Neutral Citation Number: [2026] EWCA Civ 1095

Case No: CA-2025-001281 & CA-2025-001288

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM Central London at the Mayor's and City Court**
**His Honour Judge Hellman**
**033DC251**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/08/2026

**Before :**

**LORD JUSTICE BEAN (Vice President of the Court of Appeal, Civil Division)**
**LORD JUSTICE STUART-SMITH**
and
**LADY JUSTICE YIP**

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**Between :**

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| **TRANSPORT FOR LONDON** | **Appellant** |
| **- and -** | |
| **(1) CAIRN YOUNG**<br>**(2) EGON UPITIS** | **Respondents** |

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**Joshua Hedgman** (instructed by **DWF Law LLP**) for the **Appellant**
**Giles Mooney KC & James Byrne** (instructed by **Truth Legal and Leigh Day Solicitors**) for the **Respondents**

Hearing dates: 27 July 2026

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 18 August 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**LADY JUSTICE YIP :**

1. This appeal concerns two County Court personal injury actions arising out of cycling accidents on a section of cycle track on Farringdon Road, which forms part of 'Cycle Superhighway 6' ("CS6"), a cycle route constructed by the appellant. The accidents occurred some months apart but in similar circumstances. Each respondent was an experienced cyclist who collided with a raised kerb separating the carriageway from the cycle track because they mistook the kerb for a white line on the road and did not notice that the cycle track was raised above the height of the carriageway.

2. Given the similarities, the two claims were tried together. HHJ Hellman found the appellant liable for the accidents on the basis that it had created a reasonably foreseeable risk of injury and could have taken measures to mitigate the risk, so that the kerb no longer gave rise to a reasonably foreseeable risk of injury. He found contributory negligence of 65% in the case of Mr Upitis and 70% in the case of Mr Young.

3. The appellant challenges the finding of primary liability.

4. The appeal raises issues common to both cases including the nature and scope of the duty owed by a highway authority or road designer when it has created a feature on the highway; the obviousness of the hazard; the relevance of the risk only presenting to a negligent road user; and the extent to which the judge was entitled to find breach of duty by reference to potential mitigating measures, in particular the possibility of installing a row of wands along the kerb.

5. The appeal was transferred up to this Court on the basis that it potentially involved legal issues of wider importance and consideration of a possible tension between *Yetkin v Mahmood & London Borough of Newham* [2010] EWCA Civ 776; [2011] QB 827 and other authorities. It was also suggested that the decision of the court below could affect the general viability of stepped cycle tracks (SCTs) as a road safety feature. However, as became apparent in the course of submissions, the perception that there may be a tension between *Yetkin* and other cases was misconceived. The legal principles applicable to this case are straightforward and largely capable of agreement between the parties. Further, the decision was one made on the facts, as they specifically applied to this particular location.

6. Although we have not seen skeleton arguments or transcripts of the oral submissions relied on below, it appears that the way in which the case was presented below may have diverted attention from the essentially factual and evaluative issues which required determination.

7. The real issues at trial were:

   (1) Did the construction of the SCT, specifically the layout adopted at this particular location, give rise to a foreseeable risk of injury?

   (2) If so, were there steps which the appellant should reasonably have taken to ameliorate that risk? (Answering that question required an evaluative judgment and I shall return to the correct approach to that.)

   (3) If so, was the failure to take such steps causative of the accident?

(4) If all three questions were answered affirmatively, was the cyclist contributorily negligent?

8. Before turning to the issues arising on appeal, I set out the relevant facts, including the layout of the cycle track at this location, the circumstances of the accidents, and the judge's principal findings.

**The facts in outline**

9. The relevant stretch of CS6 included a SCT between the pavement and the carriageway. It was set below the level of the pavement but above the carriageway, so that there were kerbs on either side of the track. The purpose of the track was to achieve separation from motorised vehicles for the safety and comfort of cyclists. That separation from the carriageway was achieved through a pale stone kerb with a vertical upstand about 5 to 6 cm high. The SCT and the carriageway were each surfaced with black tarmac and had a very similar appearance. Double red (no stopping) lines were marked on the carriageway adjacent to the kerb.

10. CS6 accessed Farringdon Road via the junction with Ray Street. Each respondent had travelled southbound along Farringdon Road through the junction with Ray Street, encountering CS6 as they cleared the junction. On the approach to the junction, they had travelled along a cycle lane level with the carriageway and marked by a continuous white line (indicating a mandatory cycle lane which vehicular traffic could not enter). This became an advisory cycle lane marked by a broken white line across the junction. That was necessary to allow vehicles to cross the cycle lane to navigate the junction. The relevant part of the track then commenced. Road markings identified this as a cycle route and part of CS6. There was a gentle gradient at the start of the track allowing cyclists to enter at carriageway level. The first two kerbstones were laid so as to create a slope to accommodate the change in level. A white triangle, similar to the markings found on speed bumps, marked the start of the track. The design of the track had incorporated a bollard positioned just in front of the start of the kerb but the judge found that the bollard was missing at the time of both accidents.

11. Both respondents travelled through the junction with Ray Street in a position that took them out into the carriageway so that they did not approach the start of the SCT head-on. Mr Young was riding with his brother and said that he moved out to see his way ahead past his brother. Mr Upitis was overtaking another cyclist. There is nothing to prevent a cyclist adopting such a position. Each man was then attempting to move back to the left intending to join the cycle route just past the start. In doing so, each mistook the kerb for a continuous white line marking the edge of a mandatory cycle lane. They failed to appreciate that the cycle route at that point was a raised track rather than a delineated part of the tarmac carriageway, into which a cyclist could cross at any point.

12. In that way, the front wheel of each respondent's bicycle struck the kerb, causing the bicycle to crash and the cyclist to fall off. Each suffered injury. It is unnecessary for these purposes to consider the detail of those injuries.

13. Mr Young's accident occurred in August 2019 and Mr Upitis's in January 2020. Both occurred during hours of darkness. The layout of the road was the same at both dates.

There were some differences between the incidents, which were relevant to the findings of contributory negligence but which do not affect the issues now arising.

## The evidence at trial

14. Both respondents gave evidence. The court also had evidence about an accident involving another cyclist, Mr Hotopf, which occurred in June 2018. He suffered a similar accident, striking the kerb a little further along CS6. He reported the accident and contacted the *Evening Standard* generating some publicity. He was contacted by Mr Munk a campaigner with the London Cycling Campaign and a total of five other cyclists (including the respondents) who had sustained accidents when colliding with a SCT. Mr Hotopf's statement was before the judge and Mr Munk gave evidence. Following Mr Hotopf's accident, the appellant sent an email to Mr Munk explaining that they planned to make some changes to the SCT in Farringdon Road, involving "effectively turning the kerbs on their side". The judge found that the changes were specific to the location of Mr Hotopf's accident and were implemented before the respondents' accidents.

15. The appellant called two witnesses, Mr Coventry and Mr Atis. Mr Coventry was described by the judge as their "main witness". He was in the witness box significantly longer than Mr Atis. Mr Coventry was Head of Engineering and had previously led TfL's Road Safety Audit ("RSA") Team, in which capacity he undertook road safety audit work for the scheme to construct CS6. He explained how in auditing the scheme his team looked for areas of potential confusion on a pessimistic basis. They would make recommendations, which they considered to be proportionate for the design team's consideration. It was for the designer to give due consideration to those recommendations and decide what, if any, steps should be taken in light of the recommendations.

16. In the design phase of CS6, the RSA reports expressed concern that a stepped track might have little differentiation from the adjacent carriageway and might appear to be a consistent surface at the same level. The designer's response rejected the concerns, noting that the double red lines would mark the edge of the carriageway, 50 mm kerbs were increasingly common across London including on existing cycle superhighway routes and confusion had not been raised as an issue in relation to them. A potential point of confusion at the start of the track was acknowledged but it was proposed that triangular ramp markings, a yellow reflective wand and tapered road markings on the approach would highlight the presence of the track and change in level. The RSA report at this stage noted that the designer appeared to have given the issue due consideration. The same issue was flagged as the works progressed and neared completion. A report flagged a concern at the accident location that the stepped layout might pose a hazard to cyclists noting that cyclists might attempt to enter the stepped facility outside the commencement point, potentially failing to identify the raised kerb.

17. In cross-examination, Mr Coventry suggested that the respondents should have been able to determine the presence of the kerb, but accepted there was an inherent risk if they did not see it. He was asked whether the kerb could have had markings ("stripes") as are often seen with double yellow lines and which might highlight the depth of the kerb. However, he had not been forewarned that was an issue and could not say whether TfL could legally use such a measure.

18. Mr Coventry was also asked about wands by Counsel for Mr Upitis. He accepted they were easy to install but said they were more expensive to maintain than a kerb as they were prone to being struck by vehicles. Installing them was a straightforward job. He accepted that had there been a row of wands, the risk of an accident of this sort would have been reduced.

19. Mr Atis was the appellant's Principal Engineer. He had become involved with CS6 while it was being constructed but was not part of the design team responsible for delivery. He was not sure if the accident location had been constructed before his involvement. He provided evidence of data demonstrating high usage of the SCT. He also dealt with questions about bollards, about which it is unnecessary to say more given the judge's findings in relation to the bollard at the accident location.

20. The judge considered a report commissioned by the appellant to "evaluate key questions relating to stepped cycle tracks in London". He said that he found it of little assistance in considering whether the relevant section of track posed a reasonably foreseeable risk of injury, and did not identify any other assistance he derived from it.

**The judgment below**

21. After considering photographs and conducting a site visit during darkness, the judge made the following relevant findings of fact:

(1) The surface of the SCT appeared very similar to that of the carriageway. [4]

(2) Particularly at night, the kerb looked similar in colour to a white road marking. Its width was similar to but slightly wider than the width of a thick line on a carriageway. [5]

(3) While the appellant had negligently failed to replace the bollard within a reasonable time, the presence of the bollard would not have made any difference to where the appellants chose to join the SCT. The missing bollard was not therefore causative of the accidents. [141-142]

(4) When approaching the SCT from the direction the respondents did, it would be easy to mistake it for a continuous white line. It was reasonably foreseeable some cyclists would make that mistake. [143]

22. Having reviewed the authorities, the judge said [124]:

> "I agree with the Claimants that the construction of the SCT was a positive act by TfL. TfL was therefore under a common law duty to road users, including cyclists, not to construct it in such a way that it gave rise to a reasonably foreseeable risk of harm to them. However, TfL was required to do no more than was reasonable to avoid such a risk."

23. As was agreed by Mr Hedgman and Mr Mooney KC, that was a straightforward and correct statement.

24. Thereafter, the judge's exposition of the law was not always as clear, and parts of the judgment elided principles relating to duty with issues concerning breach. I shall return

to this in due course but note that confusion may well have been introduced in the way in which the case was argued in the court below.

25. The judge noted that the concerns identified in the RSA reports anticipated what the respondents said in their evidence about mistaking the upstand for a lane marking.

26. He found [130] that the appellant's approach at the design stage was reasonable in taking the view that the measures adopted did not give rise to a reasonably foreseeable risk of injury. He said:

> "A cyclist who noticed neither the double red line nor the triangle would be a cyclist who was simply not paying attention."

27. However, once the SCT was in operation, the appellant received a small number of reports of accidents resulting from cyclists colliding with the kerb upstand. The judge regarded Mr Hotopf's accident in June 2018 as significant. He found that the appellant impliedly accepted that it highlighted a reasonably foreseeable risk of serious injury by taking steps to address the risk, and that they were correct to do so. [131-2] Those steps included widening the kerb, which the judge described as "quite a subtle measure".

28. The judge then said [135]:

> "The question for the court is whether, in light of the widened kerb, painted double red lines and painted white triangle, the kerb upstand provided a reasonably foreseeable risk of injury at the date of the Claimants' injuries and, if so, whether there were any further steps which TfL should reasonably have taken to reduce that risk so that it was no longer reasonably foreseeable. As stated earlier, I am satisfied that (even without widening the kerb) painted double red lines and a painted triangle would have been sufficient to warn a reasonably careful cyclist not to attempt to cross from the carriageway to the SCT over the kerb. I am also satisfied that these markings would have been visible in the lighting conditions present at the time of both accidents. We are therefore concerned with whether it was reasonably foreseeable that some cyclists would fail to appreciate the risk."

29. The judge reminded himself that there was only so much that could reasonably be expected of TfL and that cyclists are expected to ride carefully and keep a lookout for potential hazards. He also noted that he was concerned only with the location of the accidents with which the litigation was concerned and was not in a position to comment on other stretches of SCT.

30. The judge later asked whether there were "any further steps which TfL could reasonably have taken to remove the reasonably foreseeable hazard posed by the kerb". He identified three possibilities:

(1) replacing the vertical upstand with a splayed kerb;

(2) painting markings on the kerb to indicate the vertical upstand;

(3) the possibility identified by Counsel for Mr Upitis of using wands to create a barrier between the SCT and carriageway.

31. He rejected option 1 on the basis that he had no evidence of the cost associated with it and a splayed kerb would make it easier for motor vehicles to stray from the carriageway onto the kerb. He declined to consider option 2 as the issue had not been raised until trial so that the appellant was not in a position to deal with it. That left option 3.

32. In relation to the use of wands, the judge found [147]:

(1) It would have been a simple and straightforward job to install a row of wands.

(2) That would have prevented cyclists from entering the SCT from the carriageway.

(3) Wands were expensive to maintain because they were prone to being struck.

(4) They were a less effective barrier than a kerb with a vertical upstand.

(5) Those concerns would not arise if a row of wands were placed on top of the kerb.

(6) There is no good reason why that should not have been done.

(7) Installing wands would have been a reasonable measure which would have removed the hazard posed by the upstand so that the upstand no longer posed a reasonably foreseeable risk of injury to cyclists.

33. The judge then concluded [148] that there was at least one reasonable step which the appellant could have taken to mitigate the hazard posed by the upstand, namely installing wands to create an obviously impassable barrier. Despite having rejected option 1, he said that replacing the kerb upstand was an alternative to wands. Another alternative was to use a painted kerb to highlight the upstand and he said "There may be other options which I have not considered."

34. In conclusion [149], he said:

> "I am satisfied that the kerb upstand caused the collision and hence the injuries sustained by both Claimants. Both collisions were reasonably foreseeable. Had TfL installed a row of wands along the kerb, or taken one of the alternative measures discussed in the preceding paragraph, neither collision would have happened. I am therefore satisfied that both Claimants were injured through the negligence of TfL."

35. He then dealt with the findings of contributory negligence saying that had the respondents been cycling with reasonable care and skill, they would have realised that the cycleway was bounded by a kerb and not a line.

**The issues on appeal**

36. The appellant raises six grounds of appeal:

(1) The decision was procedurally irregular and unjust because it depended on a finding of negligence on an unpleaded allegation.

(2) The judge materially misdirected himself on the duty of care.

(3) The judge misunderstood the evidence of Mr Coventry and/or was wrong to find breach on the available evidence.

(4) The judge failed to engage in any proper evaluative assessment in coming to his conclusion on breach of duty.

(5) Failure to take account of relevant factors in assessing the issue of breach.

(6) The standard of care was set at an impermissibly high level.

37. These grounds overlap. Reduced to their essentials, they raise the following issues:

(1) Was the judge right to hold that the appellant owed a duty of care to the respondents in relation to the risk posed by the design and construction of the SCT?

(2) If such a duty was owed, did the judge wrongly treat foreseeability of harm in the event of careless cycling as sufficient to establish breach?

(3) Was it open to the judge (both procedurally and on the evidence) to find negligence by reference to a failure to install wands?

(4) Did the judge carry out a proper evaluative assessment, taking account of all relevant factors, in reaching his decision on breach of duty?

(5) If the judge's reasoning on breach was insufficient, should this Court determine the issue itself or remit the claims for a fresh hearing?

**Legal principles**

38. Despite the extensive citation of authorities in the court below and on appeal, I consider that the law on the duty of care in relation to the creation of hazards on the highway is settled and clear.

39. When granting leave to appeal, the judge referred to a tension (actual or apparent) between *Yetkin* and "other authorities in this field", which he thought would benefit from further consideration by this Court. It is not clear which other authorities he was referring to, nor what the particular tension he had in mind was. Mr Hedgman suggested that it related to "the interplay between the principles that (1) there is no duty to warn against obvious dangers and the ordinary hazards of road use and (2) the fact that the duty, when it exists, extends to careless or negligent road users".

40. I do not consider that any real tension exists. The authorities draw a distinction between two different kinds of case. The first is a case in which the complaint is, in substance, that the highway authority failed to improve the highway, failed to warn of an ordinary feature of it, or failed to exercise a statutory power to make the road safer. The second is a case in which the authority, by a positive act, has created or materially contributed to a danger on the highway.

41. The first category is illustrated by *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. In those cases the House of Lords emphasised that road users must take the highway network as they find it. The common law does not impose on a highway authority a general duty to remove or warn against all hazards, still less to protect road users against the consequences of their own failure to take reasonable care. A statutory power to improve road safety does not, without more, generate a private law duty to exercise that power for the benefit of individual road users.

42. The second category is different. In *Gorringe* (Lord Hoffman [13]) it was expressly recognised that a public authority which acts positively may come under the same common law obligations as any other person whose conduct affects the safety of others. The point is not that the authority is liable because it has a statutory power. It is that, if it exercises its powers in a way which creates or materially contributes to a danger, ordinary principles of negligence may apply.

43. *Yetkin* is an example of that second category. There the highway authority had not merely failed to confer a benefit or improve sight lines. It had constructed a pedestrian crossing arrangement and planted shrubs which grew so as materially to obscure the pedestrian's view of oncoming traffic. The Court of Appeal held that the authority owed a duty not to create a hazard on the highway affecting the safety of road users. That duty was not confined to careful or prudent road users. It extended also to those whose own negligence contributed to the accident. As Smith LJ said [17]:

> "The common law recognised a duty on a person not to create a hazard on the highway which would affect the safety of road users. The extent of the duty would be a matter of fact and degree; the common law has only ever imposed a duty to do what was reasonable (or avoid doing what was unreasonable) in all the circumstances."

44. There is, therefore, no inconsistency between *Gorringe* and *Yetkin*. They address different situations. *Gorringe* rejects a general common law duty to improve the highway or warn of ordinary and obvious hazards arising from the highway as found. *Yetkin* confirms that, where the authority has created or materially contributed to the relevant hazard by a positive act, it may be liable if it failed to take reasonable care. The fact that a claimant was negligent does not preclude the existence of the duty, though it may bear heavily on breach, causation and contributory negligence.

45. The recent decision of Cotter J in *Braithwaite v Lewisham LBC* [2025] EWHC 782 (KB), which was placed before us, is merely a further illustration of these established principles.

46. It is important not to elide duty and breach. Even where a duty is owed because the authority has created the relevant feature, liability does not follow simply because injury was foreseeable. The duty is to take reasonable care, not to eliminate all foreseeable risk.

47. The judge was therefore required to decide whether the risk posed by the layout and features of the SCT was such that the appellant was reasonably required to take additional steps to mitigate it.

48. That called for an evaluative assessment taking into account all relevant circumstances, that is all the factors that assist in deciding whether it was reasonable to expect the respondent to take additional precautions. Such factors include the magnitude of the risk, the gravity of possible injury, the social utility of the facility, any applicable standards and guidance, the professional judgment involved in the design, the history of accidents or complaints, and the cost, practicality and potential disadvantages of further precautions. As *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 makes clear, the fact that injury is foreseeable does not mean that reasonable care requires every possible precaution. In some circumstances it is reasonable to do nothing further.

**Discussion and conclusions**

49. The judge's concise summary of the duty of care owed to the respondents at [124] which I have set out above was accordingly entirely correct, as is now agreed. The appellant plainly owed a duty of care to all road users in relation to reasonably foreseeable dangers arising out of the design and construction of the SCT at this location. The real issue was whether the appellant was in breach of that duty.

50. The judge made a clear finding that there was a foreseeable risk that some cyclists would mistake the kerb at this location for a continuous white line and suffer exactly the sort of injury that the appellants did. In fact, that risk was not only foreseeable, it was foreseen in the RSA reports at the design and construction stage. The danger was not merely the existence of the kerb. Nor was the danger simply that a cyclist might fall while attempting to cross a raised kerb. The point was that the particular configuration at this particular location was such that (on the judge's findings) the kerb upstand might easily be mistaken for a painted line with the consequence that some cyclists would attempt to cross it without appreciating that it was a raised edge. That consequence carried the risk of serious injury, potentially even fatality.

51. So understood, the judge was entitled to reject the submission that the claim was necessarily defeated because the markings were sufficient for a reasonably careful cyclist. *Yetkin* shows that the duty, where it arises from a positive act, is not owed only to the careful. The carelessness of the road user does not negate the duty. It may, and in this case did, sound in contributory negligence.

52. The seriousness of the potential harm is an important consideration but not the sole consideration. The limits of the standard of care must be recognised. Liability does not follow whenever the design of a highway feature is capable of being misunderstood by some road users. Foreseeability of harm is not to be equated with breach. The duty remains one to take reasonable care. The essential question was whether the appellant acted unreasonably in failing to take additional precautions.

53. This is where the judge's reasoning requires the closest analysis. He accepted that a reasonably careful cyclist would have understood from the double red lines and the triangular marking that the kerb was not a painted lane marking which could safely be crossed. That finding was significant. It did not preclude liability, but it meant that the case depended on the proposition that reasonable care required the appellant to take further steps to guard against a risk arising principally from inattentive or mistaken use.

54. The judge also had to weigh the wider design context. The stepped cycle track was intended to provide protection and comfort for cyclists while making efficient use of limited road space. The kerb upstand was part of that design. The evidence before the court included material suggesting that kerb upstands of this kind were recognised features of cycle infrastructure. There was also the evidence of design consideration and audit responses addressing conspicuity and the risk of confusion, which the judge found to be reasonable. Those matters were not conclusive, but they were directly relevant to the question whether the appellant fell below the standard of reasonable care.

55. The accident history was also material. A very large number of cyclists used the route. The fact that a small number of accidents occurred does not of itself establish that the risk was so substantial that further precautions were required. Equally, the absence of a long history of accidents is not conclusive, particularly where safety audits had identified the possibility of confusion. The point is that the judge had to engage with the scale of the risk in proportion to the use of the route and explain why that risk crossed the threshold requiring further mitigation. The judge's treatment of that point was limited. He merely distinguished the facts of this case from those in *Tomlinson* and other cases without engaging in proper consideration of the principle that the degree of risk is a factor to be weighed separately from the potential seriousness of outcome. It was highly relevant in considering the proportionality, and therefore reasonableness, of any response.

56. I do not accept the appellant's complaint that relying on wands as a possible remediative measure was procedurally unfair. Each respondent's pleaded case on negligence was sufficient to encompass the wands point. The appellant was on notice that it was alleged that more could have been done to make the kerb more readily distinguishable and/or to prevent cyclists attempting to enter the track at a point where they would come into contact with it. Mr Coventry was cross-examined about wands. No objection was raised about that line of questioning and Mr Hedgman did not seek to re-examine Mr Coventry to address issues arising out of the cross-examination. The judge readily appreciated that it would have been unfair to rely on painting marks on the kerb since the appellant had not had a proper opportunity to deal with that aspect. No similar point appears to have been taken in relation to wands. The judge was entitled to take account of Mr Coventry's evidence about wands.

57. However, the judge's reasoning does display confusion between issues relevant to the existence of a duty, and those relevant to breach.

58. Having clearly identified the duty and standard of care at [124], the judge should have gone on to conduct the required evaluative assessment applying that standard. However, at various parts in the judgment, he revisited the duty and in doing so misdirected himself. He repeatedly returned to the question of foreseeability of harm in the context of considering whether the respondent was in breach of duty. In identifying the standard of care (at [125] and [135]), the judge referred to steps to mitigate the risk "so that it was no longer reasonably foreseeable". He was wrong to do so. The duty owed to cyclists (including those who were less careful than others) was clear as was foreseeability of the risk of harm. But that was not sufficient in itself to require that the respondent should take the measure of installing wands which the judge had identified.

59. In my judgment, the judge moved too quickly from foreseeability of harm to the availability of a further precaution to his finding of breach. He did not sufficiently explain why the risk, assessed against the high volume of use, the design purpose of the stepped cycle track, the applicable guidance, the prior audit consideration and the consequences of a barrier solution, made it unreasonable for the respondent not to take the further step identified.

60. That conclusion is reinforced by the judge's amplified reasons which he provided after this Court had accepted transfer of the appeal, for which he had given permission. They confirm that the finding of breach depended materially on the availability of a row of wands along the kerb, so as to create a barrier which was obviously impassable to cyclists. Those reasons identify the basis of the decision, but they do not cure the difficulty. They confirm that the judge did not carry out the full evaluative assessment required before concluding that reasonable care demanded that step.

61. This is not to say that these claims could never succeed. Nor is it to say that safety audit concerns about visual confusion are immaterial. On the contrary, such concerns may be powerful evidence that a risk was foreseeable and that the design called for scrutiny. The point is narrower. The judge had to conduct the wider evaluative assessment, not merely identify a foreseeable risk and a possible way of preventing it. The factors identified above were central to that assessment, particularly the scale of the risk, the purpose of the SCT, the recognised design context, and the practical and safety consequences of installing a line of wands.

62. For those reasons, I would hold that the judge erred in his approach to breach. The proper approach is that the appellant owed a duty of reasonable care because it had created the relevant highway feature, but that duty did not require it to take action to protect cyclists against every foreseeable risk arising from error or confusion. The judge was required to decide, by reference to all the relevant circumstances, whether the risk was such that reasonable care required further mitigation. He did not conduct that evaluative exercise adequately.

63. The exercise which was required is fact-sensitive and evaluative. It depends on an assessment of the evidence as a whole, including matters of design judgment, the implications of different remedial measures, the weight to be attached to the accident history and audit material, and the particular circumstances of each accident. In the light of the way in which the case was tried and reasoned below, this Court is not in a position fairly to substitute its own assessment for that of the trial court.

## Conclusion

64. The judge was right that in constructing the SCT, the appellant owed a duty of reasonable care to all road users and that such duty was not confined to careful cyclists.

65. However, the judge did not sufficiently distinguish between foreseeability, duty and breach. The fact that some cyclists might mistakenly treat the kerb as a painted line did not of itself establish negligence. The question was whether, having regard to all the circumstances, reasonable care required the appellant to take further steps to reduce (or eliminate altogether) the risk of that error. That required proper evaluation of the risk, the design purpose of the feature, the relevant standards and guidance, the accident

history, and the practicality, effectiveness and consequences of the proposed measures. The judge's reasoning did not adequately carry out that evaluation.

66. I have considered carefully whether it would be appropriate for this Court to conduct that evaluative assessment to remake the decision on breach. However, the conclusion depends on a full assessment of the evidence and on judgments about risk, design, practicality, causation and contributory negligence which are closely interrelated. I do not consider it possible for this Court properly to make the assessment on the basis of the judge's findings of fact. All matters will therefore need to be reconsidered together at a fresh hearing.

67. I would therefore allow the appeals, set aside the findings of liability and the consequential decisions and remit both claims for a fresh hearing before a different Circuit Judge. At that hearing all issues will be at large, including contributory negligence. There will be no preserved findings of fact.

68. I would encourage the parties to consider alternative dispute resolution. This is not a case that raises novel points of law or that is likely to set a precedent for other claims. In truth, the claims are ordinary County Court personal injury claims depending on the application of established principles to the facts, and concerning this particular location only. The parties are familiar with the evidence and have seen it tested at the last trial. The approach to be taken at the fresh hearing is as outlined above.

**Lord Justice Stuart Smith:**

69. I agree.

**Lord Justice Bean (Vice President of the Court of Appeal, Civil Division):**

70. I also agree.