

BETWEEN:

MARK STEPHEN GILBERT

Claimant

and

MARGARET PAYNE

(Executrix of the Estate of Stuart Lesley Payne)

Defendant

JUDGMENT

1. In this case the Claimant, Mr Gilbert, claims damages arising out a road traffic accident which occurred at about 10.15am on Sunday 20 July 2014. The accident occurred when a Kawasaki motorcycle ridden by the Claimant collided with a bicycle ridden by Stuart Payne. There is no dispute that the collision took place. Tragically, Mr Payne was killed and Mr Gilbert sustained serious injuries.
2. The Claim was issued on 21 June 2017. The Defendant is Mrs Margaret Payne, who is the widow and executrix of Stuart Payne. The case was listed before me for a trial on the preliminary issue of liability. I heard evidence and submissions on 17 and 18 September 2019 and I then reserved judgment. This is that judgment. Mr Gilbert represented himself. Counsel, Mr McLaughlin, appeared for Mrs Payne.

Background

3. Although the key issue of negligence is very much in issue, the background is not significantly in dispute and, save as appears below, I find the following facts established on the balance of probabilities.
4. On 20 July 2014 Mr Gilbert and a friend, John Andrews, were out riding their respective motorcycles. Mr Gilbert was riding his Kawasaki ZX-6R motorcycle (registration number KX06 DDV "the Kawasaki") and Mr Andrews was riding a Yamaha R (registration number YR57 YBZ). The weather was fine and road conditions were dry.
5. The route taken by Mr Gilbert and Mr Andrews took them on the B6047 from Market Harborough towards Melton Mowbray. They passed through the village of Great Dalby. Mr Gilbert was in front and Mr Andrews was riding a little way behind.

6. The B6047 from Great Dalby to Melton is a single carriageway road with one lane in each direction. After leaving Great Dalby the speed limit is the national speed limit of 60mph. The edges of the road are marked by a solid white line on each side. The centre of the road is marked by a dotted white line. The road passes a disused airfield on the left-hand side and there a long, level and straight stretch before the road reaches what is described by PC Bird [303] as a “gentle” left-hand bend. Coming from the direction of Great Dalby there is a turning to the right approximately two-thirds of the way through the bend. That junction is with a minor road known as Sandy Lane. In addition to the dotted white line in the middle of the road, the first half of the bend is marked by a single solid white line bordering the northbound lane, and the second half by a single solid white line bordering the southbound. Each lane is about 2.6m wide. An aerial photograph is at page [214].
7. The collision between Mr Gilbert and Mr Payne occurred a little after the junction with Sandy Lane, coming from Great Dalby. The precise point of first impact is disputed. I shall deal with the evidence as to impact in more detail below. The force of the impact pushed Mr Payne and his bicycle along and across the B6047 towards Melton. The Kawasaki also fell over and Mr Gilbert and the Kawasaki also skidded along the road. Mr Andrew’s motorcycle was a few seconds behind and he ran into the debris on the road. He, too, fell over.
8. A number of passers-by came upon the scene and the Police and Ambulance Services were called. Although some of the witnesses saw either Mr Payne or Mr Gilbert prior to the collision (and I shall return to this below), none of them actually saw the impact. Witness statements were taken by the Police from a number of people.
9. PC 1027 Bird attended together with other officers. He arrived at the scene at 11.50am on the day of the collision (ie about 1½ hours after the impact). He examined the scene and took a series of photographs and measurements. At his direction another officer (PC Hinton) carried out a 3D laser scan of the scene. He later prepared a written report [300], in which he records the various marks which he found at the scene.
10. Mr Andrew was interviewed under caution at Melton Police Station at 13.20hrs on the day of the accident. Transcripts are at [251] and [266]. Mr Andrew explained that he had come around the bend “minutes afterwards or whatever” and there was “debris everywhere.” He explained that a wheel had come from nowhere under the front of his bike and that had caused him to fall off. It is apparent that he had not witnessed the collision.
11. On 10 March 2015 Mr Gilbert was interviewed under caution. A transcript is at [145]. He was asked for his recollection of events and I shall return to this below. In due course Mr Gilbert was charged with an offence of causing death by careless driving. A jury trial took place at Leicester Crown Court in which expert evidence was given (by PC Bird for the prosecution and Mr JA Griffin for Mr Gilbert). Mr Gilbert was convicted on 17 August 2017 and was sentenced to 9 months’ imprisonment suspended for 2 years [31]. He appealed the conviction, but his application for permission to appeal was dismissed by the Court of Appeal on 12 June 2018 as being wholly without merit. Mr Gilbert has continued to deny his guilt (see eg his email dated 30 June 2019 [57]).
12. In the meantime, on 15 February 2017 Mr Gilbert’s then solicitors (Cramer Solicitors) wrote a letter of claim to Mrs Payne setting out Mr Gilbert’s version of events [84A].

13. The Claim Form was in these proceedings was issued on 21 June 2017 [4]. At that stage Mr Gilbert was represented by Cohen Cramer Solicitors.
14. On 30 June 2017 the Court received (and subsequently issued on 19 July 2017 under claim number D67YX446) a Claim Form by which Mrs Payne (on her own behalf and as executrix of Mr Payne's estate) made a claim against Mr Gilbert. The Particulars of Claim are at [75]. A Defence (dated 22 November 2017) was filed on behalf of Mr Gilbert in those proceedings in which he explained that he had no clear recollection of the accident circumstances ([78] – see further below). That claim was subsequently settled by Mr Payne's insurers and there was never any determination on the merits.
15. Mr Gilbert sustained serious injuries as a result of the accident. Although the issues of causation and quantum of loss have not been explored before me, and I am not making any specific findings in this regard, I note that according to the medical report filed on Mr Gilbert's behalf from Mr Gillham FRCS (consultant orthopaedic and trauma surgeon) dated 23 July 2017 [333]) those injuries are said to include multiple neck and spinal fractures, a complete avulsion injury of his right brachial plexus and right vertebral artery dissection. The schedule of loss claims sums in excess of £860,000.
16. The trial of the preliminary issue on liability was directed by the order of Deputy District Judge Calnan made on 24 January 2019 [35].

Statements of case

17. The Amended Particulars of Claim (dated 1 June 2018 and prepared by Mr Gilbert who by then was acting in person [6]) is on its face a partial response to the proceedings which Mrs Payne had brought against him. Under the heading "Details of the Incident" Mr Gilbert set out the following
 8. I now accept that I may be a bit confused as to where Mr Payne was when I first noticed him, two brain experts have explained to me how this can happen. Apparently, it is very common for people to make mistakes and get things a bit mixed-up after receiving a major head trauma. I also accept that some of the terms are used in my statement to describe certain moves I made and my road positions could have been misleading or misunderstood. **However, I do remember moving to the left to try to avoid a collision with Mr Payne**, this has also been proved by crash investigators.
 9. It's been proved and agreed by two crash experts that **Mr Payne turned to the right** into the path of the motorbike and therefore made a major contribution towards the crash.
 10. Mr Payne did not give any hand signals or any indication that he was about to turn to the right.
 11. When Mr Payne turned to the right I was too close to apply the brakes, **the only course of action I could take was to move to the left to avoid him**, this would also explain why the police reported me being so close to the left side of the road just before the crash.
 12. All the above was caused by Mr Payne's negligence" (emphasis added).
18. The Defence (dated 2 July 2018) [21] relies upon the defendant's conviction pursuant to section 11 of the Civil Evidence Act 1968 and asserts that the collision was caused and/or

contributed to by the negligence of the claimant. Extensive particulars of negligence are set out including (a) riding too fast in the circumstances (b) riding in excess of the speed limit (c) failing to keep any or any proper look out (e) failing to move into the opposite lane in good time in order to overtake the deceased if that is what he wished to do (f) failing to give the deceased a sufficiently wide berth when passing him and (k) riding into the deceased pedal cycle from behind. The Defence also set out inconsistencies given in various accounts supplied by Mr Gilbert.

19. The Defendant's case as put in cross examination and final submissions was that Mr Gilbert was lying as to the account which he was now giving of the accident and his claim was dishonest in seeking to recover damages from the defendant.

Law

20. It is Mr Gilbert who brings the claim and it is for him to prove that Mr Payne was negligent. The standard of proof required is the balance of probabilities.
21. The Defendant seeks to rely on Mr Gilbert's conviction. Section 11 of the Civil Evidence Act 1968 provides that any subsisting conviction by a United Kingdom court is admissible in subsequent civil proceedings to prove that the offence was committed by the person convicted, whenever it is relevant to do so. By subsection 11(2) it is provided (in effect) that the conviction establishes a presumption that the convicted person committed the offence which operates until it is rebutted by being disproved on the balance of probabilities.
22. As is pointed out in *Phipson on Evidence* (19th ed., para 43-89) the provisions of section 11 are far from easy to operate. There are cases which suggest that it would be an abuse of process for a person to bring an action which amounted to a collateral attack on his own previous conviction unless he had fresh evidence which entirely changes the aspect of the case (*Hunter v Chief Constable of West Midlands Police* [1982] AC 529, HL) but I have not heard argument on that issue and I therefore approach the case on the simple basis that it is for Mr Gilbert to prove that he did not commit the offence.
23. It is also important to bear in mind that, even if the Court is satisfied (whether relying on Mr Gilbert's conviction or not) that Mr Gilbert was negligent, it is possible that Mr Payne was also negligent. The conviction of Mr Gilbert does not answer the question of whether Mr Payne was also at fault.
24. It has been submitted by the Defendant that in fact Mr Gilbert's and his claim are fundamentally dishonest within the meaning of section 57 of the Criminal Justice and Courts Act 2015 and CPR Part 44.16 respectively.
25. A claim is "fundamentally dishonest" if the dishonesty goes to the root of either the whole of the claim or a substantial part of it (see *Howlett v Davies* [2017] EWCA Civ 1696).
26. In *Ivey v Genting Casinos Limited (t/a Crockfords Club)* [2017] UKSC 67 the Supreme Court restated the common law test for dishonesty and, in summary, held that whilst dishonesty is a subjective state of mind, the standard by which the law determines whether that state of mind is dishonest is an objective one, and that if by ordinary standards a defendant's mental state is dishonest, it is irrelevant that the defendant judges by different standards.

Evidence of fact

27. I heard oral evidence from the Claimant. He also called Georgina Ann Rymer and Simon Timothy Paul Askew to give oral evidence.
28. For the Defendant, Mrs Payne was called to give oral evidence, although in the event Mr Gilbert did not ask her any questions at all.
29. **Mr Gilbert.** In order to put Mr Gilbert's oral evidence in context, it is necessary first to set out the various accounts of the accident which Mr Gilbert has given either directly or through his solicitors
 - a. *Recorded police interview under caution (conducted by DC Bingham) on 10 March 2015.* A transcript is at [145]. He said [146] "I entered the bend which is the big sweeping left hand bend. I was about three quarters of the way through it and **I saw a cyclist on the opposite side of the road coming towards me. I thought nothing of it for a split second. I looked back down to the road to check where I was and to check my line as I glanced up again I'd covered obviously some more ground and this particular time he was turning his bike into the middle of the road. And that's all I can remember.**" It was suggested to him by DC Bingham that his recollection of the incident was brief. He was asked whether that was because he was struggling to remember what had happened and was asked whether that was the sole amount of what he could recall that day. Mr Gilbert replied "okay be honest I say came around the bend he was on the opposite side of the road coming towards me and I looked back where I was going and then I looked back to where he was and he was halfway across that line turning his bike into the middle of the road. And that's all I can remember." A similar comment was made later in the interview [173] but he added that Mr Payne was turned across him at an angle of about 45 degrees facing away from him (Mr Gilbert) towards the airfield [178].
 - b. In the *letter of claim dated 15 February 2017* sent by his then solicitors (Cramer) it was said that [84A] "the claimant was . . . Travelling from Dalby village towards Melton Mowbray. As the claimant exited a left-hand sweeping bend around the junction of Sandy Lane the deceased, **riding a pedal cycle appeared to be coming towards him on the opposite side of the road. The claimant looked away for a minute to check his line. Following which the front part of the pedal cycle was positioned at around a 45° angle across the centrepoint of both carriageways and continued his manoeuvre directly into the path of the claimant's motorcycle.** The collision occurred shortly after the junction with Sandy Lane."
 - c. In his *witness statement dated 23 September 2017* (and the statement upon which he relies with regard to the trial of the preliminary issue now before me [86]) he said (para 5)

"as I approached the left hand bend before Sandy Lane the road in front of me was clear. I was around two thirds of the way around the bend about to exit the bend when I **noticed a pedal cyclist who appeared to be coming towards me but who could have been static. I looked away for a split second to check my line and as I looked up the front part of the pedal cycle was at a 45° angle across the centrepoint of both carriageways and the cyclist was looking down the right-hand side of his bike towards the floor. By this time he was around 15 to 20 feet in front**

of me and appeared to be riding directly into my path. I could not go to the right so I veered to the left trying to miss him and that is all I remember.

He continued in paragraph 7 “I had absolutely no time to avoid the cyclist as he rode directly in front of me. I am an experienced motorcyclist. I had been riding for just under 10 years at that point and would cover around 3000 miles a year plus . . .”

10. Everything happened so quickly from my first seeing the defendant to him riding into my path and **my swerving to the left**. I have no recollection of the accident after this point until I eventually regained consciousness in intensive care.

- d. In the *Defence filed on Mr Gilbert’s behalf in the separate proceedings brought by Mrs Payne* against Mr Gilbert, dated 22 November 2017, with a statement of truth signed by a solicitor Mr Wallace saying that he was authorised to sign it on behalf of Mr Gilbert, paragraph 3 said [78]

“[Mr Gilbert] has **no clear recollection of the accident circumstances due to his head injury and will rely upon expert reconstruction evidence** in respect of the most likely series of events leading to the collision.”

- e. In his *Amended Particulars of Claim* dated 1 June 2018 he said [8]

- i. (para 8) “I now accept that I may be a bit confused as to where Mr Payne was when I first noticed him . . . I also accept that some of the terms are used in my statement to describe certain moves I made and my road positions could have been misleading or misunderstood. However, **I do remember moving to the left to try to avoid a collision with Mr Payne**, this has also been proved by crash investigators.
- ii. (Para 9) “It’s been proved and agreed bike to crash experts that Mr Payne turned to the right into the path of the motorbike and therefore made a major contribution towards the crash.
- iii. Under the heading Particulars of Negligence he said (f) “**the collision was caused by Mr Payne turning right without looking or thinking.**”

- f. In *emails dated 19 February 2019* (which were copied to the Defendant’s Solicitors) he said

- i. (19.06) “I sent you an email with reference to the crash. I was just sitting at home when suddenly everything came back to me, I can remember exactly what happened.”
- ii. (23.06) “I was approaching the last section of the bend. Payne appeared from the right, Sandy Lane. **He crossed over my path and got almost to the other side of the road, by this time Payne obviously knew I was there. He wobbled a bit then turned his head back and looked over his right shoulder at me, as he did that his bike was moving to the right**. He obviously wasn’t aware of the movement, he appeared to be more preoccupied with me. The last thing I saw was Payne and his bike at a 45° angle to me.”

These emails are not in the trial bundle but were produced to me in the course of closing submissions by way of explanation as to part of the email train which is in the bundle.

- g. At the *Pre-Trial review held before District Judge Glassbrook on 12 August 2019* [53] in the light of the email comments dated 19 February 2019 the Defendant had made an application to adduce a supplemental report from her expert Mr Whitehead. However that application was not pursued upon Mr Gilbert confirming to the judge that (as is

recorded in the Order) he did not intend to amend his particulars of claim to plead that Mr Payne had exited from Sandy Lane.

30. At the outset of his oral evidence Mr Gilbert confirmed that his witness statement was the truth, as he believed it to be, at the time when he made his statement. He said that he could not necessarily recollect what had happened at the time when he made his statement but now he did have a recollection. In cross examination he explained that there were people who were telling him what had happened and he tried to work out what had happened in his own head on the basis of that information. He was asked why when he came to prepare his statement he did not say that he could not recall events. He explained that he had a recollection of what he thought had happened.
31. He was asked whether paragraph 5 of his witness statement (in which he had explained that he was around two thirds of the way around the bend when he noticed a pedal cyclist who appeared to be coming towards him) was correct. Mr Gilbert explained that it was correct at the point when he made the statement. He was then asked whether it was still his recollection and he answered "no." He said that his recollection had changed about four or five months ago.
32. He was asked whether he had any recollection of the period leading up to the crash. Mr Gilbert said he had what he thought was a recollection of something which had happened but he was not 100% clear on it. When asked whether this was based on his own recollection or on what others had said Mr Gilbert explained that it was based on what he thought had happened and that leading up to the crash he had recollections. He said that he believed that he had seen a pedal cyclist coming towards him but that he was always willing to accept that he could have been wrong.
33. He was asked whether he no longer recalled a cyclist coming towards him and Mr Gilbert's response was that he was more positive that a cyclist was not coming towards him.
34. It was suggested to Mr Gilbert that his account was a pack of lies to deflect blame for the accident. Mr Gilbert denied that. He accepted that he had given various different accounts of the accident to the police in interview, the letter from his solicitors and in his witness statement.
35. He said that his account now was that the cyclist had turned right (ie to the cyclist's right) across his path as he (Mr Gilbert) had come around the bend. He accepted that it was possible that he was wrong and that he may have been confused. He said that Mr Payne may have been in the opposite lane to start with. Mr Payne was travelling across him at 90° more or less. The direction of travel was from one side of the road to the other and Mr Payne had been on the opposite side of the road. Mr Gilbert again confirmed that he had recalled all of this 4 to 5 months ago. He said that he had made a witness statement about what he could now recall and had informed the defendant's solicitors.
36. Mr Gilbert was asked about the email to the Defendant's solicitors dated 30 July 2019 [387] in which reference was made to the email sent by Mr Gilbert to a Mr Forman on 19 February 2019 (see above) saying that "Payne appeared from Sandy Lane." Mr Gilbert said that he had assumed that Mr Payne had come out of Sandy Lane but that he was not now saying that. He

accepted that the accident had not occurred at the junction of Sandy Lane and that he did not know where Mr Payne was. Just before impact he had been on the left-hand side of the road about two thirds of the way across. He was more than 0.5 m from the left-hand curb. Mr Payne was at an angle of 45° to him facing away. Mr Gilbert said that he had moved to his right to go round Mr Payne. Mr Payne looked over his right shoulder. He almost got to the far side of the road. Mr Payne was travelling from his offside to his nearside but was facing away from Mr Gilbert. Mr Gilbert said it was difficult to say what the angle was, but it was more likely to be 90°. The impact occurred just after Mr Gilbert moved out to go round Mr Payne. Mr Payne looked over his right shoulder and Mr Gilbert was then on top of him. Mr Payne swerved to the right. His bike at impact was about three quarters of the way across the left-hand lane. He was asked whether Mr Payne had come across and then gone back and Mr Gilbert answered yes. Mr Gilbert said that he was attempting to overtake Mr Payne to his right at the point of impact.

37. When taken back to his witness statement at paragraph 5 ([86] to the effect that Mr Gilbert had moved to the left at the impact) he said that was now wrong.
38. I comment that at no stage did Mr Gilbert seek permission to adduce any further statement explaining what he now contended was the truth. He seeks to rely upon the emails dated 19 February 2009 at 19:06 hours in which he said "I sent you an email with reference to the crash. I was just sitting at home when suddenly everything came back to me, I can remember exactly what happened." At 23:06 hours he said "okay, I was approaching the last section of the bend. Payne appeared from the right, Sandy Lane. He crossed over my path and got almost to the other side of the road, by this time pain obviously knew I was there. He wobbled a bit that turned his head back and looked over his right shoulder at me, as he did that spike was moving to the right. He obviously wasn't aware of the movement, appeared to be more preoccupied with me. The last thing I saw was pain and his bike at a 45° angle to me." He then referred to the evidence of Ms Rymer and Mr Askew (who as I shall set out below suggested by implication that Mr Payne came from Sandy Lane). He then said "I'm only telling you this because I now remember it, right from the start I have always said that he came from the right. But nobody believed me."
39. **Simon Askew** said in his witness statement [103] that he had been a front seat passenger in a car driven by his partner, Ms Rymer. They were travelling from Melton towards Great Dalby and were intending to drop off their son Izaak at a Skate Park which is known as "Terminal 1" which is located on an old runway on Melton airfield. They drove past the Sandy Lane turning (on their left) and after a short while turned right onto the airfield. They dropped their son off and, within a about a minute, turned around and started to drive back to Melton. It was his evidence that he did not see Mr Payne on Dalby Road coming from Dalby towards Melton. After turning back onto the B6074 as they approached the left-hand bend they saw there had been an accident at the junction with Sandy Lane. They got out and went to help. Mr Askew expressed the view, as an engineer, that damage to the bicycle did not (in his view) suggest a rear-end shunt, but rather a side-impact because the bicycle was bent in the middle by the seat-post
40. The unwritten suggestion which was apparently behind this evidence was that the only place which Mr Payne could have come from was Sandy Lane (and that by implication he had pulled across the B6047 into the path of Mr Gilbert. In oral evidence he confirmed that he had not

seen either the bicycle or the motorcycle prior to the collision. Yet at least the motorcycle must have passed along the B6047 at that time.

41. I also comment that Mr Askew is not an expert witness in the case. Experts have a special status in civil cases and they owe an overriding impartial duty to the Court and it is of paramount importance that an expert is familiar with the duties imposed on them under the rules. Expert evidence should be, and must be seen to be, the independent product of the expert uninfluenced by the content of the litigation. Mr Askew has not been instructed, still less reported, as an expert and none of the safeguards set out in CPR Part 35 or Practice Direction 35 have been complied with. Indeed, Mr Gilbert has not sought to rely upon Mr Askew's views as expert evidence within this trial, but I nonetheless make the point about it, lest it thought that I have simply ignored Mr Askew's views for no reason.
42. **Georgina Rymer** is Mr Askew's partner. In her statement [89] she too confirms that she did travelled to "Terminal 1" with Mr Askew and their son and did not see Mr Payne on Dalby Road on the way there. Having come across the accident scene on their way back towards Melton Mowbray she went to help. In her oral evidence she confirmed that she had not seen either the bicycle or the motorcycle prior to the collision.
43. Mr Gilbert also sought to rely upon various witness statements which are in the bundle before me:
 - a. Alison Gilbert [93] is Mr Gilbert's wife. They first met in April 2015 (about 9 months after the accident). Her evidence relates to the difficulties in life which Mr Gilbert has as a result of the accident. Her evidence does not relate to the accident itself;
 - b. Frank Kelly [108] sets out his knowledge of Mr Gilbert and is, in effect, a character witness. He also gives evidence as to the change in Mr Gilbert since the accident. However, he did not witness the accident itself
44. For the Defendant, Mrs Payne gave oral evidence on her own behalf to confirm the truth of her witness statement but in the event was not asked any questions in cross examination.
45. I also have various statements before me which the Defendant relies upon pursuant to the Civil Evidence Acts:
 - a. **Colin Taylor** (statement dated 22 January 2018 [117]). On the day in question he was walking his dogs at Sandy Lane. He saw Mr Payne (who he recognised) cycling towards Melton on the B6407. He did not see the collision but her heard the noise of a motorcycle on Dalby Road and then a scraping noise. He realised there had been an accident and walked back to Dalby Road. In his final submissions Mr Gilbert said he believed that Mr Taylor **did** see the accident but for whatever reason is not being honest about it. However, Mr Taylor has not given oral evidence and in any event, there is no evidence as to what Mr Gilbert believes he saw, if he saw anything. His evidence is of no assistance in determining the issues before me.
 - b. **Dean Lounds** (statement dated 17 October 2014 [125]). He says that on the day in question he was at work (just off the B6407 near Melton). He saw two motorcycles travelling at "very high speed" along the B6407 and a little later heard the air ambulance arrive and went the scene. However, he does not say that the vehicles which he saw were those of Mr Gilbert and Mr Andrews and he did not see the collision. His evidence is of no assistance in determining the issues before me.

- c. **PC Bird** (statement 18 October 2014 [128]). His evidence deals with his attendance at the scene and the recording of information, the taking of photographs, the 3D laser scan, a DVD recorded driver-through the scene, a location plan, a reconstruction plan and a reconstruction report (dated 1 November 2014). The location plan [131] reconstruction plan [132] is of particular assistance in recording the presence of marks on the road and the apparent position of debris and the riders. The narrative account of where marks and items were found is set out in the report (section 4) [137]. It is apparent that the scuff marks on the road commence approximately 45m north of the centre of the junction with Sandy Lane (see also para 4.8 of PC Bird report [137]). The relevance of this evidence is purely factual. PC Bird is not relied upon as an expert in this case (see further below). Mr Gibert makes the valid point that by the time Mr Bird was on the scene items, such as the debris might have been moved. I bear that in mind, but there is no evidence that anyone moved the bicycle or the motorbikes very far from their eventual resting places, and in any event the skid/scuff marks on the road would not moved.
46. Also in the bundle before me is the police report [248]. The Police Report contains a number of additional statements from various witnesses who were at the scene in the aftermath of the crash. I have read all of this material, but none of these witnesses saw the collision or give any relevant evidence about the position of Mr Gilbert or Mr Payne immediately before the impact.

Expert evidence

47. Permission to the parties to adduce the written expert evidence of an accident reconstruction expert was given by the case management order of Deputy District Judge Calnan made on 4 February 2019 [35].
48. The Defendant instructed Mr Whitehead and she relies upon his report. Mr Gilbert has not obtained any expert evidence for the purposes of this case.
49. The position is slightly complicated by the fact that in the criminal proceedings both prosecution and defence adduced expert reconstruction evidence. The prosecution relied upon the expert evidence of PC Bird. Mr Gilbert relied upon the evidence of a Mr Griffin. I have not seen Mr Griffith's report, but they produced a joint memorandum which I have before me at page [69]. However, as I commented in the course of final submissions, that evidence is not expert evidence in *this* case. Mr Whitehead has not had the opportunity of a discussion with any expert, nor has any such expert evidence been tested in cross examination before me. Whilst that evidence forms an important part of the background I repeat that it is not expert evidence before me.
50. That joint report stated [69] that
- a. (para 3) they were of the opinion that the motorcycle would have been to the left of what are described the 'start of the slide mark from the Kawasaki' and that the impact occurred a short distance prior to the commencement of them;
 - b. (para 4) the location of the first marks on the road occurred some 1.3m from the nearside edge of the road (centrally within the northbound lane);

- c. (para 6) they agree that at the time of impact the bicycle would not have been to the nearside of the lane and “would have been subject to an undetermined amount of right movement centrally within the lane.” This is borne out both by the damage to the bicycle and the motorcycle as well as the post collision movements of the vehicles and riders;
 - d. (para 7) they could not provide a definitive reason for the movement of the bicycle but they consider that the rider might well have looked over his right shoulder to check behind him, which has introduced ‘an amount of steering input and movement’;
 - e. (para 8) using the physical evidence alone they determined that when the Kawasaki went to ground (some point after impact), its speed was between 48 and 56mph. (para 9) An amount of speed would have been lost during the impact phase. This was difficult to determine with any accuracy, but it could have been in the region of 5 to 10mph. The full speed range at impact could have been between 53 and 66mph.
51. On the instructions of the Defendant, Mr Whitehead presented a written report (dated 13 May 2019 [182]) and also gave oral evidence. Although no order had been made, at Mr Gilbert’s request he attended for cross-examination. Although he used PC Bird’s photographs, measurements and laser-scan at the basis for his report, Mr Whitehead came to some different conclusions to that set out in the joint report from the criminal trial.
52. In his written report Mr Whitehead explained that his firm (Hawkins) had received initial instructions from Mrs Payne’s insurers in December 2017 and he had considered the police laser scan data in October 2018, together with instructions to prepare a reconstruction report. On 7 February 2018 he had examined Mr Gilbert motorcycle and the remains of Mr Payne’s bicycle and on the same day had visited the accident scene and taken photographs.
53. In his report (which is lengthy and detailed) Mr Whitehead comments (in summary) as follows
- a. (3.2.1, 3.2.2) the frame of the bicycle was made from aluminium alloy tubing and the rear of the frame had suffered extensive damage. The chain stays and seat stays had fractured and detached from the seat tube (photo 9 [242]) and the rear wheel was severely crushed (photo 10 [242]). The rear gear sprockets were missing and were found by Mr Whitehead in a bag of debris. The rear face of the seat tube was at photo 11 [243]. Scuff marks and black rubber tyre transfer marks were present (on the seat tube) which were likely to have resulted from the forwards displacement and crushing of the bicycle’s rear wheel and tyre.
 - b. (3.2.3, 3.2.4) The front fairing of the Kawasaki (incorporating the headlights and windscreen) was entirely detached. The front tyre on the Kawasaki had a number of cuts and marks (photograph 14 [245]). The appearance and alignment of some of those cuts and marks corresponded approximately with the teeth on the rear gear sprocket of the bicycle (as depicted in the photographs at [246]. Mr Whitehead then undertook a comparison of the alignment of the Kawasaki (leaning at angle of 14 degrees) with an undamaged bicycle (see [247]) and the gear sprockets alignment with the front tyre of the Kawasaki.
 - c. (3.2.5) The bicycle was likely to have been generally upright when it was struck (but possibly leaning to one side or the other) and the Kawasaki was most probably leaning

- to the rider's left (as one would expect following a left-hand curve) but it had not capsized onto its left hand side.
- d. (para 3.2.7) The damage to the front fairing on the motorcycle resulted from direct contact with Mr Payne as he in effect "sat down" onto the front of the motorcycle.
 - e. (para 4.4.3) There was a short, dark coloured scuff mark (with the appearance of a tyre mark) visible on the 3D laser scan on the road surface in the northbound lane alongside where the scanner was positioned. (4.4.7) The mark is located approximately 12m south of the start of the slide marks made by the Kawasaki (ie a distance equivalent to about 0.46 seconds at 59 mph). The longitudinal position of the scuff mark along the road relative to the start of the slide marks "is in my view consistent with the scuff mark being made as a result of the impact between the front wheel of the motorcycle and the rear wheel of the bicycle, the motorcycle thereafter capsizing on to its nearside." (4.4.8) the lateral position of the mark is approximately 0.5 m from the edge of the carriageway line. The position of this scuff mark is consistent with a typical riding position for a cyclist.
 - f. (4.4.9) PC Bird did not apparently notice the scuff mark or recorded as significant and it does not appear on his plan. However "in a collision of this type I would expect a scuff mark from the rear tyre of the bicycle at the point where the bicycles rear tyre was struck."
 - g. (4.5.1) Mr Payne and the remains of his bicycle were projected along the road in the same direction as the Kawasaki's post-impact movement.
 - h. (4.5.2 and 4.5.3) On the aerial photograph at figure 5 [218] Mr Whitehead drew a yellow dashed line through the general direction of the scuff marks made by the Kawasaki leading back from the eastern verge and extrapolated back along the road south of the start of the slide marks. He repeated the exercise on the path of Mr Gilbert shown as the red dashed line. The point where the dashed lines intersect is the likely point of impact and is about 12m before the first mark from the sliding motorcycle and coincides with the scuff mark referred to above.
 - i. (paras 4.2.1 and 4.7.3) The calculated post-impact speed of the Kawasaki was 48 to 62 mph. For a post-impact speed of 48 to 63mph, the calculated pre-impact speed range is about 62 to 82mph. (para 4.7.4) There was no physical evidence to suggest that Mr Gilbert motorcycle was subject to very hard braking prior to the accident. If there was any braking Mr Gilbert's pre-impact speed would have been higher than the range 62 to 82 mph.
 - j. (4.8.1) The tyre scuff mark to the south of the motorcycle slide marks suggests that the motorcycle was being ridden close to the nearside of the northbound lane when its front wheel struck the rear wheel of the bicycle. It follows, therefore, that Mr Payne was also probably riding his bicycle in about the same lateral position when he was struck.
 - k. (4.8.2) If Mr Payne had been riding at a significant angle facing towards the left when he was struck Mr Whitehead would expect him to have continued towards the left post impact and to come to rest on the Western verge. Furthermore, if aligned facing towards the left the sprockets (on the right hand side of the bicycle) would have been much less likely to have made contact the motorcycles from tyre. Mr Gilbert's initial account of events in his police interview is not consistent with the recorded physical evidence.
 - l. (4.8.4) Given the significant interaction between the front of the motorcycle and the bicycle at the point of collision all three separate bodies (motorcycle, bicycle and cyclist)

are likely to have been moved immediately post impact as one in approximately the same direction. It is therefore not possible to state the precise orientation of the bicycle at the point of collision simply based on where cyclist and bicycle came to rest. 4.8.5: "It is my interpretation of the damage to the motorcycles front tyre bicycles rear wheel that they were essentially in line when the impact occurred, although I cannot say with any certainty there was a small angle between them with the bicycle angled towards the left or right of the motorcycle's path."

- m. (5.7) From the distance over which the Kawasaki slid to rest, the distance which Mr Payne was projected and the conservation of linear momentum, Mr Whitehead calculated the immediate pre-impact speed of the Kawasaki as in the range of about 62 to 82 mph.
 - n. (5.8) The collision between the motorcycle and the cyclist was fully engaged, such that it is likely that the cyclist was accelerated up to the motorcycles immediate post impact speed.
 - o. (5.10) "If Mr Gilbert's initial account of the cyclist's path is rejected, then it would appear he rode into collision with the rear of a bicycle which was positioned directly ahead of him in his forward field of vision for at least 4 to 5 seconds before impact, if his speed was at the lower end of my calculated range of 62 mph. That should have been sufficient time for him to react and widen his cornering path, or stop if Mr Gilbert was riding at high speed, at the upper end of my calculated range of 82 mph Mr Gilbert might have had only about three seconds to take action and thus his opportunity to avoid the collision would have been reduced."
54. In his oral evidence in cross examination Mr Whitehead said that the impact damage to the Kawasaki was the result of impact damage with the rear of the bicycle. Damage to the rear wheel of the bicycle and the front of the Kawasaki was consisted with the bicycle being struck from behind. There was evidence of the frame of the bicycle being crushed from the rear to the front, with longitudinal pressure. The scratches and smearing to the rear face of the seat tube of the bicycle (photo [243]) were consistent with the rear tyre being crushed forwards. The damage to the front of the Kawasaki (see [244]) with damage to the area of the headlights and instruments were the result of the cyclist in effect sitting on that area after impact.
55. Mr Whitehead said that if the rear wheel of the bicycle had been hit side-on, then one would not have the alignment of the teeth from the bicycle's gear sprocket with front tyre of the motorcycle. It was suggested to him that the broken weld behind the seat tube of the bicycle would not have broken with an impact from behind. Mr Whitehead explained that the frame was made from aluminium and that all of the tubes have bent from behind and have been pushed down in a way was consistent with a crush. He accepted that this damage could also have occurred with a side impact, if considered in isolation from other evidence.
56. It was also suggested to Mr Whitehead that the damage to the bicycle could have been the result of the bicycle sliding down the road. Mr Whitehead explained that the bicycle and the Kawasaki ended up in almost the same place, indicating that the bicycle had been propelled down the road by the impact with the Kawasaki.
57. Mr Whitehead said that he had no doubt that the Kawasaki was upright at impact and that in this regard he disagreed with PC Bird's original analysis to the contrary (and he commented

that PC Bird had altered his view in the joint report). He said that the Kawasaki had capsized after the impact and had then run along the ground before coming to rest.

58. It was also suggested to Mr Whitehead that the marks on the Kawasaki tyre from the gear sprocket could also have been caused by the bicycle being at a 45 degree angle to the motorcycle. Mr Whitehead responded that it was not possible to be say whether the impact was perfectly in line but the general pattern was of a rear impact.

Analysis and discussion

59. The only direct evidence of the accident itself comes from Mr Gilbert. In this case I have to form a view as to the credibility of Mr Gilbert and decide whether his evidence is, after such a long passage of time since the accident, actually reliable and truthful. In his final submissions Mr Gilbert told me that his previous versions of events were from what others had told him and which he had believed. The account in oral evidence was what he now remembered. He said he had been told by two brain experts that memory could come back, and that was exactly what had happened. The Defendant submits that Mr Gilbert's evidence is a pack of lies.
60. In assessing Mr Gilbert's evidence I bear in mind that
- a. It is essential to evaluate a witness's performance in the light of the entirety of his evidence. Witnesses can make mistakes, but those mistakes do not necessarily affect other parts of their evidence.
 - b. Witnesses can regularly lie. However, lies themselves do not necessarily mean that the entirety of that witness's evidence has to be rejected. A witness may lie in a stupid attempt to bolster a case, but the actual case nevertheless remains good irrespective of the lie. Of course a witness may lie because the case is a lie.
 - c. I accept that it might, theoretically, be possible for someone who had sustained a traumatic brain injury to have difficulties in recalling an incident for a long period of time and then to have a moment of clarity in which he was actually able to recall what had really happened, having recovered from a state of post-traumatic amnesia. However, if such a medical explanation is to be advanced for a witness's confused account and then a clear recollection in a specific case, I would expect expert medical evidence to be presented to support such a submission. In this case there is no such expert evidence before me. Indeed there is no written evidence about the return of memory at all, except the emails referred to above.
61. What is, however, abundantly clear is that Mr Gilbert's accounts of the accident have not been consistent. Of course, witnesses will sometimes make errors or forget relevant matters when relating the facts and 100% consistency and recall cannot reasonably be expected. However, where accounts given by a witness are substantially different it calls into question the reliability and even credibility of the evidence being given. The courts will require a cogent explanation of why a witness has said one thing at one time and then seeks to give a different account in oral evidence before the court.
62. In my judgment the changes of Mr Gilbert's accounts of events are significant. Most importantly

- a. No suggestion was made in the first part of Mr Gilbert's Police recorded interview, his letter of claim or his witness statement relied upon in this proceedings that his account of the accident which he was giving might actually be wrong because of memory difficulties, that what he was saying did not reflect what he actually remembered or that he was relying upon any other witness for the facts of the collision.
- b. This is in sharp contrast with his Defence to the proceedings brought by Mrs Payne in which he asserted that he had no clear recollection of the circumstances due to his injury and would be relying on accident reconstruction evidence [78]. This came only 2 months after the witness statement signed by Mr Gilbert giving the version of events upon which he relied upon in this case up to his oral evidence at trial.
- c. In his Amended Particulars of Claim [6] Mr Gilbert acknowledged that he had got a "bit mixed up" in describing where Mr Payne had been when he first noticed him, but again he set out an affirmative recollection of what had happened.
- d. Mr Gilbert explained in his oral evidence in this case that there were people that were telling him what had happened and that he tried to work out what had happened in his own head. However, there is no other person who witnessed the accident from which Mr Gilbert could have reconstructed or assumed movements by Mr Payne across his path as he describes. There is no one else who saw what happened or was in a position to fill in any memory gaps for Mr Gilbert or who could have told him what had happened.
- e. The account to the Police in interview does not, in fact, seem to suggest any movement by Mr Gilbert to avoid the collision. He relates Mr Payne turning across him from his (Mr Gilbert's) right, having moved from the other lane. In his police interview he was unable to recall the orientation of the vehicles at impact [150]. Later in the interview he said that he could not recall what happened after Mr Payne turned [173], but that Mr Payne was turned across him at an angle of about 45 degrees facing away from Mr Gilbert towards the airfield [178]. The first suggestion that Mr Gilbert actually took avoiding action appears in his witness statement where he says that he could not turn to the right so he veered to the left (paragraph 5). Again, the statement does not suggest that Mr Gilbert did not remember that action or was uncertain of it. The move to the left is also set out in the Amended Particulars of Claim.
- f. This is all in striking contrast to the oral evidence given before me in which Mr Gilbert said that he had swerved to his right, and the reference to left in the statement was wrong. Of course a swerve to the left would not have enabled Mr Gilbert to strike the bicycle in such a way as to hit the gear sprocket on the bicycle (which sits on the offside of the rider's rear wheel) to cause the marks on his front tyre as recorded by Mr Whitehead. It is obvious that this change in evidence is not the result of some previous error by Mr Gilbert. His account has changed. The reason for this is because, he says, in February he found he could recall what had occurred. No medical evidence has been produced to support this sudden memory recovery.
- g. Another major area of change between the accounts relates to Mr Gilbert's evidence of the movement of Mr Payne's bicycle. In the accounts to the Police he explained that Mr Payne had been coming towards him on the opposite side of the road and had then turned across him into the middle of the road. A similar explanation was given in Mr Gilbert's witness statement. However, in the email dated 19 February 2019 Mr Gilbert asserted that in fact Mr Payne had crossed his path and got almost to the other

side of the road before looking over his shoulder and moving to his right. In his oral evidence Mr Gilbert adopted this explanation and suggested that Mr Payne was in fact heading back towards the middle of the road.

63. I repeat that there is no medical evidence to explain why there should be these changing accounts. What actually appears from the evidence are accounts which are so contradictory that in my judgment Mr Gilbert cannot be regarded as a reliable witness. There is, quite simply, no consistent thread in the various accounts given by Mr Gilbert. He has previously asserted as true facts which he now asks the court to reject and instead asks the court to accept a yet further version which has not been set out or explained in a witness statement. The unexplained shifting sands of these various accounts lead me to the conclusion that in promoting this Claim as he has and giving evidence to this court, and in attempting to shift the blame for what happened onto Mr Payne, Mr Gilbert has simply lied. He has tailored his account to suit what he believed to be his best advantage. It may well be that Mr Gilbert has no clear recollection of what really happened, which is why he gave that explanation in his Defence of Mrs Payne's claim. But, if that is correct, it does not justify him inventing various accounts for the purposes of this claim.
64. As I have set out above, the evidence of Mr Askew and Ms Rymer does not assist in the crucial issue of how the accident happened. On any view the impact took place north of the junction of Sandy Lane. Whether Mr Payne emerged from Sandy Lane is irrelevant. Indeed, if Mr Payne was turning across Mr Gilbert it seems unlikely that he had so emerged. The question is where Mr Payne actually was at the point of impact.
65. By contrast to Mr Gilbert I found Mr Whitehead to be a straightforward witness who, in accordance of what one would expect of an expert, was doing his very best to assist the court. His evidence was unshaken in cross examination and in my judgement his reasoning and conclusions were reliable and, indeed, compelling. I adopt Mr Whitehead's views as to how this accident occurred without hesitation.
66. I therefore make the following findings:
- a. At the point of impact Mr Payne was cycling on the B6047 in the direction of Melton Mowbray. He was positioned approximately 0.5m from the nearside (left) edge of the road. It is not possible for me to make any positive general findings as to where Mr Payne had been riding to and from.
 - b. The point of impact itself was at the spot with the scuff mark was noted by Mr Whitehead in paragraph 4.4.3 of his report, some 12m south of the slide marks recorded.
 - c. The impact between Mr Gilbert's Kawasaki and Mr Payne's bicycle occurred when Mr Gilbert's Kawasaki hit the bicycle from the rear. Although the bicycle may have been a slight angle, the impact was in essence when the two vehicles were in line.
 - d. At impact the speed of the Kawasaki at impact was between 62 and 82 mph. It was in excess of the speed limit.
 - e. The front wheel of the Kawasaki struck the rear wheel of the bicycle. The front tyre of the Kawasaki caught the gear sprocket to the right of the rear wheel of the bicycle.
 - f. The cause of the accident was that Mr Gilbert was travelling at an excessive speed in the circumstances and simply failed to see or notice Mr Payne in time.

- g. Mr Payne did not cause or contribute to the accident. He was not to blame.
67. For these reason the Claim will be dismissed.
68. The final issue which I need to address is that of Fundamental Dishonesty. The burden rests on the Defendant to establish this. The inconsistencies in Mr Gilbert's evidence are such that, in my judgment, this is not simply errors of recollection. Mr Gilbert has, on any analysis, been untruthful. If, genuinely, he had little or no recollection about the accident, he has made a witness statement giving his account when he knew or believed it to be untruthful. In my judgment he has quite simply changed his account to suit the audience receiving it (and the apparent contrary evidence at the time).
69. I am therefore satisfied on the balance of probabilities that the claim (founded as it was on lies) was fundamentally dishonest.
70. The order which I therefore propose to make is that the Claim is dismissed. There is then the issue of costs to consider. Unless the parties are agreed on that, there will have to be an oral hearing.
71. This Judgment will be handed down on at 10.30pm on Wednesday 6 November 2019 at the County Court at Northampton. This judgment will be formally handed down and will not be read out. The hearing will the deal with any other matters, such as costs. If the parties have agreed an order no attendance will be necessary, but in the absence of agreement the parties must attend. By 4pm on Friday 1 November 2019 that parties must file with the court
- a. a list of any necessary typographical corrections to this draft judgment;
 - b. a note of any issues which have not been determined in the draft which it is submitted need to be adjudicated upon;
 - c. a draft order, including costs.

His Honour Judge Hedley