

Neutral Citation No. [2008] NIQB 160

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

Delivered: 21/2/08

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

PAUL McCAUSLAND

Plaintiff;

-and-

MICHAEL ARUNDELL and AXA INSURANCE

Defendant;

HIGGINS J

[1] This is a claim for compensation for personal injuries sustained in a motor cycle accident which occurred on 19 May 2001 on the main road between Limavady and Coleraine, sometimes known as the Broad Road. On 30 May 2006 Master Wilson ordered a separate trial of the issues of liability and damages. The issue of liability came on for hearing and on 12 December 2006 a judgment was handed down by this court in which the first defendant was found to have been negligent. Questions relating to contributory negligence were adjourned for further investigation of the pleadings. The issue relating to damages remains outstanding, though by an amended statement of claim the plaintiff claims special loss in excess of £1.1 million. No order or final order has been drawn up. In January and February certain events occurred which resulted in an application to adduce further evidence relating to the issue of liability. This application was granted. Further evidence was adduced at a later date and this judgment considers the implications of that further evidence.

[2] The motor cycle accident occurred on a sweeping right hand bend at the top of the mountain between Limavady and Coleraine. The plaintiff and his companions were travelling towards Coleraine to attend a motor cycle event which had been organised in place of the North West 200 motor cycle

aces which had been cancelled due to foot and mouth disease. Police officers attended the scene of the accident but were unable to ascertain precisely what had occurred. The plaintiff was unconscious and removed to hospital. Only the plaintiff's motor cycle was damaged and no other vehicle was alleged to be involved. The plaintiff's brother, who did not see the accident, informed the investigating officer that the wheels on the plaintiff's motor cycle locked out, causing the crash. That apart no-one was able to inform the police about the circumstances leading to the accident. At the hearing on liability the plaintiff's case was that his companions were his brother Martin, Brian Donnelly and Michael Arundel, the first defendant.

[3] The plaintiff was seriously injured and spent a long time in hospital initially in Coleraine and later in Omagh. He has no memory of the accident itself. Following the accident the plaintiff inquired frequently whether any of his companions had struck him from behind and caused the accident. He could not understand how he, an experienced motor cyclist, could have left the road, travelled across a lay-by and crashed into a post in the hedge at the side of the carriageway. About nine months after the accident the first defendant admitted that the front wheel of his motor cycle had touched the rear wheel of the plaintiff's motor cycle causing the accident. The first defendant was insured with the second defendant and his insurance related to a dark green Yamaha XJ900S Diversion motor cycle. At the trial on the liability issue the first defendant admitted that the front wheel of his motor cycle had 'tapped' the rear wheel of the plaintiff's motor cycle. The second defendant, who had been joined as a defendant by order of the Master on 6 October 2005, disputed this account and alleged that this was a fraudulent claim. Evidence was given by the plaintiff, his brother Martin, Brian Donnelly and Michael Arundel. Several paragraphs of the judgment summarise the substance of their evidence relating to the accident.

[1] On 19 May 2001 the plaintiff set off from Omagh with his brother Martin and Brian Donnelly to travel via Limavady to Coleraine to attend a motor cycle show. Each was travelling on his own motor cycle. They stopped at a café outside Strabane for breakfast where by coincidence they met the first defendant Michael Arundell who was also travelling on his motor cycle to the same show. The plaintiff and the first defendant were acquaintances mainly through their interest in fishing. The first defendant was riding a touring motorcycle and the plaintiff a lighter but faster Kawasaki 600cc. After leaving the café the party proceeded together towards Coleraine. Martin was often in the lead. There was a lot of traffic on the road including other motorcyclists. About midway between Limavady and Coleraine the road

risers to top the mountain. For traffic proceeding towards Coleraine there is a moderate incline toward the summit where there is a gentle right hand bend which can be taken at speed. A short distance back from the bend the road levels off and is less of an incline. At this point on the left hand side of the road there is a car parking area or lay-by (the lay-by). As the party approached the bend Martin was in front followed by the plaintiff who was on the inside of the carriageway then the first defendant, then a small saloon car and then Brian Donnelly. The first defendant was a short distance behind the plaintiff but on the outside of the carriageway. There was linear and lateral separation between them. About the entrance to the lay-by the plaintiff's motorcycle left the road and travelled across the parking area, then over a grassed area where the plaintiff and the motorcycle parted company. The plaintiff was propelled through the hedge and came to rest in the field on the other side. The motorcycle was propelled from the left hand hedge across the road to the hard shoulder on the opposite side of the road where it came to rest. Two paramedics happened on the scene within minutes and attended to the plaintiff. A short time later an ambulance arrived and took the plaintiff to hospital. He was critically injured and it was not thought he would survive the night. After a period on life support equipment in intensive care he made a sufficient recovery permitting him to transfer to Omagh Hospital where his recuperation continued. His recovery has not been complete. However the court is not concerned with his injuries and the consequences of them on this occasion save that he has no memory of the accident and where his present claims for compensation bear on his credibility.

[2] Two police officers from Limavady arrived shortly after 1130am as the plaintiff was being placed in the ambulance. Two others arrived later. The police officers spoke to various people at the scene. They included Martin who on noticing no-one behind him had turned and driven back to the scene. Needless to say he was quite distressed. He spoke to Constable Patterson and identified himself and his brother and informed her of where they were coming from and travelling to. She noted in her notebook that

he told her - "that the wheels on his bike locked out, causing the crash". No other person provided an account to the police at the scene. If the extent of the plaintiff's injuries had been known to the police at the scene it is likely a more forensic investigation might have taken place. So far as the police were concerned one motor cycle and one casualty were involved and no-one else. At the scene police found the motorcycle, various pieces of plastic from its bodywork and a black mark which commence at the inside corner of the kerb at the entrance to the lay-by. The mark ran from the kerb across the parking area over the inner kerb and across the grass area beyond, where it ended. Constable Patterson drew a sketch of the scene. She arranged for Martin to make a statement to a Constable from Omagh which was taken at his home some time later. There the matter rested.

[3] A short time after the ambulance left the scene the first defendant followed to Coleraine hospital where along with close members of the plaintiff's family he remained constantly for the next five days. He believed the plaintiff was going to die. He continued to visit the plaintiff in hospital in Omagh and later at his home and helped the plaintiff's wife with some chores. The plaintiff's recovery was slow and I am sure he was difficult to live with for some time, as the plaintiff's wife recounted. There can be little doubt that in some respects he was a changed man. As he had no memory of the accident he was frequently and naturally inquiring what had happened and speculating as to the cause. No-one was able to assist him. The first defendant continued to call usually about once per week. On one occasion about nine months after the accident or maybe later the first defendant was in the kitchen with the plaintiff and it was alleged the plaintiff's wife was present making them tea. The plaintiff was again inquiring what had happened. There were different accounts as to how the conversation began and precisely what was said. But the first defendant admitted to the plaintiff that he was the cause of the accident as his front wheel had come into contact with the rear wheel of the plaintiff' motorcycle. Needless to say this lead to some strong language and harsh words and the plaintiff's wife stormed out of the

room. She met the first defendant several days later when he called again and further words were spoken on this occasion.

[7] Brian Donnelly gave evidence that he was travelling behind the small family saloon and in front of this were the plaintiff and the [first] defendant. The plaintiff was on the inside of the carriageway and slightly in front of the first defendant who was towards the centre line. As they approached the bend he saw the brake lights of both motorcycles come on, the first defendant's first and then smoke. The car in front braked and so did he. He claimed he was approached by a policeman and that he told him what happened. He said he was not asked for his name and address, nor was he asked for a statement. He claimed he was present by coincidence when a police constable from Omagh called with Martin to take a statement from him at the request of Constable Patterson from Limavady, the investigating officer. He claimed he told the Omagh constable what had happened. I can understand why the Omagh constable did not take a statement from Brian Donnelly as he was only requested to take a statement from Martin. But if Brian Donnelly told a policeman at the scene what he observed I would expect at the very least that his name and address would have been taken. If Brian Donnelly is correct about what he claimed to see, it may explain what Martin told the police about his brother's wheel locking out.

[4] The trial commenced on Wednesday 29 November 2006. The plaintiff and his wife gave evidence on the first day. That night the plaintiff contacted his brother Martin who in turn contacted Brian Donnelly. Both then attended court the following day and gave evidence about the accident. Brian Donnelly said he was unaware of the court case and only became aware that the first defendant was to blame when he was asked to come to court. The plaintiff and his wife were not impressive witnesses. Thus the crucial issue was the credibility of the first defendant in admitting that he was to blame, having failed to mention this for nine months. The court recorded its findings in paragraph 9 without reliance on the plaintiff, his wife or his brother Martin.

“[9] Mr T Wright the consulting engineer demonstrated that the first defendant's description of the accident could not be correct if he was 10 - 15 yards behind and his glance to his instruments took

one second. I consider the first defendant has been engaged in ex post facto rationalisation, part of which was his experiment with the stopwatch to time his glance. Undoubtedly the plaintiff's motorcycle left the road at the lay-by. It must have hit something solid to deflect it across the road. Mr Wright's analysis of the sketch and the mechanics of the accident is probably correct. This is a smooth roadway with a wide sweeping bend. There was little reason associated with the road or his driving for the plaintiff to suddenly leave the road. That makes contact with an object the most plausible explanation. The nearest object to him was the first defendant. It is unlikely the plaintiff's motorcycle fell over on the ground at the entrance to the lay-by otherwise there would have gouge marks on the lay-by and the grass area. If it did it would be unlikely the plaintiff would have ended up in the field or the motorcycle on the other side of the road. The mark identified by Constable Patterson and traced on her sketch is more consistent, taking the other factors into account, with the plaintiff struggling to keep his motorcycle upright while braking hard across the lay-by and onto the grass before colliding with the solid post identified by Mr Wright at which point the plaintiff was projected from the motorcycle into the field and the motorcycle across the road. For the motorcycle to cross the road the impact must have been at speed which leads me to conclude that the plaintiff was travelling very fast towards the bend as was the first defendant who was closer to the plaintiff than he admits. Ultimately the question of the credibility of the first defendant is crucial. I find that he is telling the truth when he admits colliding with the rear wheel of the plaintiff's motorcycle. I suspect he was not accustomed to riding his touring motorcycle in convoy with other motorcyclists on more sporty machines. Having failed to disclose his responsibility at the scene and shortly thereafter it would have become harder and ultimately took courage to admit, but I am satisfied he did so and so find without reliance on the evidence of the plaintiff or his wife or Martin. These findings confirm that the first defendant was behind the plaintiff and on the outside of the carriageway and the plaintiff in front on the inside. The accident required both linear move and lateral movement.

There was no apparent reason for the first defendant to move to his left but there was an apparent reason for the plaintiff to move to his right to take the bend by the shortest line near the centre of the road. That would account for the lateral movement which probably caught the first defendant unawares. I do not find that the first defendant moved to his left but he was travelling too close to the plaintiff at the time and was the primary cause of the contact. Therefore on the preliminary issue I find the first defendant liable to the plaintiff; however I consider the plaintiff contributed to this accident."

[5] In January 2007 Brian Donnelly sent an email to the Customer Services general website of the Axa Insurance Company. He used his Hotmail account under the pseudonym 'Badboy290272'. His initials are 'BAD'. The email stated -

"hello axa

there has been an motorcycle insurance claim between mr paul mccausland from omagh n-ireland, and mr michael arrundell also from omagh n-ireland, in which mr mccausland suffered serious injuries, and a year later mr arrundell owned up to knocking mr mccausland off his motorcycle, i also know that this case has recently went to court with mr mccausland winning his claim for compensation from mr arrundell and axa insurance, no payment has been paid as yet, the claim is over 1 million pounds .. for injuries, loss of earnings, etc ...

i confided my information in a friend who works for a soliciter and they said that if their was a false claim and anyone had information that the insurance group would pay them for that information.

i have information and undoubtable and provable proof about this case between mr mccausland and mr arrundell that would overturn this case in favour 100% in axa insurance favour, without a doubt.

unfortunately i know all partys involved so i have to remain annomious, unfortunately I can not give this information out for free, I also have family and any money paid is truly needed.

at this time an email address is all i can give you to reply to at the minute, so if you are interested in what i have to say, please reply to this mail and i can give you a contact number so we can talk or meet.
yours ... needing money."

[6] On 15 January 2007 this email was forwarded to Mark Andrews a Claims Investigator for Axa, who was previously involved in fraud investigation. He replied to the email and arranged a meeting with Donnelly on 31 January 2007. At this meeting Donnelly told him that Arundell was not at or involved in the accident and that the fourth member of the group was a Richard Kennedy. He gave Kennedy's address. He said he was contacted on the first day of the trial and offered £1000 to give evidence. When he heard at the hearing that the plaintiff was getting over £1 million he was annoyed he was getting only £1000. He said Martin McCausland was also contacted that night and would be given £1000 and that Arundell was getting £10,000. He said that Kennedy accompanied the plaintiff in the ambulance. The plaintiff's motor cycle and that of Kennedy were removed from the scene in a furniture van. The plaintiff's motor cycle was left at Coleraine or Limavady police station and the other at Coleraine. He said the group was travelling at speeds in excess of 120mph. He identified the four motor cycles as - a red Kawasaki ZX600 driven by the plaintiff, a blue Suzuki GSXR 600 driven by Martin McCausland, a red Honda VFR400 driven by himself and a yellow Suzuki GSXR 750 driven by Kennedy. Later Donnelly indicated that he would not sign a statement. At no time did he indicate to Mr Andrews that the information he had given was false.

[7] On 7 February 2007 Mr Andrews, accompanied by Mr Kyle called with Richard Kennedy. He said he was interested in discussing the accident and that he wished to record the conversation. Mr Kennedy was content to do so. It was clear to Mr Andrews that Mr Kennedy was unaware of the plaintiff's claim. After a short period Mr Kennedy's brother Kane Kennedy came into the room and stood nearby. He made comments throughout and was unaware that the conversation was being recorded. Mr Richard Kennedy stated that he was a member of the group and was riding behind the plaintiff and witnessed the accident which was caused by speed alone. His account was detailed and was given clearly and precisely and without delay. He said he had been a friend of the plaintiff's for many years. Some months after the accident the plaintiff asked him what had happened and had he hit his motor cycle and would he say this. At this point they fell out. Mr Kennedy indicated that he was prepared to sign a statement. Mr Andrews did not tell Kennedy anything about Brian Donnelly. A transcript of this conversation was prepared subsequently.

[8] Later Mr Kennedy telephoned Mr Kyle and told him that while he stood over what he had said he had discussed the matter with his wife and was not prepared to sign a statement. He said it would be wrong if the plaintiff did not get some money for the injuries he had sustained.

[9] On 6 March 2007 Mr Andrews called with Mr Kennedy again. Mr Kennedy informed that within a week of the previous meeting the plaintiff had called with him and said that he believed 'Axa were out'. Mr Kennedy denied this to the plaintiff. Mr Kennedy said the plaintiff was threatening and stated that if the claim failed he was a dead man and that he would burn his house. Mr Kennedy declined to sign a statement but confirmed a picture of the type of motor cycle driven by the first defendant. He did not withdraw any of the information that he had given previously.

[10] Emails seeking further information were sent to police officers identified as being on duty that day. Two responses were received one of which was from Constable Eardley. The furniture van (used after the accident to transport the motor cycles of the plaintiff and Mr Kennedy) was traced to a firm called Tweedy Atcheson of Limavady and the occupants identified as Kevin Williams, Carl Mullan and William Bradley. Statements were taken from the first two named. The ambulance driver and attendant were also contacted.

[11] The plaintiff, his wife, Martin McCausland, Brian Donnelly and the first defendant were recalled and gave further evidence. Miss McGonagle, solicitor, Mr Andrews, Mr Kyle, Richard Kennedy, Constable Eardley, Kevin Williams and Carl Mullan gave evidence.

[12] The plaintiff, Martin McCausland and Michael Arundell maintained the accounts they had given previously. They denied that Richard Kennedy was a member of the party and that they were riding at excessive speed.

[13] In advance of the hearing Miss McGonagle, solicitor, wrote to Brian Donnelly at an address she had for him, enclosing a subpoena. The envelope and contents were returned to her on 5 September 2006. Written on the envelope were the words 'not at this address returned as requested'. In addition she had arranged for service of a copy subpoena on Brian Donnelly at an address in John Street, Omagh. A copy of this subpoena duly endorsed was returned to her at the end of August 2006. On 15 August 2006 she received a phone call from Donnelly who stated he was not attending court and that he was not at the address to which she had sent the letter. He inquired why he was required at court and she explained it was because of his contact with Axa. He said he had been threatened and was not going to court. He was going to see his own solicitor the following day and may contact her again. He refused to name his solicitor. He said he was not giving evidence and that Richard Kennedy was to blame for all of this. It was clear

he was trying to evade service and to evade attendance at court. He did not attend on the first day but after a message was conveyed to him that steps would be taken to secure his attendance he did so and gave evidence. He admitted writing the email to Axa and speaking to Mark Andrews and giving him the information noted. He said it was lies. He wrote the email in order to get revenge on the plaintiff who had slept with his then girlfriend about one year before the accident, that is 7 years previously. (Mr Andrews noted at the time that he appeared to be vindictive). Donnelly did not confront the plaintiff about this as he did not like confrontations and fighting. He claimed he would get a severe kicking from the plaintiff and his two brothers and that he had no brothers to call on to help him. He had heard about the plaintiff making claims about what he would spend the compensation on and he thought he would take 'him off his high horse'. He said he did not like the plaintiff and only gave evidence as he was asked to do so by Martin McCausland. He did not think anything would come off his revelation. When he wrote the email he had already decided he was going to involve someone else. He was aware that Richard Kennedy 'had his own grief with the plaintiff' but was unaware of what it was. He said he needed someone to back up his case and the only person he was friendly with was Kennedy, but he could offer no explanation why he chose Kennedy. Shortly after the meeting with Mr Andrews he went to see Kennedy and told him what he had said to Axa and Kennedy agreed with it. He expected to get a 'few pounds' from Axa but it had not been discussed. He said he was no longer still scared of the plaintiff though he would be scared if the court decided that the plaintiff should not be compensated. He said that at the first sign of this returning to court he contacted Axa and asked for Mr Andrews as he was not going to lie in court before a judge. He agreed that he had probably told Mr Andrews what would happen to him if he put his name to a statement. He denied that he had been threatened but in order to extricate himself he had probably mentioned threats about killing and burning and that he was told to leave the country. He agreed that he probably mentioned K Kennedy's name when he mentioned these things. He remembered being approached by K Kennedy who inquired whether he was going to 'stand with us'. He identified K Kennedy as the 'biggest threat'. When he spoke to Axa later he did inquire about money as he was curious to know what was on offer. He denied that he was involved in any attempt to 'con' money out of Axa. He also alleged he had a grudge against Arundell whom he blamed for giving information to David Rea who told police that he was involved in providing false insurance certificates to people and which led to his shop being raided by police and his computer seized. He had only heard a rumour that Arundell had said this. He accepted that it was true that the motor cycles belonging to the plaintiff and Kennedy were removed from the scene in the furniture van and that Kennedy did travel with the plaintiff in the ambulance. He did not mention Kennedy when he gave evidence previously as he did not consider it was relevant to do so. He accepted that he had a criminal record for offences involving dishonesty.

[14] Martin McCausland described Donnelly as a close friend. When the plaintiff told him what Donnelly was now saying he said he would speak to him. He telephoned him. Donnelly said he never met anyone from Axa, he denied saying what Martin McCausland had heard from the plaintiff and said that Axa were making it up in order to avoid paying the money. After that the two men drifted apart and in McCausland's words Donnelly 'sort of disappeared'. By chance he met Donnelly in the grounds of Omagh hospital. Donnelly waved him down. He would not say where he had been, but said he was moving to Canada and that he would not be attending court. McCausland said he knew Richard Kennedy all his life. He was a close friend though not as close as Donnelly. He spoke to Richard Kennedy who told him it was all Donnelly's doing, that he had planned the whole thing to 'con' Axa and that Donnelly would pay him some of the money. He was shocked on hearing this but did not go to the police about it. He did not see Kennedy at the scene of the accident, though he saw him in the hospital. At the hospital Kennedy told him he had come in the ambulance and that his motor cycle had been brought in the removals van. Kennedy told him he had been travelling behind the removals van. He described Arundel 'landing at the hospital after him'. He admitted that his evidence on the first occasion that he was riding a Suzuki 750 was incorrect. He was riding a Suzuki 600. He could give no explanation how he made this error.

[15] Richard Kennedy is 34 years of age. Since he was nineteen years of age he has worked as a care assistant in the Tyrone and Fermanagh Psychiatric Hospital in Omagh. He grew up with the McCausland brothers and was a friend of the plaintiff. He and his wife are godparents of the plaintiff's youngest child. Mr Kennedy stated that on 3rd or 4th February 2007 Donnelly telephoned him and later called with him. [It transpired later that he told Miss McGonagle, solicitor, that the telephone conversation with Donnelly took place in the middle of January]. Donnelly said that he had been in touch with Axa in January and that he had told them that he, Kennedy, was part of the McCausland group and that Arundell was not. This was the first time he was aware of a claim by the plaintiff. He said that Donnelly told him that he had given Axa information that was false. He was in financial difficulties and wanted Kennedy to go along with his story to Axa to clarify or verify that Arundell was not present. He told him the case was in court in November but gave no details relating to it and Kennedy was not aware that Donnelly was a witness on behalf of the plaintiff. He said that when the case was concluded he would 'sort him out'. He said that Axa would be paying money and £50,000 was mentioned. Donnelly then gave him all the details relevant to the case concerning what happened on the day of the accident. During the meeting, which lasted two or three hours, Donnelly went over this a few times and warned him that Axa would visit him. When he was visited by Mr Andrews he went along with Donnelly's suggestion. He said Donnelly gave him the impression that he was in financial difficulties. He was not aware that

what he told Axa would be harmful to the plaintiff. The description of the car as a white Golf driven by a woman he made up. It was the first car that came into his mind. He said Donnelly told him he needed to prove to Axa that he was behind the plaintiff. Thus he told them that the plaintiff's motor cycle flew over him and that he was doused in fluids. Donnelly had told him that he had told Axa that Kennedy's motor cycle was damaged and covered in fluid. Donnelly had told him that he was trying to make out that he, Kennedy, was Arundell. Thus he mentioned he was at Coleraine hospital throughout the time the plaintiff was there. Donnelly said the plaintiff was travelling at speeds between 120 - 130mph and that he had gone through a hedge so he told Axa he saw the plaintiff hitting his head off a post at 130mph. When he spoke to Axa he was told that this could go to court. He telephoned Donnelly that evening and told him that he was not going along with it. Donnelly tried to persuade him to do so as he was doing it for the money, but was unsuccessful. The following day he phoned Mr Kyle and told him he was not willing to stand over the account he had given the day before, that it was a lie and he was not sticking to it. When Mr Andrews called on 6 March 2007 he told him he was not signing any statement and that what he told him was fabricated. He said Mr Andrews was harassing and pushing him. He told Mr Andrews the plaintiff had called him and threatened to burn him out but this was not true. He said the plaintiff was a life-long friend and he could not say why he had told Mr Andrews that he thought the plaintiff was a psychopath. He recalled telling Mr Andrews that after the accident he put his motor cycle in the garage and thereafter did not open it. He stated that Donnelly had told him that he had told Mr Andrews that Kennedy's tyre had been deflated and that he had disposed of the motor cycle. He said there was no truth in this as he retained the motor cycle for a further two years. He said he obtained the names of the four members of the McCausland party from Donnelly. He agreed that when he spoke to Axa first he did state that he was willing to go to court. He did not retract his account until he spoke to Miss McGonagle on 6 September 2007. On that occasion he said also that when visiting the plaintiff in Omagh hospital Martin McCausland told him that the plaintiff was knocked off his motor cycle by Arundell. In evidence he said he had no grudges against anyone.

[16] Mr Kennedy also gave evidence about what he claimed he did on 19 May 2001 the day of the accident. He stated that he had arranged to meet his brother Christopher Patrick (otherwise known as or referred to as Kane or Ken Kennedy) at the Tower Restaurant. They left Omagh about 0845 and travelled to Limavady via Plumbridge, New Buildings and Londonderry. Although he had stopped previously at Dolans for breakfast and with his brother, he did not do so on this occasion. After Limavady he and his brother travelled on towards Coleraine to attend the same motor cycle event as the others. He and his brother were travelling together with no great gaps between them. Between Limavady and Coleraine he came across a queue of traffic and stopped to investigate. His brother who was in front but in his line

of sight carried on towards Coleraine. He pulled in behind the furniture van and spoke to Martin McCausland who was at the fence leading to the field. He learnt from him that the plaintiff was involved and described himself as in total shock as they were friends. He and his wife were godparents to the plaintiff's youngest child. He observed that ambulance personnel were attending the plaintiff in the field. He did not go into the field but assisted with the stretcher on the road side. The plaintiff was put in the ambulance and he decided to go with him to the hospital. He arranged for his motor cycle, which was not oily or dirty, to be transported in the furniture van to Coleraine. He said he was not covered in fluid. At Coleraine Hospital he saw Arundell for the first time. He told him that the plaintiff was in a serious condition and might not survive. He stayed at the hospital for about two hours but returned the next day to see how the plaintiff was. At Coleraine Hospital he did not inquire how the accident had happened, nor did he do so in the days and weeks that followed. He said he was more concerned about the condition of the plaintiff. He next saw him in Omagh hospital but the plaintiff was not fit to carry on a conversation. He described his recent contact with the outside world as limited due to a stroke suffered by his father which necessitated a move to a different residence. He stated that he had no 'fall-out' with either McCausland.

[17] Michael Arundell said he had never heard of Donnelly being involved in false insurance certificates and never told David Rea such information and was unaware of Donnelly holding any grudge against him. He never asked for £10,000 for his evidence or implied that he wanted money. He alleged that Donnelly had said this in order to 'get him and the plaintiff into bother'. He gave evidence about what occurred after his motor cycle came into contact with the plaintiff's motor cycle. He said the plaintiff left his line of sight still on the motor cycle heading in towards the trees on the left hand side of the road facing Coleraine. Mr Arundell said he was travelling at about 60 - 65 mph and braked as hard as he could. He travelled about 100 yards while carrying out the emergency braking and on slowing sufficiently he executed a u-turn and travelled back about 100 yards and parked in the lay-by at the entrance nearest Limavady. He searched for the plaintiff in the fir trees at that entrance and then saw the plaintiff's motor cycle on the other side of the road nearer Coleraine on the apex of the bend. He ran to that area and began searching for the plaintiff. While in that area he saw the plaintiff lying in the field on the opposite side of the road being attended to by Kevin Williams. He went across the road to the fence but no further. He then described the assistance rendered by Williams and Mullan and others at the scene. He thought it was Martin McCausland who accompanied the plaintiff to hospital. He recalled seeing Richard Kennedy at the hospital but not at the accident site. The first occasion was about ten or fifteen minutes after he arrived at casualty. Kennedy told him that the plaintiff was 'not doing too well' and as a result he asked the receptionist to get a priest to give him the last rites. He had not mentioned Kennedy before as he did not consider him relevant. He stated

that Kennedy disappeared that evening and did not stay at the hospital in Coleraine all the time the plaintiff was there. He reiterated that he had panicked at the scene. He thought he would be charged with causing death by reckless driving and did not want the plaintiff's death on his conscience and this was why he said nothing about how the accident occurred at the time. As time passed and it became clear the plaintiff was not going to die the main reason for saying nothing had disappeared but he could not bring himself to tell what happened. He maintained that he had told the truth on the last occasion and that speed was not involved.

[18] In May 2001 Kevin Williams worked for Tweedy Atcheson as a removal man and was sitting on the passenger side of the furniture van as it made its way from Limavady towards Coleraine. The van was a heavy vehicle. The road from Limavady to the top of the mountain has several steep inclines as well as some more level sections. When they were on one of the steep inclines and crawling along they were overtaken by four motor cyclists travelling line astern. 'They seemed to be moving at a fair rate of knots' so much so they rocked the van. He described it as 'like being under fire' of which he had some experience as a former member of the 1 Battalion the Royal Regiment of Wales. They were not passed by any other motor cyclist before they arrived at the scene of the accident some three or four minutes later. Williams saw debris on the road and it was clear someone had come off a motor cycle. As he was first aid trained he instructed the driver to pull over and phone for an ambulance. The van stopped at the Coleraine end of the lay-by. There was a motor cycle parked on the hard shoulder next to the verge some 25 or 30 metres in front of them and beyond the lay-by. They saw no other vehicle or motor cycle in the area. Williams identified the passage of the plaintiff through the hedge and on looking into the field saw the plaintiff lying on the ground with a man in racing leathers standing over him. He vaulted the fence and ran to the plaintiff. He obtained his name from the man in the racing leathers who was agitated. He spoke to the plaintiff and cleared his airways. He sent Mullan his fellow employee to get blankets for the plaintiff. The plaintiff's brother then arrived at the scene and was screaming that's my brother. Then an off-duty casualty nurse arrived followed by two off-duty paramedics. They took over management of the plaintiff and he looked after the plaintiff's brother. He assisted with the removal of the plaintiff from the field to the ambulance. He recalled a man in racing leathers who wished to travel in the ambulance but was worried about his motor cycle. He offered to take it to Coleraine in the van which he did. He left it at the hospital. Carl Mullan who was seated in the middle of the front of the van corroborated much of what Williams said. Neither of them noticed Arundell's green motor cycle parked at the Limavady end of the lay-by nor liquid or petrol on Kennedy's motor cycle or on Kennedy himself.

[19] Constable Neil Eardley was one of the police officers to arrive at the scene of the accident. He was in the second vehicle. He made inquiries of

those present as to the cause of the accident. No-one was able to provide him with any assistance. He spoke to one of the Tweedy Atcheson employees who stated that the motor cycles overtook them at speed. He recalled the plaintiff's motor cycle in the yard at Limavady police station. As he had an interest in motor cycles he inspected it and its 'clocks'. He seemed to remember that on the speedometer the needle was pointing to a position which indicated a speed in excess of 70 -80 mph. Mr J McGlinchey a consulting engineer gave evidence about the speedometer on a Kawasaki motor cycle. Both the rev counter and the speedometer have needles. The drive from the gear box is taken and transmitted electronically to a display and converted into analogue movement. The speedometer is designed to record the speed of a moving vehicle. When a motor cycle is horizontal the needle tends to the 12 o'clock position which is a speed in the region of 90 - 100mph. He said this tied in with the evidence of the Constable. However it was simply a manifestation of the forces involved and not the speed of the vehicle.

[20] I summarise briefly the submissions of counsel which helpfully were set out in the form of skeleton arguments. It was submitted by Mr Cahill QC who appeared on behalf of the first defendant that the original finding of credibility of the first defendant had not been affected in any way by the new evidence that was adduced. The first defendant has been consistent in his account since first given to Miss McGonagle, solicitor and that his account should be preferred.

[21] Mr Ringland QC highlighted differences in the evidence between the various witnesses relied on by the plaintiff and in the accounts given by those witnesses. In relation to the first defendant he highlighted inconsistencies in his accounts and matters mentioned on the second occasion which were not mentioned on the first occasion. He also relied on the accounts given by Donnelly and Kennedy to Axa.

[22] Mr McCrea who with D Mr Fee QC appeared on behalf of the plaintiff submitted that Brian Donnelly was an unreliable witness who attempted to 'con' money from Axa at a time when he was in difficult financial circumstances. In relation to Kennedy he submitted that he was trying to help a friend in financial difficulties and shortly after had second thoughts about going along with Donnelly's scheme. In saying to Mr Andrews that Arundell was not at the scene, when Mr Andrews had not mentioned his name, betrayed the fact that he had spoken to Donnelly before he met Mr Andrews and that the two of them were engaged in a pre-arranged conspiracy to 'con' money out of Axa. His account to Mr Andrews which he now retracted could not be relied on by the second defendant. In any event those accounts were inconsistent or inaccurate Mr Arundell was a consistent witness on both occasions and the fresh evidence did not detract in any way from his credibility.

[23] As was acknowledged during the hearing and the prior application the introduction of the allegations by Brian Donnelly and Richard Kennedy and the evidence of the Axa representatives involved the admission of hearsay evidence. This hearsay evidence was sometimes interspersed with direct evidence. In addition the revelations led to cross-examination about earlier or subsequent inconsistent statements or alleged inconsistent statements. The hearsay evidence was admissible under Article 3 of Civil Evidence (Northern Ireland) Order 1997. This provides -

“3. - (1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay.

(2) All common law rules providing for exceptions to the rule against hearsay in civil proceedings are superseded by this Order.

(3) In this Order-

(a) "hearsay" means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and

(b) references to hearsay include hearsay of whatever degree.

(4) Nothing in this Order affects the admissibility of evidence admissible apart from this Article.

(5) The provisions of Articles 4 to 6 (safeguards relating to hearsay evidence) do not apply in relation to hearsay evidence admissible apart from this Article, notwithstanding that it may also be admissible by virtue of this Article.”

Article 5 of the Civil Evidence Order makes provision for the assessment of hearsay evidence under the heading - Considerations relevant to weighing hearsay evidence. Article 5 provides -

“5. - (1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) Regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of the notice given.

(3) Regard may also be had, in particular, to the following-

- (a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;
- (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
- (c) whether the evidence involves multiple hearsay;
- (d) whether any person involved had any motive to conceal or misrepresent matters;
- (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
- (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

Not all of these considerations are relevant but a number are and some of these are more relevant than others. In my assessment of the evidence I have applied these considerations and borne in mind the cautions they entail.

[24] On the last occasion the court was concerned principally with two issues. Firstly with whether this was a false claim based on the fact that Arundell did not 'own up' until about 9 months after the accident and secondly with his evidence as to the mechanics of the contact between his motor cycle and the plaintiff's motor cycle. The court has already made

findings in relation to the admission made by Arundell and his evidence as to the mechanics of the contact alleged between his motor cycle and that of the plaintiff. The issue of Arundell's presence at the crucial time was not disputed and therefore did not arise. The evidence that Arundell was member of the plaintiff's group travelling to Coleraine was not disputed on the first occasion. Nor was Arundell's evidence that he was travelling immediately behind the plaintiff. The fresh evidence adduced raises the issue whether Arundell was a member of the plaintiff's party and the third member of the group and immediately behind the plaintiff as they approached the bend at which the accident occurred. I am satisfied that Arundell was present after the accident as I am that Kennedy was also then present. The issue now is whether Arundell was behind the plaintiff at the time of the accident. This involves a consideration of the fresh evidence to determine on the balance of probabilities whether Arundell was a member of the plaintiff's group and whether Arundell was behind the plaintiff and in a position for his motor cycle to be in contact with the plaintiff's motor cycle. None of those disputed issues have been adjudicated upon before.

[25] Undoubtedly Donnelly and then Kennedy gave accounts of this accident to Axa representatives. Those accounts indicated that the first defendant was not present as stated and that this claim was fraudulent. Later they withdrew those accounts in circumstances in which they alleged threats were made against them, though they stated they invented the threats in order to extricate themselves from the situation they had created. Each gave reasons, detailed above, why they gave the initial account to the Axa representatives. Neither explanation is credible. Donnelly was a witness at the first hearing on behalf of the plaintiff. It is simply not credible that within a matter of weeks he invented a false account in order to revenge himself against the plaintiff who allegedly slept with his girlfriend some 8 years previously. Nor is it credible that having supported Arundell in court, a few weeks later he is seeking revenge for a grudge which is alleged to have arisen some years previously based on a rumour. Kennedy's evidence that he was persuaded to go along with Donnelly and rehearsed by him as to what to say to the Axa representatives and to do so in the manner described by those representatives, is not credible. Therefore I conclude they gave these accounts not for the reasons stated but for other reasons. Furthermore it is equally more probable that they withdrew their accounts because of threats of one sort or another and that the threats were not invented as a reason to withdraw them but were real and genuine threats. The fact that each says he spoke to Axa and gave them the information now before the court (albeit they alleged for those discredited reasons) is significant, as is what they said to Axa.

[26] It was submitted that Donnelly and Kennedy were proven liars in that they say now that what they told Axa was untrue and therefore could not and should not be relied on as witnesses. Furthermore it was submitted that Arundell had given his evidence on each occasion in a straightforward and

credible manner and should be believed. I accept that Arundell gave his evidence on both occasions in a straightforward manner and was consistent about the accident. However I do not think this issue can be resolved by simply saying that as Donnelly and Kennedy now say they lied to Axa and Arundell has been consistent, the account given to Axa should be dismissed. If they were threatened, which I am satisfied they were, and thereafter adopted a low profile, which they did, then the court is entitled to inquire into why they gave the accounts to Axa, which they did, and what weight or reliance can be placed on those accounts in conjunction with the rest of the evidence.

[27] Donnelly was contacted by Martin McCausland on the night of the first occasion and asked to help the plaintiff. He agreed to do so. If Donnelly told the truth about Arundell on the first occasion, why six weeks later go back on that evidence to the detriment of his friend's brother whom he had agreed to help? The suggestion that he did not like him is inconsistent with him agreeing to help him and visiting him over the six months prior to giving evidence on the first occasion and to a limited extent with his purchase of a caravan from him within that period. It might be said he did it for money; but would he tell such an untruth to deprive a seriously injured man, who was the brother of his friend, of compensation to which he was truly entitled, simply for money. That in the nature of things is much less likely and is to be contrasted with telling the truth to Axa in the expectation that he would be entitled to some recompense in due course. If when approached by Martin to help the plaintiff, he agreed to tell untruths to enable him to obtain compensation, it is more likely that he did so in return for some reward, possibly money. If the sum was £1000 it was paltry in comparison with what the plaintiff is claiming. He could have asked for more when he discovered the amount being claimed. However he might have regarded or found himself in a weak position to do so as he had already come to court and given evidence. But would he go to Axa with an account, which exposed him as having told lies in court, if the new account was not true and to do so for money. That is less likely. It is more likely he would go to Axa with a truthful account particularly if he thought he would gain some reward with the truth being told. The enormity of what he was saying and the potential loss to his friend's brother of a sum in excess of £1 million make it less likely that he would go to Axa with a false story. For similar reasons would Kennedy go along with telling Axa a false story for some financial gain at the expense of his friend obtaining just compensation for what everyone agrees were serious injuries. That is less likely and receives some support from Kennedy's comment to Axa that the plaintiff deserved some compensation for his injuries. But Kennedy is in a very different position. I accept that when he was visited by Messrs Andrews and Kyle he was unaware of the plaintiff's claim. In those circumstances it is inconceivable that he was spoken to by Donnelly either in the middle of January 2007 as Kennedy alleged to Miss McGonagle or provided with all the details of the case on 3rd or 4th February 2007 as he

alleged in evidence. The court has listened to a portion of the tape recording. While the quality of the recording is poor there is a clear impression of the nature and progress of the conversation. My conclusion, based on all the evidence relating to it, is that what he said to Axa on 7 February 2007 came unsolicited and unrehearsed. Kennedy suggested that he had deliberately exaggerated part of his account as Donnelly told him he should do so to make it sound more plausible. I do not accept that suggestion or that Donnelly had informed him of the claim and the background. As he (and his brother) recounted to the Axa representatives they had heard something of what going on. While there may have been some exaggeration in the telling of the account in a general conversation, albeit recorded, I do not think that was deliberate. Looking at Kennedy's account as a whole it gives the impression of an account of someone who had participated in what he was describing and certainly not a repetition of what he heard from Donnelly. Much emphasis was placed on the absence of evidence that Kennedy was covered in fluids from the plaintiff's motor cycle and his assertion that the motor cycle passed over his head. When he first gave evidence Donnelly stated that the plaintiff's bike was leaking oil. It was risky for Kennedy to say the motor cycle passed over his head when there might have been marks on the road suggesting otherwise. The absence of marks across the road (when they were present on the lay-by) suggest that the motor cycle did not slide across the road and more likely flew in the air after impact with the post. The evidence relating to the fluid is inconclusive, though the factors involved require to be borne in mind.

[28] Therefore I look to see whether in the evidence as a whole there is material which confirms or tends to confirm that Arundell was present as the third rider or which supports or tends to support the suggestion that he was not so present.

[29] Kennedy featured in a major way both at the scene and at the hospital. It is significant that he was not mentioned by anyone on the first occasion as being at the scene of the accident or the hospital, yet he was a good friend of Martin McCausland and known to the others. In particular he was not mentioned, either as accompanying the plaintiff to hospital or informing Arundell that the plaintiff was in a bad way which prompted Arundell to ask the receptionist to send for a priest. Arundell did mention the priest on the first occasion, on one occasion, though in different terms. He said ' at that stage they called the priest to give him the last rites'.

[30] On the first occasion Martin McCausland described his motor cycle as a Suzuki 750. He could give no explanation as to why he made this error. He was an experienced motor cyclist and an enthusiast. Donnelly's description to Mr Andrews of Kennedy's motor cycle as a Suzuki 750 was not disputed. His motor cycle was the one that was conveyed in the van to Coleraine Hospital and left there. Arundell thought it was Martin McCausland who accompanied

the plaintiff in the ambulance. In the absence of a convincing explanation why Martin McCausland with his experience described his motor cycle as a Suzuki 600, this could be a significant piece of evidence if Kennedy was being 'air-brushed' out of the incident on the first occasion, as suggested.

[31] Kevin Williams was an impressive and confident witness. It is clear from his evidence alone, though it is supported to some extent by that of Constable Eardley, that the cyclists who overtook the van were travelling very fast. This is in marked contrast to the evidence of Arundell that he did not 'do speed' and 'preferred a relaxed ride'. His motor cycle was a touring motor cycle. The other machines mentioned were more in the nature of racing motor cycles with top speeds well in excess of 100mph and probably close to 150mph. Donnelly described Arundell as someone they met at Dolan's and who was 'tagging along'. If that be correct I doubt if Arundell would keep up with these other motor cycles if they were being driven very quickly. He was not a racing enthusiast whereas the others were.

[32] Richard Kennedy in evidence described his route from Omagh as via Plumbridge and New Buildings. This was an odd choice of route. I was quite satisfied that he chose this route to distance himself from Strabane and Dolans where the other bikers had gathered. This raises the question - why did he do so? He also stated that he and his brother left Omagh and the restaurant to proceed to Coleraine at 0845. The police were tasked to the accident at 1130. Given the distances involved and the absence of evidence that the journey was interrupted in any way Kennedy should have been in Coleraine long before the accident occurred. This raises the question - why did he say he left Omagh at 0845?

[33] Of the persons present at the scene of the accident only the plaintiff and the first defendant were present at the first day of the trial on the first occasion. Martin McCausland and Brian Donnelly attended on the second day. Donnelly and the Kennedy brothers appear to have been unaware that a claim was ongoing which in the circumstances and considering the friendships is unusual to say the least, particularly when on the day in question there was no understanding of how the accident occurred. As one witness testified Omagh is a small place and word gets around about what is going on. It is strange that Donnelly was not requested to attend on the first occasion. His evidence on the first occasion was that he saw everything and was in the best position to state who was in the group and the order of the riders on the road. The plaintiff gave evidence that Donnelly told him he saw nothing. Donnelly said on the second occasion that he was only aware of the court case the night before he came to court to give evidence on the first occasion. He also said he only became aware that same night that Arundell was to blame, yet on the first occasion he said that the plaintiff told him about a year after the accident that Arundell had bumped into his motor cycle, yet he did not tell the plaintiff what he alleged he had observed. When Arundell

gave a statement to Miss McGonagle, solicitor, on 29 August 2002 he identified the group as the plaintiff, his brother himself and 'one other'. Thus the identity of Donnelly was not disclosed. The impression that this claim and the nature of it were being kept within the knowledge of a small number of people has not been dispelled. Equally unusual is the marked lack of inquiry as to what had occurred, particularly at the hospital. I do not accept that the condition of the plaintiff would have prevented such inquiry. It is in the nature of things that questions would have been raised and discussions taken place as to what caused the plaintiff's motor cycle to leave the road, unless of course the reason was well known. Similarly, little information was volunteered to the police by those at the scene, nor were names and addresses given to the police by Donnelly, Kennedy or Arundell.

[34] Following the revelations to Axa, Donnelly was described as 'dropping of the radar' and it was difficult to make contact with him. Kennedy described himself as having limited contact with the outside world, albeit he stated this was related to his father being ill. I doubt his father's illness would have prevented contact with his friends. This little piece of information, like the route he chose, begs the question - why was it added in? It is significant that the two persons who spoke to Axa and who alleged to Axa they were threatened (which is not disputed though it is stated it was invented to provide a reason for their retraction) should simultaneously adopt a low profile.

[35] If Richard Kennedy is correct in his evidence as to how he encountered the accident scene, then his brother who was not far ahead of him would certainly have driven through the accident location after it occurred; otherwise he was in front of Martin McCausland or between Martin McCausland and the plaintiff. I think that it is a highly unlikely that a motor cycling enthusiast would drive through an accident scene involving a motor cyclist, particularly on a day when such enthusiasts were all converging on the same destination. If the Kennedy brothers were travelling together why did K Kennedy press on to Portrush as alleged by Richard Kennedy and why did Richard Kennedy, even allowing for his occupation, not follow him if he did so. There are inconsistencies and improbabilities in this account. Together with the choice of route and the questions it raises, they lead me to conclude that Richard Kennedy was not travelling with his brother on this occasion.

[36] At the first hearing the plaintiff stated that Donnelly told him he saw nothing. In those circumstances it is strange that he should cause his brother to contact Donnelly and arrange for him to attend court if there was nothing he could say. On the other hand it could be explained if Donnelly were being asked to give false evidence and would be consistent with that.

[37] Mr Ringland QC highlighted some differences in the accounts given by Arundell. Some of these were minor or might be accounted for by the passage

of time. On the first occasion Arundel stated that he thought Martin McCausland accompanied the plaintiff in the ambulance. He knew Martin McCausland and was, according to his evidence, in his company that day. It is not easy to understand that mistake. However it would be easier to understand why he said that, if Kennedy was being kept out of the account. Martin McCausland said he was riding a 750cc motor cycle which was not true and it appears now a 750cc motor cycle (Kennedy's) was removed from the scene in the van and taken to the hospital. If Martin McCausland said he was riding a 600cc motor cycle and did not travel in the ambulance it might be asked who was riding the 750cc motor cycle and who travelled in the ambulance. At the first hearing the plaintiff would not have known what evidence the defence had gathered.

[38] On the first occasion Arundell described braking and the plaintiff disappearing out of his line of view. He said he pulled over in less than 100 yards having gone beyond the lay-by and parked up his motor cycle (the transcript reads 'packed up' but this is an error for 'parked up'). He then said 'I had to move it because I realised where Mr McCausland was in the field I would be blocking the ambulance so I moved my motorbike into the car park'. The car park was the lay-by. He was asked if he rode the motor cycle back into the car park and replied 'Yes, I tried to get it out of the way as fast as possible'. Then he parked the motor cycle again and stated 'I started looking for Mr McCausland and I seen Mr Donnelly passing me and he stopped further up the road'. He was asked if he knew Donnelly and replied 'I knew him to see, I knew his first name was Brian, that's all I knew of him at that time'. In passing him Donnelly would have been wearing a helmet and in his leathers. On the first occasion Donnelly said he did not really know Arundell. He placed Arundell's motor cycle near the car on the left hand side of the road (where there is a hard shoulder) well beyond the lay-by as shown in photograph 5. His reason for moving his motor cycle demonstrates remarkable prescience as to where the ambulance driver would choose to park.

[39] On the second occasion Arundel said he had known Donnelly 8 or 10 years as an acquaintance. He stated that after braking he did not stop but executed a u-turn and returned along the road to the Limavady end of the lay-by where he parked his motor cycle. This would have taken him through or passed the debris on the road and the plaintiff's motor cycle would have been lying to his left at the verge and visible. After parking he immediately began to look for the plaintiff in the fir trees beside where he parked. Then, from the fir trees, he saw the plaintiff's motor cycle on the far side of the road at the apex of the bend and nearer to Coleraine than he was. He ran to it and searched there for the plaintiff and while standing on the banking there he saw the plaintiff almost opposite him in the field on the other side of the road.

[40] The two accounts of his movement after braking are impossible to reconcile. If he saw the plaintiff in the field before parking in the lay-by there was no need to look for him in the fir tree or on the opposite side of the road. However if he was not involved in colliding with the plaintiff's motor cycle but happened upon the scene when following the others to Coleraine, the second account might make sense. Mr Williams saw a motor cycle in the area beyond the lay-by after he arrived. On either of Arundell's accounts that cannot have been Arundell's motor cycle. Donnelly said he stopped his motor cycle near where the plaintiff was in the field and that he was the first to enter the field to assist him.

[41] At the first hearing it was difficult to understand why Arundell carried out the experiments with a stop watch to time his glance down at his instruments. He said on the second occasion that he performed this within weeks of the accident. If he was the cause of this accident and greatly affected by it and the injuries suffered by the plaintiff (as he suggested) it is not credible that he carried out this experiment within weeks of the accident. If he carried it out at a later time (nearer to his admission to the plaintiff) then it would be consistent with an experiment to discover a feasible reason to put forward as the causation of the accident and his involvement in it.

[42] Arundell was interviewed by Miss McGonagle on 29 August 2002. He was asked about the delay in reporting this accident to his insurers. He stated that he thought an insured person was required to report only a claim and not an accident, he not having been involved in an accident before. This was at best naive and at worst disingenuous, as the real reason he did not report the matter was that he feared prosecution for causing death (or grievous bodily injury) by dangerous driving. If he was present at the time of the accident and came into contact with the plaintiff's motor cycle then he concealed from Miss McGonagle (and the insurance company) the true reason for not reporting the accident.

[43] The direct evidence in support of the contention that Arundell was a member of the group and behind the plaintiff at the critical time comes from Arundell himself and Donnelly. The plaintiff gave evidence that Arundell was a member of the group but cannot say where he was at the time of the accident. His credibility was seriously undermined in cross-examination on the first occasion. Kennedy's direct evidence does not impinge on this issue. Donnelly has given one version in evidence and a different account to the Axa representatives. His credibility has been seriously undermined.

[44] The developments in this case have been as dramatic as they have been serious. They have raised issues for all the witnesses. Ultimately they cause the court to look critically at all the evidence of the first defendant on the issue as to his whereabouts at the time of the accident. The issues relating to the mechanics of the accident as testified by him have already been determined in

the absence of an issue relating to his presence. I have considered carefully all the evidence and the probability or otherwise of various matters being true or false. In that regard it must be said that in the scheme of things it is less likely that a motorist would accept responsibility for an accident were his involvement not true. An admission of such at or close to the time of the accident will bear more weight than an admission months after the event. However in the absence of other evidence undermining a late admission such an admission can be given weight and acted upon as occurred on the first occasion. On the first occasion the issue was restricted to what I have referred to above. The onus was on the plaintiff to adduce sufficient evidence to satisfy the court on the civil standard that the first defendant's motor cycle was in contact with the plaintiff's motor cycle negligently. The issue on the second occasion relates to the presence of the first defendant at the critical time. The onus remains on the plaintiff to establish that fact, not being an issue on the first occasion. However to isolate the issues in a clinical fashion might be to adopt a rather artificial approach, as the evaluation of the evidence and the witnesses must involve a degree of overlap.

[45] In a civil case where the standard of proof is the balance of probability the evidence may be overwhelmingly in favour of a plaintiff (what might be described as near certainty) or just more probable than not (sometimes expressed as 51 %) or somewhere in between. In some instances the evidence to displace a finding of probability may require to be substantial whereas in other cases minimal evidence may be required to reduce the finding of probability to a finding of not probable or less probable or likely (sometimes expressed as not proven). It could not be said that the evidence in this case on the first occasion fell into the first category that is a near certainty, but was in or very close to the second category, that is more probable than not. Bearing in mind the difficulty in separating the issues this may be the fair approach to adopt, where overlap occurs.

[46] The first defendant has given evidence that he was behind the plaintiff at the time of the accident on two occasions. On the first occasion he was not challenged on that issue and the court, naturally, proceeded on an acceptance of that evidence. On the second occasion the first defendant has been so challenged. Having considered the evidence on that issue and bearing in mind what I have said in the preceding paragraph my conclusion is that the plaintiff has failed to adduce sufficient evidence to satisfy me on the balance of probability that the first defendant was directly behind him at the time of the accident. The following factors, seen in the light of the observations about them which I have made throughout this judgment, have been influential in that decision, though they are not listed in any particular order -

- the allegations made by Donnelly to Axa;
- the allegations made by Kennedy to Axa;
- the reasons given for making the allegations and the retractions;

- the threats made to Donnelly and Kennedy;
- Donnelly and Kennedy blaming each other;
- the low profile adopted by both Donnelly and Kennedy following their discussions with Axa;
- the absence of any reference to Kennedy on the first occasions despite the reasonably prominent role he played after the accident occurred;
- the fact that persons who were present on the day did not know of Arundell's claim to be at fault and the resulting court case;
- the speed at which the motor cycles were travelling;
- Arundell's evidence that he 'did not do speed' which seems more in keeping with my assessment of him and he not being a speeding motor racing enthusiast;
- Kennedy seeking to distance himself from Strabane;
- the inconsistent accounts by Arundell as to his movements after the accident which raised a real possibility that he tagged along and some distance behind and came upon the accident some time after it had happened;
- Arundell's late admission;
- Arundell's experiment with the stopwatch.

[47] As I am not satisfied to the required standard that Arundell was present at the time of the accident and directly behind the plaintiff it follows that he could not have been in contact with the plaintiff's motor cycle. In those circumstances his admission to having caused the plaintiff to crash cannot be accepted as fact. Therefore the claim by the plaintiff, based solely on that admission, cannot succeed and is dismissed.

[48] This case has given rise to serious allegations and counter-allegations which warrant further investigation by the appropriate authorities. The evidence has disclosed, inter alia, the possibility of an attempt to obtain compensation from an insurance company fraudulently, the possibility of an attempt to obtain money from an insurance company by deception and the possibility of perjury. I have made no definitive finding on any of these issues. I refer the papers in the case to the Public Prosecution Service for investigation by them and/or the Police Service of Northern Ireland as appropriate.