MARK SHARP -v- AVIVA INSURANCE

JUDGMENT

Introduction

1. The claimant, Mark Sharp, claims damages for personal injury, expenses and losses, following a road traffic accident in Birkenhead on 23rd February 2015, which he alleges was caused by the negligent driving of Philip Hamilton, who was insured by the defendant, Aviva Insurance.

2. The claim for damages for personal injury is a modest one on any view arising from soft tissue injuries to his left knee and right wrist.

3. In addition, there is a very substantial claim for special damages, the single largest item being for the cost of the credit hire of what the claimant asserts was a replacement motorcycle. The sum claimed for credit hire charges originally and until closing submissions was £58,209.84 together with the pre-accident value of his motorcycle in the sum of £6,150, miscellaneous expenses of £50, recovery and storage charges of £874.40 and loss of earnings of £690.21.

4. Liability for the road traffic accident is denied. There is no counterclaim.

5. The defendant has levelled against the claimant a wide range of objections and asserted early on the first hearing day of this case that the claimant has been fundamentally dishonest or, in the alternative, that his evidence and disclosure leave so much to be desired by way of clarity that he has not proved his claim.

6. The original estimated length of this multi-track trial was five hours and the case was listed for hearing on Friday 18th August 2017. However, it became clear by the lunchtime adjournment on that day that the case would not be completed within the allotted time. By the end of court sitting hours on that day the claimant had only just completed his evidence. A second hearing day was secured having regard to the commitments of counsel and myself on Wednesday 11th October 2017. I gave directions as to the filing of skeleton arguments and of any authorities to be relied on. I subsequently made an order of my own motion for the adducing of further evidence. Neither party has objected to that. A small supplemental bundle of documents was filed for the second hearing day, which was then was fully taken up with the balance of the evidence and oral submissions. This is a reserved judgment.

7. During the hearing I heard oral evidence from the claimant, Phillip Hamilton and Gavin Baden Wall.

8. The parties have had the advantage of able representation by experienced counsel. The claimant was represented by Mr Andrew Hogan of Counsel and the defendant by Mr William Poole of Counsel.

9. Given the nature of the defences raised, the reliability of the claimant is plainly an issue for me to determine. In the circumstances, I have written this judgment to deal with matters in the following order:

    9.1. The road traffic accident and the injuries alleged;

        9.1.1. Undisputed facts;

9.1.2. The claimant's evidence;

9.1.3. The defendant's evidence;

9.2. The evidence in relation to the quantum claim in relation to credit hire and other alleged losses;

9.3. The parties' submissions as to the relevant law and the facts to be found;

9.4. Observations about the manner in which the claimant gave his evidence, discussion and findings as regards the claimant's reliability;

9.5. Discussion and finding and decisions on liability and quantum issues.

The road traffic accident and the injuries alleged

10. Undisputed facts

10.1. At the date of the accident the claimant was the owner of a Suzuki Bandit 1255 m/c, registration number PK64 LGJ ["the Suzuki"]. This had a 1250 cc engine.

10.2. Mr Phillip Hamilton was the driver of a Nissan Qashqai m/c ["the Nissan"], registration number PK64 UMJ. He was insured by the defendant.

10.3. A collision occurred between these vehicles at about 15.40 on 23rd February 2015 on Canning Street, Birkenhead at the junction with Lord Street. The trial bundles contain a Google Map image of the area as well as a comparable satellite aerial view image and various photographs taken along Canning Street showing the view that the claimant and Mr Hamilton would have had as they approached the area where the collision between their respective vehicles occurred.

10.4. Canning Street is a long straight road along which traffic can pass along travelling north and south away from and towards the centre of Birkenhead. So far as the claimant and Mr Hamilton are concerned, both were travelling south along Cannon Street in the direction of the centre of Birkenhead. There are traffic lights at the junction with Shore Road, which is beyond the junction with Lord Street. Lord Street is a minor road, which forms a "T" junction with Canning Street and was to the right of the claimant and Mr Hamilton.

10.5. A collision occurred between the vehicles at the junction of Canning Street with Lord Street. Put neutrally, Mr Hamilton was in the process of turning his Nissan right from Canning Street into Lord Street and the claimant was riding his Suzuki motorcycle past the line of traffic on Canning Street travelling in the same direction as Mr Hamilton. The Suzuki motorcycle and Nissan collided on Canning Street at the junction with Lord Street.

10.6. At the time of the collision there was a line of traffic on the southbound carriageway of Canning Street; there is an issue as to whether it was stationary or moving. There was rather less traffic travelling north away from Birkenhead in the opposite direction. The weather as dry and sunny. Visibility was good. The road surface was dry. Neither party contends that the surface of the carriage way was a factor in the collision.

10.7. After the collision the claimant was taken by ambulance to the accident and emergency department of Arrowe Park Hospital where an x-ray was performed. No bony injury was detected.

11. <u>The claimant's evidence as regards the road traffic accident and the injuries alleged:</u>

11.1. The evidence adduced is from the claimant himself and Dr Brittain-Dissont.

11.2. The claimant said that his statements dated 31st March 2016 and 24th May 2016 were true.

11.3. He said he had been riding motorcycles for 11 to 12 years. He was riding his Suzuki motorcycle along Canning Street intending to travel to New Ferry. He was in no particular hurry. There was a queue of stationary traffic ahead of him in his lane stretching back from traffic lights at Shore Road beyond the junction with Lord Street. He therefore decided to filter past this line of traffic by riding along the offside of those vehicles in a position just to the right of the broken white line that divided the road. There were no oncoming

vehicles at that time. He said that he had just checked behind him to ensure that there were no other motorcycles also filtering past as he was when, as he turned back to look forwards again and came to the rear offside tyre of the Nissan, he saw the right turning indicator of that vehicle flashing and it suddenly began to turn right across his path. If he had seen the indicator earlier he would have stopped. He turned right too in an attempt to avoid colliding with it but was unable to avoid a collision and fell from his motorcycle. He hurt his left knee and right wrist as a result. He told Dr Brittain-Dissont that he was absent from his employment as a community care worker for three weeks although in evidence he explained that a couple of days of this period was in fact a pre-booked holiday period.

11.4. Under cross-examination he initially said that at the time he made the statement he believed that Mr Hamilton was completely responsible for the accident but then said that he accepted some responsibility for the accident. He said that he was filtering past the other vehicles on his motorcycle and declined initially to adopt the suggestion put to him by Mr Poole that he was in fact overtaking them but then he did say that he was overtaking them at Lord Street. He said that the Nissan was stationary in a line of other stationary vehicles. He said that he was not travelling past the other vehicles at 30 mph. There was a little gap between the vehicles. He said that he thought now that he was at fault for overtaking at the junction with Lord Street, having had rule 167 of the Highway Code put to him which provides:

"DO NOT overtake where you might come into conflict with other road users. For example approaching or at a road junction on either side of the road…"

11.5. On 2nd March 2015 about one week after the collision the claimant attended to see his general practitioner, who recorded that his right wrist was still painful but settling and his left knee was still painful.

11.6. On 25th April 2015, some two months after the collision, the claimant was examined by Dr Brittain-Dissont for the purposes of that medical practitioner writing a medico-legal report for this claim. The claimant told Dr Brittain-Dissont him that he had not been injured in a road traffic accident in the three years prior to the index accident. He also told Dr Brittain-Dissont that his left knee pain had been immediate and severe and remained so for three weeks with mild swelling. By the date of his appointment with Dr Brittain-Dissont, his knee pain was worse when going up and down stairs, in cold weather and during longer periods of standing. His right wrist pain was severe for one week but, by the date of his appointment, he had moderate pain to the dorsal of the right wrist aggravated by gripping and lifting.

11.7. On examination Dr Brittain-Dissont found tenderness over the medial collateral ligament of the left knee with mild pain on valgus stress and mild swelling over the ulnar styloid with pain on flexion, extension and on ulnar and radial deviation. He diagnosed that the claimant had sustained soft tissue injuries to his right wrist with persistent pain over the ulnar aspect and medial lateral ligament

sprain to his left knee. He opined that the claimant would enjoy a full recovery from both injuries six months after the injury without any permanent disability. He also stated that the claimant's three weeks of absence from work was reasonable.

11.8. The claimant was asked in cross-examination why he had not informed Dr Brittan-Dissont about an occasion when he was seen by an out of hours doctor associated with his general practitioner's Liscard Group Practice in Liscard on 6th November 2014 following what is described in the general practitioner records in what appears to be a pro forma wording as "Motor vehicle traffic accidents (MTVA)". It is recorded that he had a bruised left arm and was referred to accident and emergency on 7th November 2014. No other records, whether accident & emergency department records or otherwise, have been adduced in evidence. In response the claimant said that he thought he had come off his bike in wet conditions; he could not recall whether he was riding a motorcycle or bicycle at the time. If he had been on his pushbike, as he called it, he said that he would not classify that as a road traffic accident. Furthermore, no other vehicle was involved. That was another reason why he did not classify this event as a road traffic accident. He had probably been travelling at no more than 30mph in the early evening. He had probably gone to a "walk in" clinic. He said he could not remember if he had been to the accident and emergency department. The claimant denied that he had sought to mislead Dr Brittain-Dissont when he told him that that he had not been injured in a road traffic accident in the three years prior to the index accident.

11.9. The claimant was also asked in cross-examination about the duration of his injuries. He said that he was not sent the exhibits to his statement dated 24th May 2016, which included Dr Brittain-Dissont's report, when he signed the statement of truth. In that statement he stated that he had seen a copy of the report and agreed with the contents and that he had made a full recovery from his injuries in line with the prognosis within that report. Under cross-examination the claimant stated that he did not have the exhibits when he signed the statement of truth. He said that his injuries had resolved in a couple of months albeit that he did have symptoms when he saw Dr Brittain-Dissont. However, they resolved in a period shorter than six months and, indeed, shortly after having been seen by him with no more pain. He maintained that everything he had said was true to the best of his abilities.

11.10. I was informed by Mr Hogan during the hearing on 18th August 2017 that, when sending a draft witness statement to be signed, the practice of his instructing solicitors, who act for the claimant, was to send all the exhibits as well. This information has been reinforced by a letter dated 4th September 2017 from Neil Turner of Armstrongs Solicitors, which acts for the claimant that this was his common practice and that he believes he would have noticed before the statement was sent if that had not been done in this case. He also states that the claimant never raised any issue as to the absence of any exhibits and that the claimant had anyway seen all of the exhibits, which would have included Dr Brittain-Dissont's report prior to signing his statement. The implication is that the claimant was not correct when he said that he was not sent the exhibits to his draft statement when he was asked to sign it.

12. The defendant's evidence as regards the road traffic accident:

12.1. Mr Hamilton as the Nissan driver gave evidence on behalf of the defendant.

12.2. He said that his statement dated 26th May 2017 was true.

12.3. In his statement he said that he was travelling back to his office in Birkenhead in the Nissan along Canning Street and was intending to turn right on to Lord Street. In cross-examination he explained that he could have driven along Canning Street to his office but that, when the traffic was backed up from the traffic lights at Shore Road, he would turn right at Lord Street and then turn left on to Bridge Street which runs parallel with Canning Street and this would be a quicker route for him back to his office. On 23rd February 2015 he decided to adopt this route back to his office because of the traffic conditions on Canning Street leading up to the junction with Shore Road. He accepted that Canning Street was a long straight road up to the junction with Lord Street.

12.4. He said that he slowed down considerably on his approach to Lord Street but was not stationary, indicated his intention to turn right, checked his mirrors and looked over his right shoulder to ensure the road was clear and then began his manoeuvre to turn right into Lord Street and was 75% of his way through that manoeuvre when the claimant's motorcycle rode into his front quarter panel of his car. He said that at the point of the collision, which he said was still on

Canning Street and not into Lord Street, the motorcycle was on the opposite side of the road as indicated in a sketch plan which he had drawn and exhibited to his statement for the purposes of illustrating what he was saying. He contended that the claimant was responsible for the collision because he overtook on the wrong side of the road despite Mr Hamilton having indicated and clearly showed his intention to turn right and begun to do so.

12.5. In cross-examination Mr Hamilton accepted that this was an unexpected occurrence which had happened to him out of the blue some two years and three months prior to his signing his short witness statement, which had been taken over the telephone and which had been sent to him for him to sign. He accepted that his statement contained no information about the weather or road conditions although he did not dispute that it had been dry and sunny, that traffic going along Canning Street in the direction in which he was travelling was heavy and that traffic coming the other direction was less heavy. He accepted that, but for the traffic behind him, he would have been able to see several hundred yards because Canning Street was a long straight road. He said that he had not made the decision to turn right into Lord Street at the last moment and that this was a route to his office that he took regularly. He said that he put his indicator on a reasonable time before the junction, a sufficient time, he said, to give warning of his intention to turn right. He was asked about rules 151, 160, 170, 179 and 180 of the Highway Code, the first three and last of which require a motorist to be aware of and take care for motorcyclists who may be passing on either side, filtering through traffic and at junctions, and the last two of which provide for the need to watch out for motorcyclists and as to the

sequence of preparatory steps to be adopted before turning. The defendant accepted that he did not say in his statement that he had checked his mirrors before indicating but did maintain that he had checked his mirror and looked over his shoulder after indicating and before starting his right turn. He said that he was a careful driver and that his statement was incorrect as to the order in which he would have prepared to turn right which would have been to check his mirrors, looked over his shoulder, indicated and only then moved.

12.6. Mr Hamilton accepted that he did not see or hear the motorcycle before the impact; he did not have his radio on. He said that if he had seen the motorcycle he would not have turned right. He was unable to explain why he had not seen the motorcycle before the collision. He said that he stopped immediately. He accepted that his recollection of where the impact occurred as depicted in his sketch plan, this suggested that the point of impact was at towards the leading edge of the front offside wing of his car, was likely to be incorrect given that the engineer from Vehicle Assessment Services Ltd who examined his car after the accident on 9th March 2015 noted damage at the junction of the driver's door with the front off side wing and at two further points along that wing the foremost of those being close to the headlamp unit. Mr Hamilton also accepted Mr Hogan's suggestion that it was likely that the point of first impact was at the junction of the driver's door with the front wing and thereafter further damage along the wing because the vehicles were both travelling forwards. He was asked whether he accepted whether he must have been mistaken as to his observations and that he had failed to see the motorcycle but he did not accept this.

The evidence in relation to the quantum claim in relation to credit hire and other alleged losses

13. In relation to the claim for credit hire and the issues raised by the defendant it is necessary to consider the evidence as regards the acquisition and history of use of the Suzuki motorcycle and the evidence concerning certain payments made by the claimant after the date of the accident.

14. The claimant said that he had owned an Aprilia motorcycle prior to the Suzuki and that he had given the Aprilia in part-exchange for the purchase of the Suzuki. Although the claimant himself was unclear about the dates an email dated 13 September 2017 received from Niall McVean of MCE Insurance reveal that the claimant was insured on a vehicle registered number DK11 CSZ, which was the Aprilia with MCE Insurance from 19th March 2014 until 14th January 2015 when it was changed to the vehicle registered number PK64 LGJ; this was the Suzuki.

15. The claimant's evidence about the cost of the purchase of the Suzuki and how it was funded was not straightforward. In his statement dated 24th May 2016 he said that he had traded in his Aprilia by way of part exchange and that his parents had loaned him the sum of £7,000; in reality he said it was his father who loaned him the monies out of his pension. However, in his oral evidence he stated that the Aprilia at part-exchange was worth about £2,500 against the purchase price of the Suzuki. He went on to say that he thought his parents had paid the sum

of £5,000 for the Suzuki in addition to the part exchange of the Aprilia. This might suggest that the total value of the Suzuki was £7,500. He had first insured that vehicle with MCE Insurance on 14th January 2015 and, as the Motorcycle Policy Schedule of that date shows the estimated value of the bike was given as £5,600. This appears at first blush to be at odds with the claimant's own evidence that he was upset with the valuation of £6,500 placed on his bike by Vehicle Assessment Services in the engineer's report dated 10th March 2015. However, he said in oral evidence that he had told MCE Insurance on 14th January 2015 that his parents had paid £5,600 for the Suzuki and suggested that that was the reason that that sum appeared in the Motorcycle Policy Schedule but then said that he didn't know why he had told MCE Insurance that the value of the Suzuki was £5,600.

16. The Suzuki was recovered after the accident and stored by Wallasey Motorcycles for a period of about one month from 23rd February to 22nd March 2015. The claimant has received invoices both dated 29th October 2015 for recovery charges in the sum of £234 inclusive of VAT and for storage charges in the sum of £638 inclusive of VAT. In his statement dated 31st March 2016 the claimant said that the charges were agreed orally. Under cross-examination by Mr Poole the claimant said that he did not have any conversation with Mike from Wallasey Motors about paying for storage and recovery.

17. During the period of storage the Suzuki was examined by an engineer to determine whether it was capable of repair and, if so, at what cost. The extent of the damage to the Suzuki is set out in the report of Vehicle Assessment Services Ltd dated 10th March 2015 following an examination on 3rd March 2015. The extent of the damage required

replacement of the following by way of new parts: handlebars, front axle, engine covers, rider footrests, RH pillion footrest, RH fork tube, radiator and fan, mirrors, fairings, screen, fairing brace, levers, exhaust, mainframe, swinging arm, front wheel, front mudguard, badges, fixing bolts and bearings. The cost of these was said to be £8,300 including VAT. The estimated pre-accident value of the bike was £6,500. The salvage value was £750. The conclusion of the engineer was that it was uneconomical to repair the Suzuki.

18. At some stage, although the date is unclear but was probably during March 2015, the claimant said he decided to sell the Suzuki to Wallasey Motors and received from them the agreed sum of £750 without any receipt for the sale of his bike. In his statement dated 31st March 2016 he said that he was paid in cash but under cross-examination by Mr Poole he said that he had been paid by way of a cheque. He also said that the monies had landed in his bank account after a conversation with Mike of Wallasey Motors. He denied that the monies may have been set off against the recovery and storage charges. However, no such sum was ever paid into the claimant's HSBC account during the period from the accident on 23rd February to 2nd November 2015, according to the disclosed bank statements. The claimant said that the HSBC account was his only bank account.

19. The claim was notified via the Claim Notification Form ["CNF"] on 10th March 2016, which was the also the date of the Vehicle Assessment Services report on the Suzuki At the date of notification the claimant had not commenced his credit hire. There is no evidence that either the claimant or his solicitors knew at that date that he would embark on a credit hire agreement for a replacement vehicle. The information

included in the CNF was that the claimant had not been provided with an alternative vehicle, that the defendant's insurer was not required to provide the claimant with an alternative vehicle and that the claimant was currently too injured to hire a replacement vehicle. Four days later on 14th March 2016, and presumably after receipt of the engineer's report dated 10th March 2016, the claimant entered into the first credit hire agreement with McAMS.

20. The claimant's solicitors asked the defendant for payment for the pre-accident value of the claimant's motorcycle in letters dated on 15th April 2015, 12th May 2015 and 4th June 2015. The defendant insurance company, which is a professional litigator, never responded to these letters or sought clarification whether the position as regards hire of a vehicle had altered since the CNF. Following receipt of the letter dated 11th October 2015, which included a copy of one of the credit hire rental agreements, the defendant paid the pre-accident value of the Suzuki on 5th November 2015 without prejudice to the issue of liability.

21. The claimant must have been informed about the conclusion of the engineer's report dated 10th March 2015 shortly afterwards because on 14th March 2015 he rented a replacement bike on credit hire. The claimant's evidence was that he needed a replacement motorcycle for domestic purposes and for getting to work. He said that he was not in a financial position himself to pay in advance for hire. He produced bank statements which showed that he had very limited financial means. Mr Poole has challenged the adequacy of his disclosure in this regard, pointing to paragraph 3 of the Order dated 31st October 2016 made by District Judge Wright, which required disclosure by the claimant of the use of credit cards, overdrafts and loans. The claimant's oral evidence

was that he was so far in debt with a TSB credit card at one stage that with the assistance of the Citizens Advice Bureau he moved all his debt to Cabot Financial Services and began to pay off his debt initially at the rate of £1 per week but later at the rate of £20. He said that he therefore had no option but to take a bike on credit hire.

22. The claimant was comprehensively insured. He said that he contacted his own insurers and they asked him whether he wanted to make a claim. They advised him that he had no hire cover for a replacement motorcycle on his policy. He said that he did not present the engineer's report dated 10th March 2015 to his own insurers because he wasn't aware of that possibility. He said that in his own mind the accident was not at all his fault. He did not recall a conscious decision not to claim on his own insurance policy. He thought that he may have had a protected no claims discount.

23. On 14th March 2015 he entered into the first of three identical credit hire agreements with McAMS for a Kawasaki Z1000 motorcycle. In his statement dated 24th May 2016 the claimant said that he was taken through the terms and conditions including the notice of right to cancel rental agreements by representatives of McAMS. He did not specifically refer to the fact that the rental agreements provide for an option for taking out insurance and that he had answered the insurance proposal sections of each agreement. He said that he signed the first agreement when the first motorcycle was delivered to him probably at home. The first agreement ran from 14th March to 7th June 2015 and related to a motorcycle registered number NEW104, the second ran from 7th June to 2nd September 2015 and related to a motorcycle registered number NEW141 and the third ran from 2nd September to 24th November 2015

and related to a motorcycle registered number NEW237. In each case the daily rate was £165 excluding VAT and there were additional charges including delivery and collision damage waiver and insurance. The individual totals for each of the three agreements were £19,553.04, £19,777.68 and £18,879.12 and the total of these was the sum claimed in the updated schedule of £58,209.84.

24. During the hearing on 18th August Mr Poole challenged whether the claimant had any need to hire a replacement motorcycle at all. Mr Poole suggested to the claimant that the MCE Motorcycle Policy Schedule for policy number MC_UK_2011154447 operative from 14th January to 18th June 2015, and so operative for a period after the accident on 23rd February 2015, showed that he was also insured for the Aprilia at the same time. Mr Poole referred to the box at the bottom of the Schedule entitled "Special Terms, Endorsements, Conditions, Excesses and Restrictions In addition to those specified in the policy booklet" in which appeared reference to the DK11 CSZ, which is the Aprilia, and a cost, presumably an insurance cost, of £575. Mr Poole suggested that this demonstrated that the claimant was insured for two vehicles at the same time after the accident and that he therefore had no need to hire a replacement vehicle at all and could, indeed should, have used the Aprilia instead of hiring the Kawasaki motorcycle.

25. The claimant had stated in his responses to the Request for Further Information made pursuant to CPR Part 18 and in his statement dated 24th May 2016 that he owned the Aprilia motorcycle prior to the Suzuki and that he had traded the Aprilia in by way of part exchange when he purchased Suzuki. He has never suggested that he owned the Aprilia and the Suzuki at the same time and there is no evidence that he in fact did

so. When Mr Poole suggested to the claimant that he was being untruthful because the Motor Policy Schedule showed he was still insured in relation to the Aprilia I intervened and asked Mr Poole whether he had express instructions to make that allegation and whether he was clear that there was only one interpretation to be placed on the Motorcycle Policy Schedule. After some discussion I invited Mr Poole to take further instructions from his insurer principals whom I suggested might have access to authoritative information before he asked pursued the question further. Having taken further instructions he told me that he was not able to pursue the question.

26. It is clear now in the light of the email from Niall McVean of MCE Insurance dated 13th September 2017 that there could never have been any proper evidential basis for the suggestion that the claimant was being untruthful in denying that he was insured in relation to the Aprilia at and after the date of the collision.

27. Following the accident it is clear that the claimant made a number of payments to businesses concerned with motorcycles. In particular:

    27.1. On 10th April 2015 he paid the sum of £45 to R and M motorcycles;

    27.2. On 11th June 2015 he paid the sum of £250 to Wallasey motorcycles;

    27.3. On 30th June he paid the sum of £280 to Wallasey motorcycles;

27.4. On 7th July 2015 he paid the sum of £179.99 to Marriott Motor CYC;

27.5. On 19th November 2015 he paid the sum of £100 to Marriott Motorcycle CYC.

28. The total of these payments was £854.99.

29. The defendant has suggested that the ability of the claimant to pay these monies demonstrates that he had the financial means to embark on the cost of repairing the Suzuki or purchasing a new bike. The unchallenged evidence in the Vehicle Assessment Services report dated 10th March 2015 is that the cost of repairing the Suzuki would have been £8,300 including VAT. This is a sum approaching 10 times the aggregate of the payments referred to at paragraph 27 above. Again, when the claimant did purchase a replacement motorcycle registered number PK09 YHR in November 2015 it cost him £4,500; that is over five times the aggregate of those payments.

30. In June 2016 at a time when the claimant said that he had sold the Suzuki motorcycle to Wallasey Motorcycles and was no longer the owner of that motorcycle he made two payments to MCE Insurance. On 11th June 2015 he paid MCE Insurance the sum of £91.06 and on 19th June 2015 the sum of £496.03. In her statement dated 28th September 2017 Amy Shilton, a Governance and Resolution Manager for MCE Insurance said that on 19th June 2015 the policy on which the Suzuki had been insured at the date of the accident and which had never been cancelled after the accident was renewed for the Suzuki until 25th November 2015.

31. On 18th August 2017, the first day of the hearing in this case, and even before he had confirmation from Amy Shilton, Mr Poole suggested to the claimant that he had not sold the Suzuki to Wallasey motorcycles as he alleged he had done but had retained it and had done work on it himself to repair it and, when he had to, also recruited expertise from professional motorcycle businesses to assist him for which he had to pay, hence the various payments totalling £854.99, and that was also why the claimant had renewed his insurance with MCE in relation to the Suzuki on 19th June 2015. The claimant denied orally, as he had done in his witness statement dated 31st March 2016, that he had retained the Suzuki and was repairing and rebuilding it. He could not recall what the payments to the various motorcycle businesses were for although they may have been to clear bills which he owed for work he had done to bikes in the past. He had omitted to answer the same questions which were posed in the Request for Further Information made by the defendant. As to the payments to MCE Insurance on 11th and 19th June 2015, he stated that he believed he had to insure the Kawasakis, which he had hired serially from McAMS and that was why he renewed the insurance.

32. The defendant has not adduced any evidence in this case from Wallasey Motorcycles nor from MCE Insurance about the method by which the claimant initially insured the Suzuki and how the value of £5,600 came to appear on the Motorcycle Policy Schedule nor as to the method by which he renewed his insurance on 19th June 2015 nor what questions were asked of the claimant and what answers were given which resulted in the insurance renewal on 19th June 2015.

33. On 30th July 2015 the claimant received the sum of £6,416.93 into his account, which was in respect of a PPI claim. He nonetheless continued to hire the Kawasaki on credit until 24th November 2015. He accepted in cross-examination that he was looking around for a replacement motorcycle from 30th July 2015 but it took him until 24th November to find a suitable replacement.

34. On 6th November 2015 the defendant sent a cheque to the claimant's solicitors in the sum of £6,150, which sum the defendant said represented the pre-accident value of the Suzuki less salvage, such payment being made without prejudice to liability. That money was paid into the claimant's bank HSBC bank account on 18th November 2015.

35. On 24th November 2015 the claimant discontinued his hire of the replacement Kawasaki motorcycle having received the insurance monies in relation to his Suzuki.

36. As to the loss of earnings claim, the claimant said that he had three weeks off work albeit that there were a couple of days when his time off coincided with a period of pre-booked holiday. He was entitled to be paid during his holidays. His claim was for £690.21.

37. The defendant called Gavin Baden Wall to give evidence as to alternative basic hire rates, but not credit hire rates, for a comparable motorcycle. He said that none was available in the Merseyside area and he therefore widened his search and located two possible suppliers, Hunts in Manchester, some 42 miles form the claimant's home, and Youles in Blackburn, some 38.7 miles from the claimant's address. He was cross-examined and agreed that, to take advantage of the hire rates, the

claimant would have had to have the financial resources for each 28 day period to pay in advance to Hunts the sum of £2,400 plus VAT together with a £500 deposit or to Youles the sum of £2,800 plus VAT together with a £500 deposit. He also stated that he was told that the possibility of purchasing a less expensive stand alone product for collision damage waiver during the period February to November 2015 depended on whether the person to whom he had spoken on 23rd November 2016 about the availability of the policy was precisely correct when she said that the product had been available for a couple of years, that is from November 2014.

The parties' submissions as to the relevant law and the facts to be found

38. The parties were agreed as to the relevant law save in relation to whether not using a policy of comprehensive insurance constituted a failure to mitigate avoidable loss or resulted in avoidable loss which the claimant cannot recover as a matter of law.

39. Based largely on the passage of Aitkens LJ in ***Pattni v First Leicester Buses Ltd [32011] EWCA Civ 1384***, paragraphs 29-41, the law appears to be as follows:

39.1. The loss of use of a vehicle is a loss for which damages are recoverable.

39.2. Loss of use can be mitigated or avoided by a claimant by the hiring of a replacement vehicle, including the hire on credit terms

subject to what is set out below, such costs being the measure of recoverable damages for that loss of use.

39.3. The claimant is only entitled to be reimbursed for expenditure or a liability for credit hire if such is reasonable. The claimant must prove that he needed to hire a replacement vehicle at all and that the replacement vehicle is no bigger or better than was reasonable in all the circumstances.

39.4. If the claimant could have afforded to hire a replacement vehicle by payment in advance in the normal way but instead rented a vehicle on credit hire he is entitled to recover only the basic hire rate for the replacement vehicle as his damages for loss of use, such basic hire rate to be assessed by reference to actual locally available figures.

39.5. If, on the other hand, the claimant could not afford to hire a replacement vehicle by payment in advance in the normal way then he is entitled to recover the cost of credit hire as his damages for loss of use.

39.6. Interest on credit hire costs will not be recoverable until judgment unless there are express terms entitling recovery of interest in the credit hire agreement.

39.7. The claimant is entitled to recover damages for loss of use only for such period as he was without the means and the reasonable opportunity to purchase a replacement vehicle.

40. The parties are not agreed as to whether a claimant who did not take advantage of his contractual rights under his own policy of comprehensive insurance would be failing to mitigate avoidable loss or whether such omission would result in avoidable loss, which the claimant could not then recover as a matter of law.

41. On behalf of the claimant Mr Hogan submitted that the issue is not one of mitigation of loss at all but in reality an issue essentially of the choice to be made by a claimant following a road traffic accident of whom he is to claim his loss from. Mr Hogan submitted that it is no answer by a defendant to a claim for the costs of an extensive care regime in a catastrophic injury claim that the claimant should have relied on statutory services: ***Peters v East Midlands Strategic Health Authority and another [2009] EWCA CIV 145***. In the same way he contends that it is not open to a defendant to deny a claim for damages for loss of use of a motor vehicle by asserting that the claimant should have instead made a claim on his own comprehensive insurance by asserting his contractual rights. In support of this refers to and relies on the well known passage in ***Parry v Cleaver [1970] AC 1*** in the speech of Lord Reid at 14D – E where he summarised his view thus:

> *"As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor".*

42. Lord Reid underlined his opinion by referring to the judgment of Asquith LJ in ***Shearman v Folland [1950] 2KB 43*** at 46 where he said:

"If the wrongdoer were entitled to set off what the plaintiff was entitled to recoup under his policy, he would in effect be depriving the plaintiff of all benefit from the premiums paid by the latter, and appropriating that benefit to himself"

43. Mr Hogan also relied on the decision of HHJ Meston QC sitting in the Poole County Court in *Rose v The Co-operative Group (CWS)* in case 4XQ51662 on 21st March 2005 in which this very same issue relating to a claimant not using contractual benefits under his own comprehensive insurance was at the heart of an appeal against an order made by a district judge that a claimant's claim for car hire charges should be dismissed because the claimant had failed to take reasonable steps to mitigate his loss by not obtaining the free courtesy car which he could have had if he had asked his own insurers. HHJ Meston QC reviewed the case law including *Parry and Cleaver* supra and *The Liverpool (No 2) [1963] P 64* and concluded that, whether or not the claimant knew or ought to have known that he had a choice of car free of charge through his own insurance, the availability of such a choice by use of his own insurance should be disregarded.

44. On behalf of the defendant Mr Poole relied on the observations of Underhill LJ in *Zurich Insurance plc v Umerji [2014] EWCA Civ 357* in which the appellant defendant wished to contend that the claimant's duty to mitigate required that he should have claimed on his own comprehensive insurance policy and so remedied his own impecuniosity and been able to buy a replacement vehicle. In the event the Court of Appeal declined to consider it during the appeal because the issue had not been pleaded or foreshadowed in any way until cross-examination which itself was not developed after an intervention by the trial judge

nor was it pursued in submissions. Underhill LJ observed that it was not a matter of pure law which could be decided in a factual vacuum and indicated that, if the appellant's argument was not precluded as a matter of principle – as to which he expressed no view – it would be necessary to consider the full circumstances including the terms of the policy and/or no claims bonus, before the Court of Appeal could form a view as to whether the claimant had acted reasonably in not doing so.

45. Mr Poole submitted that the claimant has failed to disclose his own policy of insurance and so the extent of his contractual benefits and possible detriments, were he to have made a claim, cannot be known. Mr Poole relies on the principle in *Lagden v O'Connor [2003] UKHL 64* that a defendant is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation should be selected. He submits that by not choosing to rely on his comprehensive insurance policy the claimant incurred avoidable loss when he could have reduced his claim by many tens of thousands of pounds. Mr Poole submits that, by acting in the way, the claimant has failed to mitigate his loss and that the decision of HHJ Meston QC should not be followed as if it were authoritative precedent. He relied on *Thai Airways International Public Co Ltd v (1) KI Holdings Co Ltd (Formerly Koito Industries Ltd) (2) Asia Fleet Services (Singapore) PTE Ltd (2015) EWHC 1250 (Comm)* in relation to the principles of mitigation to be applied.

46. So the issues for determination by me as a matter of law are these:

46.1. Must a claimant who has suffered loss of use of his vehicle in a road traffic accident which is in whole or in part the fault of another driver and who has his own comprehensive insurance policy always

seek to make good his loss of use by relying first on the contractual benefits of his policy so as to place himself in funds with which to purchase a replacement vehicle rather than pursuing a claim for damages for loss of use from the other negligent driver, as he perceives him to have been?

46.2. If he does not do so and instead pursues a claim against the negligent driver is he precluded from successfully claiming against him damages for loss of use, including credit hire charges where these have been incurred, because these were avoidable?

47. In my judgment the answer to the issues and questions posed in paragraph 46 are capable and indeed should be determined as a matter of principle without having regard to the circumstances of individual cases. I align myself with the reasoning and decision of HHJ Meston QC in *Rose v The Co-operative Group*. There are potent reasons of principle why a tortfeasor defendant or his insurers ought not to be able to require the fruits of a comprehensive insurance policy into account. To do so in the context of road traffic accidents and the post accident hire of replacement vehicles would create an unjustified exception to a well-established principle. It would mean that a claimant who could afford a comprehensive insurance policy would ultimately be worse off than a person who had a limited policy. At some stage the cost to the claimant with comprehensive policy cover would catch him up in terms of higher premiums perhaps long after the claim had been disposed of by settlement or at trial. If he has a protected no claim bonus why should he be obliged to use and lose that in respect of a claim on his own insurance policy rather than making a claim against the negligent driver? In addition, there are practical reasons relating to the conduct of litigation

why such a departure ought not to be permitted. The costs of investigations into circumstances in which a negligent driver or his insurance company may later contend that the benefits of a claimant's policy were not adequately called upon and a possible resulting rise in litigation in that regard could be considerable. Nor would subrogated claims between insurers for recovery of outlay be avoided. The potential for creating yet more satellite litigation in this area is considerable. I have therefore come to the conclusion that as a matter of law, in not relying on his contractual rights under his own comprehensive insurance policy, the claimant did not fail to mitigate his loss or incur avoidable loss.

48. The parties also made submissions about the claimant's reliability as a witness of truth.

49. Early on the morning of the first day of the hearing on 18th August 2017 Mr Poole told me that it was the defendant's case that the claimant had been "fundamentally dishonest" in relation to the claim. In effect, as was borne out in his closing submissions, Mr Poole was indicating an intention to submit that, pursuant to section 57 of the Criminal Justice and Courts Act 2005, the claimant's claim should be dismissed.

50. In the updated counter schedule drafted by his solicitors and dated 10th July 2017, long after the procedural steps of disclosure and service of witness statements had been dealt with, there is no reference to fundamental dishonesty" nor does any clear allegation of "dishonesty" appear. The claimant is variously accused of "concealment" in relation to his non-disclosure of his previous accident in November 2014, of sundry discrepancies, of a failure to disclose information and documents and of a failure to provide responses to request for further information in

relation to which the court is invited to draw "an adverse inference" on two occasions. However, none of this necessarily imports or forewarns of an intention to allege dishonesty against another party.

51. Mr Hogan did not object to Mr Poole cross-examining the claimant on the basis that he had been dishonest, although he did object when the allegation on one occasion seemed to be based on a misunderstanding of what a document revealed. For my own part, I have been content to allow cross-examination on this basis. I do not know for certain when the claimant was first informed that it would be alleged that he had been dishonest but it did not appear to come to him as a complete surprise. I make this observation only; in this case if the defendant had decided by the date of the service of the updated counter schedule that it intended to make an allegation of dishonesty against the claimant that should in fairness to the claimant to have to stated clearly in the counter schedule.

52. In relation to liability, Mr Poole on behalf of the defendant submitted to me that:

52.1. The claimant was at fault for overtaking in the vicinity of the junction of Canning Street with Lord Street and had admitted this. It was an action forbidden by the Highway Code.

52.2. In the alternative, the claimant should have satisfied himself that no vehicle close to the junction might turn right and should have travelled slowly enough so as to be able to stop to avoid a collision.

52.3. Mr Hamilton had done all that was really required by the Highway Code. His obligation was to look over his shoulder. If he did that he had done all that was required of him irrespective of whether he realised or should have realised that the motorcyclist was there.

52.4. If there was to be an apportionment of liability then the claimant should bear the lion's share and the apportionment should be 90:10.

53. In relation to liability, Mr Hogan on behalf of the claimant submitted to me that:

53.1. I should find that the claimant was an honest man, who was unsophisticated, had difficulty in reading and writing and with documents and was not always able to explain clearly what had happened.

53.2. The claimant had ridden at a low speed and was simply almost upon the Nissan when Mr Hamilton suddenly indicated and turned right across his path. The claimant was not to be criticised on the basis that what he was doing was in reality overtaking at a junction. That is not the appropriate interpretation and he was in fact merely filtering past stationary traffic, filtering being what the Highway Code without any criticism describes that motorcycles do from time to time.

53.3. He relied on the four rules of the Highway Code to which he had referred which he submitted substantiates the fragility of the position of motorcyclists in relation to car and other vehicle drivers.

53.4. He submitted that the claimant was not at all at fault but that, if I did not agree, the discount to reflect relative blameworthiness and causative potency should not exceed 25%.

53.5. In contrast, Mr Hamilton had been impressionistic in his evidence. He had not seen or heard the motorcycle and, despite having said he looked before turning right, the collision between the Nissan and Suzuki had still occurred.

54. In relation to quantum, Mr Poole on behalf of the defendant submitted to me that:

54.1. The claimant had been fundamentally dishonest within the meaning of section 57 of the Criminal Justice and Courts Act 2005 and the court should not be satisfied that he would suffer substantial injustice if his claim were dismissed and his claim should be dismissed.

54.2. In this regard the defendant relied on the non-disclosure to Dr Brittain-Dissont about the November 2014 accident, the incorrect statement that his injuries had resolved as prognosticated by Dr Brittain-Dissont but which was in contrast to his oral evidence and the claimant's payment for renewal of the insurance policy in relation to the Suzuki with MCE Insurance on 19th June 2015 despite the fact

that he said that had sold that motorcycle in or about March 2015 to Wallasey Motorcycles,

54.3. Mr Poole submitted that the claimant probably never sold the Suzuki at all but retained it, taking it back into his custody when the period of storage ended on 22nd March 2015 and that is why he reinsured it on 19th June 2015. This is corroborated too, he submitted, by the absence of any sum of £750 being paid into his HSBC bank account despite the fact that he said in oral evidence that he had been paid a cheque for that amount when he sold the Suzuki to Wallasey Motorcycles and had paid it into the account. The claimant had also failed to give answers to several of the requests for further information. Mr Poole pointed also to the various sums paid to motorcycle businesses during the period of hire of the Kawasaki. He accepted that he could not say whether these payments might have been for parts or clothing but they evidenced an ability to pay for the repair of the Suzuki, whether or not that is what he did, and that is what he should have done. This was somewhat at odds with his later submission that the claimant had probably taken the Suzuki back into his own custody on 22nd March 2015 when the storage ended and that the Suzuki had by then already been repaired and was probably roadworthy from that date. If that had been done then, subject to the position on impecuniosity and the availability of his own comprehensive insurance policy monies, it would have been reasonable if he had rented a motorcycle on credit hire until his Suzuki had been repaired and made roadworthy, which was probably 22nd March 2015. However, the claimant had adduced insufficient evidence that he was unable to repair the Suzuki. Mr Poole suggested

that, as his evidence evolved, the claimant's explanation became increasingly far-fetched.

54.4. Mr Poole also submitted that if the claimant had chosen to repair the Suzuki then, subject to the position on impecuniosity and the availability of his own comprehensive insurance policy monies, it would have been reasonable if he had rented a motorcycle on credit hire.

54.5. Mr Poole contended also that, if the claimant had notified the defendant shortly before or after commencing the credit hire that he was about to embark on credit hire, the defendant would probably have behaved in the same way as it did when actually apprised of the credit hire position on 12th October 2015 and would have made an interim payment for the pre-accident value of the vehicle less salvage at an early stage.

54.6. Mr Poole said that, if I did not conclude that the claimant had been fundamentally dishonest or dishonest, then his evidence was so confused and so unreliable that I should conclude that he had failed to prove his case.

54.7. In essence, he submitted that the claimant should receive no damages at all.

55. In relation to quantum, Mr Hogan on behalf of the claimant submitted to me that:

55.1. The claimant was an honest man; see above. He was honest when he said that he thought that his injuries from his November 2014 accident when he fell off his pushbike and which did not involve any other vehicle did not result from a road traffic accident. There is no evidence that he had the Suzuki repaired. The small amounts he paid to various motorcycle shops during the period of credit hire could never be assumed to be part of an attempt to rebuild the damaged motorcycle given the very substantially larger estimated costs of such repair. There is no evidence that he had access to other sums of money. His explanation that he renewed his motorcycle insurance on 19th June 2015 because he thought he had to keep the hired Kawasakis insured should be accepted.

55.2. The claimant's injuries were modest but he plainly had objective signs when he was examined two months after the accident by Dr Brittain-Dissont. He contended for an award of £3,000 for general damages but accepted that that I would have to decide what I made of the evidence.

55.3. As to the credit hire charges, he said that the claimant had demonstrated a need for a replacement vehicle, that he plainly could not afford to pay in advance the size of sums to hire a replacement motorcycle that Mr Wall had had identified and was impecunious, that the duration of hire should be limited to 14 days after the receipt by the claimant of his PPI monies on 30th July 2015, the 14 day period being a necessary but sufficient time within which he could identify and purchase, tax and insure a replacement motorcycle. The sum now claimed is £38,522.88 to 14th August 2015. There was no criticism to be made of the claimant not using his own

comprehensive insurance policy and no criticism of the period otherwise because the defendant insurer was a professional litigant which could have made an interim payment of the pre-accident value of the motorcycle at a much earlier stage. It had repeatedly ignored correspondence and, even if the claimant had notified the defendant in March 2015 of his intention to rent a replacement motorcycle on credit hire, it should not be assumed that a payment would have been made any earlier. The claimant should also recover the pre-accident value of the motorcycle in the sum of £5,750, miscellaneous expenses in the sum of £50, the storage and recovery charges either on a contractual basis or as a quantum meruit and his lost earnings even if in part they represented a few days of loss of amenity when he spent time on paid holiday but in discomfort.

Observations about the manner in which the claimant gave his evidence, discussion and findings as regards the claimant's reliability

56. During his evidence, during cross-examination by Mr Poole but in answer to a question which I posed as a result of his apparent difficulty in following Dr Brittain-Dissont's report about which Mr Poole had been asking him questions, the claimant told me that he had difficulty with reading and figures and, although he not been the subject of a statement of special educational needs at school, other members of his family had been. It was evident to me that the claimant had some difficulty reading the oath, appeared to struggle to read some of the documents and also to understand some of the complicated questions asked in cross-examination by Mr Poole, and especially those which were overlong and contained abstract concepts. In particular, he struggled to answer tag questions. On several occasions I asked Mr Poole to re-

phrase a question he had put and to put it more shortly and without a tag ending. Even then the claimant appeared not always to understand what was being put to him. However, he remained clear that he had not told untruths. When, on more than one occasion, it was put to him that he was not telling the truth he took what appeared to me to be spontaneous and clear exception.

57. In assessing the claimant's evidence as a truthful witness and as a reliable witness, and those two findings need not be the same, I remind myself of the helpful approach to be taken to evidence of a claimant against whom allegations of dishonesty had been made in ***Miley v Friends Life Ltd [2017] EWHC 2415 (QB)***. In that case an investment bank employee who was unable to do his job as a result of chronic fatigue syndrome was held entitled under an income protection insurance policy. The defendant insurance company had alleged that he had deliberately fabricated or exaggerated the extent of his disability. Turner J. considered such matters as the claimant's general credibility, his demeanour, whether apparent discrepancies in evidence necessarily implied fraud and motive. So far as demeanour was concerned, Turner J. said that judges should exercise some caution when seeking to determine the credibility of a witness wholly or mainly on the basis of an assessment of their demeanour. However, in that case he had found it helpful to observe the claimant giving evidence and watching the proceedings, there was nothing in his presentation which appeared to contradict his evidence and that of his witnesses concerning the impact of his illness. His behaviour and appearance in court provided at least some level of support for his case.

58. In this case I have heard oral evidence only from the claimant in support of his case and from no other person. The claimant did not volunteer or seek to make anything of his difficulty with reading or writing and the fact that he had such difficulties emerged only as the result of questions which I posed to him. His difficulty in understanding questions put to him was evident from time to time. Complex questions left him baffled. He reasonably made appropriate concessions including that he was to be criticised for overtaking at a junction albeit. At no stage did he become upset or angry. He was prepared to stand his ground when he understood a matter being put to him with which he disagreed. I have in mind that Mr Poole put to him that he was not filtering past traffic on Canning Street but was overtaking it. The claimant disagreed and said that Mr Poole could call it overtaking if he wished but that it was filtering. Again, he was pressed hard as to why he had represented in his statement that his injuries had resolved in line with Dr Brittain-Dissont's opinion, that is, within six months, when he was conceding in his oral account that they had resolved a short time after he had seen Dr Brittain–Dissonnt which was only two months after the accident. Mr Poole suggested that he had intended the reader of his statement to believe that his injuries had been more significant than they in fact were. Concessions under cross-examination such as this are commonplace in the county court. They do not usually lead to an allegation being made that the claimant has been dishonest.

59. As appears both above and below, I formed a favourable impression of the claimant and considered him to have been an honest witness, although one whose evidence was not always easy to follow and, indeed, was on occasion contradictory.

Discussion and finding and decisions on liability and quantum issues

60. As to the road traffic accident itself, I find that both the claimant and Mr Hamilton were doing their best to assist the court and that they were honest witnesses.

61. However, I have come without any real difficulty to the conclusion that the claimant's evidence is to be preferred. Mr Hamilton was not able to explain why he had not seen or heard the claimant's motorcycle before the impact. The claimant was there to be seen.

62. I accept that claimant's evidence that he was filtering past a line of stationary or near-stationary traffic and that the Nissan's right turning indicator came on only as he reached the rear offside tyre of the Nissan and that it turned almost immediately such that he had no sufficient opportunity to avoid a collision despite turning right to try to avoid colliding with the Nissan. It is clear from the engineer's report of the damage to the Nissan that he struck the Nissan at the junction of the driver's door with the front wing and then caused further damage as he moved forward along the wing.

63. Why then did Mr Hamilton not see the motorcycle before he commenced his turn? He was driving back to his office and when he saw the traffic backed up along Cannon Street from the junction with Shore Road he decided to turn right with a view to taking the alternative route back to his office. He was familiar with this route and used it quite often. Whether on this occasion he was lulled into a false sense of security because the traffic was at a standstill or near-standstill and did not look in his mirror or over his shoulder at all or whether he gave a cursory look

but that this did not amount to keeping a proper lookout I am unable to decide. However, what is clear is that the claimant's motorcycle was there to be seen and that Mr Hamilton should have seen it. I reject Mr Poole's submission that Mr Hamilton's obligation as a careful motorist was discharged if he looked but did not see the motorcyclist that was there to be seen. That is illogical. The obligation of the careful motorist is to keep a proper lookout. If on that day Mr Hamilton had kept a proper lookout he would have seen the claimant on his motorcycle and would not have commenced his turn. The collision would thereby have been avoided. In my judgment primary liability rests with Mr Hamilton for whom the defendant is responsible as his insurer.

64. The defendant contends that the claimant was also negligent in overtaking at a junction. Mr Poole referred to rule 169 of the Highway Code which states "DO NOT overtake where you might come into conflict with other road users. For example when approaching or at a road junction on either side of the road…" Mr Poole submitted that this was a mandatory rule. He said that the claimant should have filtered back into the stream of traffic before the junction but not overtaken where and when he did. The claimant himself, as I have said above, conceded that he was in the wrong in continuing to filter past at the junction. I consider that concession to have been properly made. In my judgment, he should have stopped filtering alongside traffic at a point well before the junction and indicated and moved when safe to do so into the line of traffic while he passed the junction.

65. The issue of relative blameworthiness and causative potency therefore arises to determine the level of reduction for contributory negligence. Mr Hogan referred to rules 151, 160, 170 and 180 of the Highway Code

during his cross-examination of Mr Hamilton and later submitted that these emphasised the relative fragility of the position of a motorcyclist as compared with a four or more wheeled vehicle. In my judgment the blameworthiness of the claimant in seeking to overtake at the junction when all seemed safe so are as he could tell until the Nissan moved into his path and the blameworthiness of Mr Hamilton in failing to look properly for a relatively vulnerable motorcyclist are not to be equated; there must be some weighting against Mr Hamilton. So far as causative potency is concerned, the action of Mr Hamilton in moving into the path of a vulnerable motorcyclist is significantly greater than the conduct of the claimant in seeking to pass Mr Hamilton on his offside in the vicinity of a junction. Overall I assess the appropriate reduction for contributory negligence is one third.

66. In assessing damages below, I assess all sums by reference to a 100% liability figure and apply the one third discount at the end.

67. What injuries did the claimant sustain and what sum should be awarded by way of general damages? When examined by Dr Britain-Dissont about two months after the injuries the claimant's account of his injuries and complaints of current symptoms were consistent with and proportionate to the findings made by the doctor, who, importantly, also found objective signs of continuing problems in both the left knee and right wrist. The issue for resolution is whether the symptoms resolved as early as shortly after that examination or at effectively the hilt of the six month period advised by Dr Brittain-Dissont as the maximum period within which he expected resolution to occur. The phraseology in the claimant's statement is a formula or a similar formula to many which I have read in County Court proceedings whereby the claimant, signing his

witness statement adopts the maximum recovery period advised by a medico-legal expert. In this case the claimant signed his witness statement on 25th May 2016, which was well after the six month period had elapsed. He had no recollection of seeing the report when he signed the statement and even though it had not been enclosed with the draft statement. I accept that his solicitors did include the report with the draft statement, as professionally was their duty. Given his evidence I doubt whether the claimant read the report at that time. Quite how the text in his statement which appears about the duration of his symptoms came to be included I cannot say. However, I accept the oral account of the claimant that his symptoms resolved shortly after seeing Dr Brittain-Dissont.

68. Mr Poole suggested that the appropriate award was one of £1,500 while Mr Hogan contended for £3,000. The claimant was unable to work for three weeks. Towards the end of this period he was on pre-booked holiday leave from work and he must have endured symptoms during that time. I consider that the appropriate award for general damages is one of £2,000 to include the minor inconvenience of having to contact the engineer, garage, hirer, solicitor, solicitor and doctors after the accident and for the extent to which he suffered an additional minor loss of amenity in not being able fully to enjoy his paid leave in March 2015.

69. The next issue is that of the credit hire. I make the following findings:

69.1. At the date of the accident the claimant owned only one motorcycle, the Suzuki. He had previously owned an Aprilia but had part exchanged this in January 2015 for the Suzuki. He insured the

bikes serially and not in tandem. The suggestion made on 18th August by the defendant to the contrary was without foundation.

69.2. The claimant had purchased the Suzuki with the aid of a loan from his parents, principally from his father who had used some of his pension monies together with the part exchange of the Aprilia. The evidence as to the purchase price for the Suzuki is not capable of clear resolution. At one end of the range was the claimant's evidence that the Aprilia was worth £2,500 at the time of part exchange and that he had borrowed as much as £7,000 from his parents. That would suggest that he had paid as much as £9,500 for the Suzuki. At the other end of the range was the fact that MCE Insurance issued a Motorcycle Policy Schedule which stated that the value of the Suzuki was £5,600. I note that the sum of £9,500 exceeded the price of a new Suzuki at £9,000, which was the claimant's evidence of the costs of a new Suzuki. No evidence has been adduced as to the method by which this questions and answers were asked and given when the change to the insurance was made on 14th January 2015. If the claimant had been asked what sum was paid for the motorcycle and had referred to the sum of £5,600 without also referring to the part exchange value of the Aprilia that might suggest that the total price paid for the Suzuki was £8,100 [ie £2,500 as the part exchange price for the Aprilia plus the sum of £5,600]. The claimant told me that the Suzuki was a brand new bike with only delivery miles or a few more on it and would otherwise have sold for about £9,000. Given that the Suzuki had a "64" number plate it would in January 2015 have been a relatively new motorcycle and, if it had been a "demonstrator" or had been previously briefly owned by another person, it may well have been worth in the region of 80%

to 90% of the sale price of a new motorcycle. When he was being cross-examined it was apparent to me that the claimant's ability with figures and to understand complex questions was limited. While I cannot be sure what figures were agreed as to the purchase of the Suzuki I find that on the balance of probabilities the claimant did not intentionally misrepresent the value of that motorcycle to MCE Insurance although he may only have mentioned the sum of money loaned to him by his parents, which I find to have probably been £5,600 but not also to the part exchange value of the Aprilia. In doing so, it is entirely possible that he was asked what was paid for the motorcycle and mentioned the loan figure but not the part exchanged Suzuki, having innocently taken the question literally. However, I do not consider that there is any sufficient evidence that he was dishonest.

69.3. Following the accident the engineer who examined the Suzuki considered that it had a pre-accident value of £6,500 but would cost £8,300 including VAT to repair. The claimant was unhappy with the pre-accident valuation of the Suzuki, as he indeed was entitled to be if what he had paid for it comprised the loan of £5,600 from his parents plus the value of the Aprilia at £2,500. I accept his evidence on this. However in the absence of any contrary evidence and despite Mr Poole's submissions that the engineer must have been wrong if I were to find that the claimant had in fact paid much more for it on 14th January 2015 I find that the pre-accident value of the bike on 23rd February 2015 was in accordance with the engineer's assessment at £6,500.

69.4. The damaged Suzuki was recovered and stored by Wallasey Motorcycles for a period after the accident. According to invoices raised on 29th October 2015 the period of storage ran from 23rd February to 22nd March 2015. The Suzuki was examined by the engineer during this period on 3rd March 2015 and his report is dated 10th March. The claimant gave contradictory evidence as to whether there was an express agreement for the storage charges; in his statement he said there was but in his oral evidence he could not recall any such conversation with Mike from Wallasey Motorcycles. Mr Hogan submitted that whether or not there was an express agreement was of no consequence because Wallasey Motorcycles would be entitled to a *quantum meruit* and that, in the absence of any alternative figures, the sum claimed was reasonable. Mr Poole referred to the invoices and did not accept the genuineness of the claim. However, he did suggest, as part of the defendant's submissions, that Wallsasey Motorcycles had undertaken work on the bike during this period so as to repair it and make it roadworthy by 22nd March 2015. I find that the bike was recovered and stored as contended for in the invoices and that, during that time it was not being repaired. There must have been an express request and therefore and agreement as to recovery. I am not able to determine whether there was an express agreement or not for storage but I do find that Wallasey Motorcycles was entitled to make a charge for storage. The defendant has not adduced any evidence as to lower costs. I find that the sum claimed was reasonable at £874.40. I allow that sum.

69.5. What then happened to the Suzuki? I have considered with care the parties rival contentions. According to the clamant, when he

learned that the Suzuki was uneconomical to repair he decided to sell the damaged Suzuki to Wallasey Motorcycles for £750. He said that that was the sum offered by Mike, and this figure may well have been arrived at because the engineer assessed the salvage value of the damaged bike at £750. According to the claimant, he left the bike at the premises of Wallasey Motorcycles. The Suzuki had not been re-built and repaired during the period of storage. He never took it back into his possession. He did not have it re-built and repaired after 23rd March 2015 either. The sums totalling £854.99 paid to various motorcycle businesses between 23rd February and 24th November 2015 did not represent payments for work done on the Suzuki to repair it. When he renewed the insurance with MCE Insurance this was not for the Suzuki but for the Kawasaki bikes which he was renting from McAMS and which he believed he had himself to insure during the period of hire. He needed to hire those bikes for domestic use and for getting to work. He was unable to pay hire charges in advance and had to rely on credit hire.

69.6. On behalf of the defendant, Mr Poole submitted that the claimant had never sold the Suzuki. Having said in oral evidence that he had been paid by cheque, the claimant conceded that there was no such sum ever paid into his bank account. Mr Poole suggested on 18th August 2017 during cross examination that the payments totalling £854.99 were indeed payments for repairing the Suzuki and on 11th October 2017 went further and submitted that the Suzuki was probably during the period of storage and taken back repaired by the claimant on 23rd March 2015. He resiled somewhat from his suggestion that the total of £854.99 was for repairs and suggested that it might have been for clothing instead although it might have

been for repairs either outstanding for other repairs undertaken after 23rd March 2015. He submitted that the only construction to be placed on the renewal of insurance for the Suzuki on 19th June 2015 was that the claimant still owned the Suzuki and that it had been repaired and that he did not need to hire a replacement bike. The claimant probably had greater financial resources than he has conceded and he had not given an adequate explanation or disclosure that he could not have borrowed monies. If he was entitled to hire on credit at all it was only until 23rd March 2015 when his repaired Suzuki was probably returned to him.

69.7. In my judgment he defendant has adduced no evidence that the Suzuki was repaired and that the claimant did not need to hire a replacement motorcycle. There is no direct evidence from Wallasey Motorcycles that it undertook repairs to the Suzuki and no evidence from any of the various motorcycle businesses at which the claimant spent money that any such expenditure was for repairs. Having seen and heard the claimant give evidence about the state of his finances I am satisfied that he was being truthful and that he did not have the means to pay for the repairs to the Suzuki in February 2015 or at any stage until he received the PPI payment on 30th July 2015. By that date he had long since sold the Suzuki to Wallasey Motorcycles in march 2015 for £750, which I find that he received in cash, as the claimant first stated in his witness statement. That is why there is no payment transaction into his HSBC account in that sum. The sums that he paid to various motorcycle business between March and `November 2015 totalling £854.99 were a tiny proportion of the sizeable capital which he would have needed to pay for the extensive repairs to the Suzuki. I find that he never had the financial means to

pay for those repairs and that he did not have the Suzuki repaired. For the same reasons, I find that he did not have the resources to pay in advance to hire a replacement motorcycle at a basic hire rate. He simply did not have the financial resources which Mr Wall gave evidence he would have required if he had gone either to Hunts or Youles for such an advance payment hire. For what it is worth and had it been necessary, I would have been prepared to find that, if the claimant had had the financial resources to pay for hire in advance for a comparable bike that he should have been prepared to travel to Manchester or Blackburn to effect such hire or arranged for the motorcycle to be delivered to him. In those circumstances, I find that the claimant is entitled to claim the cost of credit hire, subject to duration, and, there being no evidence of credit hire rates other then those charged to the claimant in the agreement, he is entitled to claim those rates.

69.8. How did it come about that the claimant apparently renewed insurance for the Suzuki with MCE Insurance on 19th June 2015 if, as he says, he had ceased to won that motorcycle in March 2015? This is an all-important matter so far as the defendant is concerned. Mr Poole relies on this as evidence that the claimant continued to own the Suzuki at this date and had had it repaired. The claimant told me that he thought he had to insure the Kawasakis that he had rented on credit hire. This is despite the fact that he had on each of the three occasions of hiring the Kawasakis he had completed a proposal for insurance via McAMS from whom he was renting the bikes. The defendant has adduced no evidence as what was said to the claimant about insurance when he hired the Kawasakis from McAMS nor as to the method by which the renewal of insurance

with MCE Insurance was effected nor as to the questions asked and the answers given. Mr Hogan described the claimant as unsophisticated and submitted that he may not have understood what was required of him. This is one of those cases where the observation of a witness has been important in assessing his credibility. I agree that the claimant was unsophisticated. I think it inherently credible that he did not understand complex matters when they were explained to him, especially if he did not have sufficient time to process the question before providing an accurate answer. I am satisfied on the balance of probabilities that, in his own mind, in renewing insurance on 19th June 2015, he thought that he was doing what was required to insure the Kawasakis during the period of credit hire, even if he was wrong in the event. If he had owned the Suzuki at that date and insured it until November 2015 it is surprising that the insurance was not then renewed by the claimant or that the defendant has not adduced evidence that it was insured by another person, if, for example, it had been sold or indeed sold at some later date.

69.9. I am therefore satisfied on the balance of probabilities that the claimant needed to hire a replacement motorcycle and did not own any other motorcycle but had sold the Suzuki to Wallasey Motorcycles for £750 and had not had it repaired then or later, that he was impecunious, not being obliged to make a claim against his own comprehensive insurance policy as a matter of law, and entitled to hire a replacement. I am also satisfied that, in renewing insurance on 19th June 2015, the claimant thought that he was insuring the Kawasaki that he had rented on credit hire and that he need to do so.

It follows that the claimant is entitled to recover the pre-accident value of his Suzuki less salvage value, namely £5,750.

69.10. I also find that he is entitled to recover credit hire charges until 14 days after 30th July 2015 on which date he received into his HSBC account the sum of £6,416.93 from a PPI claim. That sum of money would have been adequate for the claimant to pay for a replacement motorcycle. There is no satisfactory explanation as to why the claimant did not then begin to look for a replacement. It would be unreasonable to find that he should that day have been able to identify, purchase, tax and insure a replacement motorcycle. In limiting his claim to a date 14 days after the receipt of the PPI sum the claimant, by Mr Hogan, has acknowledged the reality of the likely finding. Indeed, had the claimant not so limited his claim during submission that is probably the very finding that I would have made. In those circumstances the claimant is entitled to recover by way of credit charges the sum of £38,522.88.

69.11. I reject the defendant's submission that the claimant had an obligation to notify the defendant of his intention to rent a replacement bike on credit hire. The hire commenced on 14th March 2015. The claimant's solicitors first requested that the defendant pay the claimant the pre-accident value of his motorcycle by letter dated 15th April 2015. That request, together with others made on 12th May and 4th June were ignored. The defendant has not provided any explanation as to why the letters were ignored. In the absence of any evidence from the defendant I reject Mr Poole's submission that an interim payment of the kind that was made in November 2015 following the claimant's solicitor's letter dated 12th October 2015

would probably have been made at an earlier date. The defendant is a professional litigator which had every opportunity to request that it be informed if the claimant was intending to rent a replacement motorcycle on credit hire and every opportunity to pay the pre-accident value of the bike on a without prejudice basis anyway. I am asked to draw an inference that such a payment would have been made at an earlier date if only the defendant had known that credit hire charges were about to be incurred or had just been incurred. I decline to draw any such inference in the absence of any evidence.

69.12. As to the claim for miscellaneous expenses, the claimant claims the sum of £50 for the expenses of having to contact the engineer, garage, hirer, solicitors and doctors. This sum appears to have been claimed for inconvenience rather than a specific sum representing actual expenditure. I have included it as an element within general damages and make no separate award.

69.13. As to the claim for loss of earnings, I discount this for the fact that the claimant told me that the calculation overlapped for some pre-booked holiday for which he was entitled to be paid in any event. I understand him to have accepted that he was paid for what he says was a couple of days of the three week period when he was on holiday. Doing the best I can on the evidence, I allow a proportionate sum, being 19/21 days x £690.21, that is the sum of £624.47.

70. In the counter schedule the defendant put the claimant to proof as to whether the credit hire agreements were enforceable where the hire agreements were signed off premises. The defendant relied on regulation

10(1)(a) and (b) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 which provides that, before the consumer is bound by an off-premises contract, the information listed in Schedule 2 must be supplied in a clear and comprehensible manner and, if a right to cancel exists, must give the consumer a cancellation form as set out in part B of Schedule 3. In cross-examination Mr Poole did not really pursue this to any degree and it was not contended for in his written or oral submissions that the claimant ought not to be able to recover any credit hire charges from which he benefitted because of any failure to comply with the regulations. In the circumstances, I understand this no longer to be an issue in the proceedings but, had I been required to make a decision here, I would have held that, where the claimant had benefitted from the credit hire, he ought not to be denied the right to recover because of any alleged flaw in complying with the regulations.

71. It follows that, on a 100% basis and absent any reduction for contributory negligence, I would have awarded the following:

71.1.	General damages for pain, suffering and loss of amenity:	£2,000
71.2.	Credit hire charges:	£38,522.88
71.3.	Pre-accident value of the Suzuki:	£5,750
71.4.	Miscellaneous expenses:	£0
71.5.	Recovery and salvage:	£874.40

71.6. Lost earnings: £624.47

71.7. Total at 100%: £47,771.75

72. Reducing this sum by one third for contributory negligence and deducting the interim payment of £6,150.00, I award the claimant damages in the sum of £25,697.83.

73. I would be obliged if the parties would try to agree the appropriate figures for:

73.1. interest, and

73.2. costs.

74. Having heard this case over two days and the way it has been advanced by the defendant, I note that the defendant's defence of the claim was founded entirely on circumstantial evidence from which the defendant invited the court to draw an irresistible inference that the claimant has been fundamentally dishonest. In my judgment there is not one piece of direct evidence of dishonesty on the claimant's part in this case at all.

75. Human beings are not all blessed with the same intelligence, sophistication and ability to explain themselves. There is a range of abilities. At some stage the defendant appears to have formed an unfavourable opinion of the claimant. I suspect that this was only after the size of the claim for credit hire emerged. It may be that the defendant has then embarked on a limited investigation of the case with

the prejudice that the claimant has in some way done something wrong and then sought to represent that the available evidence supports this thesis. I say a limited investigation because, as I have observed above, the defendant has not adduced any evidence from Wallasey Motorcycles to the effect that the Suzuki was never sold to that business, nor as to what the payments made by the claimant to the various motorcycle businesses were for, nor as to the method by which the insurance policy with MCE Insurance on 19th June 2015 was renewed and what questions were then asked of the claimant and what answers given nor as to whether the Suzuki ever appeared on any motor vehicle policy after 24th November 2015. During the first day of the hearing on 18th August 2015 Mr Poole suggested to the claimant that he had never sold the Aprilia and in fact at the time of the accident owned two motorcycles such that he had no need to hire the Kawasaki after the accident because he could have used the Aprilia. It is clear now, as a result of information sought during the period of adjournment between the two hearing dates and probably as a result of direction which I gave of my own motion after considering the case further after adjourning following the first day of evidence on18th August 2017, that that allegation was entirely unfounded and should never have been made. The defendant is a professional litigator. It has the ability to garner information about which vehicles are or were insured on which policies at any one time. The casual way in which this serious allegation was put to the claimant was alarming and wholly unwarranted. It seems to me having listened to this case for two days that the defendant may have decided that the number of discrepancies in the claimant's evidence necessarily implied that he has been dishonest and that an attempt has been made to construct a version of "probable events" following the accident and to attempt to defend this case on that basis. The suggestion made by Mr Poole that the claimant had probably

had the Suzuki repaired by 22nd March 2015 when the period of storage ended seemed to me to be a complete flight of fancy. Given that less than three weeks earlier the Suzuki had been found by the engineer to be uneconomical to repair, such repairs requiring expenditure of £8,300 including VAT with a long list of required parts listed in that report, it seems to me vanishingly unlikely that the Suzuki could have ben repaired in that timeframe. It also seemed to me equally vanishingly unlikely that the Suzuki was ever repaired given that there is no evidence that it was ever again insured after 25th November 2016.

76. In no claim should an allegation of dishonesty be made casually. It behoves an insurer seeking to make such a serious allegation actively to make its own enquiries and to adduce evidence and not merely, as here, to point to a number of inconsistencies and omissions on the part of the claimant and suggest that these are sufficient to compel a finding of dishonesty. As is apparent from this case, such an approach leaves much to be desired. Had the defendant actively investigated matters as I have suggested within the judgment I think it highly likely that this case would have settled long ago.

Recorder David Heaton QC

15th October 2017