Neutral Citation Number: [2021] EWCA Civ 1503

Case No: B3/2021/0369

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
His Honour Judge Gargan (sitting as a Judge of the High Court)
[2021] EWHC 97 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 October 2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE NUGEE

- -

Between :

SABOOR GUL **(by his father and litigation friend GHAFOOR GUL)**	**Claimant/ Appellant**
- and -	
(1) JAMES McDONAGH **(2) MOTOR INSURERS BUREAU**	**Defendants/ Respondents**

- -
- -

Paul Rose QC and David Rivers (instructed by **Slater and Gordon LLP**) for the **Appellant**
Tim Horlock QC (instructed by **Weightmans LLP**) for the **Second Respondent**

Hearing date : 13 October 2021

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Approved Judgment

Lord Justice Nugee:

Introduction

1. On Saturday 17 October 2015 at about 1.35 pm the Appellant, Saboor Gul, then aged 13 years and 8 months, was crossing Bulwer Street, a residential road near Shepherd's Bush in West London, when he was struck by a Ford Focus car being driven by the 1st Defendant, James McDonagh, travelling at about 40 mph. He unfortunately sustained very serious injuries.

2. The question of contributory negligence was tried as a preliminary issue before HHJ Gargan, sitting as a Judge of the High Court (**"the Judge"**). In a commendably clear, careful and thorough reserved judgment handed down on 8 January 2021 at [2021] EWHC 97 (QB) (**"the Judgment"**) the Judge found that the Appellant had been contributorily negligent and that it was just and equitable to reduce his damages by 10%.

3. The Judge refused the Appellant permission to appeal but he was granted permission by Bean LJ. In the appeal the Appellant contends that the Judge should not have made any reduction. Despite the able submissions of Mr Paul Rose QC, who appeared with Mr David Rivers for the Appellant, I do not consider that the Judge made any error and I would dismiss the appeal.

Facts

4. The action was brought by the Appellant against Mr McDonagh as 1st Defendant and the Motor Insurers Bureau (**"MIB"**) as 2nd Defendant. Mr McDonagh was uninsured and the MIB was joined as having a contingent liability to satisfy any judgment against him. As a result of the accident Mr McDonagh was charged with, and pleaded guilty to, a count of causing serious injury by dangerous driving, and a further count of dangerous driving arising out of his conduct after the accident, and sentenced to a term of imprisonment. He has taken no part in the proceedings either at first instance or on appeal.

5. The MIB admitted primary liability and judgment was entered against Mr McDonagh for damages to be assessed. The trial before the Judge was limited to the question of contributory negligence.

6. There was no live evidence called before the Judge. There were a number of factual witnesses but none of them saw the accident itself, and they were not required to attend for cross-examination. There were also accident reconstruction experts instructed by the Appellant and the MIB, but they had prepared a Joint Statement in which they concluded that there were no significant areas of disagreement between them, and they were not required either.

7. On this material the Judge found the following facts, none of which Mr Rose has sought to challenge on appeal. In order to make sense of what follows, I should explain that Bulwer Street, which lies just to the north of Shepherd's Bush Green, runs roughly east-west between Caxton Road at its eastern end and Wood Street at its western end, and that about a third of the way along Bulwer Street (coming from the east) there is a junction with Aldine Street which runs north into it.

8. Mr McDonagh had an extensive criminal record, and the previous month had been given a sentence of imprisonment, suspended for 12 months, for making false representations in relation to Apple products. On the day in question he was attempting to sell Apple products to members of the public and, although he had not been convicted, the Judge found on the balance of probabilities that he was engaged in a further criminal enterprise. He was approached by police but made his way to Caxton Road where his Focus was parked, and when confronted by a police officer drove off with the door open and wheels spinning; he drove up Caxton Road, turned left (west) into Bulwer Street and hit the Claimant at (or just beyond) the junction of Bulwer Street and Aldine Street. Despite colliding with him and sustaining substantial damage to the windscreen of the Focus, he continued to drive away. There was CCTV footage which among other things showed the nature of his driving after the accident, variously described by the judge who sentenced him, and by counsel on both sides, as appalling, reckless, furious or atrocious.

9. The Appellant was walking from his father's shop to a learning centre in the Westfield Shopping Centre, a route he was very familiar with and which he had walked with his father many times. He walked up Aldine Street to its junction with Bulwer Street, where he would usually cross the road to the pavement on the north side of Bulwer Street. He was crossing the road when he was hit by the Focus. He suffered a very serious brain injury and took no part in the trial.

10. Just to the west of the junction with Aldine Street, there is a "built-out" section of the pavement on the south side of Bulwer Street. It was agreed that the Appellant was crossing from this built-out section to the northern side of Bulwer Street. Bulwer Street is a residential street with marked parking bays on each side. At the point where the Appellant crossed, the distance between the built-out section of pavement and the edge of the parking bay on the north side is 4.6m; the distance between the lines delineating the parking bays on each side is around 3.65m to 3.8m.

11. The Appellant was hit by the front offside of the Focus, the experts variously calculating that he had travelled 3.2m or 3.5m to the point of impact, and that it would have taken him about 2.1 seconds to travel to that point. He would only have needed to travel another 30 cm to have successfully cleared the path of the car. That would have taken him 0.18 seconds, and if he had increased his speed, he would, on the balance of probability, have avoided the impact.

12. The speed limit in Bulwer Street was 20 mph, but having regard to all the circumstances the Judge found that the reasonably safe speed to drive along it would have been less than that, which he put at 15 mph. The Focus was travelling at about 40 mph at the point of impact. Since there was evidence that Mr McDonagh had braked, he must have been travelling faster before that, and the Judge found that his approach speed was about 45 mph. Counsel were agreed that that meant that the Focus must have been about 42m from the Appellant when he started crossing.

13. If Mr McDonagh had been travelling at 20 mph the Appellant would have been able to cross safely before the car reached him, and equally Mr McDonagh would have been able to stop before reaching him if he had been travelling at 20 mph and braked when the Appellant left the kerb. Indeed Mr Rose calculated that if Mr McDonagh had been driving at 15 mph, the Appellant would have been able to cross 3.3 seconds before the Focus arrived at the point of impact, a calculation that was not challenged.

14. There was a parked car, a Fiat 500, in the parking bay on the south of Bulwer Street immediately to the east of the junction, and the Judge found that as a result the Appellant would not have been able to see the Focus clearly as he approached the kerb. But although there was no direct evidence the Judge found on balance that the Appellant would have looked to his right to check for traffic before setting off across the carriageway, and that he would then have had a clear view of the Focus (42m away as I have said).

15. There were headphones found at the scene and the Judge found that these were the Appellant's and that it was likely that he was wearing them. It was not suggested that that was in itself negligent, but the Judge said that when a person who is wearing headphones attempts to cross a road it becomes more important for them to take a careful look at the traffic because they cannot rely on their hearing to warn them of danger.

The Judge's findings in respect of fault

16. Those were the primary facts found by the Judge, set out with meticulous care in the Judgment between [15] and [82]. At [83] he posed as the central question whether, given his clear view of the Focus when it was about 42m away, the Appellant should have appreciated that it represented a potential danger to him as he crossed. He gave his views on that at [89] which I should cite in full, as follows (I have added numbers to the sentences):

> "89. [1] The witnesses who saw the Focus comment upon how badly and how fast it was being driven. [2] In my judgment that should have been apparent to a reasonable adult who had made an appropriate assessment of the dangers he faced in crossing the road. [3] I then have to consider whether a reasonable 13 year old with the claimant's experience should be expected to have made the same judgment. [4] I accept that many children cannot judge how fast vehicles are going or how far away they are. [5] However, at 13, I consider it likely that the claimant would have experience of crossing roads on his own, even roads where traffic might be going at 40mph. [6] It would be wholly wrong to expect the claimant to have been able to estimate the precise speed of the Focus. [7] However, in my judgment a reasonable 13 year old making a careful assessment would have realised that the Focus was being driven much faster than usual. [8] Further, although the claimant did not have far to go, I consider that a reasonable 13 year old would have considered that the Focus represented a source of potential danger and would have waited for the Focus to pass. [9] Further, even if a reasonable 13 year old had set off, I consider that they would have kept the Ford Focus under observation so that, if necessary, they could hurry across the very short distance."

17. Having considered some further submissions, the Judge reiterated his conclusions as follows:

    (1) A pedestrian is expected to keep looking and listening for traffic while crossing and if the Appellant elected to cross, given that he should have realised the Focus was approaching unusually quickly, then it was reasonable

to expect him to have kept it under observation, even taking into account his age (at [94]).

(2) A reasonably careful 13 year old would and should have waited for the Focus to pass. Even if they did set off, a reasonable 13 year old, realising that the Focus was travelling unusually quickly, would and should have kept his eye on it as he crossed (at [95]).

(3) The Appellant should have waited for the vehicle to pass. If he elected to cross he should have kept his eye on the vehicle as he did so (at [96]).

The Judge's findings in respect of causation

18. The Judge also dealt very briefly with the question of causation at [96]. He said that if the Appellant had adopted either course (that is of waiting for the vehicle to pass, or keeping his eye on the vehicle as he crossed) the accident would have been avoided, either because he would have remained on the southern pavement, or because, having started to cross, he would have been able to accelerate and reach safety as the Focus approached. These conclusions have not been challenged and seem obviously right. As Mr Rose himself submitted, the Appellant was only just short of reaching safety (by some 30 cm or 0.18 seconds) when he was struck, so it seems clear that the Judge was entirely justified in concluding that if he had noticed the Focus approaching at speed, he could have got across in time.

The Judge's findings in respect of a percentage reduction

19. At [97] the Judge turned to the remaining question, which was what, if any, reduction should be made. It is simplest to set out his reasoning in full, as follows:

> "97. In determining what reduction it is just and equitable to make on account of the claimant's contributory negligence, it is necessary to evaluate the relative degree of blameworthiness and causative effect of the acts and omissions which constitute negligence on the part of the claimant and the first defendant respectively.
>
> 98. It is generally expected that a court will impose a high burden on drivers of cars to reflect the fact that a car is potentially a dangerous weapon. The first defendant's driving in this case was particularly egregious. His speed excessive, the risk of injury obvious and his motivation the desire to avoid arrest. Insofar as the claimant could see the defendant so too the defendant could see the claimant and could and should have slowed down. It would not have taken much adjustment on the part of the defendant to allow the claimant to complete that final 30cm across the road. The causative potency of all these factors is extremely high and must weigh heavily against the first defendant.
>
> 99. Mr Rose QC argues that even if the claimant's conduct was culpable the first defendant's conduct was so extreme that it is not just and equitable to make any reduction in the claimant's compensation. Mr Horlock QC suggested a reduction of 25% in his skeleton argument.

> However, in his oral submissions he accepted that such a deduction was too great on the facts of this case and suggested that the appropriate bracket was in the region of 10% to 20%.
>
> 100. Whilst deeply sympathetic to the claimant, I do not think his culpable misjudgment can be wholly ignored. However, when balanced against the conduct of the first defendant it falls very much at the lowest end of the scale suggested by the second defendant. I consider that the just and equitable reduction in all the circumstances of this case is 10%."

20. He therefore concluded that liability should be apportioned 90:10. That was given effect to by his Order dated 8 January 2021 by which he ordered that there be judgment for the Appellant to recover 90% of any damages he might be awarded.

21. By that Order he also refused permission to appeal. His reasons for doing so are to be found in the Form N460 which he completed, which I refer to, so far as relevant, below.

Grounds of Appeal

22. Mr Rose advanced three Grounds of Appeal. In summary they were as follows:

    (1) The Judge's reasoning that the Appellant ought to have appreciated the speed of the Focus was flawed because he equated the Appellant's perception with that of a number of witnesses who saw and heard the car in very different circumstances.

    (2) The Judge was wrong to conclude that the Appellant was partly responsible for the damage he sustained, having regard to the questions of blameworthy conduct and causative potency.

    (3) The Judge was wrong to find, in the event that the Appellant bore any such responsibility, that it was just and equitable to make a reduction of 10% from the Appellant's claim.

Ground 1

23. This ground focuses on the Judgment at [89] and specifically the first two sentences (see paragraph 16 above). The complaint is that the Judge equated the view the Appellant had with the view of bystanders. They gave vivid descriptions, but the circumstances in which they saw the Focus were very different. There were three groups of such witnesses: the police officers who saw Mr McDonagh drive off at speed when confronted; a group of three young people who were on the north side of Bulwer Street facing away from the site of the accident and who saw the Focus drive past them at speed; and a Mr Jones who was sitting in a car and saw the Focus approach in his wing mirror.

24. I agree that the circumstances of all three groups of witnesses were rather different from that of the Appellant, but I do not accept that the Judge, who had recited their evidence, where they were, and what they saw (and heard) in some detail, made the mistake of equating their viewpoint with that of the Appellant. When this ground was

advanced before him at the hand-down of the judgment he refused permission, giving his reasons in the Form N460 as follows:

> "I do not accept that I equated the view of a person crossing the road (C's view) with that of the other witnesses who saw the car. In para 89 I expressly held that the speed of the car's approach should have been apparent to a reasonable adult who made an assessment of the dangers faced in crossing this road. I then considered whether a reasonable 13 year old should have appreciated the relevant danger in that situation. In any event, it is clear from my judgment that this was the issue that I was considering."

I see no reason not to accept this at face value. As the Judge said, he did not expressly equate the view of the Appellant with that of other witnesses, and I do not think there is any reason to assume that he made the mistake of thinking that because other witnesses in a different situation had commented on how badly and how fast the Focus was being driven, that meant that the Appellant should have reached the same conclusion. As I read the Judgment, his first sentence is simply identifying that Mr McDonagh's driving was bad and fast (as other witnesses had noticed) as a way of introducing the question he posed, and answered, in the second sentence, namely whether the same should have been apparent to an adult looking to his right before crossing the road. In the third sentence he then, correctly, went on to consider whether the same could be said of a reasonable 13-year old.

25. I see no flaw in this method of proceeding, and I think it is to read far too much into the first and second sentences to treat the Judge as having falsely equated the position of other witnesses with the hypothetical adult crossing the road in the second sentence. An appellate court should usually assume that a judge knows how to carry out their functions unless they have demonstrated the contrary; far from his judgment demonstrating the contrary, I am left quite unpersuaded that the Judge here made any error at all. When Mr Rose was asked if we could take into account what the Judge said in the form N460, he said that it was possible that the Judge had subconsciously taken account of the way Mr McDonagh's driving had struck the other witnesses. That does not seem to me sustainable either.

26. I would dismiss this ground of appeal.

Ground 2

27. Ground 2 is that the Judge should not have found the Appellant to share in the responsibility for the accident.

28. The starting point here is the relevant statutory provision. This is found in s. 1(1) of the Law Reform (Contributory Negligence) Act 1945 (**"the 1945 Act"**), which provides as follows:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

As Stuart-Smith LJ pointed out in argument, the terms of the section indicate that this provision was passed to alter the common law rule under which contributory negligence could defeat a claim entirely.

29. It follows from the wording of the section that there are, as Mr Tim Horlock QC, who appeared for the MIB, submitted, three questions that arise when considering whether a reduction should be made to a claimant's damages. These are as follows:

(1) Was the claimant at fault?

(2) If so, did the claimant suffer damage (partly) as a result of his fault? Or in other words, was the claimant's fault a cause of his damage?

(3) If so, to what extent is it just and equitable to reduce his damages?

30. The first two questions are in principle hard-edged or yes/no questions. Either the claimant was at fault, or he was not; either his fault was a cause of the damage he suffered, or it was not. The third question is equally clearly not a yes/no question but a question of degree.

31. For the purposes of the first question, namely whether the claimant was at fault, it is well established that "fault" does not mean a breach of a legal duty owed to someone else. It simply means that the claimant failed to take reasonable care as he should have done for his own safety or property: see *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 (***"Davies"***), *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 per Viscount Simon:

> "But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

See also *Jackson v Murray* [2015] UKSC 5 at [27] per Lord Reed, referring to the pursuer acting with a want of regard for her own interests. In the present case the conclusions of the Judge at [89] (in particular in the seventh, eighth and ninth sentences) and at [94]-[96] of the Judgment (see paragraphs 16 and 17 above) established that the Appellant was at fault in this sense.

32. The second question is one of causation. It is sufficient if the claimant's fault is one of the causes of the damage, as stated in *Davies* at 322 per Denning LJ:

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

In the present case the Judge's conclusion at [96] that if the Appellant had done either of the things he should reasonably have done (waited before crossing, or kept a

lookout as he was crossing) the accident would have been avoided (see paragraph 18 above) was sufficient to establish that his fault was one of the causes of his damage.

33. That left the third question, namely to what extent it was just and equitable to reduce his damages. By the express terms of s. 1(1) of the 1945 Act, that required the Court to have regard to his share in the responsibility for the damage. It has long been established that there are two aspects to this, namely causative potency and blameworthiness, as stated in *Davies* at 326 per Denning LJ:

> "Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be "just and equitable," having regard to the claimant's "share in the responsibility" for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness."

34. Mr Rose's argument was that on the facts of this case, the Appellant may have been guilty of a misjudgment but that was not blameworthy and therefore he did not share in the responsibility for the accident. He submitted that although there are some misjudgments which are blameworthy there are some which are not, and the Appellant's fell into the latter category. By way of illustration he referred us to *Craven v Davies* [2014] EWHC 1240 (QB) where HHJ Freedman, sitting as a Judge of the High Court, said at [11] that even if the deceased was guilty of a degree of inadvertence, it did not amount to negligence.

35. That seems to me a case where on the particular facts of the case the judge found that the deceased was not at fault within the meaning of the 1945 Act at all. Here however the Judge has found the Appellant not to have acted as a reasonable 13-year old should have done, and if Ground 1 is dismissed, that finding stands and as I have already said is sufficient to establish that the Appellant was at fault. In those circumstances it was not clear to me whether Mr Rose's submission was (i) that the Appellant did not in fact fail to take reasonable care for his own safety or (ii) that although he did fail to take reasonable care for his own safety, that was not to be characterised as blameworthy. When Mr Rose was asked which it was, he said it was both.

36. I do not myself think however that either submission is well founded. Submission (i) runs into the fact that the Judge made findings to the effect that the Appellant did fail to act as a reasonable 13 year old should have done. Once Ground 1 is dismissed there does not seem to me any other basis for disturbing that conclusion, and Mr Rose did not suggest one. On the Judge's findings, the Appellant was not guilty of mere inadvertence but of failing to appreciate, as he should have done, the speed of the Focus and the danger it posed to him, and failing to wait until it had passed.

37. As to submission (ii), that raises the question whether a person who fails to take reasonable care for their own safety can ever be said to be free from blame such that they do not have any share in the responsibility for the damage they have suffered. That I think rather doubtful, but it is not necessary to resolve that question. It is sufficient to say that on the facts he had found the Judge was entitled to conclude, as he did, that the Appellant's misjudgment was culpable (see the Judgment at [100]),

which means the same thing as blameworthy. I see no basis on which we could properly hold that that was not a conclusion open to him.

38. I would therefore dismiss Ground 2.

Ground 3

39. Ground 3 is that the Judge was wrong to conclude that it was just and equitable to reduce the Appellant's damages, Mr Rose's submission being that no reduction should have been made.

40. Mr Rose submitted that even if the Appellant did fail to take reasonable care, his failures were totally eclipsed by Mr McDonagh's conduct. The Appellant was engaging in an entirely commonplace, everyday activity; on the Judge's findings he did look to his right before he crossed, his only failure being to misjudge the speed of the Focus; and he got it wrong by a fraction of a second. That bore no comparison with the conduct of Mr McDonagh who was driving furiously at three times the safe speed, in a reckless manner, and with complete disregard for the safety of other road users such as pedestrians; and who was responsible not simply for the fact of the accident but for the gravity of it. There was, he submitted, such a massive imbalance between their respective conduct that it was not just and equitable to make any reduction at all.

41. One of the questions raised by this submission is whether it is open to a Court that has found a claimant to have suffered damage partly as a result of his own fault nevertheless to make no reduction to his damages. When that question was put to Mr Horlock he submitted that the answer was No: if a Court has found the claimant to be at fault, and that fault to be a cause of his damage, it *is* just and equitable to make a deduction. But he further submitted that we do not need to answer the question, as the relevant question is whether the Judge's decision to make a 10% reduction can be impugned.

42. The limited circumstances in which an appellate court can disturb a trial judge's decision under the 1945 Act as to the degree of reduction that is just and equitable have been authoritatively stated by the Supreme Court in *Jackson v Murray* [2015] UKSC 5. Lord Reed, giving the decision of the majority, referred at [27] to it not being possible for the Court to arrive at an apportionment which is demonstrably correct, not least because the blameworthiness of the pursuer and defender are incommensurable; at [28] to apportionment being inevitably a somewhat rough and ready exercise, to different judges legitimately taking different views of what would be just and equitable in different circumstances, and to the principle that such differing views should be respected within the limits of reasonable disagreement; at [35] to it being, in the absence of an identifiable error, only a difference of view which exceeds the ambit of reasonable disagreement that warrants the conclusion that the Court below has gone wrong; and at [38] to the need for the appellate court to be satisfied that the apportionment made by the Court below was outside the range of reasonable determinations.

43. The question for us therefore is whether the Judge's decision that it was just and equitable that the Appellant's damages be reduced by 10% exceeded the ambit of reasonable disagreement and was outside the range of reasonable determinations, it

not being suggested that the Judge made any identifiable error. I do not think we can properly reach this conclusion. I have set out the Judge's reasoning at [97]-[100] of the Judgment (see paragraph 19 above). As can be seen, he was fully alive to the egregious conduct of Mr McDonagh, and regarded it, rightly, as weighing heavily against him, but he also concluded that the Appellant's culpable misjudgment could not be wholly ignored, although he selected a figure of 10% at the lower end of the suggested bracket. It was common ground that 10% was an unusually low reduction, but I see no basis for saying that it was not open to the Judge to adopt it. It is impossible to say that it is outside the range of reasonable determinations.

44. That is enough to deal with Ground 3, and it is unnecessary to address the question referred to in paragraph 41 above as to whether a judge, having found the claimant's damage to be partly the result of his own fault, could properly consider it just and equitable nevertheless to make no reduction. I prefer in those circumstances not to say anything about that question; it is enough to say that whether or not the Judge could have made a nil reduction, he did not err in making a 10% reduction.

45. I should add that in his written submissions Mr Rose also submitted that the 10% reduction was so modest that it cast doubt on whether any reduction should have been made at all. The point was not strenuously pressed by him in oral submissions, and I accept Mr Horlock's submission that however unusual it might be, there is nothing either in the 1945 Act nor in any authority we were shown which suggests that a 10% deduction is not permissible. It would indeed seem odd if the open-ended discretion conferred by the 1945 Act were to be regarded as constrained in this way.

46. In those circumstances I would dismiss Ground 3 as well.

Conclusion

47. I would dismiss the appeal.

Lord Justice Stuart-Smith:

48. I agree.

Lord Justice Underhill, Vice-President of the Court of Appeal (Civil Division):

49. I also agree.