[2021] EWHC 632 (QB)

Case No:F91LS382

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
LEEDS DISTRICT REGISTRY

The Court House
Oxford Row
Leeds LS1 3BG
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Before :

His Honour Judge Saffman sitting as a Judge of the High Court

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Between :

YYY (1) **AVIVA INSURANCE LTD (2)**	**Claimant**
- and -	
ZZZ	**Defendant**

- -
- -

Mr Nicholas Grimshaw counsel for the Claimants
Mr Patrick Vincent QC for the Defendant

Hearing date: 16 March 2021
Judgment: 17 March 2021

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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.

Introduction

1. I heard this case over the course of yesterday. This judgment is given following my consideration of it overnight. The judgment has been anonymised to protect the interests of XXX, a person injured in the accident with which I am concerned who received a substantial sum in settlement of her claim under the auspices of an anonymity order. This judgment is anonymised so as not to undermine the effect of that order.

2. This claim arises out of a road traffic accident that occurred at about 8 p.m. on 16 March 2014 on the A642 Wakefield Road, Rothwell, West Yorkshire. It is a two lane highway separated by broken white lines and the speed limit is the national speed limit of 60mph. It is not an urban road, it is, I think, a trunk road but will no doubt be corrected if that is wrong.

3. The defendant, ZZZ was riding a Suzuki Bandit GSF 600 motorcycle in a northbound direction. He had a pillion passenger namely XXX. His motorbike was in collision with a Ford Ka being driven by the first claimant who is insured by the second claimants, Aviva insurance Limited.

4. The accident occurred when the first claimant who, shortly before the accident was also travelling in a northbound direction ahead of the defendant, was executing a U-turn in order to enter a layby adjacent to the opposite carriageway. In order to execute this U-turn she had left the carriageway and entered a layby to her near side from which she commenced her U-turn

5. The defendant's motorbike collided with the driver's door of YYY's motor vehicle the front of which, at the point of impact, had just traversed the centre white lines. At impact the car was broadly in an east /west orientation, as one would expect if the object was to execute a U turn on a road that ran from north to south.

6. XXX, YYY and ZZZ were all seriously injured as a result of the accident but XXX sustained the worst injuries including severe head/brain injuries. The severity of her injuries was such that she is now a protected party and, in that capacity, commenced proceedings against the first and second claimants. These were ultimately settled on the basis of a payment of very substantial damages. As mentioned, the order in her favour includes an anonymity order.

7. This claim is a claim for contribution from the defendant on the basis that, whilst it is acknowledged that the first claimant's driving in attempting to execute a U turn in the circumstances that pertained here was negligent and that she bears a greater burden of responsibility for the accident, nonetheless, the defendant was also at fault to a lesser but significant extent. Mr Nicholas Grimshaw, counsel for the claimant's contends that the defendant was 20% responsible for the accident and that should therefore be the amount of his (or presumably his insurers) contribution to the settlement of XXX's claim.

8. ZZZ is represented by leading counsel, Mr Patrick Vincent QC. His contention is that this accident and the consequences arising from it were exclusively caused by the negligence of the first claimant and the defendant was blameless. If, contrary to that position, there is a finding that the defendant is liable to contribute then the relative blameworthiness and causative potency of the 2 motorists' actions do not justify a contribution exceeding 10%.

The evidence

9. The lay evidence consisted only of the first claimant and the defendant. Experts were instructed to reconstruct the accident. Mr David Hague on behalf of the claimant and Mr Charles Murdoch of the defendant. The defendant also instructed a Mr Matthew Cass, a forensic image analyst to consider some video evidence in this case.

10. The video evidence consists of some headcam footage taken by a friend of the defendant, Mr Michael Hawksworth. Mr Hawksworth was on a 125 cc motor cycle travelling a few seconds behind the defendant's motorbike. All 3 were on their way home from a trip to the seaside. Mr Hawksworth was wearing a helmet into which was fitted a video camera which provided the footage which I, and the accident reconstruction experts, have seen and which was analysed by Mr Cass. Mr Hague, Mr Murdoch and Mr Cass all gave evidence but it was not lengthy. There had been a joint meeting between all 3 experts and much was agreed.

The first Claimant

11. The first claimant's substantive witness statement is dated 14 April 2014. It is right to say that Mr Vincent did not challenge it to any great extent.

12. The first claimant has a child, Katie. On the day in question Katie had been with her father, Andy and the accident occurred when the first claimant was travelling to pick her up. She and Katie's father had arranged to meet in the layby on the southbound carriageway to which the claimant was headed immediately before the accident.

13. The layby on the northbound carriageway from which the first claimant started her manoeuvre which she hoped would lead her to the layby opposite was fairly close to a roundabout. In fact the expert evidence is that the distance from the exit of the roundabout to the point of impact which was adjacent to the "northbound" layby was 137 metres. At paragraph 15 of her witness statement she states;

> *"My intention was to take the first left hand turn off the roundabout onto the A642. The layby where I was going to meet Andy was the first layby off the roundabout. There were laybys on either side of the road. I would pull in on the left, check the road both ways for traffic and then do a U-turn so as to drive into the layby where Andy was parked. I would then be facing the right direction for my return journey*."

At paragraph 17;

> "*As I came off the roundabout there was no traffic so I did not need to stop. I then turned onto the A642 and continued driving down the road with the intention then of pulling into the layby. I cannot remember exactly when I started to indicate but I did indicate my intention to pull into the left. I pulled into the layby. There were no other cars in the layby at that point."*

At paragraph 19;

"As I was pulling in I did not stop my car but looked in my interior and driver's door mirrors to check if there was any traffic in either direction. There was nothing coming either from behind or in front of me. The road was completely clear in both directions".

At paragraph 20

"I cannot say whether in fact I indicated my intention to pull out of the layby although that would be what I would normally do".

Finally, at paragraph 21

"As the road was clear in both direction I pulled out to my right in second gear. I do not know how far across the road I had travelled before, as I was sideways on, I became aware of a bright round light immediately at the right hand side of my face. The next thing I knew was that something had hit me".

14. In answer to Mr Vincent the first claimant simply clarified that;

    i. The decision to do a U-turn was not spontaneous, it had always been the plan because the rendezvous with Andy and Katie depended on it.

    ii. She was aware the manoeuvre could only be executed when there was nothing coming up behind her and, once she was in the layby on the northbound carriageway, if the absence of following traffic was to be confirmed by reference to her wing mirror, the car would have had to have been parallel to the carriageway.

    iii. She had a specific recollection of indicating to the left but could not remember whether, having entered the first layby, she then indicated to the right.

    iv. She did not do anything to alert any following road users that she intended to do a U-turn because she did not believe that anybody was behind her.

The Defendant

15. The defendant was referred at some length to his witness statement dated 28 July 2019 and which thus post dates the accident by about 5.5 years and his interview with the police at the first opportunity after the accident on 19 April 2014, 4 weeks or so after the accident. He was also referred to a police statement given on 26 January 2015. Various inconsistencies in his accounts were discussed with him.

16. In his skeleton argument from paragraph 26 to 29 Mr Grimshaw's briefly summarises the defendant's account given to the police. I do not think that I can improve on it and trust that he will forgive me therefore simply reproducing it to a greater or lesser extent;

"26 a)He was travelling at around 50 mph as he left the roundabout

b)He saw the first claimant's car "veer" into the layby and thought it was "suspicious" so eased off and dropped his throttle reducing his speed to about 40mph (about 40.43,44 max) "I probably went down to about 40 mph".

c)The first claimant's car had its off-site tyres "just inside" the line on the edge of the layby and stopped in a manner that he was "very suspicious" about.

d)He went to look over his shoulder to see where Mr Hawksworth was, preparatory to moving his motorcycle towards the crown of the road. As he turned his head, he saw Mr Hawksworth in the mirror. Looking forwards again he was confronted by the Ford immediately ahead, by just "a bike length, if that".

17. His account given in January 2015 gives a higher estimate of speed as he left the roundabout (50 to 55 mph). He describes the Ford as pulling into the layby and "stopping". He speaks of continuing to travel along the road, relaxing his throttle and maintaining his speed. He talks of glancing briefly in his mirror and then suddenly, and without indication, the Ford pulling into his path at a point too close for him to take effective evasive action.

18. In his witness statement in these proceedings he describes his maximum speed after leaving the roundabout as 50 miles per hour. He saw the Ford pull into the right-hand half of the northbound layby and his reaction was to come off the throttle so as to reduce the speed and he instinctively moved towards the centre line. He speaks of "flicking" his eyes to the mirror as the Ford pulled into the layby (there is no reference to "veering") and he could see Mr Hawksworth's headlight thereby obviating the need to physically look over his shoulder. The Ford then suddenly turned sharply to its right directly into his path. He braked instinctively but there was no time to take successful evasive action.

19. His cross examination essentially centred on these inconsistencies. The defendant's oral evidence was to the effect that he was not really checking his speed. This was an open trunk road with a 60 mph speed limit. That was the maximum speed that Mr Hawksworth's bike was capable of and he knew he was travelling at less than that because Mr Hawksworth was keeping up with him.

20. He noticed the Ford as he exited the roundabout. It was going considerably slower than was he. It caused him to wonder what the driver had in mind. Mr Grimshaw points out that in the police interview the defendant stated that, when he first saw the Ford, it was doing the same sort of speed as was the defendant. As I understand it the defendant's clarification was that that was only at the point that the Ford exited the roundabout and thereafter it slowed down.

21. The Ford subsequently turned into the layby, as the defendant recollects, without indicating left. The off side wheels of the Ford were in the layby, but only just. He took his hands off the throttle, looked in his mirror but did not look over his shoulder. He noticed that Mr Hawksworth was a safe distance away and instinctively moved into a more central position on the road. He did so because he assessed that the Ford might represent a hazard in that the driver might open her door or might return from the layby to the northbound carriageway. He never imagined that she intended to execute a U turn.

22. His assessment was that he was doing about 50 miles per hour before he came off the throttle but that is only an approximation because, as I have said, he was not looking at his speedometer. Without any indication the Ford turned into the road at an acute angle from the layby so that it was side on to him. He instinctively braked but, as he repeated, he simply had insufficient time to avoid an accident.

23. As to why he took his eyes off the road ahead when the Ford was behaving "suspiciously" in order to look in his mirror, he was clear that he did so because he wanted to check that his plan of action in moving into a more central position on the road would not bring him into conflict with following road users, in particular Mr Hawksworth.

24. As I have also said, he says that he did not expect that the first defendant would attempt a U turn from the layby. He did not accept that the fact that she may have veered into the layby if that is what happened, or the fact that she had not indicated or that she was only just in the layby in the sense that her offside wheels were just to the layby side of any straight line drawn between the carriageway and the layby were clues that the driver was going to carry out a U turn into his path.

25. He does not challenge the experts' calculations that his average speed after exiting the roundabout was about 54 or 55 mph and that his speed at impact was about 50mph, higher than he has suggested to the police or indeed subsequently. He agreed his assessment of having reduced his speed to 40 mph immediately before ethe impact was not correct. He pointed out that when there is a pillion on board braking speeds are compromised.

26. He accepted if the experts had concluded that if he had been travelling at 40 mph rather than 50+mph then this accident may have been avoided. He made the point that if he had been going a lot faster he may well have past the Ford before it started its manoeuvre. He accepted that the police had given him some words of advice but he could not recall now what they were. He was not taken by counsel to the video evidence.

27. There was nothing about the manner in which he gave his evidence to cause me to conclude that he was anything other than an honest man doing the best he could to recall these fleeting events.

The experts

28. I have rarely had the benefit of such speedy evidence from experts. I think in total they must have occupied the court for little more than 1 hour. This is far from a criticism. It seemed to me that there was not a great deal that separated them. Indeed my recollection is that neither counsel felt it necessary to refer to the expert evidence in their final submissions.

29. What appears not to be in dispute is:

    a. The Ford did not stop in the layby. It entered the layby and re-emerged on to the northbound carriageway on its intended course to the southbound carriageway in one continuous movement.

    b. The Ford executed a "hook turn" whereby it did not straighten up in the layby for any significant period and will have been parallel to the carriageway for nor more than the time it took to pass through parallel in the course of reorientation of the car into an east/west direction from its original north/south direction.

    c. The defendant was travelling at an average speed of either or between 54 and 55 mph over the 137 metres between exiting the roundabout and impact.

    d. If the defendant was travelling at less than 54 or 55 mph when he exited the roundabout he must have been travelling at a greater speed on his approach to the Ford in order for the average speed to be 54 or 55mph.

    e. At impact the defendant's speed was 50mph.

    f. At impact the first claimant was travelling at either 8 or 9 miles per hour

g. The time for the Ford to travel from a position in the layby at which it was parallel to the carriageway to impact was about 1.5 to 2 seconds.

h. The video footage is not of good quality and can distort perception both of the speed of the defendant's motorbike and the distances between vehicles and objects recorded in it..

30. One area of disagreement between the experts relates to whether there is evidence that the defendant braked before impact. The video seen by the experts is unclear but Mr Hague, the expert instructed by the claimant thinks that the defendant did brake for perhaps half a second before impact and that may have reduced the speed of the motorbike by up to 7mph but it could have been less.

31. Mr Cass however thinks that the defendant's brake light probably did not illuminate before impact. I add that a police officer who scrutinised a superior copy of the headcam recording believes that the brake light of the defendant's bike did illuminate for about half a second before impact and so Mr Hague's belief is not uniquely held, indeed, as I understand it, it is informed by the conclusion reached by that police officer. Mr Murdoch took the view, as I understand it, that the question was one that depended on an analysis of the video and so he was prepared to defer to Mr Cass.

Findings

32. Mr Grimshaw invites the court to make a number of findings. He sets them out in paragraph 37 of his skeleton;

a. That the defendant had an average speed of 54mph on the approach from the roundabout to the point of impact.

It is the agreed evidence of the experts that the defendant's average speed was 54 or 55 mph and is not gainsaid by the defendant. I therefore so find.

b. Ahead of the defendant and in his direct view, the first claimant turned into the layby and out again in a continuous "hook turn" back into the road travelling at 8 or 9 mph

As to the conduct of the first claimant, that is the agreed evidence of the experts. The defendant does not gainsay it. Accordingly I find that the first claimant was executing a continuous "hook turn".

On the issue of the defendant's "direct view", he says that his view of the movements of the Ford was interrupted by his averting his eyes from the road ahead of him when the actions of the claimant began to unfold in order to look in his mirror to assess the whereabouts of Mr Hawksworth before he moved into the centre of the road.

I see no reason to doubt the defendant's evidence that he consulted his mirror and so his view of the Ford was interrupted to that extent.

c. The defendant had the opportunity to reduce his speed to 40 mph but did not do so, at odds with his initial account to the police.

I accept that the defendant did not reduce his speed to 40mph. I accept that he initially told the police that he had. If the finding that Mr Grimshaw seeks relates to the opportunity to reduce speed to 40mph when the claimant commenced her move into the layby I am prepared to find that he had such an opportunity. However, that does not answer the

question as to whether, in failing to avail himself of it, he fell short of his duty of care to the claimant or indeed his pillion. I shall deal with that below.

d. **The defendant instead maintained his approach speed (perhaps accelerating to a maximum speed in excess of 54mph) and braked only at the last moment**.

Despite the inconsistencies that Mr Grimshaw has highlighted the defendant has been consistent that he eased off the throttle when the claimant started her manoeuvre. I see no reason to doubt that. The experts do not say that he probably failed to do so. It is a course of action that makes sense.

I find that he did actually apply the brakes in the half second before impact. The defendant believed that he did but determination of the issue appears to be dependent also on the video evidence. A police officer who saw a superior copy of the video evidence felt that the brake light of the motorbike did illuminate half a second or so before the impact. Mr Hague opines that there was some braking. Mr Murdoch abstains but Mr Cass, who concludes that there was no braking, has been disadvantaged by forming a view on the basis of a video that he recognises as being significantly suboptimal.

To be clear, I do not find that the defendant accelerated when his suspicions about the claimant's actions arose. His evidence that he did not do so is not inconsistent with any conclusions reached by the experts. I note that his speed at collision was slower in any event than his average speed.

I should say however that even if I am wrong and there was no braking and indeed some acceleration, in my view that in itself is not determinative of negligence. I shall deal with this below.

e. Speed at impact was in the region of 50mph

I make that finding. It is the evidence of the experts and is not disputed.

f. Had the defendant in fact reduced his speed to 40mph when the Ford turned towards the layby or when it turned sharply back towards the carriageway he would have avoided a collision.

I accept that the evidence of the accident re-construction experts is that, when the first claimant started to turn back towards the carriageway, had the defendant been travelling at 40mph, an accident could have been avoided. The experts are not as one as to why that is so but they are as one that that would have been the effect. If that is the case then clearly an accident could have been avoided if the defendant had been travelling at 40mph when the first claimant moved into the layby.

33. Mr Vincent asks me to make a finding to the effect that the defendant identified the first claimant's conduct in leaving the carriageway and entering the layby as a potential hazard.

34. I do make that finding. It was the defendant's evidence that I have no reason to doubt. There is no reason to believe that the defendant did not see the Ford. It is almost inevitable that a motorcyclist, bearing in mind his vulnerable position, may fear that a motorist entering a layby might open the car door in his path or perhaps rejoin the road without taking adequate care. That was the defendant's evidence and it makes complete sense.

Discussion

35. The burden is on the claimants to establish that it is more likely than not that the defendant's riding fell below the standard of a reasonable motorcyclist carrying a pillion passenger and that

accordingly he failed to discharge his duty of reasonable care and that contributed to the accident and the injuries.

36. The court must guard against imposing a counsel of perfection. As was said in *Ahanonu v South East London & Kent Bus Company Ltd* (2008) EWCA Civ 274;

"*There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care*."

37. The same refrain was taken up by Coulson J in *Stewart v Glaze* (2009) EWHC 704 (QB)

5. I have to apply to Mr Glaze's actions the standard of the reasonable driver. It is important to ensure that the court does not unwittingly replace that test with the standard of the ideal driver. It is also important to ensure, particularly in the case with accident reconstruction experts, that the court is not guided by what is sometimes referred to as 20:20 hindsight.

……

7. By the same token, it is important to have in mind that a car is potentially a dangerous weapon (Latham LJ in Lunt v Khelifa (2002)EWCA Civ 801) and that those driving cars owe clear duties of care to those around them. Compliance with speed limits and proper awareness of potential hazards can often be critical in such situations."

38. Consideration of the counsel of perfection has inevitably been considered in other cases. *Birch v Paulson* (2012) EWCA Civ 487 was one such. The Court of Appeal stated in that case that the trial judge had rhetorically posed the following question:

"15. The question in this case, therefore is whether or not a reasonably careful driver in the position of the defendant, observing what I have held could have been there to be observed by such a driver in the circumstances, would have considered there to be a sufficient risk that the claimant might suddenly step into the road in front of her as to make it necessary for her – as a precautionary measure – to reduce her speed to below 40 mph and/or to steer to the centre, so as to give herself more time and space to react should the claimant act in such a way.

39. The Court of Appeal concluded that;

"32…… the legal test is not a question of the counsel of perfection using hindsight. Of course it is not, and drivers are not required to give absolute guarantees of safety towards pedestrians. The yardstick is by reference to reasonable care. As the judge found, there was nothing here to require the defendant as a reasonably careful driver to act in any way other than the way in which she did act given the situation in which she found herself at the time".

40. It might be thought that what was exercising the court in that case was not wholly dissimilar to the scenario with which this defendant was confronted. There it was pedestrian who stepped into the path of the defendant. In this case it is a motorist (in the considerably more lethal weapon) who drives into the path of a more vulnerable motorcyclist and pillion. Moreover, in that case the claimant appeared to be asserting that the action that the defendant ought to have taken was to reduce her speed to 40mph. In this case the assertion is that the defendant ought to have reduced his speed. Having said that, I readily appreciate that all these cases are fact sensitive and no two cases are identical.

41. The courts have also considered the issues raised by the findings that I have made in paragraph 27f above to the effect that if the defendant had been travelling at 40mph when the first claimant started her manoeuvre into the layby the accident would have been avoided.

42. Mr Vincent suggests that the issue gives rise to a consideration of what has been called the fallacy of the coincidence of location. It was the description applied in *Whittle v Bennett* (2006) EWCA Civ 1538 para 24. The fact that it is called the "fallacy" throws some light on the court's approach to this. One can see why in my view. It cannot matter that the accident would not have happened if the defendant had been travelling more slowly because the first claimant would have been out of the way before he got there. Equally the accident would not have occurred if the defendant had been travelling so fast that he had cleared out of the way before the first claimant started her manoeuvre. What matters in this case it seems to me is whether the actual collision was contributed to by the defendant because his riding fell below the standard that could be reasonably expected of him especially while carrying a pillion. That of course includes a consideration of the speed at which he was travelling.

43. Mr Grimshaw argues that this is not a case of promulgating a case based on the fallacy of coincidence in location. The assertion is that the defendant was negligent in not slowing down bearing in mind the position in which he found himself and taking account of the fact that he had a pillion who is especially vulnerable. That, he says, is the relevance of the assertion that he should have been travelling at 40mph

Conclusion.

44. Mr Vincent asks me to actually consider by reference to the pleaded case what it is the claimant is asserting as negligence. He argues that what the allegations essentially amount to is a criticism that the defendant did not foresee that the first claimant would perform an unannounced U turn directly into his path, did not reduce his speed to one which would have enabled her to get out of the way before there was a crossing of paths and did not keep his eyes on the first claimant's vehicle all the time but chose instead to take the time to look in his mirror preparatory to moving into a more central position on the road.

45. By specific reference to the allegations of breach of duty he makes the following points;

16.1 Failed (having exited the roundabout) to maintain a consistent and proper look out with regard to the manoeuvring of the Ford.

46. If this is an allegation that he diverted his eyes to look in his mirror when the first claimant started her manoeuvre then, Mr Vincent suggests, it cannot be said that to do so was negligent.

47. The defendant formed a judgment that the potential hazard was that the first claimant might open her car door from a position very close to the road or might suddenly rejoin the carriageway. He formed a judgment that the way to mitigate the risk was to move to the right. That requires consulting his mirrors. The Official Guide to Riding issued by the Driver and Vehicle Standards Agency (DVSA) specifically advises that when approaching a hazard the rider should "*check the position of following traffic using your mirrors or looking behind you at an appropriate time."*

48. Mr Grimshaw also refers to the DVSA Guide which includes a section to the effect that, in the context of recognising hazards "*it's important to allow enough time and space to see and respond to a hazard before it develops into a real danger*". It is right to recount though that the next paragraph reads "*To say you have to see a hazard may sound obvious but it requires you*

to be looking in the right place. This is why you should be scanning the road ahead, constantly varying your attention from near to far distance, while also making frequent mirror checks to keep you up to date with the situation behind."

49. So, argues Mr Vincent, the claimants are driven to argue that the defendant should not have looked in his mirror or should have done so at a different time. Neither, he says have any cogency. The former is not even supported by the DVSA Guidance. The latter boils down to a question of judgment and Mr Grimshaw did not even suggest to the defendant when a look in the mirror would have been more appropriate.

50. In this case the defendant's position is that he looked in his mirror when the first claimant started to drive "suspiciously" and after he had done that there was simply no time to react to the U turn she had recklessly initiated. Even if, suggests Mr Vincent, other riders might have confronted the potential hazard in a different way, that does not make his choice a negligent exercise of judgment.

16.2 Failed (having himself noted that the Ford suddenly "veered" into the layby) to maintain a careful view of the vehicle and to moderate his own approach speed.

51. Mr Vincent questions how this is different to allegation to 16.1. In so far as it asserts that he did not moderate his approach speed he reminds me that the defendant's evidence is that he did by easing off the throttle. That he did so is a finding I have already made.

16.3 Failed to slow down notwithstanding the fact that (as he told Police) he regarded the movements of the Ford as "suspicious".

52. I need only remark that this allegation is not supported by my findings above.

16.4 Maintained a speed of between 54 and 60mph upon his approach to the layby and the Ford.

53. I accept that merely because there is an agreed average speed of 54 or 55mph does not mean that the speed was not higher at some points and lower at others. However there is no evidence that his speed was negligently high. Just because if it was slower no accident would have occurred is nothing to the point, as already discussed. Just because it was more than 40mph is equally nothing to the point - even if the defendant at one time would have wished it to be believed that that was his speed. As Mr Vincent put it; "*estimating the speed at 40mph is not the same as acknowledging that that was the speed at which he should have been travelling".*

54. I should say that I do not accept that the conduct of the first claimant in entering the layby, even veering into it, if that is what happened, or the fact that she had not indicated or that she was only just in the layby in the sense that her offside wheels were just to the layby side of any straight line drawn between the carriageway and the layby were clues that the driver was going to carry out a U turn in his path. Why I ask rhetorically should they be? Even when considered in the cold light of day, never mind in the seconds available to the defendant who had to exercise judgment in the agony of the moment.

55. As Mr Vincent points out, turning only marginally into the layby reduces the suggestion that a U turn is to follow. A driver intending to U turn is much more likely to turn all the way into the layby to increase the arc for the U turn and at least give him/herself the greater opportunity to emerge from the layby at an angle that gives a better view of oncoming traffic.

56. In so far as this allegation is premised on the contention that by reducing speed to 40mph as soon as the first claimant drove suspiciously an accident would have been avoided. Even to the

extent that does not fall foul of the fallacy of coincidence of location (for the reasons expressed by Mr Grimshaw), it is clear that the conduct of the defendant cannot be judged with the benefit of hindsight or, in my view, having regard to nice calculations done by experts with the benefit of computer models and calculators. What matters is whether, having identified a potential hazard, the claimant has established that the steps taken by the defendant to mitigate it were not reasonable steps or a reasonable response even in the agony of the moment.

57. I do not accept that an average speed of 54 to 55mph has been established to be negligently too fast or that any realistic speed above that (to compensate for any slower speed and still maintain the average) was negligently too fast taking account of the conditions on the road that the defendant could reasonable anticipate.

16.5 Failed to proceed with caution in the context of:

- **The road position adopted by the Ford (having moved off the main carriageway the vehicle initially maintained the position with his offside wheels on or close to the line separating the layby from the carriageway and it therefore did not enter the layby fully or in a conventional manner.**
- **The fact that he did not see any indication from the Ford**
- **The failure of the Ford to slow down and stop within the layby**.

58. I am not sure how much this allegation adds to those that have gone before. It seems to be a specific reference to what Mr Grimshaw called "the clues" as to the first claimant's intentions. I have already covered that.

59. In so far as I have not addressed it, I fail to see how not stopping by the first claimant should be interpreted as indicating an intention to do a U turn. On the contrary, I would have thought that a following driver may be less inclined to believe that a car that has entered a layby and begins to emerge therefrom without stopping is going to do a U turn. The obvious conclusion is surely that they are simply going to rejoin the carriageway from which they have come.

16.6 Failed adequately or at all to watch/assess/react to what was happening ahead of him (as the Ford entered manoeuvred within the layby)

60. As Mr Vincent suggests, this is nothing more than another iteration of the allegations that precede it.

16.7 Took his eyes entirely away from the road ahead of him (and away from the Ford) in order to turn and look over his shoulder towards his fellow motorcyclist and companion, Michael Hawksworth (who was riding behind and following the defendant).

61. I am satisfied that the defendant did not look over his shoulder. I simply do not accept that taking his eyes off the road to look in his mirror was a breach of his duty of care. This is for the reasons which I have already explained but which are based on my conclusion that the defendant's decision to move to a more central position on the road was not a negligent one and, that decision having been made, it was not negligent to ensure that there was no following traffic that made it unsafe to do so. That involved looking in his mirror.

16.8 By turning to look over his shoulder he deprived himself of any opportunity to observe or react to the Ford when it exited the layby to commence the U-turn (when the defendant did turn back to look ahead he saw that the Ford had pulled out and was across his path – successful evasive action by the defendant was not then possible.

62. I do not accept that the defendant did look over his shoulder. However even had he done so I would not have been satisfied that this was a breach of duty in the light of his reasonable decision to move to the right hand side of the carriageway.

16.9 Failed (in the context of his own prior observation of the suspicious manoeuvring of the Ford) to ride with caution and in a manner which afforded him adequate time to react/swerve/brake in the event that the Ford proceeded to exit the layby.

63. In my view this adds nothing to the previous allegations.

16.10 Failed to sound his horn in order to ensure that the first claimant was aware of his presence and approach.

64. This criticism was not even put to the defendant. In any event it is highly speculative. Who is to say that the horn would have been heard? Who is to say that expending time on sounding the horn rather than using that time to apply the brakes or take other evasive action would have been a better use of the defendant's time? Even if it were, who is to say that the defendant's judgment that his time was better spent in other ways to avoid the collision was a judgment which was not a reasonable one to make.

16.11 Failed so to steer, swerve, slow down or otherwise to control and manoeuvre his motorcycle as to avoid the accident when by exercising reasonable riding skill and care he could have done so.

65. In my view this adds nothing to the previous allegations.

66. I mentioned above that I would return to issues relating to braking and acceleration. It will be recalled that I made a finding that the defendant did brake for at least the half a second prior to impact. I indicated that, even if I was wrong in that, it was not determinative of negligence. The claimant must establish that, on balance, it was the defendant's negligence that deprived him of the opportunity to brake and that negligently he failed to brake.

67. If the defendant had no time to do so because at the time that braking may have helped he was justifiably looking in his mirror then the absence of braking does not help the claimant. I find it vanishingly difficult to conclude that a motor cyclist who did not have a suicide wish would simply chose not to brake when presented with a vehicle coming across his path. Accordingly, if there was a failure to brake it was because the time for doing so effectively coincided with the brief period when the defendant was checking that it was safe to move out. That is wholly unsupportive of a finding in negligence. In any event, the way that the claimants phrase paragraph 16.8 of their Particulars of claim that I reproduce above appears to accept that it was the act of spending time looking in the mirror that deprived the defendant of the time to effectively tale evasive action.

68. Equally, even if, contrary to my findings, the defendant accelerated in the period when the first claimant's suspicious actions began, I am not satisfied that that would have been an unjustified response to the situation that was unfolding. Here the defendant was presented with a driver whose intentions were unclear, the driver may come to a standstill and open the car door into the path of the defendant or he/she may come back into the path of the defendant. In the agony of the moment a motorcyclist may justifiably conclude that the safest thing to do is get the motorist behind him. Such a course only becomes untenable if the driver intends to carry out a U turn but, for the reasons already adumbrated at length, there was insufficient reason for the defendant to believe that that was the intention.

69. I really do not see how the inconsistencies that Mr Grimshaw has identified in the defendant's evidence sufficiently help the claimant. In my experience, inconsistencies are to be expected to some degree in these cases. The process requires a motorist or motorcyclist to analyse in minute detail, and usually at a time chronologically far removed from the accident in question, a course of events that occurred over seconds,. The analysis requires the motorist to give this minute detail about events which are essentially of very little significance until significance is conferred upon them by the accident that follows. Then the party has to wind back in his mind how things unfolded up to that accident. It is no surprise that inconsistencies occur.

70. That is not to doubt that sometimes inconsistencies in a party's evidence can clinch victory of the other party. I do not think however that the inconsistencies in this case are of such a magnitude or significance to do so for the claimants in this case.

71. I simply do not accept that, on their case, the claimants have established that the standard of the defendant's riding fell below a reasonable standard, even bearing in mind that he was carrying a pillion. In the end, the first claimant attempted to execute a U turn on a major road when the defendant was behind her. Even on the claimants' case, I see no basis for concluding that the defendant should have considered that there was a sufficient risk that the first claimant would take such a step. The standard that the claimants assert is too high. It is a counsel of perfection. As is clear from the authorities, that is not the test.

72. For all these reasons I conclude that no blame attaches to the defendant and the claim for contribution should be dismissed.

I am grateful to counsel for the economical and effective way in which this case was presented.

HH Judge Saffman