Neutral Citation Number: [2025] EWHC 523 (KB)

Case No: KB-2022-BHM-000186

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Bull Street,
Birmingham

Date: 7th March 2025

Before:

HIS HONOUR JUDGE TINDAL
(Sitting as a Judge of the High Court)

- -

Between:

KYIEM DORMER
(a Protected Party, by his Mother and Litigation Friend ITEEN DORMER) **Claimant**

- and -

(1) JAHEIM WILSON
(2) GREEN REALISATIONS 123 LIMITED
(3) MOTOR INSURERS BUREAU

Defendants

- -

Mr Simon Brindle (instructed by **Thompsons Solicitors**) for the **Claimant**
Mr Patrick Blakesley KC (instructed by **Kennedy Law**) for the **Second Defendant**
The First Defendant represented himself
The Third Defendant did not appear

Hearing dates: 9th 10th 11th December 2024

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JUDGMENT

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ TINDAL:

Introduction

1. This case is the liability-only judgment in a serious personal injury claim arising out of a road traffic accident involving a stolen motorbike. It raises interesting and overlapping legal questions about the illegality defence in tort, liability under the Road Traffic Act 1988 ('RTA') of an insurer of a stolen motorbike (including to an injured pillion passenger where such liability is excluded under the policy); and the liability of the Motor Insurers' Bureau, including the ongoing effect of EU Law.

2. In the accident on 12th April 2017, the Claimant, Mr Kyiem Dormer, sustained serious injuries, including a traumatic brain injury. Consequently, he has been a Protected Party under CPR 21, proceeding by his Mother and Litigation Friend, Mrs Iteen Dormer (although that has changed since this trial in this case as I address at the end of this judgment). The Claimant and his uncle the First Defendant were riding a motorbike, but neither of them were wearing helmets. They went through a red light at a crossroads and collided with a car (which I shall refer to as 'the Mini' as its driver was blameless). The Claimant and First Defendant say the latter was 'the rider' (as I shall call the person at the front and 'driving' the motorbike) whilst the Claimant was his pillion passenger. They both say the First Defendant's negligence caused the Claimant's injuries (although the First Defendant has not entered a Defence, is unrepresented and has played a limited part at trial save as a witness for the Claimant). However, the First Defendant is unemployed and will not be able to pay the damages, which the Claimant's original claim estimated as in excess of £1 million. Therefore, the Claimant has also joined the Second and Third Defendants, who are the 'real' defendants to the claim.

3. The Second Defendant was the insurer of the motorbike, a Yamaha TW125cc Tricity motorcycle (with the distinctive feature of two wheels at the front and one at the rear) with the registration LT15 TRV ('the Motorbike'). Its owner (who again is entirely blameless) reported the Motorbike stolen from his home a few days before the accident. However, the owner had a current insurance policy with the Second Defendant in respect of the Motorbike ('the Policy'). As the First Defendant was not insured under it, the Claimant contends the effect of s.151 RTA is to make the Second Defendant liable as the insurer responsible to the Claimant as an injured third party, (commonly in these cases referred to as an 'RTA Insurer').

4. In the alternative, the Claimant contends the Third Defendant (which I shall refer to by its well-known acronym, the 'MIB') is liable under its 2015 Uninsured Drivers Agreement ('the Uninsured Drivers Agreement'). However, the Second Defendant is responsible for settling any liability of the MIB to the Claimant under Art.75 of the MIB's Articles of Association, (typically known as the MIB's 'Art.75 Insurer'). The Second Defendant accepts that as Art.75 Insurer, it stands in the shoes of the MIB for any liability the latter may have. So, the MIB has not appeared at trial, leaving its defence to the Second Defendant, facing two different routes to liability: firstly directly as 'RTA Insurer'; and secondly indirectly as 'Art.75 Insurer'.

5. It was directed there be a split-trial with both liability and contributory negligence to be determined first. At the start of that trial, I agreed the issues with Counsel: Mr

Brindle for the Claimant and Mr Blakesley KC for the Second Defendant (the First Defendant understandably did not address me at that point), which are as follows:

(i) The first issue is factual: the background and facts of the accident; whether the Claimant was the rider or passenger of the Motorbike; and crucially: whether he knew or suspected it was stolen or unlawfully taken.

(ii) The second issue is whether the Claimant is prevented from recovering damages by the Illegality Defence, i.e. whether he was unlawfully involved in the theft or retention of the Motorbike, or its dangerous riding;

(iii) The third issue is whether the Second Defendant is liable to the Claimant as RTA Insurer, in particular: (1) whether he knew or had reason to believe the Motorbike was stolen or unlawfully taken; or (2) that liability to the Claimant was excluded under a specific clause in the Policy;

(iv) The fourth issue is whether the MIB (and so the Second Defendant as its Art.75 Insurer) is liable to the Claimant under the Uninsured Drivers' Agreement, in particular (1) whether the Claimant knew or had reason to believe the Motorbike was stolen or unlawfully taken; or (2) whether the Claimant knew or had reason to believe the Motorbike was uninsured;

(v) The fifth and final issue was what deduction should be made to any damages the Claimant will recover owing to contributory negligence (it is accepted that some deduction is inevitable given he was not wearing a helmet, but the extent of the deduction turning on my other factual findings including the Claimant's knowledge of any theft and/or dangerous driving).

I will structure this judgment accordingly: adding a summary of my conclusions at the end; and before turning to my findings of fact, my observations on the evidence.

Evidence

6. Whilst the issues give rise to several rather complex points of law in this case, ultimately both Counsel in closing submissions addressed me at more length about the evidence – the credibility of the Claimant in particular. Since this is not a case where there are many contemporary documents relevant to credibility, they each emphasised the importance of the Claimant's evidence under cross-examination, the overall plausibility of evidence and its internal and external consistency and of statements against interest. Unsurprisingly neither Counsel felt the need to refer me to authority on these classic judicial tools for assessing evidence, but if needed, a useful modern summary of the approach with limited documentation was given in *Natwest v Bilta* [2021] EWCA Civ 680 at [51], where the Court of Appeal said:

> "Faced with documentary lacunae…the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided…the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by

reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that…"

7. At trial, I had a main bundle comprising just under 900 pages. A significant part was extensive pleadings from all the parties (save the First Defendant who has not entered a Defence), which I will not length this judgment by rehearsing, but which effectively raise the issues I have summarised above. Indeed, they were agreed with Counsel as slightly narrowed-down from the more generally-phrased issues directed for liability-only trial by DJ Griffith of 7th August 2023, namely: (a) whether the Claimant was the rider or pillion passenger; (b) whether he is disentitled to damages by the illegality defence; (c) whether the Second Defendant 'retained an insurable interest' in the Motorbike and is liable to satisfy a judgment to the Claimant against the First Defendant under s.151 RTA; (d) if not, whether the MIB is liable to the Claimant under the Uninsured Drivers Agreement; and (e) contributory negligence.

8. The Police produced an Accident Report confirming the accident occurred on 12th April 2017 at 13.10 the junction of Longmore Street and the dual carriageway at Belgrave Middleway just next to Birmingham Central Mosque in Highgate, Birmingham. (I am very familiar with the location). The report described the Motorbike as riding across Belgrave Middleway from Longmore Street resulting in a collision on the southbound carriageway, where the Mini had just pulled off on its green signal. The Mini driver recalled the Motorbike as ridden by two young black men not wearing helmets who cut straight across and hit her before she could stop. The report recorded the riders of the Motorbike as the Claimant and First Defendant although stated it was not known which was the rider and which was the passenger. It also noted the Motorbike was stolen from its owner three days earlier on 9th April.

9. The Police also obtained relevant CCTV and 'Dashcam' footage, which I have in a bundle of stills and have had the opportunity to watch several times. Each show the accident and from different angles the approach of the Motorbike to its location. Indeed, the CCTV itself was from the Mosque and the Dashcam footage from a driver in the queue of traffic going south on Belgrave Middleway behind the Mini. However, both the CCTV and the Dashcam footage is from a considerable distance and its view if the impact is obscured by other cars, walls, fences and other 'street furniture'. It gives a broad impression of the general circumstances of the accident, but as the car passes, the Dashcam footage also surveys more closely its aftermath.

10. Therefore, I am particularly indebted to the agreed evidence of the Claimant and Second Defendant's Accident Reconstruction Experts (Mr Tydeman for the Claimant and Mr Wilson-Law for the Second/Third Defendants). It was unnecessary for them to attend trial to give oral evidence: By careful site inspections, consideration of the general evidence and scrupulous analysis of the Dashcam and CCTV, they agreed these key conclusions in their joint statement (although of course I have taken into account all the information in their reports):

    (i) That the approach to Belgrave Middleway on Longmore Street has a 20 mph speed-limit and is clearly signposted that all traffic should turn left onto Belgrave Middleway northbound, except buses, taxis and cycles (although the latter only appears on a sign, not on the road markings which I shall call the 'Bus Lane') which can carry on straight on over to Horton Square.

(ii) Whilst the left-hand lane filter lane from Longmore Street bends north onto Belgrave Middleway, entry from the ahead-only Bus Lane is controlled by a traffic light and a stop line, back 9 metres from the carriageway. The junction is a crossroads between Longmore Street and Belgrave Middleway.

(iii) The time between a green signal on Longmore Street Bus Lane turning amber and a green signal on Belgrave Middleway was 7-12 seconds, depending on whether a pedestrian pushed the request button to cross. As the Motorbike was about 70 metres from the Longmore Street traffic light, it turned from green to amber and from amber to red when it was about 35 metres from the stop line, travelling under the speed limit - about 17-18 mph. The stopping distance would have been just over 8 metres, so the Motorbike had plenty of time to stop. (At the same time, the Mini was stationary at the traffic light at the crossroads southbound on Belgrave Middleway).

(iv) However, the Motorbike did not stop, instead it actually accelerated towards its red light on Longmore Street. By three seconds before impact, whilst the Mini was still stationary, the Motorbike was only 3-4 metres from the stop line but had accelerated to 21mph. Less than a second later, as the Mini pulled away with its green light southbound on Belgrave Middleway, the Motorbike entered the dual carriageway into the path of the traffic going in both directions, accelerating up to between 25 and 33 mph.

(v) The Motorbike crossed the northbound carriageway before cars in that lane crossed its path, but then its nearside was hit by the front of the Mini. The Claimant and the First Defendant were both thrown off, sustaining injuries. Mr Tydeman and Mr Wilson-Law opined that statistically head injuries are generally mitigated if helmets are worn in motorcycle accidents, although they deferred to medical experts as to the extent of mitigation in this case.

11. Turning to medical records of relevance to liability, ambulance notes record the 999 call as 13.07 and the ambulance at the scene at 13.15. 50 minutes later at 14.00, they recorded the Claimant's Glasgow Coma Score of 14/15 (near the best) and 'agitated'. The Ambulance Record noted (it is unclear whether said by the Claimant himself or one of the passers-by in the crowd seen in the Dashcam footage):

> "Passenger, motorcyclist vs car then hit lamppost appr.50 mph. No helmet."

Similarly, admission notes at Birmingham Children's Hospital A&E an hour or so after the accident at 14.09 recorded a similar Glasgow Coma Score, that he was 'irritable' and that he had been the passenger (although the notes later recorded the Police were uncertain whether he was the rider or the passenger). In the Claimant's discharge summary on 23rd April 2017 recorded that the Claimant had sustained a left tibial fracture, a skull fracture, subarachnoid haemorrhage and cerebral contusion necessitating decompressive craniotomy. The summary noted he had been the passenger on the back of a motorbike going at 50 mph without a helmet when he crashed. It is unclear if that was a repetition of earlier notes or self-reported.

12. Whilst all the injuries are detailed in medical reports, for the present trial, I have only been referred to a few of them. The leg fracture midshaft to the Claimant's left tibia and fibia (i.e. his left lower leg) and a soft tissue injury to his left knee is detailed by the Claimant's Consultant Orthopaedic Surgeon, Mr Tillman. But it does not mention injuries on the same date - 12th April 2017 - to either of the

Claimant's ankles (the relevance of which I consider later), although Mr Tillman confirmed that the Claimant's left leg was in a long-leg plaster. He noted the Claimant did not recall any problems with his left lower leg and was fit and well until fracturing his left femur in another road accident in December 2018.

13. I did hear live evidence from the Dr Bajaj, the Claimant's Neurologist and Mr Macfarlane, the Second/Third Defendants' Neurosurgeon on how far a helmet would have made a difference to the Claimant's traumatic brain injury ('TBI'). Dr Bajaj accepted if he had worn a helmet, he would probably have avoided the skull fracture causing cerebral laceration and contusion (bruising and bleeding) and extradural haemorrhage (a large swelling of blood on the side of the head). But Dr Bajaj maintained that a helmet would not have prevented the Claimant sustaining Diffuse Axonal Injury ('DAI') caused not by direct trauma but by angular momentum on being thrown by the impact, causing rotational shearing of the axons in the brain. However, Dr Bajaj accepted all but one subarachnoid haemorrhage seen on the MRI scan of 17th April 2017 he claimed indicated DAI were in the 'penumbra' of the contusion, but still denied they were caused by it not DAI. Nevertheless, Dr Bajaj conceded a Neurosurgeon like Mr Macfarlane would have more experience in seeing and treating injuries of this kind. For his part, Mr Macfarlane explained in detail how all the marks on the MRI Dr Bajaj attributed to DAI were explained instead by the contusion. The fractured bone penetrated the brain and caused the extradural haemorrhage, which bled back into the brain and when the fractured bone was surgically removed, blood filled the void. Mr Macfarlane said this, together with the deepest mark being a blood vessel, explains all the MRI findings. Ultimately, he was not challenged about this evidence and to the extent that his evidence differs from that of Dr Bajaj, I prefer Mr Macfarlane's evidence.

14. Nevertheless, Mr Macfarlane's own evidence on the extent to which it would have made a difference if the Claimant had worn a helmet, differentiated between two different factual scenarios that he summarised in the Neurology joint statement:

    a. If the Claimant had been wearing a helmet and was thrown and hit the ground directly, the skull fracture, extradural haemorrhage, contusion and other brain injury and surgery would have been avoided completely.

    b. If the Claimant's helmet had hit 'street furniture' (e.g. a lamppost) before hitting the ground, the greater impact would have caused some brain injury (but not fracture, haemorrhage or contusion) with minor consequences.

15. I turn next to the lay witness evidence, starting with the First Defendant's evidence as to his acquisition of the Motorbike. The owner's CCTV shows it being stolen in the early hours of Sunday 9th April 2017, but it is impossible to identify the gang who took it. The First Defendant suggested that between the theft and the accident, he was approached by a stranger (a white male) in a park who asked him if he wanted to buy the Motorbike that he had with him. The First Defendant said he checked and the man reassured him it was not stolen, but they did not discuss paperwork or insurance. The First Defendant said as he had £100-£150 in cash on him, 'pocket money and birthday money' (he turned 16 five months earlier), he bought the Motorbike even though he knew he was not allowed to ride it until he was 17. I am afraid, like Mr Blakesley, I found the First Defendant's story to be totally unbelievable. Quite aside from the extreme implausibility of a stranger

approaching a young lad not known to him in a park to offer to sell him a valuable motorcycle for £100-£150; there is the troubling question of why the First Defendant just so happened to have that amount of money on him as he took a pleasant springtime stroll through the park; and the rather too convenient earnest enquiry and confirmation that it was not stolen, which I find was a complete lie.

16. However, I am not persuaded by Mr Blakesley's effort to 'take the plums and leave the duff' in the rest of the First Defendant's evidence, by relying on it where it diverged with the Claimant's evidence. But nor in fairness can I accept Mr Brindle's equally sterling efforts to minimise the differences in the evidence between the two. Save on a couple of points, the evidence of the Claimant and First Defendant diverged and the real issue is whether either are credible. For example, the First Defendant suggested he hid the Motorbike at the back of his house, out of eyesight of his mother (the Claimant's father's mother) who would be annoyed by him buying it. But the Claimant recalled seeing it at the front of their house. Moreover, the First Defendant's account about trying to conceal the Motorbike is inconsistent with him showing it off at a local community barbeque, which he did not mention in his statement, but accepted in evidence as the Claimant described. The First Defendant said he did not have a helmet, but the Claimant says there was one on top of his wardrobe. Moreover, the Claimant said they were told by the First Defendant's older brother to wear helmets if they took the Motorbike out, which the First Defendant accepted in cross-examination, but never mentioned in his statement. Their accounts did largely converge that the Claimant sustained an ankle injury at their friend Jeahian's house and how this prompted them to ride to hospital, with the First Defendant riding and the Claimant as pillion passenger. But even then, the First Defendant sought to minimise his own responsibility for the accident, suggesting he would not have run a red light even though the agreed expert evidence shows that it was happened. In short, the First Defendant's evidence was totally unreliable where it diverged from or was unsupported by the Claimant's evidence.

17. Indeed, the Claimant's evidence was in total contrast to that of the First Defendant. I make allowances both for and against him for the passage of time and effect of his accident (there is no suggestion of retrograde amnesia, but his troubled life since has doubtless coloured his memory). Whilst the Claimant sometimes struggled to articulate what he meant, I found him an essentially truthful and reliable witness:

    a. Firstly, the Claimant and the First Defendant's accounts that the latter was driving and the former was a passenger are *externally consistent* (or at least not inconsistent) with the Police Accident Report and Ambulance Report.

    b. Secondly, unlike the First Defendant, the Claimant's accounts in his statement and evidence were also *internally consistent*. Under searching and skilful cross-examination by Mr Blakesley, the Claimant's essential account did not change save for only one significant detail. He mentioned for the first time in oral evidence that he asked the First Defendant on the journey to take an underpass under Belgrave Middleway, which he either did not hear or ignored. I do not accept the Claimant was making things up in cross-examination. It was a detail he would not have invented, since it did not assist his case: the subway would have been a longer way around, their riding through it unsafe to pedestrians and the First Defendant ignored it.

c. Thirdly, I was impressed by how the Claimant gave evidence when put on the spot. He was unexpectedly recalled about hospital notes suggesting Police came to hospital due to gang conflict and that he had a gun-butt held to his head just before the accident. He denied that but honestly accepted his wider family were involved in gangs, but insisted he was not himself involved in criminality before the accident. Whilst Mrs Dormer did not hear his evidence on that, when recalled, hers was essentially consistent with it.

d. Fourthly, the Claimant's account was generally reasonable and plausible, for example his descent into criminality after the index accident. He readily accepted repeated drug offences and imprisonment and several incidents causing injury since the index accident. However, he did not minimise and took responsibility for that, accepting that he had been manipulated by gangs into crime, making his own life even worse than just after the accident.

e. Finally, the Claimant's account of the day of the accident contained three other admissions against his own interest – showing his essential honesty as a witness by admitting inconvenient truths - besides his unwise but ineffectual suggestion of riding through the subway. Working backwards:

    i. The Claimant said he injured his ankle when he was revving the Motorbike at their friend's house. Whilst Mr Blakesley said this was a childish excuse for why they were seriously injured when out joyriding, the expert evidence is they were driving below the speed limit before accelerating through the red light. As Mr Brindle said, when teenagers make up excuses, they usually deflect blame from themselves. With his story about injuring his ankle, the Claimant was actually taking responsibility for it being his fault that they were riding into the city to go to hospital. Moreover, his mother herself accepted in that situation, they would have wanted to 'sort it out themselves' and get treatment for his ankle before telling an adult.

    ii. The Claimant's account that he and the First Defendant were told by the latter's older brother to wear helmets if they took the bike out was clearly an admission against interest: underlining the Claimant's negligence in not wearing a helmet. Whilst Mr Blakesley relied on the First Defendant saying there was no helmet available, not only is this contradicted by his admission in cross-examination that his brother told them to wear helmets if they did take out the Motorbike, it is also contradicted by the Claimant's evidence he saw a helmet.

    iii. That too was an admission against interest by the Claimant, as there was a helmet available which he could have worn after the brother's warning even if the First Defendant had chosen not to do so.

For all those reasons, I found the Claimant an essentially credible witness.

18. Moreover, I found the Claimant's evidence was corroborated in several crucial respects by that of his mother, Mrs Dormer. Of course, like any mother, she has loyalty to her son and wants the best for him. Doubtless she also sees how he was before the accident through rose-tinted spectacles for all the pain he has caused her since then. She is hardly independent. Nevertheless, I found her an entirely honest witness trying to assist the Court – including rushing back, despite being ill, to be recalled on the hospital notes discussing gang activity. I found her evidence reliable:

a. Firstly, when she was recalled about those notes which recorded her telling hospital staff the Claimant was associating with gangs and her father saying he was in a gang, she pointed out the notes also recorded her stressing to staff he was *not* in a gang and said the staff had misunderstood her father saying members of one gang had tried to visit the Claimant in hospital to threaten him *as one of his relatives* was in a rival gang, *not the Claimant*. I prefer her tested direct evidence to this untested multiple hearsay evidence.

b. Secondly, whilst the First Defendant suggested in evidence that his family did not have much money and he bought the Motorbike himself out of £100-£150 cash he just happened to have on him, not only was his evidence implausible, it was contradicted by Mrs Dormer's evidence. Corroborating the Claimant's similar evidence, she said that she was not surprised by the First Defendant having a motorcycle at 16, as she often saw people of his age riding round on similar bikes. If she had not known the Motorbike in question was stolen, she said she would have assumed like the Claimant that the First Defendant's family bought it for him 'as it was the kind of thing they would do'. (This was not necessarily entirely complimentary, as she also accepted telling hospital staff that she felt the First Defendant was a 'bad influence' on the Claimant and she did not approve of motorbikes herself as her brother had been seriously injured on one some years before).

c. Thirdly, I confess when the Claimant said in his evidence that he had been brought up not to question other family members and to 'mind his own business', which he suggested was typical of British-Jamaican families, I was a little surprised. The latter seemed to be a generalisation (even a self-inflicted stereotype) with which many British-Jamaican people may not accept. Mr Blakesley said this was an excuse for 'not asking questions' when wider family were involved in criminality - and indeed rather a convenient one for why the Claimant admitted not asking the First Defendant about the provenance of the Motorbike. Nevertheless, in her evidence, Mrs Dormer not only corroborated the Claimant on this point, she actually seemed rather proud of him for it. She confirmed it was indeed the way she had brought him up and in fairness she simply saw it as good manners. Whether or not I or others (whether or not of British-Jamaican heritage) would parent or think in the same way is totally irrelevant. I accept that is how Mrs Dormer raised the Claimant to be – and indeed partly what she grieves he has lost since the accident in his change in behaviour.

For those reasons, whilst not independent, I accept Mrs Dormer was an honest and reliable witness and I accept her evidence, including in corroborating her son.

19. I will next turn to my findings of fact based upon that evidence. Since there has been much discussion in this case of criminality, it is appropriate to remind myself – just as juries are routinely directed – that I must reach my findings on all the evidence, not just part of it, whether the CCTV (which cannot prove the central issues in this case, only the circumstances of the accident) or indeed the oral evidence. However, unlike a jury, I am applying a civil standard of proof and making factual findings on the balance of probabilities, since there is only one civil standard which does not change with the seriousness of the allegation (see e.g. *Shagang v HNA* [2020] 1 WLR 3549 (SC)). As Mr Blakesley accepts (following *Stych v Dibble* [2012] EWHC 1606 (QB) at [18]), the burden is on the Second and

Third Defendants to prove (i) the Claimant had 'actual knowledge' or 'blind-eye knowledge' the Motorbike had been stolen or unlawfully taken; (ii) the illegality defence; and (iii) for contributory negligence, how far the Claimant's injuries would have been less with a helmet. But the burden of proving all other 'facts in issue' (e.g. whether he was the rider or passenger) is on the Claimant. To reflect that distinction, I will first set out my 'background findings of fact' for which the burden of proof is on the Claimant, then my findings on his knowledge when it shifts.

Background Findings of Fact

20. The Claimant was born in October 2001 (so was 15 in April 2017) to his mother, Iteen Dormer ('Mrs Dormer' as I shall call her) and his father, whose younger brother is the First Defendant. However, whilst the latter is strictly the Claimant's uncle, he was only born a year earlier in November 2000 (so was 16 in April 2017), so they grew up like cousins and went to the same school. It is a wide extended Birmingham family of proud British-Jamaican heritage, but the Claimant admitted that his second cousins (the First Defendant's cousins) were associated with gangs.

21. Understandably, the Claimant did not go into too much detail about this (and it seems to have been something the Police were well-aware of. That is mentioned in the hospital notes recording an incident whilst he was admitted after the accident). However, he accepted that even before the accident he had been aware of and familiar with this less law-abiding small minority in his extended family. As I shall explain, this is an important part of the Defendants' case against his claim. It was plain from Mrs Dormer's evidence that whilst she tolerated the Claimant spending time with these people, because ultimately they were family, she was anxious and worked extremely hard so that her son would not go the same way. It is extremely painful for her that after the accident and several failed attempts at education and work, the Claimant was gradually drawn into the world of criminality, not only committing offences but sustaining repeated injuries, including re-injuring his head. So, whilst I am not making findings about the long-term effect of the injuries, as the Second and Third Defendants challenged the Claimant's character, it is instructive to compare his pre-accident and post-accident character (but in reverse order).

22. According to Dr Bajaj's first report from October 2022 and the August 2022 report of Dr Naing, Consultant Psychiatrist, after the accident in April 2017, the Claimant was regularly openly defiant and abusive to staff at school (6 incidents in six months). Even after passing GCSEs in Maths, English Language and Literature and Art, the Claimant went to college but was excluded for assaulting another student. He then went to Art College but left and then tried to train on a Gas Engineer course but struggled with it too. Mrs Dormer suggested all these frustrations, anger and self-consciousness about the appearance of his head injuries, changed her son into a different person. He became verbally and physically aggressive with her and his two younger brothers. So, after less than a year, he moved in with his Grandmother (his father and the First Defendant's mother). He later moved to a flat but lost it when he got in trouble with the Police. The Claimant described himself as 'easily manipulated' and his mother suggested his frustrations drew him into crime and injuries related to the world of criminality. In June 2018, he was caught with a wrap of drugs and swallowed it, ending up in hospital. On Christmas Day 2018, he was involved in a car accident and broke his upper left leg. Tellingly, he was with people

involved in gangs - drugs and cash were found in the car. In 2019, he was sentenced to a Community Rehabilitation Order for drugs offences. In May 2021, he was involved in a fight and was pushed onto the floor, banging his head. On 8th June 2022, he fell down a flight of stairs, again banging his head. In July 2022, he was involved in another road accident at a speed of 80 mph, sustaining injury to his shoulder. In September 2022, he had yet another road accident fracturing his right arm. In May 2023, he was charged with driving without a licence or insurance and banned from driving. In February 2024, he was imprisoned for drugs offences.

23. Whilst I stress I am not making findings about the Claimant's pleaded 'personality change', such pre-accident records as I have show nothing like and indeed suggest he was an ordinary 15-year old. He had never been in trouble with the Police and although (according to Dr Naing's report), he had a record of fairly low-level disruptive behaviour in school (11 incidents in 3 years up to April 2017), he had not been suspended or excluded and had above-average educational ability. When he and his mother were recalled about medical notes suggesting that he was either a member of a gang, or associated with gangs, before the accident, they were both adamant this was not the case and I accept that. They gave evidence clearly and straightforwardly and Mrs Dormer explained that hospital staff had misunderstood a complex situation being explained by her father about the association of the wider family with gangs and how gang enmity might put the Claimant at risk even though he was not personally involved in or even associated with gangs. A family member who was in a gang came to visit the Claimant in hospital. Other visitors told Mrs Dormer the Claimant had been recently threatened with the butt of a gun at school, but the Claimant denied that occurred and I prefer his straightforward evidence to multiple hearsay. In if that note had been correct, it would only have shown the Claimant had suffered trouble from gangs, not that he was involved with, still less part of, a gang. I accept that whilst a few of the Claimant's wider family had been involved in gangs, Mrs Dormer was working hard as a Health Care Assistant (she is now training to be a Nurse) bringing up her three boys as best she could to shield them from the gangs. Nevertheless, at least by contact with his wider family, the Claimant had some exposure to the world of criminality even before the accident.

24. Whilst knowledge that relatives are involved in criminality is unlikely to encourage probing enquiries, there is a quite distinct factor which it is important to bear in mind within the Claimant's family's internal dynamic. The Claimant and his mother both suggested that within their extended family, it was considered rude and disrespectful to ask probing questions of all family members, not just 'elders and betters'. As they both put it, she raised him to 'mind his own business' generally. (Indeed, this may have been drummed into Mrs Dormer by her past experience when as a prosecution witness, she was ostracised but unsupported by Police). Whilst they both suggested this was typical of British-Jamaican families, I have no wider evidence of that and it may be many other families of that heritage would dispute it. But what matters was that it is the culture within *the Claimant's family*.

25. In other respects, the Claimant was a typical teenager, who enjoyed football and wrestling. He also mentioned to Dr Naing that he had 'liked motorbikes' although in evidence he struggled to explain what he meant, as Mr Blakesley fairly pointed out. However, that does not mean he was being evasive. I accept he had no long-standing interest in motorbikes. Indeed, his mother did not recall him having any

such interest – she remembered him playing with toy cars not motorbikes - and I accept she would have remembered and discouraged any interest in motorbikes as her brother had previously been seriously injured on one. Nevertheless, the fact is the Claimant specifically mentioned to Dr Naing that he 'liked motorbikes'. But whilst there may be no sharp distinction between an interest in motorbikes generally and one in how they work, I find the Claimant was fascinated by – but not expert in - motorbikes just as young men are often fascinated by 'flash cars' and their status, without having any interest in tinkering with them armed with a Haynes Manual. That was clearly relevant to the Claimant's reaction to the Motorbike in April 2017.

26. As I have already said, I do not accept the First Defendant bought the Motorbike in good faith believing it was not stolen. There is no evidence he stole it himself – the CCTV is unclear as to the identity – even ethnicity - of the group which did so and the First Defendant has not been charged with any offence relating to it. However, given he paid no more than £150 for a Motorbike which was clearly worth much more (the Policy indicated it was a 2015 model worth £1800), without any documentation in unorthodox circumstances, I find on the balance of probabilities that the First Defendant must have known that it had been stolen. He also admitted he knew he could not legally ride a motorcycle like it until he was 17 (rather than a moped he could ride when 16). He accepted he took no test and had no insurance.

27. However, I accept the First Defendant hardly would have broadcast the shady provenance of his new acquisition, especially not to his own mother whom he knew would not approve of it. Yet he was still brazen enough about it to show off the Motorbike at a community barbeque, where a friend filmed him on it and posted it on Snapchat. That is where the Claimant first saw it, though he said he did not realise it was classified as a motorcycle which only 17-year olds could ride. He thought it was a moped which he knew 16-year olds did ride. On balance of probabilities, I accept that: the two wheels at the front and one at the back of the Motorbike (a picture of the model is in Mr Wilson-Law's report) is not a 'classic' moped (e.g. as associated with 'Mod culture') but nor is it a 'classic' motorbike. Indeed, at 125cc, it is the lowest capacity which is not lawful for 16-year olds to ride, hardly a 'superbike'. I accept the Claimant had no technical expertise in motorcycles and I accept he thought it was a moped and did not think anything of the First Defendant as a 16-year old having it, just like he was aware many other 16-years olds rode mopeds. The Claimant was unaware of legal technicalities.

28. The day before the accident, the Claimant was dropped off at the First Defendant (Jeheim)'s house by his mother, who was working during the Easter holidays. She explained she would tend to drop him off by a path and did not see the front of the house, but the Claimant saw the Motorbike there. He said this in his statement:

> "I assumed one of Jeheim's brothers or sisters had brought it for him, as they were like that. If one of them needed something they would do their best to provide it, often clubbing together. I assumed that this had been the case with the bike and so I never asked him where it has come from or how he has paid for it and assumed that the bike belonged to Jeheim. I had no idea or suspicion that the bike was stolen. It did not cross my mind that it was or might be, and I never had any reason to ask Jeheim whether it was."

I reach my conclusion as to the truth of that account later, but I simply note for the moment that I accept Mrs Dormer would have shared that view had she not known

it had been stolen. The Claimant did not ask the First Defendant where he had got or how he had afforded the Motorbike. Many of us would have a natural curiosity when a friend or close family member suddenly acquired a fascinating 'new toy' like a motorcycle. But the Claimant was adamant that he did not ask the First Defendant about that because that would be considered what he called 'enough' or 'extra' in his family – meaning what I might call 'nosey'. Mrs Dormer corroborated that. However, another reason he might not have asked is if he suspected that it was not legitimate, especially being aware other wider-family members were involved in criminality. It is better to decide that after all my other background findings.

29. As the First Defendant's absence of insurance is obviously less serious than the fact that 'his' Motorbike had previously been stolen, insurance is very unlikely to have been on the Claimant's mind. Not many 16 and 15 year-olds discussing a new motorcycle that one of them had just got would have an earnest conversation about motor insurance. They were teenagers, not middle-aged - and a middle-aged Judge evaluating this must try to put himself back in the shoes of a teenager, as Mr Brindle rightly said. Whilst the Claimant admits he was dimly familiar at that age with insurance to drive a car, his mother herself said she had not discussed this with him (doubtless as he could not drive yet anyway). I find it is entirely plausible that the Claimant would not think to ask the First Defendant about his insurance for riding the Motorbike – and I accept that he thought that it was like a moped which a 16-year old like the First Defendant could ride. But *if* the Claimant was not asking about the provenance of the Motorbike because he thought it might be illegitimate and 'did not want to know', he would hardly have thought that it was insured either.

30. On the day of the accident, again the Claimant was with his uncle the First Defendant as both were on their school holidays. Again, the Claimant was dropped off by his mother and I am sure he was keen to see the new Motorbike again. Tellingly, he recalled being in the First Defendant's room and seeing a helmet on top of the wardrobe and the First Defendant's older brother coming in and sternly warning them that if they went out on the bike, they had to wear helmets. The Claimant assumed this was because the First Defendant had taken it out without a helmet before. I consider this – like the Claimant's assertion that he did not ask the First Defendant about the provenance of the Motorbike – a very important piece of evidence. I will have to evaluate how they fit together on the crucial issue of whether the Claimant had actual or blind-eye knowledge that the Motorbike had been stolen or unlawfully taken. On this particular factual detail about seeing the helmet and what the First Defendant's brother said, I accept the Claimant's account. It reflects his essential honesty as a witness, since it is a statement against his interest. After all, it was a specific reminder by an older family member to wear helmets and specific reference to the availability of at least one helmet, which underlines their decision later that morning to ride without a helmet was negligent. Accordingly, it is not something the Claimant would want to invent. It is more likely to be etched on his memory as an 'if I had only listened' moment. However, it also suggests an older member of the First Defendant's family (albeit not his mother, the Claimant's grandmother) knew about the Motorbike and gave them (conditional) permission to ride it. This may have reinforced the Claimant's impression the First Defendant's brother knew and approved of him having and riding the Motorbike.

31. The First Defendant rode the bike with the Claimant on the back the short distance to their friend Jeahian's house. This was not only the evidence of them both (and however unreliable the First Defendant's evidence otherwise, he offers some corroboration on this point for the Claimant's generally reliable evidence). It is also an uncontradicted and plausible account. It was the First Defendant's Motorbike (in fact ill-gotten), not the Claimant's. It was relatively new and whilst the First Defendant had a couple of days' experience riding it, the Claimant had none. It would have been surprising if the First Defendant had allowed the Claimant to drive him, as opposed to letting the Claimant 'mess around' with it off the actual road. Indeed, I accept the (again on this point essentially consistent) evidence of the Claimant and First Defendant this is precisely what happened at Jeahian's house.

32. When the Claimant and First Defendant arrived at Jeahian's house to show off the Motorbike, the First Defendant let the Claimant 'have a go'. The Claimant revved the engine but let go of the brake and it ran into a wall and fell onto his ankle (he was not sure which one, he said 'probably left'). He said it was very painful and he couldn't walk on it and worried it was broken. But they did not want to tell either of their parents (or Jeahian's parents as it would get back to theirs) in case they got in trouble. So they decided the First Defendant would take the Claimant to Birmingham Children's Hospital the other side of the City Centre. As Mr Blakesley pointed out, there was no record of an ankle injury in the hospital notes. As I said, he suggested this was a far-fetched teenage story to excuse their decision to ride the bike into Birmingham when they both sustained serious injuries – to cover up the fact they were actually joyriding. However, as I also said, I accept the Claimant's account on this on balance of probabilities. I do so for three reasons:

    a. Firstly, I agree with Mr Brindle that far from seeking to deflect blame as teenagers typically do, here the Claimant was accepting responsibility for why they were riding into the city when he sustained serious injuries. So, it was a statement against interest suggesting his honesty as a witness. Indeed, whilst I do not suggest the Claimant realised this, it raises the question of whether by prompting the journey with his injury, he had 'caused' the First Defendant to use a vehicle without insurance – a criminal offence under s.143 RTA. I briefly consider this when considering the illegality defence, but I can say now that Mr Blakesley was entirely right not to pursue it.

    b. Secondly, I also agree with Mr Brindle that it is unsurprising there is no reference to an injured ankle in the Claimant's hospital notes. He was admitted with serious head injuries and a broken left leg. No-one was going to be focussing on any injury to his ankle. As Mrs Dormer said, she was worried whether her son would even pull through and in any event, after he did, his left leg was in a cast and he was in bed, not walking on his ankle.

    c. Thirdly, on that subject, this is a strange story for the Claimant to invent. As Mr Brindle observed, it is notable he did not say it was definitely his left ankle, as he would have if inventing it, knowing it could not be gainsaid due to the cast. He said it was 'probably' his left ankle (which I accept it was). There were much simpler lies to tell if the Claimant wished to make excuses, such as he thought the First Defendant would just ride around a side street, but he took off at speed and would not let the Claimant off. That would be a classic teenage 'someone else's fault' excuse (and given I will find the serious injuries were indeed the First Defendant's fault, excusable). On the

> contrary, the Claimant's account involved Jeahian, so could have been checked. Mr Blakesley does not seek to draw an inference from Jeahian's absence as a witness, but fairly points out he (and the First Defendant's older brother on the helmets) did not give evidence to corroborate the Claimant. That is true, but if his 'ankle story' had been a lie, Jeahian could have contradicted it, or perhaps more likely after several years said he 'did not remember'. Moreover, far from being implausible that teenage boys would not tell adults if one of them injured himself messing about, that is precisely the sort of stupid thing some teenage boys do. Notably the Claimant's own mother confirmed that she was not at all surprised that they acted this way. That poor decision (jointly with the First Defendant) prompted the journey and I return to it at the end of the judgment on contributory negligence.

33. That would also explain why the First Defendant rather than the Claimant was riding the Motorbike with the Claimant an injured passenger. However, even if I am wrong about that, I find the Claimant has proved on the balance of probabilities that he was the pillion passenger on the Motorbike. Not only is that his evidence, corroborated by the First Defendant (for what his corroboration is worth), there is no evidence to contradict it. More importantly, it is corroborated by one of the few contemporaneous documents in this case, the Ambulance Record, by paramedics on the scene at 13.15, within 8 minutes of the 999 call by a passer-by. Even assuming that was the Claimant's own account (since his readings are consistent with being able to communicate) it is internally consistent, as I said earlier. It is unlikely in that shocked condition he would have the presence of mind to lie about being the passenger not the rider. Moreover, in the Dashcam footage, there were a crowd of passers-by around after the accident, including one who called 999. It would be likely they were still there when the ambulance arrived a few minutes later and could well have confirmed who was rider and who passenger – even if the Police in their Accident Report reserved judgment, there was no contrary evidence. (I also note the Ambulance note mentioned the location's 'proximity to BCH' - Birmingham Children's Hospital – consistent with 'the ankle story'). Finally, as I also explained earlier, it is also entirely plausible the Claimant was the passenger and the First Defendant the rider even if the Claimant was not already injured. It was not the Claimant's bike, he was younger and even more inexperienced.

34. For those reasons, I would also have found on balance of probabilities the Claimant was the passenger even if I had found the 'ankle story' was an excuse for joyriding. But as I said earlier, there is simply no evidence of joyriding and some evidence contradicting it. The Claimant (corroborated here for what its worth by the First Defendant) is clear that there was no joyriding, indeed in his statement he said this:

> "At first, I recall Jeheim going a little fast, but not excessively so, and I was holding on tightly and asked him to slow down as the speed was hurting my ankle. He slowed down and was driving sensibly as we approached the lights near to the mosque on Belgrave Middleway, which was not far from our friends house. I understand that CCTV footage from the mosque shows that he was driving sensibly but then that as he reached the lights he sped up, I presume this was possibly to beat the lights. I am certain that I did not encourage him to speed up as going faster hurt my ankle. I understand that we ended up in a collision with another vehicle, but I cannot recall this."

I accept this evidence as consistent with the agreed evidence I summarise again in a moment. However, as Mr Blakesley fairly pointed out, there was no reference in the Claimant's statement to him asking the First Defendant to take the subway, which would have been a longer way round and unsafe for any pedestrians they met. This was the only significant difference between the Claimant's statement and oral evidence (it is understandable he did not mention gangs in his statement as I found he was not involved with any then). On the 'subway' point, Mr Blakesley n one hand suggested the Claimant made it up in evidence, but on the other, he relies on it as consistent with the Claimant encouraging unsafe riding. I consider it honest evidence precisely because it is an admission against interest for that reason. Yet as Mr Brindle said, whilst in hindsight it was unsafe, in the Claimant's mind, he was still thinking as a pedestrian to go the way he would normally go. In any event, the First Defendant either did not hear or ignored him, so ultimately it did not matter.

35. In fact, the Claimant's unheeded preference to go through the subway is relevant in one way: it underpins that the decision to go straight over the lights was the First Defendant's alone as the rider in control. Indeed, this is consistent with the agreed accident reconstruction expert evidence I summarised earlier. It concluded that on the approach only 20 metres from the junction along Longmore Street, the Motorbike was travelling at 17-18 miles per hour, before it suddenly accelerated less than 5 metres away from the stop line. Indeed, by my own repeated viewing of the Mosque CCTV, the Motorbike appears to have been travelling much more slowly than some of the cars already filtering left, hardly consistent with joyriding. Since on the expert evidence, the Longmore Street traffic light straight on was already red, this is consistent with the Motorbike pulling up slowly towards the junction, perfectly sensibly. However, as the expert evidence concluded, less than 5 metres from the stop line, the Motorbike suddenly accelerated again and went through its red light, before the traffic in the nearer northbound carriage way started moving. It 'beat' that to the halfway point of the junction, but then drove into the traffic on the southbound carriageway, already in the middle of the junction, hitting the Mini. Whilst the First Defendant did not accept that he had driven through a red light, the agreed evidence and CCTV plainly shows he did. But in fairness, that is consistent with his making a last-split-second fateful decision – not with the encouragement of the Claimant, but contrary to the route through the subway he would have preferred to take. Therefore, I find on the balance of probabilities the First Defendant approached the junction at a normal speed with a view to stopping at the already-red light, but on the spur of the moment before he stopped, suddenly reaccelerated - not to 'beat the lights' as the Claimant thought, but to 'beat the traffic': – to speed through the junction before the traffic on it started crossing the middle. However dangerous, the CCTV shows he nearly made it – the Mini was in the furthest lane, next to the traffic light on an island in the entry to Horton Square.

36. The agreed reconstruction expert evidence suggested it was unlikely that the Claimant was injured by being thrown onto the Mini, as its front hit the nearside (left) of the Motorbike. Indeed, from my own repeated viewing of the CCTV, it appears (although this is not entirely clear) the Motorbike passed across the front of the Mini, consistent with a blow from the left-hand side as it passed, pitching the Motorbike and riders into the vicinity of a traffic light island in the mouth of Horton Square. That itself can be just seen from the other direction on the Dashcam footage, although since it is at right-angles and is so far back, it is not the clearest view.

However, as the car with the Dashcam passes the island and the aftermath, it shows the Mini stationary next to it, the Motorbike on its side at the base of a lamppost with the traffic lights and a large crowd shielding the Claimant and First Defendant on the ground. Someone rang 999 and the paramedics arrived within 8 minutes. As I said, Mr Macfarlane's opinion on this point is that if the Claimant hit the ground directly, the skull fracture, extradural haemorrhage, contusion and other brain injury and surgery would have been avoided completely, but if he hit street furniture like a lamppost before hitting the ground, the greater impact would have caused some brain injury (but not fracture, haemorrhage or contusion) but with more minor consequences. Both he and Dr Bajaj and the accident reconstruction experts left that decision to the Court. In my judgment, whoever strictly the burden of proof is on (whether for loss the Claimant or for contributory negligence the Defendant), I find on balance of probabilities that the Claimant did hit the lamppost (or other street furniture on that little island that can be seen on the dashcam footage) because:

a. Firstly, it is recorded by the paramedics on the Ambulance record that: 'Passenger, motorcyclist vs car then hit lamppost appr.50 mph. No helmet'. As I said earlier when referring to this as corroborating the Claimant's evidence that he was the passenger not the driver of the Motorbike, this is one of the few contemporaneous records in the case and the information would have come from the scene, either from him or passers-by the paramedics spoke to, or both. Whilst the Claimant cannot remember now what happened, that contemporaneous note suggests he hit a lamppost, or perhaps other street furniture in its vicinity, before he hit the ground.

b. Secondly, the Claimant hitting a post of some kind is also very likely given his proximity to the traffic island with the lamppost and many other posts on and around it, as shown in a clear still from the Dashcam footage in Mr Wilson-Law's report. I find the Claimant was pitched off the bike diagonally right as Mr Macfarlane said: towards the the island, lamppost and other street furniture. (But not 'ramped up' or 'lofted' as Mr Macfarlane put it, but this may be because it was a side impact, also corroborated by the Claimant's fractured left lower leg). It would have been very lucky in the circumstances if neither had hit anything before the ground. It is more likely than not the Claimant did hit the lamppost or other street furniture.

c. Thirdly, whilst Mr Macfarlane said that in that case he would have expected a greater degree of injury if the lamp-post was struck with significant force, that is not inconsistent with contact with the lamppost, which is one of the two options Mr Macfarlane presents on the evidence. It is simply consistent with the contact with the lamppost not being a significant force (e.g. a 'glancing blow'). I find that occurred on the balance of probabilities.

Therefore, accepting Mr Macfarlane's unchallenged opinion on the extent of injury had the Claimant worn a helmet, I find he would have avoided the skull fracture and so the extradural haematoma and contusion. Whilst of course he would still have sustained the left leg fracture and some minor brain injury (indeed at the lower end of the range Mr Macfarlane was considering as there was glancing or not significant impact from street furniture before hitting the ground), there would have been no more than minor enduring sequelae which would not have affected his capacity to make decisions, his ability to obtain gainful employment or independent living and the risk of post traumatic epilepsy would have been much-reduced.

37. As it was, because the Claimant was not wearing a helmet, as I explained above, he also sustained a right parietal skull fracture causing cerebral laceration and contusion and extradural haemorrhage with much more serious consequences, which I am not asked to make findings about at this stage. However, Dr Bajaj went further and gave evidence that the Claimant sustained Diffuse Axonal Injury ('DAI'). However, Mr Macfarlane comprehensively rebutted that in his unchallenged oral evidence. I therefore find on the balance of probabilities (again it does not matter on whom the burden rests) that the Claimant *did not* sustain DAI. Mr Brindle did not challenge Mr Macfarlane's evidence as a forensic decision as he believed he would persuade me (as he has) that the Claimant hit street furniture before hitting the ground and could therefore rely on Mr Macfarlane's opinion. Nevertheless, as Dr Bajaj's evidence of DAI was rebutted and I reject it, which is also relevant to contributory negligence, it is a finding which will bind the parties going forward.

38. Indeed, one of the slightly curious aspects of Dr Bajaj's evidence is that he relied on the Ambulance Record timing the Glasgow Coma Score as being recorded at 14.01: almost an hour after the impact and about 45 minutes after the paramedics arrived. He even implied the paramedics' approach was inappropriate. However, the paramedics recorded exactly the same time to the second – 14.01.54 - for *all* observations and readings. Unless they did all that in in one second, the likelihood is that time is not when they *made* the observations at the scene, but when they *recorded* them, not least because by 14.01, they had arrived at Birmingham Children's Hospital and had handed over the Claimant to staff there. I find on the balance of probabilities that the Claimant had a Glasgow Coma Score of 14/15 at the scene, which is further support for Mr Macfarlane's view. I also find that the paramedics responded swiftly and appropriately and gave the Claimant the very best of care, which I do not doubt prevented his injuries from being much worse.

39. Finally on my findings of fact for this liability-only trial, I find the very same is true when the Claimant was in Birmingham Children's Hospital, after his admission on 17th April 2017 in relation to an unfortunate incident there. After cross-examining the Claimant, the Defendant and Mrs Dormer on the first day of trial, Mr Blakesley asked for the Claimant to be recalled on the second morning. He had overnight spotted a reference in Dr Bajaj's report (possibly finalising his preparation for cross-examining him, which he did with consummate skill) to this hospital note:

> "18 April 2017…..Police involved as gang members apparently visiting [Claimant]. Mother said he had a butt of a gun held to his head just before this admission. Two sides of the family are apparently in different gangs and have been arguing and fighting. Uncle was the 16-year-old on the bike from father's side of the family whom mother feels is a bad influence."

As I mentioned in my review of the evidence, the Claimant denied that he was the member of a gang as Mr Blakesley alleged or that he had been threatened in this way just before the incident. However, he honestly accepted his wider family were involved in gangs, but insisted he was not involved in criminality before the accident. Mrs Dormer explained that a visitor to the Claimant in hospital told her he had been recently threatened with the butt of a gun at school (which in fact was in a separate medical note that Dr Bajaj rolled together), but as I said, the Claimant denied that occurred and I prefer his evidence to multiple hearsay. However, whilst

he was in hospital, a family member in a gang came to visit the Claimant in hospital but Mrs Dormer told him to leave. A rival gang visiting their own gang-member in hospital saw that relative there and Mrs Dormer saw on social media they were threatening to come to the hospital to harm the Claimant (who was not in a gang) to get to his relative (who was). They tried to visit him, pretending to be relatives but were turned away by hospital staff as Mrs Dormer had asked them to do with any visitors when she was not present. This is the incident her father had discussed with hospital staff who (in this rather convoluted situation) wrongly noted down the Claimant himself was in a gang. As stated in a later note, Mrs Dormer corrected that and said he was not in a gang but sometimes associated with family who were. I accept her evidence and his that he was not in a gang then and indeed, there is no evidence of any criminality or even contact with the Police before the accident. But he was in contact with (family) gang members and she saw the First Defendant as a 'bad influence'. That is relevant to the issue of whether he had actual or blind-eye knowledge the Motorbike was stolen or unlawfully taken, to which I now turn.

Knowledge or reason to believe the Motorbike was stolen or unlawfully taken

40. This is the central issue, because if the Claimant did have 'knowledge or reason to believe' the Motorbike was stolen or unlawfully taken when he was a passenger, several consequences follow. Firstly, he would have committed the offence of 'Allowing to be Carried' under s.12 Theft Act 1968, potentially engaging the illegality defence. That would apply to a vehicle he knew or had reason to believe was either 'Taken Without Consent' under s.12 TA, or 'stolen' i.e. Theft under s.1 TA. The difference is the latter also requires 'intention to permanently deprive', that many who unlawfully take vehicles lack (e.g. car-jackers who take a 'getaway vehicle' then abandon it as in *R v Mitchell* [2008] EWCA Crim 850). In the present case, there is no doubt the Motorbike had actually been *stolen* by the thieves as they sold it on, not abandoned it. Mr Brindle does not suggest there is any difference between the Claimant's 'knowledge or reason to believe' the Motorbike was 'stolen' (s.1/6 TA) or 'unlawfully taken' (s.12 TA). In fairness to the Defendants, I will focus on whether they have proved on balance of probabilities the Claimant knew or had reason to believe it was 'unlawfully taken' ('the key finding'). Secondly, irrespective of the illegality defence, the key finding would relieve the Second Defendant from liability to the Claimant under s.151 RTA, as it would be an 'excluded liability' under s.151(4) RTA. Thirdly, the key finding would also mean the MIB (so the Second Defendant as its 'Art.75 Insurer') would not be liable to the Claimant for his judgment against the First Defendant, despite the latter being uninsured and the former his passenger, as Art.8(1) of the MIB Agreement states:

> "MIB is not liable for any claim…in respect of a relevant liability by a claimant who, at the time of the use giving rise to that liability, was voluntarily allowing himself to be a passenger in the vehicle and, either before the start of the claimant's journey in the vehicle…knew or had reason to believe…(a) the vehicle had been stolen or unlawfully taken, or (b) the vehicle was being used without there being in force in relation to its use a contract of insurance complying with Part VI of the [RTA] 1988…"

41. I return to sub-para (b) later, as it is not strongly contested and is better dealt with along with a short point of law relating to it specifically. That wording in sub-para (a) of the 2015 MIB Agreement - 'knew or had reason to believe the vehicle had

been stolen or unlawfully taken' - was aligned with the similar phrase in s.151(4) RTA. Previously, in the 1988 MIB Agreement in otherwise materially similar terms, rather than saying the claimant '*knew or had reason to believe* the vehicle had been stolen or unlawfully taken or was being used without insurance', it stated '*knew or ought to have known*' that it had been stolen or unlawfully taken, or was being used without insurance. The 1988 version was the one considered in *White v White* [2001] 1 WLR 481 (HL). In that case, the plaintiff sustained injuries when a car driven by his brother overturned. His brother was not insured (i.e. sub-para (b) but the wording was the same: 'knew or ought to have known'). The issue was whether the plaintiff 'knew or ought to have known' that his brother when driving was uninsured, given that his brother had in fact not passed a driving test, had driven without a licence before and indeed had been disqualified from driving. The trial judge (unsurprisingly on those facts) found that whilst the plaintiff did not actually know any of that or his brother was uninsured, he 'ought to have known' by making enquiries. The Court of Appeal agreed, as did Lord Scott in the House of Lords. Nevertheless, the majority of the Lords disagreed and allowed the appeal.

42. In *White*, the leading speech for the majority was given by Lord Nicholls, who noted that 'knew or ought to have known' was different from the (then) EEC Motor Insurance Directive which stated compensation to injured passengers could be excluded under national law (including the MIB Agreement) if they had voluntarily entered the vehicle causing the damage when the MIB could prove 'that they *knew* it was uninsured' (I return to 'it' later). Lord Nicholls decided that even though the MIB Agreement was not legislation, it was intended to implement the Directive and should be interpreted consistently with it so that 'know or ought to have known' should be limited to two categories of 'knowledge', as he explained at [15]-[17]:

> "15..[K]nowledge by a passenger that a driver is uninsured means primarily possession of information by the passenger from which the passenger drew the conclusion the driver was uninsured. Most obviously and simply, this occurs where the driver told the passenger that he had no insurance cover. Clearly, information from which a passenger drew the conclusion that the driver was uninsured may be obtained in many other ways. Another instance would be when the passenger was aware, from his family or other connections with the driver, that the driver had not passed his driving test ('if he'd taken the test, I would have known'). Knowledge of this character is often labelled actual knowledge, thereby distinguishing other types of case where a person, although lacking actual knowledge, is nevertheless treated by the law as having knowledge of the relevant information.
>
> 16 There is one category of case which is so close to actual knowledge that the law generally treats a person as having knowledge…where…[in] the present context, a passenger had information from which he drew the conclusion the driver might well not be insured but deliberately refrained from asking questions lest his suspicions should be confirmed. He wanted not to know ('I will not ask, because I would rather not know'). The law generally treats this state of mind as having the like consequences as would follow if the person, in my example the passenger, had acted honestly rather than disingenuously. He is treated as though he had received the information which he deliberately sought to avoid….

> 17…[T]hese two categories of case fall within the scope of the ['knowledge'] exception permitted by the Directive. Conversely, I am.in no doubt that 'knew' in the Directive does not include what can be described broadly as carelessness or 'negligence'. Typically, this would cover the case where a passenger gave no thought to the question of insurance, even though an ordinary prudent passenger, in his position and with his knowledge, would have made inquiries. He 'ought' to have made inquiries, judged by the standard of the ordinary prudent passenger. A passenger who was *careless* in this way cannot be treated as though he *knew* of the absence of insurance. As Lord Denning MR said in *Cia Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] QB 49, 68, negligence in not knowing the truth is not equivalent to knowledge of it. A passenger who was careless in not knowing did not collude in the use of an uninsured vehicle, and he is not to be treated as though he did."

Lord Nicholls said the Judge had (understandably) gone wrong by applying that incorrect objective approach. Whilst Lord Scott dissented, he equated Lord Nicholls' second category in [16] with traditional 'blind-eye knowledge' at [53]:

> "In *Manifest Shipping* Co *Ltd v Uni-Polaris Shipping Co Ltd* [2001] 2 WLR 170….at para 116, I tried to express the essentials of 'blind-eye' knowledge: "[It] requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist . . . The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe."

43. In *Stych v Dibble* [2012] EWHC 1606 (QB), Stadlen J applied the *White* test of 'actual or blind-eye knowledge' to when an injured passenger 'knew or had reason to believe' that a vehicle had been 'stolen or unlawfully taken' as the test for 'excluded liability' under s.151(4) RTA. Stadlen J explained at [5]-[14] that s.151(4) RTA was intended to implement another Article of the same EU Directive stating policy clauses excluding unauthorised drivers could not be invoked against injured third parties, but could be invoked against voluntary passengers 'when the insurer can prove they knew the vehicle was stolen'. Whilst Stadlen J noted 'stolen' was narrower than 'stolen or unlawfully taken' in s.151(4) RTA (to which I return), he also pointed out 'knew' was the same for the Article of the Directive for knowledge of no insurance analysed in *White*. Therefore, he took the same approach as in *White* in holding the injured passenger in *Stych* did not 'know or have reason to believe' a vehicle in which he was injured had either been stolen or 'unlawfully taken'. He disagreed with Keith J in *McMinn v McMinn* [2006] All ER 87 who had not applied the *White* approach to s.151(4) RTA as he thought the Directive did not apply to it. I respectfully agree with Stadlen J for the reasons he gave. (That said, *McMinn* is a clear case of an excluded liability as the claimant actually knew his brother was uninsured yet asked him to drive his own works van without its owner's consent). Yet in *McCracken v Smith* [2013] EWHC 3620 (QB) (discussed further below), Keith J himself changed his mind and applied *White*, holding a pillion passenger on a bike involved in a crash with a car did not 'know' the bike had been stolen (over a year earlier) but did 'know' the 16-year old driver was uninsured. By contrast, in *Stych*, a passenger who accepted a lift from a friend who worked at a garage using a customer's car (and was then injured) was held neither to know that the friend did not have the customer's consent to drive it, nor to have suspected it

but deliberately not checked, given the trip was only due to be a short distance to his home.

44. Another factual example of the *White* test is *Whyatt v Powell* [2017] EWHC 484. Lewis J (as he then was) allowed an appeal from the trial judge who held three passengers negligently injured by their uninsured driver 'knew or had reason to believe' that he was uninsured. The trial judge had wrongly drawn inferences of 'knowledge' from his own (actually incorrect) assumptions that the driver had previously been imprisoned for driving offences and the three passengers from the same small community 'must have known that'. One was 15 years old and just assumed the vehicle was insured. Lewis J held rightly-adverse findings about his credibility on other matters (e.g. on alcohol) could not justify an inference of 'actual or blind-eye knowledge'. The same was true of another passenger even though his evidence had been rightly rejected that the driver told him the car was 'legit'. The third passenger actually (incorrectly) believed the driver had gone to prison but had only thought so after the accident, so the trial judge's inference had been flawed there too. Lewis J contrasted *Akers v MIB* [2003] EWCA Civ 18, where the Court held that the claimant on the evidence *must have* overheard a conversation suggesting the driver had no insurance, so *did* have 'actual or blind-eye knowledge'.

45. In the present case, Mr Blakesley puts his case in three ways. Firstly, he submits that I can infer 'actual knowledge' like *McMinn* or *Akers* and find there was actually a conversation where the First Defendant told the Claimant that the Motorbike was unlawfully taken. The difficulty with that is such a finding would not only involve rejecting the evidence of the First Defendant as I already have (partly based on Mr Blakesley's submissions), but also not just rejecting, but flying in the face of, the Claimant's evidence which I already have largely accepted (contrary to the submissions of Mr Blakesley). Moreover, even if I did so, rejection of evidence is not in itself a basis to infer the opposite of that evidence, as illustrated by *Whyatt*.

46. The second way Mr Blakesley puts his case is that I should infer that there was a conversation where the First Defendant told the Claimant what he told the Court but the Claimant would have not believed it just as I have now not believed it. However, again, finding that occurred would involve rejecting the evidence of the Claimant that I have accepted and inferring the existence of a conversation both deny. In any event, even if that had happened and the Claimant disbelieved the First Defendant's account, that would not be 'actual knowledge' in the sense discussed in *White*. Thinking a story is untrue is not the same as actually 'knowing' that the opposite is true. Even if it may amount to 'believing' the opposite is true, 'belief' is not *itself* 'knowledge', as the Court of Appeal said in a criminal case involving an allegation of 'handling stolen goods' *R v Hall* (1985) 81 Cr App Rep 260. Of course, belief coupled with a deliberate decision not to ask further questions would be 'blind eye knowledge', which is how Mr Blakesley adapted that point in submissions. However, that would involve concluding (i) the First Defendant told the Claimant he had been told when buying the Motorbike that it was not stolen; (ii) the Claimant did not believe the First Defendant; but (iii) deliberately refrained from asking questions about it. Whilst the Claimant accepted not asking questions, he did not accept (i) or (ii) and nor did the First Defendant. So, this would be a 'taking the plums and leaving the duff' inference, just as untenable, if in a different way, than those in *Whyatt*. (But I return to Mr Blakeley's second scenario in a moment).

47. In fairness to Mr Blakesley, he focused on his rather better third route to inference of 'blind-eye knowledge'. The Claimant accepted not asking the First Defendant about the provenance of the Motorbike but said he did not ask as it would be (my word, not his) 'nosey' with another family member. Mr Blakesley invited me to reject the explanation for deliberately not asking but to infer a different reason: as Lord Nicholls put it in *White*: that the Claimant thought 'I will not ask, because I would rather not know': i.e. classic 'blind eye knowledge'. Mr Blakesley suggested I could draw that inference as: (i) the Claimant knew the First Defendant very well and that he was a 16 year old who could only ride a moped not a motorbike, but who never had one before nor talked about it; (ii) the Claimant found out the First Defendant unexpectedly had a new apparently expensive motorbike with no obvious means of buying it, coming from a family without sufficient money; and (iii) the Claimant was not as naïve as he was suggesting, because he spent time with people in gangs and knew 'not to ask questions' because of their possible criminality. Mr Blakesley suggested it was only 'neutral' (if I found as facts as I have) that (iv) the Claimant had seen the First Defendant show off the bike in public on the video; (v) the latter's older brother had given 'conditional permission' for them to ride it if they had helmets; and (vi) the Claimant's mother would also have genuinely assumed the First Defendant's family had bought the Motorbike for him.

48. However, as Mr Brindle says, factors (iv), (v) and (vi) are not as neutral as Mr Blakesley suggests. Indeed, I consider they clearly outweigh factors (i), (ii) and (iii), which are also not as powerful as suggested:

    a. Factor (i) is largely rooted in undisputed fact, although it only goes so far. The fact the First Defendant had not discussed with the Claimant that he wanted to get a bike does not mean the Claimant would have doubted that - or the Motorbike's legitimacy. The Claimant (and indeed his mother) knew it was common locally for 16 year-olds to ride mopeds. I have accepted that because of its unusual double-wheel at the front, the Claimant – fascinated by motorbikes, but not expert in them – believed it was like a moped. The Claimant certainly knew the First Defendant was inexperienced on the Motorbike (which I come back to on contributory negligence), but it would be a non-sequitur to infer from that he suspected it was illegitimate.

    b. Factors (ii) and (vi) are linked with and qualify each other. Whilst the First Defendant said in evidence that his family did not have much money, he also said he just happened to have £100-£150 in cash on him in a park. I prefer the more reliable evidence of Mrs Dormer that the First Defendant had a large family and buying him a motorbike 'would be the kind of thing they would do': 'clubbing together' as the Claimant put it.

    c. Factor (iii) is relevant (why I allowed cross-examination to be re-opened). I accept the Claimant was less naïve and more 'streetwise' than many 15 year-olds. With family that he knew were in gangs, I am sure the Claimant would think 'I won't ask as I don't want to know'. However, for all my criticisms of the First Defendant, as Mr Brindle pointed out, there is no evidence that *before* the accident he was in a gang or was linked with criminality at all. Mrs Dormer's 'bad influence' comment came *after* he injured her son.

    d. In any event, factor (iii) has to be weighed against factor (iv). Whilst the Claimant was 'streetwise' not 'naïve', the first time he had seen the

Motorbike (and the First Defendant with it) was in a video of a community barbeque. That would not suggest the Motorbike was illicit or that the First Defendant was trying to hide it. I have found *the First Defendant* knew it was stolen, but also that he was hardly acting as if it was. Whilst the Claimant may well have been surprised to see the First Defendant with the Motorbike, that does not mean he would have thought there was anything illegitimate about it. I find he would not have realised or thought there was.

e. However, factor (v) seems to me particularly important. I have accepted the Claimant's evidence (against his interests on contributory negligence to which I return at the end of the judgment) that the First Defendant's brother told them that if they went out on the Motorbike, they had to wear helmets. I described this as 'conditional permission' because a more senior member of the family clearly knew about the Motorbike and authorised them to use it if they wore helmets (and the Claimant could see one on the wardrobe). Any suspicions he might have had were likely to have been allayed by that.

I do not consider it is justified to draw an inference of 'blind eye knowledge'. I find on balance of probabilities the Claimant did not ask about the Motorbike's provenance because his mother had brought him up not to be 'nosey'. I find the Claimant did not know or have reason to believe it was stolen or unlawfully taken.

49. However, there is a simpler route to the same destination. Let me return to Mr Blakesley's second scenario I have rejected on the facts – that the First Defendant told the Claimant he had been told by the seller that the Motorbike was not stolen. Given the First Defendant said that, it would have been very easy - if the Claimant was not telling the truth - for them to agree to pretend the First Defendant had told him the same thing (that would corroborate the First Defendant too) That would have been a strong (if dishonest) answer to alleged actual or blind-eye knowledge the Motorbike was stolen or unlawfully taken, unless I had found not just that the Claimant *should* have disbelieved the First Defendant's story as I have, but that he (i) *did* disbelieve it; and (ii) deliberately chose not to ask further questions about it. In short, it would have been an easy lie that would have offered him significant protection. It speaks to the Claimant's honesty as a witness that he did not take that path. Instead, he honestly admitted that he did not ask questions, but explained why. He made several admissions against interest as I have discussed, including his foolish subway idea in his oral evidence. Therefore, even if the burden of proof were on the Claimant, I would positively find on the balance of probabilities that he did not have actual or blind-eye knowledge the Motorbike was stolen or unlawfully taken. In short, I find he was telling me the truth. As explained in *White*, 'blind-eye knowledge' is a suspicion actually in someone's mind which he deliberately chooses to avoid confirming (as Lord Scott said in *Uni-Polaris*). Here, I would find positively on balance of probabilities there was no such suspicion in the Claimant's mind. He was streetwise, but his naivety about his 'uncle-cousin' – a year older – and his trust in him - was sadly the Claimant's greatest foolishness of all.

50. In the light of that conclusion, I can take the more technical legal issues in the rest of my judgment more quickly, just as Counsel did in submissions. As I will explain, the conclusion that the Claimant had neither actual nor 'blind-eye' knowledge that the Motorbike was stolen or unlawfully taken means (i) he did not commit the offence of 'Allowing to be Carried' under s.12 TA for the purposes of the illegality

defence'; (ii) the First Defendant's liability to him in negligence is not an 'excluded liability' under s.151(4) RTA; and (iii) the MIB's liability is not excluded on the ground of his actual or blind-eye knowledge that the Motorbike was stolen or unlawfully taken. So, I shall deal with those issues briefly. However, issues remain as to whether (1) the illegality defence applies on any other basis; (2) the Policy means the Second Defendant is liable as 'RTA Insurer' under s.151 RTA; if not (3) whether it is liable as 'Art.75 Insurer' turning now on whether the Claimant had actual or blind-eye knowledge of lack of insurance; and (4) contributory negligence.

Is the Claimant's claim barred by the illegality defence ?

51. Whilst the illegality defence can be engaged by non-criminal serious unlawful conduct, called 'turpitude' in *Servier v Apotex* [2014] 3 WLR 1257 (SC) by Lord Sumption, none is alleged here. (The suggestion in *Sarfraz v Akhtar* [2021] RTR 13 at [24] that 'unlawful taking' in s.151 RTA may be wider than the s.12 TA offence of 'Taking Without Consent' is academic on my findings). The three crimes alleged are (1) 'Allowing to be Carried' under s.12 TA; (2) 'Causing a vehicle to be used without insurance' under s.143 RTA; and (3) 'Dangerous Driving' under s.2 RTA. I shall consider those in reverse order, but start with the key cases on illegality: *Patel v Mirza* [2017] AC 467 (SC), *Henderson v Dorset NHS* [2021] AC 563 (SC), *Joyce v O'Brien* [2014] 1 WLR 70, *McCracken v Smith* [2015] PIQR P19 (CA), *Clark v Farley* [2018] PIQR P15 (HC) and *Wallett v Vickers* [2019] PIQR P6 (HC).

52. Before *Patel*, the approach to what was then still called *'ex turpi causa non oritur actio'* ('You cannot recover damages in consequence of your own criminal act') was seen as *causative:* the law did not allow recovery of damages caused by an unlawful act. *Joyce* is a good example of this former approach (in fairness before the few years' of intense activity in the Supreme Court starting with *Servier*). In *Joyce*, the Court of Appeal rejected a heroically optimistic claim for personal injury brought by one of a pair of hapless thieves, who fell out a van being driven dangerously by the other away from their theft of some ladders. Elias LJ at [27]-[29] held the injury was *caused* in their course of their joint criminal enterprise where it was foreseeable that injury may be likely and did not matter it stemmed from the other's driving. Elias LJ adopted the 'ex turpi causa' analysis of Dillon LJ in *Pitts v Hunt* [1991] 2 QB 24, dismissing a claim by a pillion passenger on a bike being drunkenly joy-ridden, rather than the analyses of 'no duty' or 'no breach' of the other judges in *Pitts*. In *Joyce*, Elias LJ considered this 'causation' approach to 'ex turpi causa' consistent with *Gray v Thames Trains* [2009] AC 1339 (HL) where the claimant, who had previously been negligently caused PTSD in a rail accident, tragically later killed a third party and then sued the company liable for his rail accident for losses due to imprisonment, rejected as they were caused by his crime.

53. *Joyce* was applied in *McCracken*, mentioned above at paragraph 43 – and understandably central to Mr Blakesley's submissions on illegality - where two boys joyriding a motorbike without helmets crashed into a car, also driven negligently. The bike passenger was seriously injured, held to have two causes – the negligence of the car driver and the negligence of his friend riding the bike he had encouraged. Therefore, whilst the passenger could recover against the car driver subject to 65% contributory negligence, he could not recover against his fellow rider riding the bike since the injuries were caused by their joint enterprise of dangerous

driving contrary to s.2 RTA (irrespective of passenger knowledge of no insurance). In *McCracken* in the Court of Appeal at [43]-[45] and [52] Richards LJ said:

> "43 On Lord Sumption's approach in *Servier*…the first question to consider is whether [the bike passenger's] conduct amounted to 'turpitude' for the purposes of the ex turpi causa defence. In the light of my previous findings, the conduct in question must be taken to have been [the bike passenger's] participation with [the bike rider/driver] in a joint enterprise to ride the bike dangerously. I have no doubt that such conduct did amount to turpitude. A person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence contrary to s.2 [RTA], punishable on conviction on indictment by up to two years' imprisonment. Dangerous driving was at the heart of the conduct found to engage the *ex turpi causa* principle in *Pitts*… On no view is it a trivial offence. At one point in argument there appeared to be a suggestion that it might fall to be treated in the same way as an offence of strict liability, since the standard of dangerous driving is an objective one…. I see no substance in the suggestion. In any event, the exception for strict liability offences [in *Servier*]....relates to offences where liability is strict *and* the claimant is not aware of the facts making his conduct unlawful; whereas in the present case [the bike passenger] was plainly aware of the facts giving rise to the offence of dangerous driving…
>
> 44 The next question is whether [the bike passenger's] claim against [the car driver] is founded on that turpitude… It is common ground that it is not a question of whether facts disclosing the immoral or illegal act are relied on as part of the claimant's pleaded case or evidence…. [W]e have to decide whether the relationship between [the bike passenger's] turpitude and his claim against [the car driver] is such as to debar the claim…
>
> 45 If this appeal concerned [the bike passenger's] claim against [the bike rider], rather than his claim against [the car driver] the answer…would be straightforward. There is a close parallel with the circumstances in *Pitts*, where the motorcycle pillion passenger injured in a collision resulting from the rider's dangerous driving was unable to recover against the driver because, in effect, the dangerous driving was the subject of a joint enterprise to which the pillion passenger was a party. [Whilst the law has developed since], nothing that has happened would lead one to expect a different outcome from that in *Pitts* itself… This is confirmed by *Joyce*….
>
> 52 [However for the claim against the car driver], I do not think that the fact that the criminal conduct [of the bike riders] was one of the two causes [of the injury] is a sufficient basis for the *ex turpi causa* defence to succeed… [C]ases involving a claim by one party to a criminal joint enterprise against another party to that joint enterprise are materially different. In my judgment, the right approach is to give effect to both causes by allowing [the bike passenger] to claim in negligence against [the car driver] but, if negligence is established by reducing any recoverable damages in accordance with the principles of contributory negligence so as to reflect [the bike passenger]'s own fault and responsibility for the accident."

54. However, as it turned out, *Servier* in 2014 was only the start of the Supreme Court's rapid development of what 'ex turpi causa', soon re-named the illegality defence. In *Patel*, a very different case where the majority of the Court held that money paid under an illegal contract should be repaid, the majority of the Court rejected the causation-based approach to the illegality defence in *Grey* and other cases in favour of the approach most clearly summarised by Lord Toulson at [120] of *Patel*:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system…. In assessing whether the public interest would be harmed, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind punishment is a matter for criminal courts…"

55. Nevertheless, in *Henderson*, the Supreme Court explained that cases before *Patel* whose result if not reasoning was consistent with it still had precedent value to that extent. So, in *Henderson*, the Court held refusal of damages for imprisonment in *Gray* remained valid with a similar claim following the claimant's conviction for Manslaughter when she was a pre-existing mental health patient negligently unsupervised by the NHS (as opposed to the consequence of a negligently-inflicted injury in *Gray*). In *Henderson*, Lord Hamblen at [119-124] clarified [120] of *Patel*:

> "119 [S]tage (a) should not be interpreted as being confined to the specific purpose of the prohibition transgressed. Whilst that is of great importance, other general policy considerations that impact on the consistency of the law and the integrity of the legal system also fall to be taken into account. …[W]hilst preventing someone from profiting from his own wrong is not the rationale of the illegality defence, it is a relevant policy consideration, which is linked to the need for consistency and coherence in the law. For one branch of the law to enable a person to profit from behaviour which another branch of the law treats as being criminal or otherwise unlawful would tend to produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system [see] *Patel* paras 99-101. In cases where it features, it too is a factor to be taken into account, even though it may not reflect the purpose of the prohibition transgressed.
>
> 120 In considering the issue of consistency and coherence in the law, the closeness of the connection between the claim and the illegal act may well be of relevance. The closer that connection is, the greater and more obvious may be the inconsistency and consequent risk of harm to the integrity of the legal system. The rejection by the majority in *Patel* of reliance as the test of illegality did not mean that reliance was thereby rendered irrelevant to the policy-based approach. It may not provide a satisfactory test of illegality, but it will often be a relevant factor.
>
> 121 [Q]uestions arise as to the weight it may be appropriate to give to different policy considerations. At para 99 [of *Patel*] Lord Toulson JSC recognised the importance of the policy considerations that a person should not be allowed to profit from his own wrongdoing and that the law should

> be coherent. Where either or both of these considerations are engaged it would seem appropriate that they are given great weight…
>
> 123 [Q]uestions arise as to whether proportionality always has to be considered and as to how it is to be addressed. In some cases…it may be apparent that the balancing of policy considerations comes down firmly against denial of the claim. If so, it will not be necessary to go on to the third stage and the issue of proportionality. This is consistent with Lord Toulson JSC's statement at para 107 [of *Patel*] that these factors relate to 'whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled' and at para 101 that they fall to be considered to avoid 'the possibility of overkill'. In other words, they are a disproportionality check rather than a proportionality requirement.
>
> 124 [On] proportionality, at 107 [of *Patel*] Lord Toulson identified four factors… likely to be of particular relevance, namely: 'the seriousness of the conduct, its centrality [to the transaction], whether it was intentional and whether there was marked disparity in the parties_ respective culpability. Lord Toulson JSC refrained from saying anything about the potential weight of such factors, no doubt to avoid being prescriptive. I would, however, suggest that centrality will often be a factor of particular importance. When considering the circumstances relating to the illegality, whether there is a causal link between the illegality and the claim, and the closeness of that causal connection, will often be important considerations."

Nevertheless, in *Henderson*, Lord Hamblen at [77] was also keen to stress that:

> "[T]hat does not mean that *Patel* represents 'year zero' and that in all future illegality cases it is *Patel* and only *Patel* that is to be considered and applied. That would be to disregard the value of precedent built up in various areas of the law to address particular factual situations giving rise to the illegality defence. Those decisions remain of precedential value unless it can be shown that they are not compatible with the approach set out in *Patel* in the sense that they cannot stand with the reasoning in *Patel* or were wrongly decided in the light of that reasoning. Lord Toulson made it clear in *Patel* that the principles he identified were to be found in the existing case law."

On that basis, whilst the focus on 'causation' in *Gray* was no longer apt, the policy considerations it identified were consistent with *Patel* and the ratio of *Gray* remined valid. Therefore, the same result of refusing damages for loss of liberty followed. (I would add, the Supreme Court's work on illegality is not yet done: they granted permission to appeal *Lewis-Ranwell v G4S* [2024] KB 745 where the Court of Appeal in yet another 'mental health unlawful killing' case held the illegality defence does not apply where the individual is unaware of their own criminality).

56. Returning to this context, in *Wallett* Males J (as he was) noted that in *Henderson*, the Court of Appeal (that the Supreme Court later endorsed) reconciled *Gray* with *Patel* and Males J effectively reconciled *McCracken* with *Patel* too, in a case of two cars racing dangerously, where one driver was killed, whose widow sued. Contrary to Mr Brindle's submission, Males J clearly considered *McCracken* was consistent with *Patel* on joint enterprise dangerous driving (what he rejected at [56] was the respondent's attempt to run the illegality defence based on the deceased's own

dangerous driving irrespective of joint enterprise, contrary to its case below). As Males J said at [43]:

> "*McCracken* is a binding authority that in the absence of a criminal joint enterprise between the claimant and the defendant, dangerous driving by the claimant will not bar a claim pursuant to the *ex turpi causa* principle. Rather, such a claim is to be determined in accordance with principles of causation (has the conduct of the defendant made a material contribution to the claimant's injuries ?) and contributory negligence (should the damages be reduced by reason of the claimant's own fault ?). These principles are sufficient to give effect to the requirements of justice and public policy."

However, Males J allowed the appeal as the trial judge had not focused on the necessary 'conduct element' and 'mental element' (what used to be called 'Actus Reus' or 'Guilty Act' and 'Mens Rea' or 'Guilty Mind') of a joint enterprise of dangerous driving between the two drivers racing consistent with the Supreme Court's analysis of joint enterprise in *R v Jogee* [2017] AC 387 (SC) at [7]-[9]:

> "Accessory liability requires proof of conduct element accompanied by the necessary mental element. Each element can be stated in terms which sound beguilingly simple, but may not always be easy to apply. The requisite conduct element is that D2 has encouraged or assisted the commission of the offence by D1…..[T]he mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal …"

A similar approach was taken by Yip J in *Clark*, who held there was no 'intentional encouragement' by a pillion passenger (with no helmet, to which I return on contributory negligence) on a dangerously-ridden bike on a path in a park.

57. That leads me back to the present case and the defendants' allegation that the Claimant's claim against the First Defendant (and so, parasitically the Second and Third Defendants) is stymied by the illegality defence as they were engaged in joint enterprise dangerous driving. Joint enterprise is necessary to this submission because I have found the Claimant did not *drive* anything: he was a *passenger*. Whilst Males J in *Wallett* held *McCracken* still means that in the *absence* of joint enterprise with dangerous driving the illegality defence does *not* lie, he did not explicitly consider the converse: whether *McCracken* is still binding after *Patel* and *Henderson* that where there *is* joint enterprise dangerous driving, the illegality defence *will* lie. However, Males LJ did say in *Wallett* that:

> "38 [C]areless driving is a criminal offence but nobody would suggest [it] prevents the recovery of damages (reduced as appropriate on account of contributory negligence) in a road traffic case where both drivers are partly to blame. In such a case the recovery of damages does not offend public notions of the fair distribution of resources and poses no threat to the integrity of the law. On the contrary, the recovery of damages is in accordance with public policy. The claimant is not compensated for the consequence of his own criminal act. Rather, as a result of the reduction for contributory fault, he is compensated only for that part of the damage which the law regards as having been caused by the defendant's negligence.
>
> 39 Dangerous driving is a more serious offence. It must be proved that the driving fell far below what would be expected of a competent and careful

> driver, and that it would be obvious to a competent and careful driver that driving in that way would be dangerous. Nevertheless, although a serious offence which can attract a prison sentence, dangerous driving [applies]…an objective standard applies which does not depend on the intention or state of mind of the driver."

For those reasons Males J gave in *Wallett*, along with those Richards LJ gave in *McCracken* at [43] quoted above, I accept a finding of joint enterprise *dangerous* – as opposed to *careless* - driving (e.g. joint joyriding as in *Pitts* and *McCracken*) between a motorcycle rider and passenger can found the illegality defence where the passenger is foreseeably injured during it (adapting Elias LJ's test in *Joyce*). That is also consistent with the *Patel* 'trio of considerations'. At (a), the purpose of the prohibition on dangerous driving in s.2 RTA (and given *Henderson* at [119-121] related policy reasons such as coherence within the law) is the deterrence of dangerous (as opposed to careless) driving such as joyriding and of its encouragement by passengers, which also puts innocent third parties at risk. Indeed, it is an imprisonable offence. Those purposes would be enhanced by denial of a claim by a joint enterprise passenger, whereas if his claim succeeded, it would both undermine deterrence but also create incoherence in the law that he could receive compensation for an injury sustained in the course of his own imprisonable offence. At stage (b) of *Patel*, of course denial of the claim would run against the common law principle that every wrong should have a remedy, but tort law already recognises that such remedies can be denied for voluntary acts (e.g. the defence of *Volenti*). If a claimant's act (whether or not technically *Volenti*) is a serious crime where injury to himself is foreseeable, as in *Pitts* and *McCracken*, the countervailing weight against consideration (a) is modest. For the same reasons, denial of such a claim even completely is in my view proportionate, especially as the agreement to take the risk is 'central' to the claim (c.f. *Henderson* at [123-124]).

58. However, there still remains in this case the actual question in *Wallett*: did the Claimant not only encourage dangerous driving but intend to do so ? That is not answered by my conclusion on 'actual and blind-eye knowledge', but it is answered by my findings of fact. I have found there was no 'joyriding' and it was the First Defendant's not the Claimant's decision to cross the traffic of Belgrave Middleway against a red light. It was clearly 'dangerous driving' under s.2 RTA, but like *Clark*, I do not find the Claimant 'encouraged' it, let alone 'intended' to do so. He would have preferred to go through the subway (and suggested it to the First Defendant but was not heard or ignored). The fact his idea would have jeopardised pedestrians does not mean he 'encouraged' *the actual dangerous driving*. Indeed, I find he was still 'thinking like a pedestrian', reflecting inexperience and carelessness.

59. However, one criminal offence which Mr Blakesley did not pursue but does arise on my findings of fact is whether the Claimant 'caused' the Defendant to 'use' the Motorbike without insurance contrary to s.143(1)(b) RTA by injuring his ankle and requiring to be taken to hospital on the Motorbike. It is a strict liability offence, but as noted in *McCracken* at [43], *Servier* stated the illegality defence cannot arise with a strict liability offence unless the claimant is aware of their own illegality. However, in *Servier* at [29], Lord Sumption did not say the illegality defence applied to *all* offences of strict liability provided the claimant was aware of his illegality, which would be difficult to square with the later Supreme Court decision in *Patel* anyway. Applying its 'trio of considerations' more briefly, as stated by

Males J in *Wallett* at [38] relating to careless driving, recovery of damages when a subsequently-injured passenger has (even knowingly) caused a driver to drive without insurance contrary to s.143 RTA is not harmful to the integrity of the legal system in the same way as dangerous driving. Again, a claimant is not compensated for the consequence of his own criminal act in encouraging driving without insurance, but for the consequences of the driver's negligence in injuring him and his foolishness can (and here in my view, does) sound in contributory negligence.

60. Finally on illegality, there is whether the Claimant committed the offence (not one of joint enterprise) of 'Allowing to be Carried' under s.12 TA (the offence is 'knowing that any conveyance has been taken without [the owner's consent or lawful] authority, [he] allows himself to be carried…on it'. That must be distinguished from 'Aggravated Vehicle Taking' under s.12A TA, where the s.12 TA offence also involves dangerous driving or injury to 'any person'. I accept 'Aggravated Vehicle Taking' with both dangerous driving and injury would engage the illegality defence just as 'dangerous driving' does. However, it would again require joint enterprise, which fails on the facts here for the same reason. The offence of 'Allowing to be Carried' is much closer to a more minor offence like 'No Insurance' and I am not convinced by itself it engages the illegality defence. (That is likely to be academic, since it would engage s.151(4) RTA and/or para.8(1)(a) of the MIB Agreement). In any event, whether the alleged offence is 'Aggravated Vehicle Taking' contrary to s.12A RTA, or 'Allowing to be Carried' contrary to s.12 RTA, either offence requires the passenger in the present context to have known (actually or 'blind-eyed') that the vehicle had been taken without the consent of the owner. I have found the Claimant did not have such 'knowledge' in relation to the Motorbike. Therefore, even if 'unlawfully taken' can be technically wider than s.12 TA, e.g. conversion as argued in *Sarfraz*, on my findings, the Claimant had no knowledge of that either. As a result, the illegality defence fails in this case.

Is the Second Defendant liable to the Claimant under the RTA ?

61. This gives rise to two questions (one of which I can deal with very briefly) on the interpretation and application of ss.145, 148 and 151 RTA, which state as material:

> "**145**(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions.
>
> (2) The policy must be issued by an authorised insurer.
>
> (3)…[T]he policy— (a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain…"
>
> "**148**(1) Where a policy is issued for the purposes of this Part of this Act, so much of the policy... as purports to restrict— (a)the insurance of the persons insured by the policy…by reference to any of the matters mentioned in subsection (2) below shall, as respects such liabilities as are required to be covered by a policy under section 145 of this Act, be of no effect.
>
> (2)Those matters are— (a) the age or physical or mental condition of persons driving the vehicle, (b) the condition of the vehicle, (c) the number

of persons that the vehicle carries, (d) the weight or physical characteristics of the goods that the vehicle carries, (e) the time at which or the areas within which the vehicle is used, (f) the horsepower or cylinder capacity or value of the vehicle, (g) the carrying on the vehicle of any particular apparatus, or (h) carrying on the vehicle of any particular means of identification …

(3) Nothing in subsection (1) above requires an insurer .. to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability.

(4) Any sum paid by an insurer…. in or towards the discharge of any liability of any person which is covered by the policy .. by virtue only of subsection (1) above is recoverable by the insurer .. from that person."

"**151**(1) This section applies where, after a policy is issued**…** a judgment to which this subsection applies is obtained.

(2) Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and either—(a) it is a liability covered by the terms of the policy and the judgment is obtained against any person who is insured by the policy, or (b) it is a liability, other than an excluded liability, which would be so covered if the policy insured all persons and the judgment is obtained against any person other than one who is insured by the policy.

(3) In deciding for the purposes of subsection (2) above whether a liability is or would be covered by the terms of a policy, so much of the policy as purports to restrict the insurance of the persons insured by the policy by reference to the holding by the driver of the vehicle of a licence authorising him to drive it shall be treated as of no effect.

(4) In subsection (2)(b) above 'excluded liability' means a liability in respect of the death of, or bodily injury to, or damage to the property of any person who, at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who— (a) did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and (b) could not reasonably have been expected to have alighted from the vehicle. In this subsection the reference to a person being carried in or upon a vehicle includes a reference to a person entering or getting on to, or alighting from, the vehicle.

(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment— (a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability…

(8) Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy, he is entitled to recover the amount from that person or from any person who—(a) is insured by the policy by the terms of which the liability would be covered

> if the policy insured all persons and (b) caused or permitted the use of the vehicle which gave rise to the liability.
>
> (9) In this section…(c) 'liability covered by the terms of the policy' …means a liability which is covered by the policy. or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy."

62. The relevant policy of insurance in this case was issued by the Second Defendant (an authorised insurer under s.145(2) RTA) to the true owner of the Motorbike from whom it was stolen. Subject to the 'pillion exclusion' point, it was clearly an insurance policy in s.145(3) RTA in that it insured that owner for liability for death or personal injury arising from their use of the Motorbike on a road or public place. The Second Defendant would be liable to third parties to pay a judgment against the owner under s.151(2(a) RTA, However, clearly, the policy did not insure the First Defendant to ride the Motorbike. Nevertheless, under s.151(2)(b) RTA, the Second Defendant must meet a liability '*other than an excluded liability*, which would be so covered *if the policy insured all persons* and the judgment is obtained against any person other than one who is insured by the policy'. Subject to the two issues in this section, that would include the First Defendant, as if those two issues do not prevent it, the Claimant is entitled to a judgment against the First Defendant. The two issues arise from the phrases in s.151(2)(b) RTA I have italicised. The first, which I can deal with very briefly, is whether the First Defendant's liability to the Claimant is an 'excluded liability' which is defined by s.151(4) RTA in terms familiar from my analysis above. The second issue however is slightly more involved and has the potential to impact other cases of pillion passengers, so I shall deal with it at a little more length. It is whether the Claimant's claim against the Second Defendant under its policy is barred by its exclusion of liability of injury to pillion passengers and whether that exclusion is itself prohibited by s.148 RTA.

63. Firstly, the First Defendant's liability to the Claimant is plainly not 'an excluded liability' under s.151(4) RTA for the reasons I have already given. Whilst the Claimant was as a matter of fact 'allowing himself to be carried' on the Motorbike when he was injured, he did not 'know or have reason to believe it was stolen or unlawfully taken'. As I have noted, in *Stych*, Stadlen J aligned 'knew or had reason to believe' in s.151(4) RTA with the 'actual or blind-eye knowledge' test in *White*. Having rejected that, it is unnecessary to consider whether 'unlawful taking' or indeed 'allowing to be carried' are coextensive or slightly wider than the offence in s.12 TA as Pepperall J considered in *Sarfraz*. Likewise, the proviso in s.151(4) RTA about not having knowledge until after the commencement of the journey and not being reasonably able to alight does not arise in this case. It suffices to say that for the reasons I have already given, the First Defendant's liability to the Claimant is not an 'excluded liability' for the Second Defendant under s.151(4) RTA.

64. Indeed, whilst is does not arise on my findings in this case either, the phrase 'stolen or unlawfully taken' in s.151(4) RTA (and indeed para.8 of the MIB Agreement) is plainly intended to encompass not just Theft under s.1 TA but also 'Allowing to be Carried' under s.12 TA. However, in *Stych*, Stadlen J at [47]-[69] observed that is wider than the EU Directive which simply excludes injured third parties 'who voluntarily entered the vehicle [causing the injury]..when the insurer can prove that they knew the vehicle was *stolen*'**.** In *Stych*, Stadlen J noted the Lords in *White* had

decided there was no need to make a reference to the EU Court of Justice on whether the word 'knew' in the Directive included 'blind-eye' as well as 'actual' knowledge. However, in *Stych* at [67], Stadlen J suggested that it might be necessary in another case to make a reference on whether 'stolen' in the Directive included vehicles which were not only 'stolen' with intention permanently to deprive, but 'unlawfully taken' which were not. However, in *Stych* itself, he found the injured passenger 'knew' *neither* that the vehicle had been 'unlawfully taken' *nor* that it had been 'stolen'. Nevertheless, in *Greenaway v Parrish* [2021] 4 WLR 97, Martin Spencer J observed that since *Brexit*, under the European Union (Withdrawal) Act 2018 ('EUWA'), it was no longer possible to make a reference to the EU Court of Justice. Therefore, in *Greenaway*, where a passenger got into a car owned by the driver's father when the passenger knew the driver did not have his father's consent to drive it (or indeed insurance) for the purposes of s.12 TA but clearly had no 'intention to permanently deprive' his father of his car under s.1 TA, Martin Spencer J (with obvious regret) accepted that as he was unable to make a reference to the CJEU, in order to construe the Directive and whether s.151(4) RTA should be interpreted to conform with its meaning, it would be necessary to consider foreign law expert evidence on the meaning of the word 'stolen' in the Directive. I have not been asked to do that in the present case and doubtless judges will continue to follow Stadlen J in *Stych* if they can (which Martin Spencer J on the 'exam-question facts' in *Greenaway* could not) and make a finding that there was or was not 'actual or blind-eye knowledge' that the vehicle was stolen *and/or* unlawfully taken (as I did above).

65. I turn to the other issue under s.151 RTA: whether the Second Defendant can rely on the 'pillion passenger exclusion' in its Policy. The Schedule states the owner of the Motorbike as insured and describes the insured vehicle as the Yamaha 125cc, which I am referring to as 'the Motorbike'. Both the Schedule and Certificate excluded cover for pillion passengers by reference to a Policy exclusion ('the Pillion Exclusion') which stated:

> "**MCE13 Pillion Exclusion**
> **We** will not pay for any damage or loss to **your motorcycle** or its **accessories** and will not make any payment in relation to the death of or injury to any person for any incident occurring whilst **you** or any other additional riders are carrying a pillion passenger on **your motorcycle**. *Where the Road Traffic Acts or any other legislation applicable to motor insurance oblige **us** to make a payment which **we** would not otherwise have paid, **we** reserve the right to recover the amount paid from **you**."*

The bold words and phrases are original and defined terms in the Policy. The italics are mine. 'Pillion Passenger' is not defined, but these definitions apply:

> **Motorcycle**
> A mechanically propelled two wheeled vehicle with or without a sidecar or trailer attached. A three wheeled vehicle having two wheels on one axle at the front and one wheel on one axle at the rear. **Motorcycle**s must be road registered in the UK. A vehicle known as a **Quad**. We may accept other vehicles not meeting this criteria, on a case-by-case basis.
> **….You…**
> The person described as **the insured/policyholder** on the **policy schedule** and current **certificate of motor insurance.**
> **Your Motorcycle**
> Any **motorcycle** described in the **policy schedule…**."

66. It is convenient first to address a debate between Counsel about the scope of the 'Pillion Exclusion' relevant to the applicability of s.148 RTA I consider below (especially as unlike most of the other endorsements and exclusions in the Policy, the words I have italicised appear to anticipate that s.148 RTA may apply). Mr Blakesley ingeniously suggested this exclusion does not affect the number of people the Motorbike can carry, because 'Motorcycle' includes a sidecar and only excludes liability if there is a 'pillion passenger' sitting on the rear of the Motorbike. However, as Mr Brindle pointed out, what is referred to in the exclusion is not any 'Motorcycle' but 'Your Motorcycle' as defined by the Policy Schedule. That is the Motorbike, which did not have a sidecar. The 'Pillion Exclusion' plainly regulates the number of people on the Motorbike, presumably to discourage passengers on the bike - most at risk from rider negligence. It is unclear what other purpose it could possibly have. The expression 'pillion passenger' is undefined by the Policy, but agreed to cover someone sitting behind the rider, consistently with s.23(2) RTA:

> "(1) Not more than one person in addition to the driver may be carried on a motor bicycle.
> (2) No person in addition to the driver may be carried on a motor bicycle otherwise than sitting astride the motor cycle and on a proper seat securely fixed to the motor cycle behind the driver's seat.
> (3) If a person is carried on a motor cycle in contravention of this section, the driver of the motor cycle is guilty of an offence.I note s.23 appears to equate 'motor bicycle' with 'motorcycle' and it is agreed that the Motorbike here was a motorcycle despite having three wheels.

(I note s.23 appears to equate 'motorbicycles' and 'motorcycles' and the latter is defined by the Policy as including a motorcycle with three wheels as in this case).

67. Before I examine whether the 'pillion exclusion' is rendered void by s.148 RTA, it is relevant to note that it appears to be inconsistent with s.145(3) RTA that I repeat:

> "…[T]he policy— (a) must insure such person… specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place…"

The 'Pillion Exclusion' on the face of it excludes cover under the Policy for 'the death of or injury to any person for any incident occurring whilst you or any other additional riders are carrying a pillion passenger on your motorcycle', even on a road. It is important to note that it does not just exclude cover for injury *to* a pillion passenger, but to *'any person'* 'if you are carrying a pillion passenger'. Therefore, it would appear to exclude cover even for injuries to a pedestrian caused by negligent riding of the Motorbike by the owner, just because he happened to be carrying a pillion passenger, even if that was totally irrelevant to the accident. As Mr Brindle said, the 'Pillion Exclusion' is flatly inconsistent with s.145(3) RTA. However, as Mr Blakesley retorted, even if a policy exclusion is inconsistent with s.145 RTA, that does not mean the insurer is liable to an injured pillion passenger under s.151 RTA. In *Bristol Alliance v Williams* [2013] QB 806, the Court of Appeal held that the exclusion in a policy for liability for deliberate acts in driving (there deliberate driving into a building by someone trying to kill themselves), providing it was not rendered void by s.148 RTA, was not covered by s.151(2)(b) RTA, even if it was inconsistent with s.145(3) RTA. The Court held s.151(2)(b)

extended the coverage of the policy to drivers not insured by the policy, not the scope of the policy. However, there are three answers to that argument in this case.

68. Firstly, whilst not referring to *Williams* (and not implicitly overruling it on the effect of s.151(2)(b) RTA), in *R&S Pilling v UK Insurance* [2019] 2 WLR 1015, the Supreme Court held that where a policy term was inconsistent with s.145(3)(a) RTA (as here), it is necessary to interpret it so as to conform if possible. In *Pilling* itself, the policy covered the policy holder for an accident 'in your vehicle' damaging someone else's property. In fact, negligent work on a car meant it caught fire and damaged someone else's garage premises. In fact, the Supreme Court held this was not a 'use' falling within s.145(3) RTA, but that the policy should be interpreted so that 'accident in your vehicle' should be read as 'accident in your vehicle *or caused by or arising out of your use of your vehicle on a road or other public place',* echoing s.153. Lord Hodge applied 'corrective construction' for 'mistakes' in contracts in *Chartbrook v Persimmon* [2009] AC 1101 (HL) and said at [49]:

> "The correction…needed is to enable the cover to extend beyond what is expressly provided for to that which the RTA requires. If…the express terms of the Policy in some respects exceed what the RTA requires, those terms must be given effect. Construction of [a] clause…to expand its cover to meet the requirements of the RTA cannot cut back that which is expressly conferred. But that which is to be added to correct the omission is that which is needed to make the cover comply with the RTA and no more."

Applying that approach here, I would interpret the Pillion Exclusion to decline cover only for a payment *to the policyholder driver* but not to injured third parties (including passengers). I would read in the words 'to' and 'you', which go much less far than the words read in by the Court in *Pilling*. The effect of it would be this:

> **We** will not pay [YOU] for any damage or loss to **your motorcycle** or its **accessories** and will not make any payment [TO YOU] in relation to the death of or injury to any person for any incident occurring whilst **you** or any other additional riders are carrying a pillion passenger on **your motorcycle**. *Where the Road Traffic Act… applicable to motor insurance oblige **us** to make a payment which **we** would not otherwise have paid, **we** reserve the right to recover the amount paid from **you**."*

That would render the Pillion Exclusion compatible with s.145(3)(a) RTA because it would still insure the policyholder's *liability*, it would just mean it would not be paid to *the Policyholder* but to third parties to whom they were liable. Interpreted in this way, the Pillion Exclusion does not prevent payment to the Claimant. If this seems to render it effectively otiose, then that seems to be a risk the Second Defendant contemplated by the italicised words at the end of the exclusion anyway.

69. Secondly, if I am wrong about that, those italicised words clearly anticipate the potential applicability of s.148 RTA. Here the applicable part is s.148(2)(c) which renders 'of no effect' any policy exclusion of a s.145 liability (such as that to the Claimant) by reference to: 'the number of persons that the vehicle carries'. I have already rejected Mr Blakesley's ingenious attempt to argue the exclusion does not do so because it does not prevent carrying passengers in a sidecar and explained why I agree with Mr Brindle that a sidecar is not covered within 'your motorcycle'. Indeed, even if a sidecar is included, the Pillion Exclusion still restricts liability 'by reference to the number of persons the vehicle carries': as it would exclude a pillion

passenger even if it did not exclude a sidecar passenger. Therefore, the Pillion Exclusion is rendered 'of no effect' by s.148 RTA and the Policy must be read as if it were deleted: *Oldham BC v Sajjad* [2018] RTR 4 (DC). Nevertheless, s.148(3) RTA does not inhibit the Second Defendant's reliance on the words I have italicised to recover any payment from the policyholder (which really seems to be why an exclusion plainly caught by s.148 RTA was included in the first place).

70. Thirdly, even if I am wrong about that interpretation of s.148(2)(c) RTA on its 'ordinary meaning', it should be interpreted purposively to achieve that effect, as that is plainly the purpose of this Part of the RTA - to protect injured third parties as reflected by s.145(3) RTA (and indeed to implement the UK's obligations under the Motor Insurance Directive: *Wilkinson v Fitzgerald* [2013] 1 WLR 1776 (CA)). The interpretation of s.148(2)(c) RTA which renders the Pillion Exclusion 'of no effect' also chimes with its inconsistency with s.145(3) RTA. Such a 'domestic purposive interpretation' does not rely on EU Law such as any 'indirect effect' of the Directive (see, for example, *Fry v SSLUHC* [2024] EWCA Civ 730 and my own earlier halting attempt in *E-Accounting v Global Infosys* [2023] EWHC 2038 (Ch)). In any event, whilst 'direct effect' in disapplying non-conforming domestic law is unavailable against a non-public defendant like the Second Defendant: *Pilling* at [41]), if necessary EU Law 'indirect effect' by conforming interpretation just as in *Wilkinson* is available (*Pilling* at [35]). In *Farrell v Whitty* [2007] 2 CMLR 46, the CJEU held that the Directive prohibited exclusion from cover for passengers not sitting in chairs in a vehicle (in that case, sitting on the floor of a van). The CJEU emphasised that the only permissible exclusions in protection for 'passengers' in (an earlier version of) the EU Motor Insurance Directive are for those who 'know' the vehicle is either stolen (which I have rejected) or uninsured (which I consider next). So, I find the Second Defendant is liable to the Claimant as 'RTA Insurer'.

Is the Second Defendant liable for the Third Defendant as its 'Art.75 Insurer' ?

71. If I am wrong about that, then I would find the Third Defendant (or more practically, the Second Defendant as its 'Art.75 Insurer') is liable to the Claimant in any event, as they accept unless they can rely on para.8 of the 2015 MIB Agreement, namely:

> "MIB is not liable for any claim…in respect of a relevant liability by a claimant who, at the time of the use giving rise to that liability, was voluntarily allowing himself to be a passenger in the vehicle and, either before the start of the claimant's journey in the vehicle…knew or had reason to believe…(a) the vehicle had been stolen or unlawfully taken, or (b) the vehicle was being used without there being in force in relation to its use a contract of insurance complying with Part VI of the [RTA] 1988…"

72. For the reasons I have given in detail and need not repeat yet again, I find the MIB (and so the Second Defendant) cannot rely on para.8(a) because I have found the Claimant did not 'know or have reason to believe' the Motorbike had been 'stolen or unlawfully taken'. Therefore, the only remaining issue on liability is whether under para 8(b) the Claimant 'knew or had reason to believe' (on the test in *White* I have considered above) that 'the vehicle was being used without there being in force in relation to its use a contract of insurance complying with Part VI of the [RTA] 1988'. There is a slightly longer and a short answer to this issue, which Mr

Blakesley did not really press if I found (as I have) that the Claimant did not have actual or blind-eye knowledge that the Motorbike was stolen or unlawfully taken.

73. The slightly longer answer to this issue is that the effect of the Motor Insurance Directive is that clause 8(b) of the 2015 MIB Agreement does not exclude 'use' if there is in force in relation to its use a contract of insurance complying with the RTA', as explained by Freedman J in *Colley v Shuker* [2021] 1 WLR 1889 at [155]:

> "[T]he test is not whether the use of the vehicle at the time of the accident was insured, but whether there was in existence a policy of insurance in relation to the vehicle at the time of the accident. There was therefore no scope for a defence under the second sub-paragraph of article 10 [of it]."

For reference, the second sub-paragraph of Art.10 of the 2009 Motor Insurance Directive (the successor to the Directive in *White*) is this (see *Colley* at [24]:

> "Member states may…exclude…payment of compensation by [the MIB] in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove…they knew *it* was uninsured."

I have italicised 'it', since as Freedman J observed in *Colley* at [147]:

> "In my judgment, the wording of the exclusion in the second sub-paragraph of article 10(2) is a reference to the vehicle being uninsured and not to the driver being uninsured. That comes from the syntax of article 10(2), which refers to the knowledge that 'it' is uninsured. The word 'it' in the context of the sentence means 'the vehicle', whereas the word 'they' refers to the drivers. The exclusion is therefore where there is knowledge that the vehicle is uninsured rather than the driver not being a named or an insured driver."

Whilst I suspect Freedman J there meant 'they' referred to the 'persons' injured rather than the 'driver', otherwise I respectfully entirely agree with his analysis.

74. Freedman J's analysis was noted without criticism by Stuart-Smith LJ upholding him on another issue in *Colley v Shuker* [2022] 1 WLR 2930 (CA) at [21]:

> "The judge found in favour of Mr Colley on the basis that the wording of the exclusion in the second sub-paragraph of article 10(2) is a reference to the vehicle being uninsured and not to the driver being uninsured. Mr Colley could not have known that the Vehicle was uninsured because at the time he entered it there was a policy in existence which subsisted until it was avoided after the accident. The MIB's proposed appeal against the judge's findings on issue 2 was abandoned shortly before the hearing. It follows the article 10(2) exclusion is of no further relevance to this appeal."

It follows that as the Motorbike was 'insured' (albeit not covering the First Defendant), para.8(b) 2015 MIB Agreement could not have applied in any event. This has not changed because of Brexit, since the concepts of 'Retained EU Law' under EUWA and now 'assimilated law' under the Retained EU Law (Revocation and Reform) Act 2023 includes causes of action arising before Brexit took effect on 31st December 2020 (see *Lipton v BA City Flyer* [2024] 3 WLR 474 (SC)). So, the law to be applied is that in force at the time of the Claimant's injury in April 2017, including the EU Directive. So, the 2008 and 2023 Acts does not change the applicability of Freedman J's analysis to events before 2021. (Though a 2022 Act making it clear the RTA is limited to 'roads and public places' despite inconsistency

with the EU Directive (see *Pilling*) has changed the legal position *prospectively* – see Mr Blakesley's own interesting article The Motor Vehicles (Compulsory Insurance) Act 2022: a System Restore Point - Crown Office Chambers).

75. Even if I am wrong about that, the short answer to para 8(b) MIB Agreement is that I find positively on the balance of probabilities that the Claimant did not have actual or blind-eye knowledge that the First Defendant and Motorbike were uninsured. Whilst I rely on all my findings of fact, for ease I repeat paragraph 29: 'As the First Defendant's absence of insurance is less obviously less serious than the fact that 'his' Motorbike had previously been stolen, insurance is very unlikely to have been on the Claimant's mind. Not many 16 and 15-year olds discussing a new motorcycle that one of them had just got would have an earnest conversation about motor insurance. They were teenagers, not middle-aged - and a middle-aged Judge evaluating this must try to put himself in the shoes of a teenager, as Mr Brindle rightly said. Whilst the Claimant admits he was dimly familiar at that age with insurance to drive a car, his mother herself said she had not discussed this with him (doubtless as he could not drive yet anyway). I find it is entirely plausible that the Claimant would not think to ask the First Defendant about his insurance for riding the Motorbike – and I accept that he thought that it was like a moped which a 16-year old like the First Defendant could ride. But *if* the Claimant was not asking about the provenance of the Motorbike because he thought it might be illegitimate and 'did not want to know', he would hardly have thought that it was insured either'. On my findings, this case is far clearer than the brother of the uninsured convict in *White* or even the 15-year old in *Whyatt* (see paragraph 44 above) where even adverse credibility findings did not justify inference of knowledge of no insurance. For those reasons, the Second Defendant is liable to the Claimant to satisfy any unsatisfied judgment against the First Defendant the Claimant for his injuries as RTA Insurer (or if I am wrong and the Third Defendant is liable to do so, the Second Defendant is liable to pay it as Art.75 Insurer). I will therefore enter judgment for damages to be assessed, but I may need to hear brief submissions on the form of the judgment. Subject to that, my remaining task for now is to consider contributory negligence.

Contributory Negligence

76. The Second Defendant pleaded the Claimant's contributory negligence in five ways:

> "1. [The Claimant] engaged in a joint joyriding venture with [the First Defendant] when he knew or ought to have known [he] was uninsured, unlicensed, not authorised to drive the motorbike and likely to drive irresponsibly and dangerously.
> 2. [The Claimant] knew or ought to have known [the First Defendant] was not an experienced rider, being only 16 yrs old, but allowed himself to be carried on the motorbike anyway.
> 3. [The Claimant] rode on the motorbike without a helmet.
> 4. [The Claimant] failed to get off the motorbike before the accident.
> 5. If [the Claimant] encouraged or condoned [the First Defendant's] manner of irresponsible and dangerous driving he was negligent to do so."

Allegations (1), (4) and (5) fall away on my findings of fact. Allegation (1) is one I have specifically rejected and allegation (5) is inconsistent with my findings that the only 'irresponsible and dangerous driving' by the First Defendant was his last-second decision to ride through the red light across the junction which was not encouraged by the Claimant. Whilst the Claimant wanted to go through the subway, which would not have been safe for pedestrians, that was foolish but ignored or not heard, so is irrelevant to contributory negligence. (4) falls away as well on my findings that the First Defendant was taking the Claimant to hospital because he had injured his ankle, so, he could not realistically have got off and walked, as he said in evidence. Therefore, that only leaves (3) (which is admitted) and (2).

77. Having said that, in my judgment (2) does arise on my findings of fact for the same reason that (4) does not: my finding at paragraph 32 above the Claimant injured his ankle 'messing around' with the Motorbike at Jehain's house. Whilst Mr Blakesley accepted that *in itself* was too remote for contributory negligence, I also found: 'Far from being implausible that teenage boys would not tell adults if one of them injured himself messing about, that is precisely the sort of stupid thing some teenage boys do. Notably the Claimant's own mother confirmed that she was not at all surprised that they acted this way. That poor decision (jointly with the First Defendant) prompted the journey and I return to it at the end of the judgment on contributory negligence'. Moreover, I also observed at paragraph 48(a) above that 'the Claimant certainly knew the First Defendant was inexperienced on the Motorbike (which I come back to on contributory negligence), but it would be a non-sequitur to infer from that he suspected it was illegitimate'. I do indeed now come back to both of those points on contributory negligence. Indeed, that is only reasonable as they were 'admissions against interest' which I took into account in accepting the Claimant's credibility. As discussed in (very culinary) submissions, just as Mr Blakesley cannot 'take the plums and leave the duff' of the First Defendant's evidence; so too Mr Brindle 'cannot have his cake and eat it'. After all, I found the Claimant did not have actual or blind-eye knowledge the Motorbike was stolen or unlawfully taken; or that its use was uninsured. But I also found he knew the First Defendant was inexperienced on the Motorbike as he had only just got it and not had one before. So, when the Claimant injured his own ankle 'messing about' with the Motorbike, whilst that in itself does not sound in 'contributory negligence', his (joint) decision with the First Defendant to ride him to hospital rather than call for help does do so.

78. Before analysing that and (admitted) contributory negligence not wearing a helmet, I turn to principle. s.1(1) Law Reform (Contributory Negligence) Act 1949 states:

> "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 discussed by Lord Reed in *Jackson v Murray* [2015] RTR 20 (SC) at [20]

> "s.1(1) does not specify how responsibility is to be apportioned, beyond requiring the damages to 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 (not, it is to be noted, responsibility for the accident)…In… *Stapley v Gypsum Mines Ltd* [1953] A.C. 663 at 682, Lord Reid stated:

> "A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

Lord Reed in *Jackson* also endorsed *Eagle v Chambers* [2004] RTR 9 (CA), where Hale LJ (as she then was) had said at [14]

> "We accept s.1… requires the court to consider 'the claimant's share in the responsibility for the damage'. But the section is premised on both parties being at fault. It is also impossible to consider the claimant's 'share' without also considering that of the defendant. Moreover, the court has to do what is 'just and equitable' that includes being fair to the claimant as well as to the defendant. Realistically, therefore, the court has to compare the one with the other."

As Lord Reed observed of *Eagle* in *Jackson* at [26]:

> "Hale LJ noted that there were two aspects to apportioning liability between claimant and defendant, namely the respective causative potency of what they had done, and their respective blameworthiness. In relation to the former, it was accepted that the defendant's causative potency was much greater than the claimant's on the facts of the case. In relation to blameworthiness, the defendant was equally if not more blameworthy….. Hale LJ noted that a car could do much more damage to a person than a person could usually do to a car…The court had consistently imposed a high burden upon the drivers of cars, to reflect the potentially dangerous nature of driving."

Both *Jackson* and *Eagle* were cases of pedestrians hit by cars where on appeal their greater than 50% deductions were reduced to reflect that greater responsibility of a vehicle driver. Ms Eagle was walking in the middle of the road 'in an emotional state' and her deduction was reduced from 60% to 40%. Miss Jackson was only 13 and walked out from behind a school bus without looking and the Supreme Court reduced her deduction for contributory negligence from 70% to 50%.

79. Indeed, *Jackson* shows that deductions for contributory negligence can still be substantial for children, although the majority of the Supreme Court found the original 90% reduction and the Court of Session's 70% reductions were both too high given the driver should have seen the school bus and anticipated children may run out. Nevertheless, due allowance must be made for children's inexperience, as Lord Denning MR said in *Gough v Thorne* [1966] 1 WLR 1387 (CA) at 1390g:

> "A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her.

> A child has not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.

Salmon LJ added at 1391g:

> "The question as to whether the plaintiff can be said to have been guilty of contributory negligence depends on whether any ordinary child of 13½ could be expected to have done any more than this child did. I say, "ordinary child." I do not mean a paragon of prudence; nor do I mean a scatterbrained child; but the ordinary girl of 13 ½."

Having said that, *Gough* was a hard case where a lorry had stopped to beckon children across a road and the defendant had ploughed past it and hit them. Unsurprisingly, the Court of Appeal held there had been no contributory negligence. (But the principle remains valid: *Owens v Lewis* [2024] PIQR P11 (HC) at [39]).

80. Lord Denning again examined contributory negligence in a road accident in a case well-known to law students and every Personal Injury practitioner: on the issue of seat-belts in *Froom v Butcher* [1976] 1 QB 286 (CA). The Court endorsed an (agreed) 20% deduction for contributory negligence for a plaintiff not wearing a seat-belt which had permitted more serious injuries than if he had been wearing one. Even though seat-belts were in those days mandatory to fit but not to wear, Lord Denning encouraged their use (i.e. that it was 'blameworthy' for an ordinary adult in the front seat not to wear one) but focussed on causation at pg.296b:

> "*[W]hat damages should be payable? This question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases…Sometimes the evidence will show that the failure made no difference. The damage would have been the same, even if a seat belt had been worn. In such case the damages should not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat belt had been worn. In such cases I would suggest that the damages should be reduced by 25 per cent. But often enough the evidence will only show that the failure made a considerable difference. Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head. In such case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent."*

81. Lord Denning in *Froom* was clear those were 'guidelines', but cases departing from them are thin on the ground. (Ironically, *Froom* itself with the agreed figure of 20% is one of the few – the only other I have found is a Northern Irish High Court case: *Hazlett v Robinson* [2014] NIQB 17 but no specific reason is given for selecting 20%). Even after the law had changed to make wearing seat belts compulsory in the front and back of a car, the Court of Appeal has declined to depart from *Froom* twice: in *Jones v Wilkins* [2001] RTR 19 and *Stanton v Collison* [2010] RTR 26. On both occasions, the Court stressed the importance of clarity and predictably in encouraging settlement, just as Lord Denning had said back in *Froom* itself. For those reasons, as Mr Brindle said, it would take a clear case to 'tweak' the *Froom*

guidelines, e.g. to make a 25% reduction when a seat belt would not have avoided all injuries (unless very minor whiplash rather than severe brain injury: an example, albeit it was a refusal of permission, is *Pearson v Anwar* [2015] EWCA Civ 1011).

82. Of course, I am not dealing with a seat-belt case, but a failure to wear a helmet. There appears to be even less Court of Appeal authority on that. But one which like *Froom* has stood the test of time, is *O'Connell v Jackson* [1972] 1 QB 270 (CA). A moped rider not wearing a helmet on a busy road in rush hour was hit by a car and suffered severe head injuries which medical evidence said would have been less serious had he been wearing a helmet. The trial judge had found no contributory negligence on the basis it was not then compulsory to wear a helmet, even though the Highway Code recommended it. Anticipating Lord Denning's approach in *Froom* which plainly drew on it, the Court of Appeal held that just because it was not compulsory did not mean it was not negligent and reduced the damages by 15%. Counsel before me suggested in motorcycle helmet cases, it was conventional to apply the *Froom* guidelines by analogy. However, Mr Blakesley said other cases had departed from them. He is quite right, although the deductions tend to be 'rolled up with' other factors. For example, in *McCracken*, having refused the pillion passenger's claim against the rider due to the illegality defence as a result of their joint enterprise dangerous driving (i.e. joyriding), the Court of Appeal held that the passenger's claim against the negligent car driver succeeded, but increased the deduction from 45% to 65%, reflecting both the joyriding and no helmet (the latter agreed at 15% because it would have reduced injuries). In *Clark*, Yip J held whilst a nearly-15 year-old pillion passenger did not intend to encourage the dangerous riding of a motorbike so the illegality defence did not apply (see paras 56 and 58 above), he was still 40% contributory negligent, as she explained at [77]:

> "The correct approach is to look at relative blameworthiness and causative potency as a whole, [not] assess…elements of contributory negligence separately and add..the percentages together…On my findings, [he] was careless about his own safety, but his blameworthiness is to be set against the dangerous driving of the riders. Even incorporating the agreement on the helmet issue, I consider that his share of responsibility should be less than that of the defendants. Leaving aside the helmet, I do not think a discount greater than one-third would be called for. Reflecting the agreement between the parties as faithfully as I can but also taking care not to double-count in assessing Liam's relative blameworthiness, I consider that the appropriate total discount for his contributory negligence is 40%.

A similar approach was taken in *Owens*, with a reduction of 30% for a 15 year-old riding on a road with no helmet and three others including the driver on a quad bike.

83. If the helmet issue had stood alone, I would have made a deduction, as Mr Brindle conceded I should, of 15%. At paragraph 36 above, I found on the balance of probabilities that on impact with the Mini, the Claimant was thrown from the Motorbike diagonally right towards a traffic island with street furniture and hit a lamppost before hitting the ground, as was recorded in a contemporaneous Ambulance record by paramedics on the scene within minutes. On Mr Macfarlane's unchallenged evidence, had the Claimant been wearing a helmet, he still would have sustained his leg fracture (obviously) but also sustained head injuries, albeit much more minor with no substantial long-term consequences like affecting mental

capacity, employability or independent living. That is similar to the outcome in *O'Connell* itself where a reduction of 15% was made, irrespective of the '*Froom*' analogy. Whilst the Claimant is a child, there would have been no reason to reduce the reduction down to 12.5% as in *Clark*, still less lower. After all, I found the Claimant was specifically warned by the First Defendant's brother to wear a helmet and one was available on top of the wardrobe. However, on the helmet issue alone, this simply counterbalanced the Claimant's age and inexperience. The warning and the availability of a helmet would not have justified an increased reduction beyond the 15% assessed in *O'Connell* for an adult (especially as under the Highway Code Rule 83 and ss.16-17 RTA, there is no legal requirement to wear a helmet for a quad bike or a tri-bike, such as the Motorbike – only advice as in *O'Connell*).

84. However, the absence of a helmet does not stand alone, for the reasons I explained in paragraph 77 above. Quite apart from the helmet, even allowing for his age of 15, the Claimant failed to take care for his safety when, having injured his ankle 'messing around' with the Motorbike, he decided alongside the First Defendant not to tell either of their parents (or the First Defendant's brother) but 'to sort it out themselves' and go to hospital. They decided to ride into the City Centre when the First Defendant had only had the Motorbike a few days and was very inexperienced, as the Claimant well knew. I said at paragraph 32 that decision 'was the precisely the sort of stupid thing that teenage boys do', as Mrs Dormer accepted. But that does not mean it has no consequences, like other stupid things that teenagers can do. Here, the causal potency must be compared between the Claimant and the First Defendant (*Eagle*). They may not have had a joint enterprise of joyriding, but they had a joint enterprise of bad-decision-making. However, as in *Clark*, the Claimant's causative potency and blame is less than the year-older First Defendant, who alone took the fateful decision to ride dangerously across the junction which caused the accident and life-changing injuries. Indeed, the Claimant's responsibility should be markedly less, not as high as 40% overall in *Clark* given that was a case of willing participation in off-road biking for fun, not a bad decision about getting medical attention. Likewise, nor was the Claimant's responsibility as grave as in *Lewis*, where the 30% reduction was for a lad of the same age sat on a quad bike with three other people without a helmet on a road. In my judgment, bearing in mind the Claimant's young age and inexperience, his trust in the older First Defendant who is clearly mainly responsible for the injuries and this being a case of poor decision-making by the Claimant rather than reckless 'fun', the appropriate overall reduction (including for the absence of a helmet) is 20%. Any more than that would risk minimising the First Defendant's joint responsibility for the poor decision, double-counting the helmet issue (e.g. with 'the warning'), or including non-causative foolishness (like the idea of riding through the subway, although even had I taken that into account, I would not have reduced damages by more than 25% overall).

The Future

85. Therefore, judgment will be entered for the Claimant against the First Defendant with a 20% reduction for contributory negligence and the Second Defendant shall be liable to satisfy any final judgment the Claimant obtains against the First Defendant, pursuant to the provisions of s151 of the Road Traffic Act. Since my draft judgment, the parties have sensibly agreed directions covering those points and costs. I am also happy to note the Claimant has recovered litigation capacity so

Mrs Dormer can be discharged as Litigation Friend. The damages, including the long-term effects on the Claimant, will now need to be decided, if necessary by the Court. However, I can make one observation that is intended to be helpful to the parties (even if the Claimant does not see it as such). The Schedule of Loss attached to the Particulars of Claim pleads damages at over £1 million, nearly 75% of which is a claim for loss of earnings and pension, essentially for a 'lost career'. However, the Claimant's expectations must be managed. I fully appreciate his case is that it was the accident that caused him to change personality and to 'go off the rails'. However, he was studying after the accident but then grew frustrated and angry (doubtless due to his injuries) and slid into criminality. Recovery of such losses will have several challenges. Whilst of course I have found the illegality defence does not apply to the claim, the Courts are wary of awarding losses where subsequent criminality has a causal role (e.g. *Gray, Henderson*). I hope it will be possible to settle this claim soon rather than have a contested trial on damages, not least because the Claimant's life has indeed fallen apart since the accident and the sooner he has stability and professional support, to supplement the love and support from his family, the better.
