



**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Case No: HQ17P01729

[2019] EWHC 72 (QB)

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25 January 2019

**Before :**

**MASTER DAVISON**

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**Between :**

**ENRIQUE LEON HERNANDEZ**  
**- and -**  
**EMRE ACAR (1)**  
**EUI LIMITED (2)**

**Claimant**  
**Defendants**

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**Mr Satinder Hunjan QC** (instructed by **Levenes Solicitors**) for the **Claimant**  
**Mr Andrew Lewis QC** (instructed by **DAC Beachcroft Claims**) for the **Defendants**

Hearing dates: 7 – 9 January 2019  
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**Approved Judgment**

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.

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**Master Davison:****Introduction**

1. Shortly after 3pm on Saturday 28 June 2014 there was a road accident when the defendant, Mr Acar, driving a BMW motor car, emerged from Redruth Road on to Victoria Park Road in Hackney, East London and into the path of a BMW R80 motorcycle driven by the claimant, Mr Hernandez. The motorcycle struck the front offside wing of the car, Mr Hernandez was unseated and was thrown some 12 metres forward. His motorbike went on to hit and come to rest in contact with the rear bumper of a Ford Focus parked on the north side of Victoria Park Road. Very unfortunately, the claimant sustained injuries which have left him paraplegic. Mr Acar has counterclaimed in respect of a psychiatric injury.
2. By an Order dated 6 February 2018 I directed that there should be a preliminary issue on liability. Placed into a nutshell, the case against the defendant is that he did not look properly before pulling out and the case against the claimant is that he was riding at too high a speed (around 50mph in a 30mph speed limit) for the defendant to have had any reasonable chance of seeing him and/or avoiding the collision.
3. For the reasons which follow, I apportion liability for the accident 60/40 in favour of the claimant.

**The accident location**

4. Victoria Park Road runs on a roughly east west axis a little to the north of Victoria Park. It is one way – the direction of traffic being westerly, i.e. from right to left on the various bird's eye plans provided of the scene. At the time of the accident it was subject to a 30mph speed limit, (since reduced to 20mph). It is a single carriageway and there are usually (and were at the time of the accident) parked cars on either side all the way down. Minor roads join it from both the south and the north. Traffic from these roads must give way to traffic on Victoria Park Road. Redruth Road joins Victoria Park Road from the south, forming a "T" junction with it. The parked cars on Victoria Park Road restrict the vision of a driver pulling out from Redruth Road. It is necessary for the driver to "edge out" so as to get a better view up Victoria Park Road before making his (mandatory) left turn on to that road.
5. Because of the parked cars, the sight line of a car waiting at the Give Way lines on Redruth Road would only be 21 – 23 metres up Victoria Park Road. If the driver moved forward so that he (the driver himself) was over the Give Way lines, the sight line would be 28 – 30 metres. In order to get a clear view up Victoria Park Road, the driver of a car such as the defendant's BMW would have to come forward still further so that the nose of his car was 4.5 metres from the Give Way lines.
6. Number 151 Victoria Park Road lies on the north side, some 45 metres before the junction with Redruth Road. There was a CCTV camera on the first floor of this property (number 151b) facing down into the road. The resident of that property, Mr Don Matthews, informed the police of its existence and the CCTV footage has played a very important part of the inquiry into the accident.

**The lay witness evidence**

7. The police and paramedics attended the scene of the accident. The police took initial statements from witnesses. The defendant said the following things. His "initial comments" were:
 

"I was pulling out of Redruth Road. Stationary on the Junction. I pulled out slowly when a moped came out of nowhere".
8. A little later (and after being cautioned) he said:

"I was driving out of Redruth Road into Victoria Park Road. I was stopped at the Give Way line when I started to slowly pull out on Victoria Park Road when I have heard a bang and seen motorbike hit my car". He confirmed that he had not moved his car since the collision. He said: "No, as soon as the motorbike hit me, I applied my brakes and it has not moved since".

9. The defendant's wife, Mrs Ozlem Acar was also interviewed at the scene and said:

"My partner was driving when he stopped on Redruth Road at the junction with Victoria Park Road, on pulling out slowly I heard a loud bang when I saw a motorbike had hit the front of our car".

10. Both the defendant and his wife later made longer statements to the police. This was on 13 August 2014. The accounts given then were more detailed. The material part of the defendant's statement was as follows:

"When I reached the give way line, I stopped my car, bringing it to a complete standstill. I do not recall whether I indicated to turn left but in any case, for vehicles entering Victoria Park Road, there is no option other than to turn left. I waited at the give way line until the road was safe to turn left. I recall two vehicles that came from the right and drove past in front of me, while I was waiting at the give way line. ... A short time after these two vehicles drove past a third vehicle also drove past in front of me. I wanted to ensure that it was safe to do so before entering Victoria Park Road. This was a Saturday and the parking spaces on either side of Victoria Park Road were filled with vehicles, parked closely one after the other. I was looking to my right because any potential vehicle travelling on Victoria Park Road would come from that direction. A Kia Jeep was preventing me from seeing the oncoming traffic. The Kia jeep was on my right and was parked on Victoria Park Road on the side of Victoria Park Road nearest to me. This vehicle was parked only about 2-2.5 metres away from the junction of Victoria Park Road with Redruth Road. The front of the vehicle was facing me. The box-like shape of the vehicle and its above-average height was making it impossible for me to enter Victoria Park Road safely. This was because I was unable to see any traffic that could potentially come from my right. As a result I decided that in order to enter and turn left onto Victoria Park Road safely, I would have to start crossing the give way line on Redruth Road very slowly. This would allow me to reach an angle, which would enable me to see any traffic that could come from my right on Victoria Park Road. I use this route regularly and I drove on this road many times, both before and after the collision. This very problem presents itself every time I turn left onto Victoria Park Road from Redruth Road. In other words, vehicles parked on Victoria Park Road obstruct the view and make it impossible to see potentially oncoming traffic on Victoria Park Road. As I turned onto Victoria Park Road. I moved my vehicle very slowly. I drove a little and stopped and repeated this each time I moved forward a little. At the same time as doing that I was looking to my right. Despite the fact that I was moving very slowly, a motorcycle came at high speed, from my right and collided with the part of my car between the front offside wheel and the front bumper. It was impossible for me to prevent this collision with the motorcycle. I estimate the speed of the motorcycle at 35 miles per hour or faster."

11. The defendant's witness statement in these proceedings and his oral evidence was very much in line with his longer statement to the police. He described how his view was blocked by the Kia motor vehicle and that he had edged out into Victoria Park Road. Two cars passed and then a third. His witness statement went on:

"I was still looking right and when I could see that there was nothing else coming and with my car in first gear I pulled out very slowly. I was also starting to turn left so that I was ready to join Victoria Park Road. I did not come straight out but having moved slowly forward, I stopped again and checked to the right. I was bending my neck round and looking over my shoulder, I also leant forward to try to get a better view around the parked cars. Eventually I was confident that there was no traffic coming and I pulled forwards. As I did so I was looking ahead to make sure it was safe for me to proceed

into Victoria Park Road. As I pulled forwards this time I heard some noise like noise from a speeding motorcycle which caused me to look to my right again. As I did so I saw the motorcycle just as he was about to crash into my car.”

12. At the point of impact, the defendant's car was some way through the arc of its left turn into Victoria Park Road. It came to rest some 2 metres further on in a position straddling the lines demarcating the bus stop which lies immediately to the west (left) of Redruth Road and still at a slightly oblique angle, i.e. not having quite straightened up in line with the main road. The defendant said in his oral evidence that when he pulled out he did so keeping to his left, “so cars could pass”. This explains his car's final resting position partially in the bus stop.
13. Mr Acar was cross-examined by Mr Hunjan QC for the claimant. Three things of importance emerged. The first was that he had at no stage manoeuvred his car into a position where he could see all the way up Victoria Park Road, (which is straight for 180 metres). He thought that the furthest he had ever been able to see was to number 151 (about 45 metres). The second was that he had not moved out into Victoria Park Road perpendicularly to that road. He had pulled out whilst similarly making his left turn, i.e. he had moved forward on an arc. The third (and as already mentioned) was that it appeared that keeping close to the left hand side of Victoria Park Road as he pulled out was a strategy to give traffic approaching from his right the opportunity to pass him on the right side.
14. Mrs Acar's evidence was in line with that of her husband and I do not propose to summarise it in this judgment. I mention just one matter, which is that she had a recollection of her husband complaining that he “could not see because of the parked cars on Victoria Park Road”.
15. The claimant had very limited recall of the accident. He was 32 years old at the time and an experienced motorcyclist. He had a clean driving licence and had not been involved in any accidents prior to this one. Prior to the accident he had been riding a vintage Vespa scooter and a more modern Aprilia scooter. But he had always wanted to acquire a BMW R80. This is an 800cc touring bike. He had ridden this type of bike belonging to friends and acquaintances on some 10 or 20 previous occasions. He bought and collected the R80 involved in the accident at around 12 noon that day. That was in Kentish Town. He then made his way (via his flat in Balls Pond Road) to his old flat in Victoria Park. He spent a little time there and then set off to return to Balls Pond Road. He thought he had his headlight on. (However, the switch was found in the off position after the accident.) He approached Victoria Park Road via Lauriston Road. From that road it was a left turn via the roundabout at the top end of Victoria Park Road. He was very familiar with the road. He was riding in about the middle of the road. He said that whilst he was not looking at his speedometer, he was not exceeding the speed limit of 30mph. He was in no hurry. His only real memories of the accident were of a car emerging suddenly from his left and of instinctively his putting his head down and seeing the petrol tank of his motorbike.
16. Under cross-examination from Mr Lewis QC for the defendant he readily agreed that if he was driving at 51mph then that was reckless. His own words were “very dangerous”. But he denied having done so. He accepted he could not make that denial based on looking at his speedometer, because he had not been doing that. But he said that he had a good “feel” for speed and his perception of speed was the same whatever vehicle he was driving, be it a push bike, a scooter or a motorbike. He denied having taken the opportunity of a long straight piece of road to “open up” his new motorbike. He emphasised that it was a touring bike, that it was a normal day and he was relaxed and in no hurry.
17. There was an independent witness to the accident. This was Mrs Faustina Aba Clarke. She was interviewed by the police at the scene of the accident some 3 weeks afterwards on 17 July 2014. I saw and listened to a video recording of that interview. She then made a statement the same day. She did not wish to add anything to that statement and she attended the trial under a witness summons. She had had a good view of the accident, having (probably) been standing on the north side of Victoria Park Road more or less opposite the junction. In her witness statement, she said that both vehicles were exceeding the speed limit (the motorbike more so than the car) and that the car had driven out without

stopping. In her oral evidence, she reiterated the latter point several times and she clearly placed the blame for the accident on the car. However, I have been driven to agree with the submission of Mr Lewis QC that her evidence generally was so full of obvious errors and inconsistencies that I can place no reliance on it at all. By this I mean (and Mr Lewis QC meant) no criticism of her. It was a very shocking event; she was very scared and upset by it; it all happened very quickly. Not everyone who sees an accident can give useful evidence about it. I record my gratitude to Ms Clarke that she came to court and she did her best to help.

### **The police inquiry and the CCTV evidence**

18. The police attended the scene of the accident and I have already set out the statements made to them there by the defendant and his wife. They meticulously recorded the physical evidence and they took a laser scan of the location. They compiled a “basic” police report in the usual way. Because of the severity of the incident, the SCIU (Serious Collisions Investigation Unit) was tasked with investigating. Statements were taken from the witnesses I have mentioned above but not from the claimant because, at that time at least, he stated to police that he had no recollection of the collision whatsoever. PC Simon Gladstone, an accident reconstruction expert, prepared a report, which was dated 30 September 2014. This was a very detailed report. An important component of it was the CCTV evidence. PC Gladstone downloaded and analysed this evidence. His analysis of it gave him a speed of 58mph for the claimant’s motorbike as it passed in front of number 151 – almost double the speed limit. DS Mallett, who was in overall charge and whose job it was to recommend any person be prosecuted, decided that it would not be appropriate to make a recommendation in this case. So far as Mr Acar was concerned, a key component of her decision was the claimant’s speed. A further component was the obvious inaccuracy of Mrs Clarke’s evidence that Mr Acar had been doing more than the speed limit of 30mph at the time. Given that the car had stopped within 2 metres of the collision, that could not have been correct, or indeed anywhere near correct.

### **The expert evidence**

#### **(A) The CCTV experts**

19. The footage was subjected to expert examination by Mr Jason Carter for the claimant and Mr Matthew Cass for the defendant. (Mr Paul Fidler, the defendant’s accident reconstruction expert, also considered the footage and in almost as much detail as Mr Cass.) The oral evidence of the CCTV experts took the best part of a day. The evidence was detailed and technical and both of them were subjected to expert and rigorous cross-examination on it. For present purposes, it is unnecessary to embark upon a detailed analysis of the evidence. Mr Carter’s conclusion was that the CCTV evidence was too unreliable to form any conclusions about the speed of the motorcycle. Mr Cass’s evidence was that the evidence was reliable and showed that the motorbike was doing about 49mph. (The reason he differed from the conclusion of PC Gladstone was that PC Gladstone had not appreciated or allowed for the fact that there were two “dropped” frames.) The speed of 49mph was based upon a distance travelled of 10.3 metres. The precise distance travelled could not be calculated with absolute accuracy. In the joint statement, the experts agreed that the distance could have been between 9.44 metres to 10.6 metres. If the distance was 9.44 metres, the speed would have been about 45mph. Mr Cass was able to offer a “check” calculation which was based upon the known length of the motorcycle itself rather than the distance of road over which it was filmed travelling. That calculation produced a speed of 48mph. Mr Fidler calculated the speed by a yet further method, which was to measure distance and time between real frames of the CCTV footage, of which there were 7. This produced a speed of between 48mph and 54mph.
20. This was a formidable body of evidence. But Mr Carter challenged it on the following principal bases. The calculations depended upon it being established that the CCTV was recording at 15 frames per second. If that was wrong, or might be wrong, then the calculations were also wrong. Additionally, he said that the pattern of images was inconsistent (“an uneven update pattern”) making analysis unreliable. Having agreed a tolerance in the total distance travelled of between 9.44 to 10.6 metres, he (on the first day of the trial) reduced the former figure to

7.44 metres. He also questioned the reliability and error margin of the police laser survey, which all the experts, other than him, had used. He questioned whether there might be other dropped frames than the two identified. His overall conclusion was that the CCTV footage had probably been corrupted and was unreliable.

21. I reject all these criticisms.

- i. Whilst Mr Carter gave careful and thoughtful answers to questions, Mr Lewis QC was correct to point out that his expertise was as an engineer with CAD and CCTV skills and not as a CCTV expert. He was in fact in full time employment as a project engineer working on decommissioning a nuclear power station. There was a gulf between this experience and these skills and those of Mr Cass, who held a degree in Photographic and Electronic Imaging Science and who was and always had been in full time employment as an imaging expert and analyst. I felt that I could place very considerable reliance on Mr Cass's evidence. I did not have the same confidence in Mr Carter's evidence.
- ii. The speed of 15fps was confirmed by Lightboard, a Home Office approved technique, and by the metadata of the CCTV system itself. No one could be in any serious doubt about this.
- iii. Mr Cass reviewed Mr Carter's analysis of the update pattern of the CCTV and showed it to be incorrect. He did this by reference to a graph which demonstrated a steady and constant pattern, (which I understood Mr Carter to concede).
- iv. The increase in the margin of error of the total distance travelled from [9.44 to 10.6 metres] to [7.44 to 10.6 metres] was an eleventh hour modification of Mr Carter's position which was never adequately explained. It was, indeed, flatly at variance with his own report. I reject this modification. Further, it would have no bearing on the other methods of calculating speed.
- v. The laser survey is the most accurate method available. It is highly accurate. In proper hands (and there was no evidence to the contrary in this case) it will, to all practical intents and purposes, be 100% accurate.
- vi. There are two and only two dropped frames in that part of the CCTV which is of interest. That is there to be seen. There is no possibility of there being others.
- vii. There is no evidence – as opposed to bald assertion – that the CCTV has been corrupted. The dropped frames are most likely due to bandwidth issues at the time of transfer to disc and/or CPU overload. That is a different thing from corruption. If the CCTV was corrupted, it probably would not play at all.

22. To add to the matters set out in the preceding paragraph is the impression gained from simply watching the CCTV recording. It lasts 6 minutes and in that time numerous cars go by. Most of them are going, or can safely be assumed to be going, at around 30mph. Then comes the claimant's motorcycle. It is travelling at a considerably higher speed. The contrast with the other vehicles is obvious and striking. I would not wish to say any more about it than that. In the absence of scientific analysis, I would not have cared to rely upon my impression from the footage alone for an estimate of speed. But it adds further support to the estimates of Mr Cass, Mr Fidler and, indeed (once allowance is made for his mistake or misapprehension over the dropped frames) PC Gladstone.

23. I find that some 44 metres from the accident site, the claimant was travelling at at least 45mph and probably nearer 50mph.

#### **(B) The accident reconstruction experts**

24. The principal role of the accident reconstruction experts was to address the speed of the vehicles before and at impact, the lines of sight and the possibilities for avoiding the accident having regard to these matters and likely reaction times. I heard evidence from Mr Douglas Boulton, formerly a police motorcyclist and accident investigator, for the claimant and Mr Paul Fidler, whose qualifications are in physics and accident reconstruction, for the defendant. Mr Hunjan QC and Mr Lewis QC had agreed to take their evidence after that of the CCTV experts. That evidence and my conclusions on it have rendered the accident reconstruction evidence of less importance and centrality than would ordinarily be the case. As did both counsel in their closing submissions, I can take the evidence quite shortly.
25. The sight lines were as stated in paragraph 5 above. The point of impact (and the video evidence) showed that the claimant had been driving slightly to the left of the centre line of the road. The speed at impact was the subject of much debate. Mr Boulton put that speed in the range 19 – 33mph, though, for reasons that I will come to, he favoured the lower end of that range. Mr Fidler put the speed at impact at about 30mph.
26. The experts used different methodologies to arrive at these figures. Mr Boulton's methodology was to work backwards from the point of rest of the motorbike. This depended on an assessment of the speed lost in the motorbike's contact with the Ford Focus, the speed lost as the bike slid across the road and the speed lost in the initial contact with the defendant's BMW.
27. Mr Fidler's methodology derived from projectile motion physics. Essentially, he calculated that for the claimant to have been thrown forward the distance that he was, he would have had to have been travelling at about 25 – 29mph. He would have lost some speed in the initial collision, but only some 2mph (because, in Mr Fidler's opinion, he would have parted company with the bike almost immediately). Therefore, the speed at impact was around 30mph. (Using Mr Fidler's figures for the projectile phase of this calculation, it appears to me that the range is 27 – 31mph.)
28. Each expert criticised the assumptions in the other's methodology. But, at the end of the day, there was not a lot between them. For my part, I prefer Mr Fidler's methodology because there are fewer assumptions. The key assumption, that the claimant parted company with his bike at the point of impact, seems to me (a) highly likely and (b) in keeping with the fact that he ended up on the road more or less straight ahead whereas the bike was displaced to the right. Further, the assumption of a loss of speed of only 2mph (for the claimant himself as opposed to his motorcycle) in the collision seems generous. But if Mr Boulton's methodology is preferred, then I also prefer Mr Fidler's analysis using that methodology, which assumed a speed loss of nearer 15mph in the impact of the motorbike with the Ford Focus. Although the photographs show only superficial damage to the bumper, the repair invoices show that structural components behind the bumper were replaced, which necessarily implies they too were damaged. A close analysis of the photographs supports the proposition that the Ford Focus was bumped forward by the motorbike in the collision. This also supports a speed at impact of nearer to 15mph than 5mph. If that is the case, then Mr Boulton's methodology also produces a speed at impact of around 30mph.
29. From that speed it is possible to work backwards to the point at which the claimant probably applied the brakes and the point (before that) when he first saw the BMW coming out and started to react to it. This modelling depends on a number of assumptions about braking forces and perception reaction times. I will not set those out. Suffice it to say that on Mr Fidler's analysis (which also took the initial speed from the CCTV evidence as being around 50mph) it seems likely that the claimant started to react roughly when he was riding through the arc of the camera positioned within number 151 Victoria Park Road and that he actually applied the brakes some 26 metres short of the impact point. It also seems likely that "the claimant and the motorcycle were out of sight from the defendant's perspective when the defendant committed to pulling out from the junction", (paragraph 9.8.7 of Mr Fidler's report). I agree that this is indeed likely and I so find.
30. It remains to mention one further aspect of the accident reconstruction experts' evidence, which was that when a motorcyclist applies heavy braking, that transfers the weight and the

braking forces on to the front wheel and this in turn renders the motorbike very difficult to turn or swerve. Once the claimant had applied the brakes heavily, he was then more or less committed to his line in the road, which, as noted above, was slightly to the left of centre.

### The legal framework

31. The relevant provisions of the Highway Code are as follows.
32. Rules 170 to 172 are headed “Junctions” and, in relevant part, say:
170. Take extra care at junctions. You should:
- Watch out for cyclists, motorcyclists, powered wheelchairs / mobility scooters and pedestrians as they are not always easy to see. Be aware that they may not have seen or heard you if you are approaching from behind
  - Not assume, when waiting at a junction, that a vehicle coming from the right and signalling left, will actually turn. Wait and make sure.
  - Look all around before emerging. Do not cross or join a road until there is a gap large enough for you to do so safely.
171. You MUST stop behind the line at a junction with a Stop sign and a solid white line across the road. Wait for a safe gap in the traffic before you move off.
172. The approach to a junction may have a Give Way sign or a triangle marked on the road. You MUST give way to traffic on the main road when emerging from a junction with broken white lines across the road.
33. Under the heading “Turning Right”, Rule 180 says this:
180. Wait until there is a safe gap between you and any oncoming vehicle. Watch out for cyclists, motorcyclists, pedestrians and other road users. Check your mirrors and blind spots again to make sure you are not being overtaken, then make the turn. Do not cut the corner. Take great care when turning into a main road; you will need to watch for traffic in both directions and wait for a safe gap.
34. Under the heading “Road users requiring extra care”, Rule 204 says this:
204. The most vulnerable road users are pedestrians, cyclists, motorcyclists and horse riders.
35. Under the heading “Motorcyclists and cyclists”, Rule 211 provides:
211. It is often difficult to see motorcyclists, especially when they are coming up from behind, coming out of junctions, at roundabouts, overtaking you or filtering through traffic. Always look out for them before you emerge from a junction; they could be approaching faster than you think. When turning right across a line of slow-moving or stationary traffic, look out for cyclists or motorcyclists on the inside of the traffic you are crossing. Be especially careful when turning, and when changing direction or lane. Be sure to check mirrors and blind spots carefully.
36. There are many cases dealing with road accidents. But as Burnett J (as he then was) observed in the case of *Jones v Lawton* [2013] EWHC 4109 (QB), each case is different and differences in the apportionment of responsibility can turn on quite narrow distinctions in the circumstances of an accident; see at paragraph 43. At the same paragraph, he observed that there is certainly authority for the proposition that if a driver emerges from a side road on to a major road exercising all reasonable care, then, notwithstanding that a collision has occurred, the driver will not be liable. But the cases have also emphasised the heavy responsibility that



lies on the driver entering a major road from a minor road. The provisions of the Highway Code cited above are clear. The Court of Appeal in the case of *Heaton v Herzog* [2008] EWCA Civ 1636 said the driver's duty was "to take extreme care before doing so and when doing so"; see the judgment of Sir William Aldous at paragraph 12; (my emphasis).

### **The submissions of the parties**

37. In broad summary, Mr Lewis QC for the defendant submitted that he had emerged from the side road on to the major road in a "normal" and careful manner at 3 – 4mph. He did not see the claimant. But even if he had, the resting position of his car after the accident demonstrated that the accident would still have occurred because he would, upon seeing the claimant, still have moved forwards for 2 metres, which would inevitably have brought them into conflict. He was not to be blamed for not seeing the claimant. He had established a field of vision and looked to his right sufficiently to see and take note of traffic driving with ordinary care and traffic driving "merely negligently". He was under no duty to guard against reckless driving, which was the proper description to be applied to the claimant. If, contrary to these submissions, the defendant was liable, then the lion's share of the blame lay with the claimant.
38. Mr Hunjan QC for the claimant submitted that in a case where the defendant had not edged out sufficiently to see the claimant approaching on his motorcycle, liability was clear and should, indeed, have been admitted. He urged me to approach the issue of the claimant's speed with caution. The claimant's speed in the tiny sector of road caught by the CCTV cameras was a "snapshot". What mattered was the speed of the claimant at the moment he had to react. This was the speed which was causally relevant. He emphasised that the claimant was very far from the typical picture of a reckless motorcyclist. If he had been speeding, that was likely inadvertent. He contrasted that with the actions of the defendant, whose task at the junction was only to look to his right (because it was a one way street) in perfect lighting conditions and establish a view right up Victoria Park Road, something he had manifestly failed to do. In terms of blameworthiness and causative potency he submitted that the overwhelming share of responsibility lay with the defendant; he suggested that if there were to be any split, it should be 80/20 in favour of the claimant.

### **Discussion**

39. It is easy to see how this accident happened and I agree with the submission of both counsel that the case is, in its essentials, relatively simple and straightforward. The claimant was going too fast. He was exceeding the speed limit by a margin of 50% or more. Not only was he exceeding the speed limit, but it can also be said the limit was too high for that stretch of road and a prudent speed would have been below 30mph. At that speed, the accident would have been avoided. So the claimant's speed was not only negligent, it was also causative of the accident.
40. The defendant was also negligent. At paragraph 7.2.1 of the joint statement, and from his stance as a former Police Driving Instructor, Mr Boulton offered the observation that it was incumbent on the defendant making this turn to ensure the road was clear to the right. This could only be done by pulling out of the junction slowly to a point where he could see down the line of the parked cars to his right, which would also give the claimant the opportunity to see and react to his emerging vehicle. Given the parameters of the role of expert evidence in cases of this sort set out by the Court of Appeal in *Liddell v Middleton* [1996] PIQR P36, it is debateable whether Mr Boulton was entitled to offer this opinion. Mr Lewis QC bridled at certain other pieces of opinion evidence that Mr Boulton expressed during cross-examination and I made it clear that what the claimant and the defendant should and should not have done were ultimately matters for the court, not the experts. Be this as it may, I entirely agree with Mr Boulton's observation, which accords with the guidance in the Highway Code and is, in my view, self-evidently correct. It was not sufficient for the defendant to edge out to the point where he could see to approximately 40 metres up the road. His remarks to his wife at the time and his strategy of moving off whilst hugging the left hand edge of the main road indicate that, at some level, he was conscious that he had not managed to see as far up the road as he would have liked before pulling out. He did not see the claimant and that strategy

did not avoid the claimant coming into collision with his car because of the difficulty (referred to above) of swerving a motorcycle under heavy braking pressure.

41. I do not agree with Mr Lewis QC's submission that if the defendant was negligent in pulling out in that way it was not causative because, at 3 – 4mph he still would have gone on some 2 metres and there would still have been an accident. If he had been edging out as I find he should have done, he would not have been travelling at even 3 – 4mph and he could and would have stopped immediately he saw the motorbike approaching. (Mr Fidler, the defendant's expert, said as much at paragraph 9.8.9 of his report.)
42. Nor do I agree with Mr Lewis QC's slightly less ambitious submission that the sight line up Victoria Park Road which the defendant in fact achieved was sufficient to bring into his field of vision any driver who was driving within the speed limit or perhaps a little above it and that that discharged his duty of care. I disagree for two reasons. Firstly, I do not accept the premise of the submission. The view that the defendant described was an oblique or diagonal view to the northern edge of Victoria Park Road. A motorcyclist (or a cyclist for that matter) who was keeping to the left hand (southern) edge of the carriageway, as some might have done, would not have come into the defendant's sight line until he was much nearer to him than the 40 metre view the defendant said he had achieved. To put it another way, the defendant had a blind spot to his immediate right. This alone demonstrates that there was a need for an emerging driver to obtain a view down the line of parked cars on the southern side. Secondly, and however this first point may be, road users must always be aware of the fact that other road users may exceed the speed limit or act foolishly or dangerously. The view up the main road which the defendant actually achieved did not sufficiently allow for that possibility. To the extent that courts have on occasion found that one party's "reckless" driving was the exclusive, proximate cause of an accident, that is not, as I find, this case. The evidence in this case is quite different from the evidence in the case principally relied upon by Mr Lewis QC, which was *Jessop v Nixon* [2010] EWHC 3211 (QB). In that case, the claimant's driving before the accident showed him not only driving at an excessive speed, but "tailgating" another vehicle and overtaking on the wrong side of the road (at night). The extent of the evidence of negligent driving in this case is that the claimant exceeded the speed limit, admittedly by a big margin, on a straight, level road and on a new motorbike which was much more powerful than the scooters he was used to. I do not think that his driving can fairly be characterised as reckless and I do not think that it can possibly be said to have been the exclusive cause of the accident. The accident was the product of fault on both sides, the claimant's in going too fast and the defendant's in not getting a proper view down Victoria Park Road before pulling out, and it is to the apportionment of fault that I turn.
43. The apportionment requires an evaluation of the culpability and causative potency of the negligence found against each motorist. As with the decision in *Jones v Lawton* (see above), there is a certain "broad symmetry" between the faults of the claimant and the defendant. In terms of culpability or blameworthiness, I would place a little more of the blame on the claimant than the defendant. Although the Code and the authorities lay heavy emphasis on the duty of the motorist emerging from the minor on to the major road, the fact remains that the claimant was doing around double a safe speed for the conditions. However, as to causative potency, there is a significant difference in the comparison, which (to borrow another phrase from the same case) "tilts the balance" back in favour of the claimant. As the Highway Code notes, motorcyclists are vulnerable road users. In collisions with other motor vehicles it is the motorcyclist who is liable to suffer significant injury and not the driver. That is an unhappy feature of riding bicycles and motorcycles and is tragically illustrated by the facts of this case.
44. Balancing those features and the overall circumstances of the accident, I will apportion liability 60/40 in the claimant's favour. There will be judgment for 60% of the claim with damages to be assessed and 40% of the counterclaim with damages to be assessed (though I note that, in the case of the counterclaim, medical causation is also in issue).