her when the bus was moving forward – but I am satisfied on the balance of probabilities that she was there to be seen at least in the wide angled mirror at a point before the collision.

[189] I accepted the evidence of Mr Seward that Mr Alexander, when carrying a short and low speed turn to the nearside, ought to have been concentrating on his nearside mirrors.

Mrs Holland did not really disagree that he ought to have concentrated on the nearside. She did not, however, accept that he could have looked in all three mirrors at once, or that he would have had useful peripheral vision to the front of the bus so as permit concentration on the mirrors. I do not suggest that Mr Alexander could have viewed all three individual mirrors absolutely simultaneously. They were, however, all within the single nearside mirror fitting, and arranged one above the other. I understood Mr Seward's evidence to be that they could all be scanned very quickly indeed one after the other given their position. I accepted that Mr Alexander would be able to act in the way described by Mr Seward.

[190] I accepted that Mr Alexander's account to PC Softley shortly after the accident was: "The sun was coming over the weaving mill shed. It was low it was obscuring my mirror with glare I couldn't see anything in the mirror". I did not accept that Mr Alexander made this statement because he was in a state of shock and confusion and did not know what he was saying, although I accepted that he was very upset at the time. The sun could not have been striking his nearside mirrors directly, as they were facing away from the direction of the sun. What he was conveying, however, was that the glare from the sun was limiting his ability to use the mirror. That is not necessarily inconsistent with direction of the sun at the time. It may have been because the sun was in his eyes even as he sought to look in the mirror, or because glare was reflected in his mirror from another surface. The photographs, including the one taken by Mr Campise, show that other items with metallic and glass surfaces were behind the coach, not least the "other" coach. Mr Campise's photograph was taken at an early stage, before paramedics had removed Mrs Cassells to an ambulance. I considered it more likely than not that Mr Alexander's vision was in some way impeded by the effects of the sun. He should not have attempted to move the bus while that was the case. That his vision was impeded would account for his failure to observe Mrs Cassells. If I am wrong about that, and he was untruthful or inaccurate in conveying the impression that his vision in the mirror was impeded by the effects of the sun, then it must be that he did not carry out the observations that I have found that he ought to.

The case against the second defenders

[191] The first question is whether the second defenders knew or ought to have known that Mrs Cassells was in the habit of going out into the car park when in the course of her employment. I am satisfied that that question should be answered in the affirmative.

[192] The evidence of Mrs Kyle and Ms Kerr as to the second defenders' attitude to Mrs Cassells's going into the car park to greet coaches was of little assistance. Mrs Kyle had worked for the second defenders for at most 6 months before the accident, and Ms Kerr only for a matter of weeks. Neither had worked with Mrs Cassells during the busy, summer season. Neither was in a position to cast light on what practices Ms Muir, as manager, had tolerated or encouraged during the years preceding January 2015 that she had been in that position. I took a similar view in relation to Mr Innes's evidence. He too had been working at the Trossachs store for only a few weeks before the accident. He was instrumental in Mrs Cassells's move to the catering department.

[193] I treated Ms Muir's evidence with caution. I did not regard her as in all respects a truthful and reliable witness. My impression was that she was prone to exaggeration. I did not think that she exaggerated with a view to damaging deliberately the position of the defenders, but rather with a view to self-aggrandisement, and presenting herself in the best light possible, although she did not have particularly good insight as to what would and would not reflect to her credit. The LinkedIn entry was an example. She represented that she had turned two of the second defenders' sites from making a loss to making a profit year on year, and that she was the manager with the highest percentage of profit in the region. While I accepted that the content of that entry probably did derive from her having been told she had improved financial results at the sites where she worked, I regarded the entry as overstating the position so as to present Ms Muir in a favourable light.

[194] Her attempt to rationalise the absence from the risk assessment she prepared of any reference to being struck by a vehicle was unimpressive. She was initially evasive as to the circumstances in which she left the employment of the second defenders. She was evasive when asked whether she was concerned about Mrs Cassells' greeting buses. Her evasion

here, in my view, reflected a belated understanding on her part that she ought to have been concerned but had not been, rather than dishonesty or unreliability in relation to her evidence that she knew that Mrs Cassells did so; that she was happy for her to do so; and that she generally regarded Mrs Cassells' practice as a "good thing".

[195] I was not satisfied that Ms Muir created a "coach champion" role in which all staff, including catering staff, were trained. I formed the impression that she was seeking to present herself as a dynamic manager keen to motivate staff to improve sales figures, and who had acted accordingly; and perhaps also as seeking to justify in retrospect her own conduct in permitting Mrs Cassells to greet coaches in the way that she did. I accepted the evidence of Mrs Kyle and Mr McLaren that they did not receive instruction to act as coach champions. I did accept, however, that Mrs Cassells regularly did greet coaches in the way that she was trying to do on the day that she died. I accepted that Ms Muir knew that. As manager she knew about it, permitted it, and probably to some extent at least encouraged it. I accepted Ms Muir's evidence to that extent.

[196] Some aspects of Ms Muir's evidence were convincing. I was positively impressed by the passage of her evidence where she said that Mrs Cassells would have been pointing at her watch in jest and saying, "Hurry up and get in here, I need my tea." It struck me as something that seemed to be derived from a genuine memory of how she had observed Mrs Cassells behaving in the past when greeting buses arriving after normal hours. I did not have the impression that that piece of evidence was manufactured or exaggerated. It supported the contention that Ms Muir had seen Mrs Cassells greeting coaches on a number of occasions in the past. I believed Ms Muir's evidence that she had received a message from Mr McLaren in the terms that she claimed to have done, referring to Mrs Cassells doing "her usual". Although in relation to most of his evidence I regarded Mr McLaren as

credible and reliable, I formed the impression from his tone and demeanour that he was uncomfortable and defensive when speaking about this matter, and his professed lack of knowledge that Mrs Cassells was in the habit of greeting coaches. I did not regard as credible his explanation for the terms in which he had given a statement to Mr Kibaris. I rejected these parts of his evidence.

[197] I generally found it easier to accept Ms Muir's oral evidence where it was supported by other evidence.

[198] That staff were expected to welcome coaches was reflected in the risk assessment 6/30/1. That is a document the content of which she prepared before she left employment. It was adopted by Mr Innes by his placing his name on it. It was not created by Ms Muir with a view to discrediting the defenders. It is focused on risks arising from the state of the car park, such as "slips, trips and falls due to pot holes". That lends support to the proposition that the task of welcoming coaches, like some of the other tasks mentioned in the risk assessment, was a task that took place in the car park.

[199] While I would not accord much weight to the hearsay account of what David Ross said about Mrs Cassells's habits, taken alone, it is another adminicle of evidence consistent with the proposition that Mrs Cassells's normal practice was to come out to the car park and greet coaches. I add to this the impression that I formed of Mrs Cassells herself on the basis of the evidence of all the witnesses who described her qualities as an employee. She was not someone likely to flout rules.

[200] Taking all of those aspects of the evidence into account, I am satisfied on the balance of probabilities that Mrs Cassells made a habit of going out into the car park to greet coaches, and that the second defenders knew of and at least tolerated Mrs Cassells's practice.

[201] The approach to that obligation in the context of a case of common law negligence was considered by the Supreme Court in *Kennedy v Cordia (Services) LLP* in the following passages:

“89. The importance of a suitable and sufficient risk assessment was explained by the Court of Appeal in the case of *Allison v London Underground Ltd* [2008] EWCA Civ 71; [2008] ICR 719. Smith LJ observed at para 58 that insufficient judicial attention had been given to risk assessments in the years since the duty to conduct them was first introduced. She suggested that that was because judges recognised that a failure to carry out a sufficient and suitable risk assessment was never the direct cause of an injury: the inadequacy of a risk assessment could only ever be an indirect cause. Judicial decisions had tended to focus on the breach of duty which led directly to the injury. But to focus on the adequacy of the precautions actually taken without first considering the adequacy of the risk assessment was, she suggested, putting the cart before the horse. Risk assessments were meant to be an exercise by which the employer examined and evaluated all the risks entailed in his operations and took steps to remove or minimise those risks. They should, she said, be a blueprint for action. She added at para 59, cited by the Lord Ordinary in the present case, that the most logical way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment. We respectfully agree.

...

110. The context in which the common law of employer’s liability has to be applied has changed since 1909, when *Morton v William Dixon Ltd* was decided. As Smith LJ observed in *Threlfall v Kingston-upon-Hull City Council* [2010] EWCA Civ 1147; [2011] ICR 209, para 35 (quoted by the Lord Ordinary in the present case), in more recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. In many circumstances, as in those of the present case, a statutory duty to conduct such an assessment has been imposed. The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees. That is because the whole point of a risk assessment is to identify whether the particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk. The duty to carry out such an assessment is therefore, as Lord Walker of Gestingthorpe said in *Fytche v Wincanton Logistics plc*

[2004] UKHL 31; [2004] ICR 975, para 49, logically anterior to determining what precautions a reasonable employer would have taken in order to fulfil his common law duty of care.

111. It follows that the employer's duty is no longer confined to taking such precautions as are commonly taken or, as Lord Dunedin put it, such other precautions as are so obviously wanted that it would be folly in anyone to neglect to provide them. A negligent omission can result from a failure to seek out knowledge of risks which are not in themselves obvious. A less outdated formulation of the employer's common law duty of care can be found in *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17; [2011] 1 WLR 1003, para 9."

[202] There was in my view an obvious risk of injury from a person being struck by a vehicle, and in particular a coach. I accepted Ms Muir's unchallenged evidence that the car park was often very busy with vehicles and people. It was supported by Mr Edwards's description of the state of affairs at the time of the accident, which was after hours and not at the height of the tourist season. Coaches required to manoeuvre and to reverse, in order to park. The absence of this risk from Ms Muir's risk assessment (6/30/1) was a negligent omission. I did not accept that the risk was omitted because staff did not go out into the car park. As I have already said, in dealing with Ms Muir's evidence, the content of the risk assessment itself indicates knowledge on the part of the author that staff did go out into the car park. The risk identified in it is a risk arising from the state of the car park. The risk assessment was inadequate. Even leaving aside the meeting and greeting of coaches, there were plainly reasons why staff might be in the car park in the course of their duties, including feeding cows and taking out rubbish. The risk of collision with vehicles in the car park was simply not addressed at all. It should have been.

[203] The status of the risk assessment 6/30/2 at the time of the accident was the subject of some discussion in the evidence. I accepted that the "body" of it was a document in circulation in the second defenders' organisation at the time of the accident. I accepted that

it was a document that Mr Innes found on site at the Trossachs branch in a health and safety manual when he came to carry out risk assessments, which were by then overdue, after the accident. I was not satisfied that anyone in the second defenders' organisation had assessed the risks relating to the car park at the Trossachs branch in accordance with the content of 6/30/2 before Mr Innes's assessment of risk. Ms Muir's evidence was that she had been satisfied with her own risk assessment, 6/30/1. The risk assessment 6/30/2 did not refer to risk of injury to staff, but did recognise a risk of customers being run over in the car park, and a risk from collisions involving cars or coaches. One of the control measures in it is the use of a banks person at very busy times. The key tasks listed in it are

- Manage car and coach parking
- Welcome coaches
- Cars buses and pedestrians entering and exiting

[204] The content of 6/30/2 provides a further basis for saying that 6/30/1 was compiled with obvious, and negligent, omissions. A generic tool available within the second defenders' organisation identified the risk of collisions between pedestrians and coaches in the car park, and recommended the use of a banks person to manage that risk. Even with that tool available, no-one in the second defenders' organisation applied it to the Trossachs premises until Mr Innes did, after the accident. If 6/30/2 had reflected an assessment of risk carried out in relation to the Trossachs store before the accident, and had effectively sat alongside 6/30/1 before the accident as it did after Mr Innes's assessment of risk, that would not have altered my view in relation to liability. It recognised a risk of collision and specified measures to mitigate that risk, and those measures were not put into practice. It is clear from the evidence that some of the control measures in it, such as they were, were not

in effect at the time of the accident. No banks person was being used. The car park markings were in poor condition as were the marked traffic routes and parking bays.

[205] Both 6/30/1 and 6/30/2 are defective in that they do not prohibit the use of the car park as a place in which staff are to welcome coaches. They prescribe no training in relation to safety in the car park. They identify no equipment relevant to reducing the risk of injury. These are all measures which the second defenders had identified as necessary measures to mitigate risk by the time of their risk assessment in December 2015.

[206] There were further changes to the assessment of risk. The car park risk assessment 6/4/111, dated 21 April 2015 identifies needs regarding alterations to pedestrian walkways, signage, and the repainting of markings in the car park. The template risk assessments were dated December 2015 (6/4/90 and 92). I have already narrated their contents. By December 2015 the second defenders' risk assessment relating to the Trossachs branch (6/4/104-106) reflected the following. The recognised hazards were: staff carrying out tasks in the car park; putting rubbish in external bins; cleaning external toilets; and cleaning any spillages in the car park. It was recognised that employees carrying out the tasks might be harmed. Under the heading, "What are you already doing" at 6/4/106 appear four control measures:

- No member of staff ever meets and greets coaches and visitors to the site in the car park
- All staff who have to conduct any task in or around the car park must wear hi viz at all times
- Training provided to all staff on safe conduct within car park (be safe, be seen document)
- No staff to be in car park unless authorised by management

[207] The practice of greeting coaches in the car park ought to have been prohibited, as it eventually was. That was an obvious precaution, and one that was clearly a practicable

measure. I accepted evidence that Mrs Cassells was an employee who would not flout instructions. Had there been a prohibition, I am satisfied that she would have respected it, and the accident would not have occurred.

[208] I am not satisfied that the lack of provision of a high visibility vest or the poor state of the traffic route markings in the car park contributed materially to the occurrence of the accident. The effect that a high visibility vest would have had was not explored in evidence. No doubt because of the layout of the buildings in the car park, it remains the case that bus drivers have to manoeuvre in a way similar to the way that Mr Alexander did, in order to reverse into the parking spaces. In order to do so they cross marked pedestrian routes, and do not follow the routes marked for smaller vehicles. I am not satisfied that the improvement in traffic route markings that took place after the accident would have made any material difference to the occurrence of the accident.

Use/provision of a banks person

[209] Mr Alexander is criticised for his failure to use a banks person, and the second defenders are criticised for failing to provide one. I am not satisfied that either of the defenders was negligent in this respect.

[210] I have no reason to doubt Mrs Holland's evidence that the Health and Safety Executive has, in some contexts at least, advised that banks persons ought to be trained. The content and context of that guidance was not explored in evidence, and the guidance was not produced. She said in cross examination that the guidance related to "transport safety". When Mr Young asked her if that related to major construction and road works, she replied, "no". I do not know whether the authors of the guidance to which she was referring were considering anything like the sort of situation that arose in the car park at the

second defenders' premises. So far as causation is concerned, I accept that it is very likely that if a third party had been outside the bus, and able to see the nearside of it, the accident would have been avoided. I do not know where the third party would be positioned in a situation where there was to be a short movement forward to the left, and then a reverse manoeuvre in a further curve. Wherever he or she might have guided the bus from, however, if the third party cleared the area of pedestrians before the manoeuvres, it is still likely that the accident would have been avoided.

[211] Whether or not the guidance referred to by Mrs Holland was drafted with operations such as those which I am concerned in mind, it is not difficult to see why a person guiding a large vehicle might require to be trained in order to reduce the risk of injury to himself or others, or damage to property. It does not follow that reasonable care will never require the provision of a banks person. What it does mean is that where the exercise of reasonable care requires such provision, the banks person must be a trained one.

[212] Mr Alexander said he had not seen 6/4/9. He would not have understood a reference to "limited or difficult spaces" to be a reference to somewhere like the second defenders' car park. I was not prepared to regard him as negligent for having failed to ask Mr Turnbull to assist, in the absence of a clear instruction to him from his employer that he ought to have done so. The case against the first defenders was based on Mr Alexander's alleged negligence, and not on any failure by them to instruct the use of a banks person or to provide a trained banks person.

[213] The provenance of 6/4/9 remained unclear. Averments by the pursuers that "In an undated risk assessment the first defender identified the risk to members of the public when a coach was reversing", and relating to the contents of the risk assessment were met with, "The risk assessment is referred to for its terms beyond which no admission is made", and

quoad ultra, a general denial. The document formed part of a bundle which was agreed to be documentation recovered from Stirling Council under a specification of documents. It bore to relate to "Allan's Coaches". There was some suggestion that this was a different legal person from the first defender. That may be correct. The present action was originally raised against Allan's Coaches Limited. How a risk assessment by "Allan's Coaches" did or not did not bear on the operations of David W Allan, trading as Allan's Group, was not explored or clarified.

[214] So far as the second defenders were concerned, the pursuers placed some reliance on the control identified in 6/30/2, namely "Banks person at very busy times." As I have noted, I was not satisfied that 6/30/2 was a risk assessment which applied to the Trossachs premises at the time of the accident. I was satisfied that the second defenders ought to have identified the risk of injuries to pedestrians, including Mrs Cassells, from collision with a bus in the car park. I was also satisfied, for the reasons already mentioned in relation to the case against the first defender, that the use of a banks person would have avoided the accident. The question then, was whether a failure on the part of the second defenders to provide a banks person was negligent. I noted that the content of the second defenders' template risk assessments changed from "Banks person at very busy times" (6/30/2) to "Bus/coach company advised to have a Banks person" (6/4/90). Mr McLaren gave evidence that the controls mentioned in 6/4/90 had been in operation since the accident, but I heard no evidence relating specifically to whether banks persons had been used at the premises since the accident, or, if they had been, by whom they had been provided. The risk assessment relating to the Trossachs premises and dated December 2015 (6/4/104-106) did not refer to the use of a banks person. It did include, at 6/4/104, under the heading "What are you already doing", the entry "All staff aware we do not offer assistance parking any vehicles on

site.” I did not hear evidence supporting the proposition that it was the duty of the second defenders to provide a banks person. It seemed to me that the obvious and appropriate measure was the physical separation of staff from vehicles by means of the general prohibition on staff entering the car park other than when authorised to be there by management, rather than the provision of a banks person.

Contributory negligence

[215] I did not accept that Mrs Cassells in the exercise of her duty to take reasonable care for her own safety required to look in the nearside mirrors of the bus to try to see whether she could see Mr Alexander in them, in order to assess whether he could see her. I did, however, accept that she approached a bus in a car-park at a time when it was mid manoeuvre. She might have thought that it had stopped altogether, but, if exercising reasonable care for her own safety she should have taken into account that it was not stopped in a parking bay, and that buses generally required to turn in a similar way in order to reverse into the parking bays. She came very close to the bus while it was mid manoeuvre. To do so is obviously attended by a risk to safety. So far as causative potency and moral blameworthiness are concerned, Mrs Cassells did not create a sudden hazard, by running in front of the bus. She was a person on foot, vulnerable to injury by a large vehicle, and acting in the course of her employment. The driver of the heavy vehicle, with its obvious potential to cause serious harm, and the employer, must bear the greater part of the responsibility. I therefore recognise Mrs Cassells’ contribution to the loss, injury and damage sustained by the pursuers by making a finding of contributory negligence of thirty per cent.

Apportionment

[216] I regard the driver of the bus as primarily responsible for the accident and the injury to Mrs Cassells which resulted in her death. The risk of harm posed by a large vehicle in collision with a pedestrian is obviously relevant in considering causative potency. That said, I regard the second defenders as bearing a significant share of the responsibility. The risk of injury to employees in the car park was obvious, and was not mitigated by the very straightforward and practical measures which would have been open to the second defenders and which they adopted after the accident. I therefore apportion liability as set out above.