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

Delivered: **27/03/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

JOHN SAVAGE

Plaintiff;

-and-

PAULA McCOURT

Defendant.

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GILLEN J

Introduction

[1] In this matter the plaintiff claims for damages for personal injuries and loss sustained by him on 22 August 2004 as a result of the negligence of the defendant in the driving of her car on the Washing Bay Road, Coalisland.

[2] Mr Keenan QC, who appeared on behalf of the plaintiff with Mr McCollum and Mr Good QC, who appeared on behalf of the defendant with Mr Collins, helpfully agreed damages during the course of the trial in the sum of £300,000. Accordingly liability was the sole issue for me to determine.

The plaintiff's case

[3] In the course of his examination in chief and cross-examination the plaintiff made the following points:

(1) On 22 August 2004 he was 15 years of age. He had been riding a quad bike ("the bike") in a field belonging to his father. He had been using

motorbikes and quads "all his life" but he knew that it was not licensed to be on the road.

(2) However he decided to drive it from his father's field across the Washing Bay Road to a field on the opposite side of the road. In the course of his evidence he marked on photographs made available to the court by his consulting engineer at least two different areas where he alleged he came out of the field to cross the road. He did have some difficulty because the topography has changed in that his father has now built a new fence and a new house.

(3) He drove across the Washing Bay Road, which it is accepted is approximately 17 feet wide at this area, and pulled into a grass verge on the opposite side of the road with all four of his wheels on that verge. There was a gateway there through which he intended to enter a field.

(4) He brought the bike to a stop i.e. the bike was stationary and fully on the grass verge. He started to get off the bike when he saw a car driving towards him. At this stage it was about 18/20 yards away from him. The car had the appearance of veering from one side of the road to the other side as if braking.

(5) The driver side of the car struck him, caught his right leg with the front wing bumper and carried him down the road a very considerable distance. His leg was caught in under the front bumper of the car on the driver's side with his leg caught between the bumper and the road.

(6) When asked in cross-examination why the car had travelled across the road onto its wrong side and collided with him on the verge, he said that he had seen two girls on the opposite side of the road i.e. on the side of the road where his house was. These girls were walking in the direction of Coalisland (the car was coming from Coalisland) and on the same side of the road as his house thus putting them in the path of the oncoming car.

(7) He opined that "maybe the speed made it come across; the driver had lost control and probably moved out of the way of the two girls". In any event it was his case that the car swerved out past the girls and struck him.

(8) At the time of the accident he had one foot on the bike and one foot on the ground.

(9) He said that after the accident there was slight marking on the footwell of the bike and on the side where his feet sit. The impact with the bike itself was slight and it was otherwise virtually undamaged. The bike did not move from where he had left it.

(10) The point where he identified that he eventually fell off the car was a second telegraph pole depicted on the photographs before me and it is common case that this would have been a distance of approximately 100 metres from the gateway that he was proposing to enter.

(11) He accepted that he had told one of the examining doctors on his behalf that he had been carried "a few hundred yards".

(12) He expressly denied the defendant's case that he had travelled along the road in the same direction as the defendant i.e. towards Coalisland when he performed a U turn into her path without notification making a collision inevitable. He also denied after the accident saying to her "I'm sorry, I'm sorry".

[4] The plaintiff's father gave evidence dealing with the following matters:

(1) He came on the scene after the accident. He marked on the photographs where the plaintiff was found and where the vehicle had ended up after the accident. He positioned the plaintiff's bike after the accident as about half the distance as that described by the plaintiff himself. The car was much further down the road and the ambulance which arrived pulled between the car and where he was.

(2) The defendant's father, who owned the vehicle, came on to the scene and told him that it was "the young boy's fault". The plaintiff's father told him to get his car fixed and he would pay for it. He subsequently did pay for the damage to his vehicle.

(3) There was very little damage to the bike which had been sitting on the verge.

(4) He recalled oil being on the road from the night before and he opined that this may have prevented the car stopping. However he did not remember ever telling police this and indeed he could not even remember a police officer calling at his house on 30 August 2004 about eight days after the accident.

(5) It was not until about six weeks after the accident, that he worked out that the accident had not been his son's fault. It took that long before the son was fit enough to discuss the incident with him.

(6) When he spoke to the policewoman several days later he informed her that "he accepted liability" but after taking legal advice he told her he was refusing to let his son make a statement.

[5] Mr Cosgrove, a consultant engineer who regularly gives evidence in these courts, gave evidence on behalf of the plaintiff and in the course of examination in chief and cross-examination made the following points:

(1) The width of the road from grass verge to grass verge was approximately 16 feet 9 inches. The speed limit at the time of his examination was 40 mph but was probably higher than that at the time of the accident. He suspected that the speed limit was about 60 mph at the time of the accident because this is a rural area.

(2) A driver in the defendant's position would have had an extensive view coming up to the scene of the accident although the brow of the hill impeded the view to some extent. A driver should have had a good view of the plaintiff coming out of the plaintiff's field.

(3) Quad bikes are often used by farmers in the area and one would not make the deduction that it was a child riding it.

(4) He gave the usual travel time distances for 30/60 mph over distances between 26 metres and 104 metres.

(5) The damage to the motor vehicle revealed that there had been obvious right hand front wing contact. The damage to the bumper strengthener was probably the most significant damage. The radiator also needed replaced. Very little damage other than handlebar damage had been caused to the quad bike. It would require a significant blow to the bumper strengthener to cause it to be damaged.

[6] Mr Cosgrove, recognising he had been handicapped to some extent by the fact that he had not examined the quad bike, depicted three possible scenarios which would arise on the basis that the plaintiff was travelling in the same direction as the defendant and made a U-turn across her path taking into account the damage to the vehicles. These were as follows:

- First, that the plaintiff had simply started into the U-turn when the accident occurred. Mr Cosgrove felt that this would cause nearside

damage to the vehicle and significant off-side to the quad and to his right leg.

- Secondly, that the plaintiff was perpendicular to the road when the accident occurred. He would have expected damage to be entirely frontal to the vehicle. If a little past that, the damage would be to the right side but he would expect extensive damage to the quad.
- If the plaintiff was almost finished his U-turn, the quad would be pointing to the nearside verge, and he would expect damage to the front off-side right and to the right leg but he would have expected significant damage to the quad. This was the "least unlikely" scenario.
- His helmet could have damaged the windscreen and the radiator to the vehicle could have been cracked. Therefore neither of these would have required a heavy impact. However the bumper strengthener would have required a significant blow although he accepted that he was not able to say how severe or moderate the impact would have been.

The defendant's case

Civil Evidence (Northern Ireland) Order 1997

[7] Under the terms of the Civil Evidence (Northern Ireland) Order 1997 I admitted in evidence two statements of evidence of witnesses who had been at the scene of the accident. I accepted that the current address and present whereabouts of both witnesses were unknown to the defendant despite investigations carried out to ascertain their current addresses and that the defendant was unable to produce the makers of the original statements as witnesses.

[8] Edward Shevlin was a claims investigator instructed by the defendant's insurance company to investigate the claim. He established that Charlene and Yvonne Bell were present at the scene of the accident. After contacting her mother, he received a phone call from Charlene on 4 October 2006 when she agreed to meet him the following day at her home. On 5 October 2006 she dictated a statement to Mr Shevlin signed by her in the presence of her boyfriend. In the course of that statement she said that on the day of the accident she and Yvonne Bell were on the side of the road of the grass verge i.e. opposite the plaintiff's house and therefore opposite the side of the road on which the plaintiff asserted they were walking. Accordingly it was suggested to the plaintiff in cross examination that there was no need for the defendant to have pulled over onto his side of the road to have avoided the pedestrians. Ms Bell's statement also records the plaintiff coming out of the gate of his home and riding towards Washing Bay i.e. as described by the defendant and rejected by the plaintiff.

[9] Yvonne Bell was contacted by telephone by Mr Shevlin and provided a verbal account of her recollection of the accident to Mr Shevlin who made notes on the

conversation after the telephone call ended. He subsequently sent a statement of her account to the address she gave him on 13 November 2006 but he did not receive a return of the signed copy. The note of that telephone call records she agreed with Charlene Bell that they had been on the opposite side of the road from the plaintiff's house walking in the direction of Coalisland.

[10] Despite investigations having established an address for Ms Yvonne Bell and a letter left for her requesting she contact the offices of the investigator, no contact was made by her. Further investigations to trace the current addresses of the witnesses proved unfruitful. The plaintiff had attempted to subpoena the witnesses but again had not succeeded in securing their attendance.

[11] Under Article 3 of the 1997 Order, in civil proceedings evidence shall not be excluded on the ground that it is hearsay. Under Article 5, 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 to the reliability or otherwise of the evidence. I have no reason to believe these witnesses were other than competent but I am satisfied that they have been reluctant to participate in these proceedings. That obviously goes to the weight of their evidence. Nonetheless, I can see no reason why these witnesses would have chosen to lie about the side of the road upon which they were walking or their direction of travel as at the time they gave their statement they would have not known of the significance of this. Hence I believe there is some measure of weight to be given to what they have said.

[12] Ms McCourt gave evidence on her own behalf and in the course of examination in chief and cross-examination she made the following points.

(1) In 2004 she was 22 years of age and had lived her whole life about three miles from the accident in Coalisland. She had been driving about six months at the time and was a restricted driver.

(2) On the day of the accident she had been at chapel and was going home having travelled about five miles to the accident spot in her mother's VW Polo. She knew the Savage house well.

(3) Driving in the direction of Washing Bay from the direction of Coalisland, she was passing the former Savage residence when she saw the quad bike with a helmeted driver travelling in the same direction as her on the left hand As she was travelling faster than the bike at 35/40mph she indicated to pass it.

(4) She indicated and pulled right to the far side of the road but at that moment the bike came across her as if making a U-turn. She

immediately applied her brakes but there was a collision and the plaintiff hit her windscreen with the bike coming up the side of her car.

(5) He ended up behind her car. When she alighted from her car and approached him he kept saying "I'm sorry, I'm sorry". He was about seven feet from the boot of her car at that time. The bike was on the road with all four wheels there.

(6) She recalled, prior to the accident, driving past two walkers who were walking on the opposite side of the road to her towards Coalisland. There was no need for her to pull out to avoid them and they presented no impediment to her.

(7) She emphatically denied that she had driven across the road and into the plaintiff when his four wheels were on the verge opposite. She denied that he became entangled at the front bumper and that she dragged him along the road for any or a considerable distance.

(8) She was adamant that she was driving within the speed limit. She asserted "As soon as I saw him cross my car I braked and the car skidded a bit."

(9) Despite the presence of pedestrians and houses she felt she was travelling at a reasonable speed. There was "a good distance" between her and the girls who were walking. She had seen them about the entrance to the house of the Savages and although there was "a good view" she could not explain why she had not seen them long before this.

(10) She had not seen the quad bike coming out onto the road even though she must have had a very good view up to the location in question.

(11) She said that she felt it unnecessary to slow down or sound her horn when overtaking the quad bike. She had left a safe distance between herself and the bike given the width of the road.

(12) She rejected Mr Keenan's suggestion that if her car collided with a quad bike one would have expected more damage to it and that the absence of damage suggested she hit the plaintiff when his bike was stationary on the verge. She responded that it was simply the right side of the quad that was hit. The bike had gone up the right side of the vehicle and it had not been on the verge or near the verge when the accident happened. Damage to her vehicle was front driver side.

[13] Counsel drew to her attention paragraph 206 of the Highway Code which states:

> "Drive carefully and slowly … when approaching pedestrians on narrow rural roads without a footway or footpath. Always slow down and be prepared to stop if necessary, giving them plenty of room as you drive past."

The plaintiff asserted that there was plenty of room and that her speed was proportionate and reasonable in the circumstances.

[14] The defendant called Mr Trevor Wright, another consulting engineer who regularly gives evidence in these courts. In the course of examination in chief and cross-examination he made the following points:

(1) He had measured the distance between the field gate which the plaintiff alleged he had been attempting to reach and the second telegraph pole described by the plaintiff as the place where he eventually came off the vehicle at a distance of just over 100 metres.

(2) Having examined the damage invoice to the vehicle and added to this his limited knowledge of the damage to the quad bike he agreed that the third scenario of Mr Cosgrove (see paragraph 6 above) was the most likely accident scenario i.e. where the quad had almost completed the U-turn. All of the damage was explicable by a light impact with the possible exception of the bumper strengthener. To get bumper strengthener damage would be consistent with the front off-side of the vehicle impacting with the footrest of the quad bike. The footrest is a solid object and if the front off-side of the vehicle struck that footrest it could account for a high pressurised local impact and a severe injury to the plaintiff's leg at that location. This is reconcilable with the damage to the quad and to the vehicle and the plaintiff's injuries.

(3) However if one accepted the plaintiff's scenario namely that he was parked with his vehicle on the verge, it is "hard to understand" the damage although he did concede the damage was consistent with either of the competing versions.

(4) Mr Wright posed a further possible scenario. The bike was mainly through its U-turn and the defendant struck it at an angle. This could account for the corner of the vehicle hitting the footrest causing localised impact. In that scenario the bike would move down the right

side and the impression the defendant would form would be one of the bike travelling down her right hand side.

(5) Finally, Mr Wright asserted that if his leg had been between the two bike wheels and the car at an angle, his leg could have been driven against the quad causing severe damage to the leg and damage to the footrest.

[15] Mr McCourt, the father of the defendant gave evidence that he had arrived at the scene and found the bike a couple of car lengths behind the car with its four wheels on the road close to the verge. He confirmed that the plaintiff's father had paid for the damage to his car.

[16] The final witness was Constable Wright who had been involved in the investigation of the accident albeit police had not attended at the accident scene until some days later. She did not recall the conversation with the plaintiff's father when she had attended his house some days later but she did make a note of what was said. The note recorded that the plaintiff's father "stated his son was in the Ulster Hospital with a very serious foot injury, he accepted liability and agreed to make good the damage caused to Paula McCourt's vehicle but after taking legal advice was refusing to let his son make a statement".

Secundum allegata et secundum probata

[17] Mr Good contended that the plaintiff's claim that the defendant had crossed the road and collided with the plaintiff who was stationary on his bike on the opposite road verge was irreconcilable with the defendant's case which was that the plaintiff, without warning, carried out a manoeuvre which led to his bike cutting across her path when she was attempting to overtake him. It was counsel's submission that the plaintiff cannot at the end of the case argue that should his claim under his own factual matrix fail, then he is entitled to have the defendant's case adjudicated upon and should there be any negligence found in relation to the defendant's case then the plaintiff can succeed.

[18] It was Mr Keenan's contention that the judge, in his role as a jury, is entitled to arrive at his own theory of the accident within the framework of the evidence. That can be made up of the result of a portion of the evidence given by one witness, a portion of the evidence given by another and inferences drawn from the portions of the evidence accepted by them. A theory so framed will be sustained if it is reasonably consistent with the evidence as a whole.

[19] Mr Keenan further contends that the plaintiff's statement of claim was sufficiently widely drafted to cover both versions of events put forward by the plaintiff and the defendant and the defendant cannot be taken by surprise in that it is the defendant's own evidence which proposes a different version of events.

Despite the fact that the plaintiff has stated in a reply to a notice for particulars that he was stationary at the time of the collision, this should not preclude the court finding as a fact that he was not stationary and yet still finding in his favour.

Conclusion on this issue

[20] Both counsel addressed the leading case in this matter of Graham v E and A Dunlop Ltd (NIJB 1977 No. 1). In that case the plaintiff, a plasterer's helper who was working on a block of flats, alleged that a platform of a hoist upon which he had stepped fell from the third floor to the ground. The defence case was that the accident happened due to the plaintiff having wrongfully and contrary to instructions travelled upon the hoist. It was the plaintiff's contention that the rejection of the plaintiff's account of the accident did not necessarily result in the failure of his claim but that the jury should have been invited to consider the validity of the plaintiff's claim on the basis of the case put forward by the defendant e.g. no warning sign erected by the defendant not to travel on the hoist.

[21] Jones LJ, at page 4, rejected this argument. He cited with approval the observation of Black LJ in Walsh v Curry (1955) NIR 112 at 134:

> "Under our system of pleading in the High Court cases have to be decided secundum allegata as well as secundum probata. In my opinion the plaintiff was not entitled without an amendment of the pleadings, which was not sought in the instant case and clearly was not desired, to judgment against Wallace on a totally different issue from the one raised in the statement of claim and on an issue which deliberately and significantly (*words which might very well be pertinent to the instant case*) her advisors never sought to raise or rely upon at the trial."

[22] In my view the thrust of Graham's case is that where a plaintiff seeks to justify a verdict on a ground which is not just a variation, modification or development of what is averred but is something which is new, separate and distinct, the principle of secundum allegata et secundum probata applies. In short the duty of a trial judge is to consider matters which are an issue on the pleadings and which were supported by evidence and only those matters.

[23] However it may be of significance that in Graham's case, the alternative theory put forward by the defendant was advanced only as a theory and, as Gibson LJ stated, "Indignantly rejected by the plaintiff". What would the situation have been if there had been positive evidence to support the defendant's case? If for example the defendants had called a witness to say that was what the plaintiff had done, "other considerations would then apply and there would be evidence for the

jury to consider if the suggestion was left to them by the trial judge" (per McGongial LJ at p. 7).

[24] Mr Keenan drew my attention to the case of Grimley v Henry (1981) 1 NIJB 6, a decision of the Court of Appeal in Northern Ireland. In that case the plaintiff made the case that he was walking along the side of the road when he was struck by the defendant's car. The defendant alleged that he collided with the plaintiff when the plaintiff was lying across the road. Rejecting the case of the appellant/defendant that the judge ought to have withdrawn the matter from the jury, and, citing with approval Casey v Martin (1920) 54 ILTR 26, 185 for the proposition that a jury is entitled to arrive at its own theory of the accident within the framework of the evidence, Jones LJ said at p. 5:

> "The kernel of the matter is that the learned trial judge could not properly, on any view of the facts, have withdrawn the case from the jury. One hasn't really to go further than to say that, on either account of the accident, that is the respondent's or the appellant's, there was a substantial case to be made against the appellant on the evidence."

[25] In Irvine v O'Hare, a Northern Ireland unreported judgment of the Court of Appeal 10 February 1987, Lord Lowry CJ cited with approval a much earlier case where a judge said:

> "A jury or other tribunal trying a case of negligence arising out of a collision between two vehicles, have to try and reconstruct the collision. In doing this, they are entitled to form what I may call a theory of the collision. I use the word theory in this sense, that it is not, necessarily, confined to a combination of the reasons given by all the witnesses; for it may be a version which is the result of three elements –
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> (1) Portion of the evidence given by one witness;
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> (2) Portion of the evidence given by another witness;
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> (3) Inferences drawn from the portions of the evidence accepted by them.
>
> And a theory so framed will be sustained if, fairly looked at, it is reasonably consistent with the evidence as a whole."

[26] The arguments of Mr Keenan have persuaded me that his is the stronger argument in this instance. Road traffic accidents are notoriously susceptible to variations in accounts. In this case it is common ground that the plaintiff had driven across the Washing Bay Road at some stage, that he had reached the right hand side of the plaintiff's pathway at another stage and that an impact occurred. It is the plaintiff's case that he had reached the grass verge and was stationary whereas it is the defendant's case that he had not reached the grass verge and that a collision occurred. This is meat and drink of road traffic cases where in instance after instance not only plaintiffs and defendants but wholly independent witnesses can at times give conflicting and varying accounts of what has happened. Whether one approaches this on the basis of Graham and asks if such aspects of evidence are in terms merely a variation or modification of the plaintiff's case or whether one adopts the Irvine approach of forming "a theory of the collision" based on different portions of evidence, in road traffic accidents of this kind the courts should be slow to invoke the purist approach of finding two wholly separate and unconnected versions. I am satisfied that the general pleading of the plaintiff allows him in this instance to ask the court to form a theory of how this accident happened by combining aspects of all the evidence before the court recognising that human frailty makes for difficulties in accurate recall of rapidly unfolding incidents in a road traffic accident.

Conclusion on liability

[27] I have come to the conclusion in this case that the plaintiff has failed to satisfy me on the balance of probabilities that the defendant was guilty of any negligence. I have formed this view for the following reasons.

[28] First, I found the plaintiff a singularly unimpressive witness which could not be accounted for by mere inaccuracy of recall. I do not expect lambent precision from a plaintiff in these circumstances but the evident exaggeration on the part of this plaintiff led me to conclude that his evidence was inauthentic and struck a false note. In my view he clearly has difficulties distinguishing between fact and fiction in recalling the events of this accident. The stitch work that tacked fact and fiction together was soon revealed in the course of his evidence.

[29] It was entirely implausible for him to suggest that he had been dragged 100 metres by the vehicle (or indeed several hundred yards as he suggested to one of the doctors). I have no doubt that had this occurred his injuries would have been far greater than even they were. This suggested a level of exaggeration on his part which is difficult to overcome. It was not supported by any of the other evidence in the case.

[30] Secondly, it was equally implausible for him to suggest that the bike had remained where he had parked it on the verge. I find it inconceivable that an impact

of this kind would have allowed it to remain in the position that it was at the time of the accident.

[31] Thirdly, I believe that he was deliberately misleading the court when he gave evidence that the two witnesses on the roadway, namely the two girls, had been on the defendant's side and that she swerved to avoid them. Whilst obviously I am constrained in the weight that I can give to the statements of witnesses who did not venture to come to court and stand over them, nonetheless I can conceive of no reason why they would have been telling untruths about the side of the road that they were on and how they could possibly have missed observing the defendant veering to avoid them had this been the case. I believe he manufactured this part of his evidence.

[32] Fourthly, it was clear from a very early stage of his evidence that his recollection of this case was seriously flawed in that within a short time he gave different accounts of the location of the field from which he had emerged on his bike. As I watched him give this evidence, it struck me that he was tailoring his evidence to what he felt best suited his case. The most charitable thing one could say on his behalf at this stage was that he is totally confused as to the facts of this accident.

[33] I found it curious that the plaintiff had taken six weeks after the accident to give his account of the matter to his father. Even then why did his father not seek to recover the damage to the defendant's vehicle which he had paid out soon after the accident? This all carried a resonance of the defendant's assertion that after the accident the plaintiff had apologised to her.

[34] On the other hand, I was very impressed by the defendant's evidence. She struck me as an honest, straightforward witness doing her very best to give an honest account of what had occurred. She made no attempt to fashion her evidence to suit her case either in terms of speed or the events of the accident. I had no doubt that when watching her, she was telling me the truth.

[35] The deductions drawn from the damage to the vehicle by both engineers were in many respects uncertain and ambiguous. Having considered the damage to both vehicles, I determined that there was weight in Mr Wright's assertion that frankly the damage could have been consistent with either party's case.

[36] I find nothing in the defendant's account that would have alerted her to anything unusual on the part of the plaintiff or to the potential of what was about to happen. There was no indication that the driver of the quad was a 15 year old boy in circumstances where apparently adults in farming communities regularly use such vehicles and should not be used by children on the public highways in any event. There was no evidence that she could have driven further to the right when overtaking. Moreover there is a school of thought that sounding her horn as she

passed might well have been dangerous. There was no reason to believe that any emergency existed and that by the time she had taken the decision to overtake, the U-turn of the plaintiff (which I believe occurred) left it too late for her to take any effective avoiding action other than that which she did.

[37] I reject entirely the suggestion by the plaintiff that the defendant had lost control of this vehicle and veered off the road on to the grass verge where he was effectively parked

[38] I have no reason to believe that the defendant's speed was anything other than perfectly normal on this road where she had a good view, was driving well within the speed limit and was simply overtaking a quad bike which at that stage was acting perfectly normally. I find no relevance in the fact that she did not recall seeing the bike emerge from the field since I believe that he continued in the direction of Washing Bay. Nothing would have led her to suspect that the driver would make a U-turn in the circumstances that actually did occur. It is simply unrealistic to suggest that this driver should have reduced her speed below 35/40 mph when overtaking a quad bike whilst she was on the other side of the road i.e. having overtaken the bike which remained on her original side of the road.

[39] In all the circumstances I have come to the conclusion that there was no negligence on the part of the defendant and I therefore dismiss the plaintiff's case.