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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **02/11/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

ALAN WALLACE

Plaintiff

and

BRIAN FITZSIMONS

Defendant

STEPHENS J

Introduction

[1] The plaintiff, Alan Wallace, 61 (dob 16 May 1954) sustained serious injuries in a road traffic collision which occurred on Sunday 26 August 2006 on the Shore Road between Strangford and Ardglass. The plaintiff was riding a motorcycle travelling from Strangford and the defendant, Brian Fitzsimons, was driving a Mondeo motor vehicle in the opposite direction travelling from Ardglass. The collision occurred on what was a left hand bend for the plaintiff and a right hand bend for the defendant. The main conflict between the plaintiff and the defendant is as to the side of the road upon which the collision occurred. The plaintiff states that he was on his correct side of the road and that, as a matter of deduction, the collision occurred on the defendant's incorrect side of the road. The defendant states that the plaintiff's motorcycle was on and the collision occurred on, his side of the road. In resolving that dispute both the plaintiff and the defendant called in aid the position of debris and of spillages on the road as recorded by the police. One of those spillages was on the plaintiff's side of the road. The police say that the spillages were petrol spillages. It is the defendant's case that the petrol spillages were coincidental and unrelated to the road traffic collision. The plaintiff's case is that the spillages were of coolant oil which was released from his motorcycle's cooling system as a result of damage caused to it in the collision with the defendant's motor vehicle. The plaintiff's case is that the "coolant oil spillage" was on his correct side of the road and that this leads

to the inference that the defendant was on his incorrect side of the road when the collision occurred.

[2] The parties agreed and I ordered that there should be a split trial so that the present issues for determination are primary liability and if that is established then whether the plaintiff was guilty of contributory negligence and if so to what degree.

[3] During the trial it was not suggested to me by either party that I should visit and inspect the scene but at the conclusion of the evidence I indicated that I was considering doing so and that on balance I wished to do so. I afforded the parties an opportunity of stating whether they objected or whether they wished to attend. There was no objection and neither party nor their representatives wished to attend. I have since given further consideration to whether it was appropriate or necessary on the facts of this case for me to do so in the light of the evidence that I heard, the detailed analysis of that evidence during the trial, the views which I have formed in relation to the credibility of the various witnesses and the difficulties that can arise in relation to site visits as set out at 35/8/2 of the Supreme Court Practice 1999. In the event I decided not to and I have not visited the scene. The decision in this judgment is based entirely on my evaluation of the evidence that I heard in open court.

[4] Mr Lyttle QC and Mr Gillespie appeared on behalf of the plaintiff. Mr Ringland QC and Mr Chris Ringland appeared on behalf of the defendant. I am indebted to both sets of counsel for their detailed consideration and exposition of the issues.

Assessment of credibility and observations in relation to a factual analysis in the case of *Clarke v Brown; Barclay 3rd Party*

[5] In assessing credibility I seek to apply amongst others the various factors set out in *Thornton v NIHE* [2010] NIQB 4 by Gillen J. At paragraph [12] and [13] of his judgment he stated

> "[12] Credibility of a witness embraces not only the concept of his truthfulness i.e. whether the evidence of the witness is to be believed but also the objective reliability of the witness i.e. his ability to observe or remember facts and events about which the witness is giving evidence.
>
> [13] In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following;

- The inherent probability or improbability of representations of fact,
- The presence of independent evidence tending to corroborate or undermine any given statement of fact,
- The presence of contemporaneous records,
- The demeanour of witnesses e.g. does he equivocate in cross examination,
- The frailty of the population at large in accurately recollecting and describing events in the distant past,
- Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication,
- Does the witness have a motive for misleading the court,
- Weigh up one witness against another."

[6] The legal principles of negligence applicable to this case are clear and the outcome of it depends on the factual conclusions which I reach. An analysis of the facts in a different case in relation to a different collision which occurred on a different bend was undertaken by the Court of Appeal in *Clarke v Brown; Barclay 3rd Party* [1986] NIJB 1. Obviously this court is not bound by any earlier factual conclusions in a different case but there are a number of observations made in that case which call for consideration in this case. The plaintiff in *Clarke* was the administratrix of a passenger in the defendant's motor vehicle. The passenger died in a collision which occurred on a corner with the third party's vehicle. The plaintiff's claim against the defendant was settled and the defendant then sought a contribution from the third party. Dr Wood gave expert evidence supporting the theory that whereas the collision occurred on the defendant's incorrect side of the road the third party had cut a right hand bend and that both cars had then sought to avoid a collision by simultaneously going to the defendant's incorrect side of the road. In the event the Court of Appeal found that Dr Wood's theory was incapable of acceptance by any standard. The judgment of Lowry LCJ is instructive not only in relation to the use of expert evidence in cases relating to road traffic collisions but also in relation to the entitlement and obligation on judges to bring to the solution of a problem their own knowledge of the world. Lord Lowry observed that:

> "It is an ordinary fact of experience, that on a right hand bend the average driver will for his own comfort and convenience, tend to straighten the bend or even cut the corner."

The question then becomes whether there "is the evidence that that likelihood was translated into a fact." In considering that question it is also

> "another ordinary fact that the (tendency to straighten the bend or even cut the corner) is not pronounced when there is or may be traffic coming in the opposite direction. Were it otherwise, collisions at moderate speeds on the sweeping bends would occur with regularity."

I would add that in circumstances where the average driver has a restricted view, so that he is aware that he cannot see whether there is or may be traffic coming in the opposite direction, the tendency to straighten the bend or even cut the corner will also not be pronounced. Were it otherwise, collisions at moderate speed on bends with restricted views would occur with regularity. In assessing the evidence and in deciding whether one potential explanation for this collision is that the defendant cut the corner I am entitled to and obliged to bring to the solution of that problem those tendencies which I consider to be a part of my own knowledge of the world. The question then becomes whether the likelihood*s* which I have set out were translated into facts in the circumstances of this particular case.

Factual Background and the resolution of factual disputes

[7] I do not propose to set out in this judgment my analysis of the evidence of each and every witness but in arriving at my factual conclusions I have taken into account all the evidence that I heard including the evidence, for instance, of Dr Woods who was called on behalf of the plaintiff.

[8] The plaintiff was a member of a group of motorcycling enthusiasts who met on a Sunday morning in Comber and would then ordinarily ride to Ardglass via Downpatrick and Strangford. In Ardglass it was their habit to stop for coffee adjacent to the harbour before travelling to Rostrevor and Tandragee before returning to Comber. On the particular Sunday, on which this road traffic collision occurred, approximately 10 members of the group met in Comber leaving at about 10.20 am and accordingly being on the Shore Road between Strangford and Ardglass at about 11.00 am. It was a fine summer's day and the road surface was dry. The evidence on behalf of the plaintiff was that members of the group have a rule that no motorcyclist should overtake another out of recognition that overtaking could lead to excessive speeds or to the potential, as between members, to race. It was also the evidence on behalf of the plaintiff and I find that the group consists of persons who are all experienced motorcyclists. They are of mature years and come from a variety of backgrounds. I consider that the aim of the group is to enjoy a gentle day out on a motorcycle and to enjoy the company of fellow enthusiasts.

[9] As the group of motorcyclists proceeded along the Shore Road the plaintiff and Mr Morrow stated that the plaintiff was in the lead followed by Mr Morrow and then the rest of the motorcyclists.

[10] The defendant, who was travelling in his motor vehicle in the opposite direction, was accompanied by his wife as his front seat passenger. They had suffered the great misfortune of losing a daughter in a road traffic collision a few years previously. This fact quickly became known after the road traffic collision and it played a part in the decision of the police not to interview and take statements from either of them.

[11] The plaintiff's account of the collision was that he was the front rider in the group of motorcyclists. That he had not overtaken any of the other motorcyclists. That as he went around the bend at approximately 40 mph on his own side of the road he saw a red coloured vehicle. A collision then occurred. He stated that he could not remember much else and after the accident he was coming in and out of consciousness. It is apparent from observations at the scene after the collision occurred and from the evidence of Mr Morrow that, after the impact between the motorcycle and the motor vehicle, the plaintiff's motorcycle travelled on towards Ardglass, then left the roadway on what would be the plaintiff's incorrect side of the road, going over a grass verge and striking and substantially damaging a 6.096 metre (20 feet) portion of a 1.0668 metre (3 foot 6 inch) high wooden post and rail fence. The motorcycle came to rest beside the post and rail fence now with the front wheel facing back towards Strangford. The plaintiff had become separated from the motorcycle and was lying on the road surface on the plaintiff's incorrect side of the road.

[12] Mr Morrow who was the motorcyclist immediately behind the plaintiff, stated that he did not see the collision but as he came around the left hand corner he saw the plaintiff lying on the road, his motorcycle travelling rider-less down the road on its wheels, then mounting the grass verge and striking the wooden post and rail fence. He stated that it was the front wheel which was the first part of the motorcycle to hit the fence.

[13] The damage to the defendant's motor vehicle was consistent with a glancing type collision between the motorcycle down the driver's side of the defendant's motor vehicle.

[14] The defendant who was 70 at the time of the road traffic collision stated that he was very familiar with the Shore Road as at the time he travelled it nearly every Sunday. That he was also aware that the road was used on a Sunday by motorcyclists. This awareness was unsurprising in that he used the road nearly every Sunday and this group of motorcyclists did use it every Sunday, so that they would have encountered each other on a regular basis. The defendant states that as well as being aware, in a general sense, that motorcyclists were on the road that he actually saw motorcyclists on the road coming in his direction as he approached the

bend by virtue of the fact that he had a good view across Kilclief Bay. That he also saw one motorcyclist who pulled out to pass one of the other motorcyclists. The defendant stated that he was driving on his own side of the road and as he went round the bend he saw a motorcyclist coming round the bend over the central white line and on his side of the road. He said to his wife that he was going to hit them. He braked and pulled into the left hand side of the road but a collision occurred. After the accident he remained in his vehicle and at one stage one of the motorcyclists said to him, referring to the plaintiff,

> "I don't know why he did that. He is not usually with us."

[15] Police and ambulance attended the scene.

[16] There were aspects of the police investigation that cause concern. I do not intend to rehearse all of them but they included small circles being marked on a police sketch without any indication as to what those circles represented, some lines on a sketch again without any indication of what they represented but, if consistent with other markings, representing debris, a failure to interview the defendant or the defendant's passenger or at the very least to ask them to provide written contemporaneous statements together with what appears to have been a fixed view that the accident was the fault of the plaintiff so that the investigation was only as to whether the plaintiff should be prosecuted for careless driving. I find that this fixed view was based on the debris which was on the defendant's side of the road and which the police officers saw at the scene. Debris can be misleading. Dr Wood's evidence was that it can be thrown some distance from where the impact actually occurred and accordingly where it lands on the road is not necessarily exactly where the impact actually occurred. I accept that aspect of Dr Wood's evidence. Accordingly no matter what the distribution of debris was like, an open mind should have been kept, until all investigations were concluded. The purpose of an investigation, both at the scene and through interviews, is to determine whether what appears to have been the situation, was in fact the situation. Accordingly I approach the police evidence with caution, though as will become apparent, despite that caution I accept a substantial part of the evidence of both police officers.

[17] Constable McGrogan was one of the police officers who attended the scene. She states that at the scene she saw other motorcyclists who were moving debris, kicking debris and lifting debris. That she told them to stop. She cannot identify the motorcyclists concerned by name or by specific description. Constable Grey also heard Constable McGrogan speaking to the individuals asking them to stop. I accept that evidence.

[18] Two police sketches were prepared of the scene one by Constable McGrogan and the other by Constable Grey. The sketch prepared by Constable McGrogan was

intended to be a rough sketch which was not to be used. There is marked on that sketch on the plaintiff's correct side of the road a spillage which is referred to as a "Petrol Spillage." No measurements are given for the size of that spillage. Opposite the petrol spillage and on the defendant's correct side of the road there is an asterisk mark which is encircled. That mark represents Constable McGrogan's record of where the majority of the debris was after this road traffic accident occurred. On the plaintiff's incorrect side of the road and towards the wooden post and rail fence and therefore in the direction which the plaintiff's motorcycle would have taken, regardless as to the side of the road on which the original collision occurred, there is a further mark on the sketch map which is labelled as "Petrol Spillage." There were various further circles marked on this rough sketch map which had no legend attached to them and which could, but which I am not persuaded did, represent a record of further spillages along the path of the motorcycle as it travelled towards the wooden post and rail fence.

[19] The other sketch prepared by Constable Grey also marked an area on the plaintiff's side of the road with the legend that this was petrol together with another area beside where the plaintiff was lying on the incorrect side of the road, again with the legend that this was petrol. That sketch also has all the debris on the defendant's correct side of the road with what was termed a "fixed point" (sic) representing the most intense centre of the debris again clearly on the defendant's correct side of the road.

[20] I accept the evidence that the cooling system of the plaintiff's motorcycle was damaged and that coolant oil was leaking from it. The invoice from John Beers, repairs and recovery, contains a charge for granules and for a lorry wash. Accordingly when the motorcycle was taken from the scene oil leaked onto the recovery lorry. However the question remains as to whether the cooling system was damaged in the initial collision with the defendant's motor vehicle or in the collision with the wooden post and rail fence. The resolution of that dispute is not assisted by the lack of an examination of the motorcycle in its final position by the police to determine whether there was oil near the post and rail fence.

[21] There was no evidence that any petrol leaked from the plaintiff's motorcycle. Accordingly I find that if the spillages were of petrol that they were not caused or contributed to by the collision but were co-incidental findings or potentially the petrol spillage which was on the plaintiff's correct side of the road could have caused the plaintiff to veer onto the defendant's side of the road especially if he was travelling too fast for this bend.

[22] The two police officers gave evidence that the spillages were petrol spillages. Neither of them touched the spillages but they looked and smelt of petrol. Constable Grey considered that the spillages on the road smelt of petrol. He did not see any

sign of oil in the area. He did not touch it. He had a close look at the defendant's car and there was no smell of petrol off it. His evidence that this was a petrol spillage as opposed to an oil spillage is to be seen in the context that he had been an aircraft engineer responsible for installing fuel systems and worked with fuel and oil on a daily basis. He considered that the spillage smelt of petrol.

[23] The evidence from the police was also to the effect that if the spillages had been of oil that they would have arranged for granules to be placed on the road surface but they did not do so.

[24] Mr Morrow, one of the motorcyclists and who has a very poor sense of smell, but relying on his lifetime experience with motorcycling, thought that it was engine oil just by the look of it on the road. He stated that he would know the look of petrol and he thought it was oil.

[25] I consider that there were a number of features of Mr Morrow's evidence which called into question his ability to form an accurate assessment of the scene.

a) He did not recall there being a centre white line when there was one.

b) He stated that after the collision the plaintiff was lying on the left hand side of the road when he was on the right hand side.

c) He did not see the obvious centre of debris which was on the defendant's side of the road and which was in close proximity to what he says was the petrol spillage on the plaintiff's side of the road.

d) He did not see any of the motorcyclists moving, kicking or lifting debris.

e) He did not see any motorcycle overtaking another motorcycle before the road traffic collision occurred.

I consider that the scene of this road traffic collision was difficult emotionally for Mr Morrow and that at the very least this affected his ability to scrutinise the scene and to accurately recall what he had seen.

[26] In addition to my conclusion that at the very least Mr Morrow's ability to scrutinise and recall were adversely affected, there is potentially an inference that he had formed a view that the accident was the fault of the plaintiff. The primary evidence from which that inference is sought to be drawn is that Mr Morrow decided to and did repair the fence which was damaged when the plaintiff's motorcycle struck it. 6.096 metres (20 feet) of fencing had been damaged. Accordingly 2 or 3 of the upright posts would have required to be replaced and the

wooden rails also replaced. The work was done by Mr Morrow on his own initiative and without informing the plaintiff. If the defendant was at fault then the work would have been the responsibility of the defendant. If the work was done by Mr Morrow at the plaintiff's instigation, then it could be suggested that this was an admission by the plaintiff that the accident was his fault. I find that the work was not done at the instigation of the plaintiff and therefore there is no question of any admission being made on his behalf. However it was suggested to Mr Morrow, that the fact that he did this work to the fence reflected the fact that he considered from his own examination of the scene that the accident was the plaintiff's fault. That he was being solicitous to the plaintiff and relieving him of any obligation that would otherwise fall on him or on his insurers. Mr Morrow's explanation was that he did not analyse whose legal responsibility it was to repair the fence but rather he considered that as it was the plaintiff's motorcycle that damaged the fence that he, as a friend of the plaintiff, should carry out the repairs to the fence. I consider that Mr Morrow was acting out of affection and concern for the plaintiff but I consider that he had formed a view as to who had caused this road traffic collision. Motorcyclists are extremely vulnerable and the plaintiff was a friend. Based on my observations of Mr Morrow and my assessment of him, I consider that he would have been concerned to analyse what he had seen and to come to a view as to who had caused this serious collision. I consider that he would have been concerned to, and did, carry out an analysis of the scene trying to observe features of significance. I consider that he had formed the view that the plaintiff was responsible for the collision and he acted to repair the fence to relieve a seriously injured friend from the worrying concern of any claim that would be made against the plaintiff's insurers for damage to the fencing and to establish the plaintiff's good character, in that any damage which the plaintiff had caused would be made good. I conclude that Mr Morrow did the work for free, relieving the plaintiff of all responsibility, but on the basis that he considered that the plaintiff was responsible.

[27] Accordingly I reject the evidence of Mr Morrow that the spillages were spillages of coolant oil. I accept the evidence of the police officers that the spillages were petrol spillages. I accept the police evidence that the centre of the debris was on the defendant's correct side of the road. I also conclude that there is no evidence of any spillage or debris that would independently support the plaintiff's case that the collision occurred on his correct side of the road.

[28] I now turn to consider the evidence of the two drivers to determine whether the plaintiff's evidence should be preferred even though there is no evidence of spillage or debris at the scene which would support his case and even though the centre of the debris was on the defendant's correct side of the road and by some margin.

[29] The plaintiff was interviewed by the police and the question and answer session included the following

> "Q. Can you remember being involved in a collision on the Shore Road on 27/8/06?
>
> A. Yes I can.
>
> Q. What can you remember?
>
> A. I approached a left hand bend. As I manoeuvred the bend I saw a red coloured car approaching.
>
> Q. What happened next?
>
> A. I was involved in a collision and then felt excruciating pain. After that I can't remember anything else. A short time later, I think my friends were all around me. I was lying on the road. I was then treated by ambulance at the scene and then taken to hospital.
>
> Q. Is there anything else you would like to add or clarify?
>
> A. No."

The interview then terminated. If the defendant was at fault then this was the opportunity for the plaintiff to say so. The plaintiff did not tell the police that the red car was on his side of the road. He did not blame the defendant in any way for causing the road traffic collision. I consider that omission to be significant and is consistent with the collision having occurred on the defendant's correct side of the road.

[30] The plaintiff states that he cannot say whether the red car was on its incorrect side of the road and as part of his explanation for being unable to do so, he states that he has little memory of the events of the road traffic collision. However he did not receive any head injury. The ambulance personnel record that they were at the scene at 11.17 am, that the plaintiff had not been knocked out, that he was fully conscious and responsive and that his Glasgow Coma Scale was 15 at 11.30am and 15 at noon. On admission to the Royal Victoria Hospital it is recorded that the plaintiff had no loss of consciousness and that his Glasgow Coma Scale was 15/15 throughout. There were no head injury findings on examination either by the

ambulance service or on admission to the Royal Victoria Hospital. The plaintiff's loss of memory cannot be accounted for on the basis of any head injury.

[31] The plaintiff undoubtedly suffered excruciating pain *in and as a result* of the road traffic collision. I have given consideration to the question as to whether this is the explanation for his lack of memory of events *prior* to the collision occurring either taken on its own or in conjunction with the very short time frame within which this collision occurred. I note that in this police interview the plaintiff said nothing about a loss of memory for the events prior to the collision, as opposed to after the collision occurring. On balance I consider that if, as the plaintiff states, the road traffic collision occurred as a result of the defendant being on his side of the road that the plaintiff would be able to remember that feature. I reject the plaintiff's explanations as to why he cannot remember crucial events prior to the collision occurring.

[32] My assessment of the defendant was that he was a reliable witness. I prefer his evidence to the evidence of the plaintiff. I also consider that the debris at the scene supports the case made by the defendant.

[33] I accept the evidence of the defendant that he saw a motorcyclist overtaking another. I consider on balance that it was the plaintiff who performed this overtaking manoeuvre and that he was travelling faster than Mr Morrow who would not have attempted to keep up. Accordingly I consider that the plaintiff was not only travelling faster than Mr Morrow and but also faster than his estimated speed of approximately 40 mph. I also consider that he was relatively some considerable distance in front of Mr Morrow's motorcycle after having overtaken him. The plaintiff and the defendant would have been in view of each other when they were 60 metres apart so that each would have to travel at least 30 metres depending on their respective speeds. I consider that the defendant would have had some 1.48 seconds at the most to react after seeing the plaintiff on his side of the road and before the collision occurred.

[34] In addition to the factual findings which I have already made I find that

a) the defendant was keeping a good look out for oncoming traffic;
b) the defendant was aware that a number of motorcyclists were approaching from Strangford as he commenced to drive around the right hand bend;
c) the defendant was aware that one of the motorcyclists had overtaken and was therefore travelling faster than another motorcyclist;
d) the defendant was not straightening or cutting the right hand bend with his motor vehicle;
e) the defendant's motor vehicle was at all material times on the defendant's correct side of the road;
f) prior to the collision and as *the cause of it*, the plaintiff's motorcycle was on the plaintiff's incorrect side of the road;

g) the plaintiff was not keeping a good look out for oncoming traffic but "looked up" just prior to the collision occurring;
h) after the collision a motorcyclist said to the defendant and referring to the plaintiff, "I don't know why he did that. He is not usually with us" by which remark the motorcyclist was reflecting what was his own assessment at the time, based on what that motorcyclist had seen occurring on the road from Strangford and what could be seen after the accident occurred; and
i) the damage to the cooling system of the plaintiff's motorcycle occurred when it struck the wooden post and rail fence and the coolant oil first leaked from the motorcycle at that point.

Conclusion

[35] I dismiss the plaintiff's action and enter judgment for the defendant. I will hear counsel in relation to costs.