CA on appeal from Leeds County Court (His Honour Judge Bush) before Chadwick LJ, Longmore LJ. 21st April 2005.

JUDGMENT : LORD JUSTICE LONGMORE

1. On 14th April 2002 there was an accident on the B1268 road in North Yorkshire between Guisborough and Saltburn-by-Sea, when a car driven by the claimant, Mrs Askey, and a motorcycle, ridden by the defendant, Mr Wood, collided. The claimant was driving a Renault Clio motorcar on this road from the direction of Guisborough towards Saltburn at about 11.15 in the morning. The defendant had a powerful motorcycle in the form of a 750cc Honda and was driving in the opposite direction. The road was a country road and governed by the national 60 miles per hour speed limit.

2. At an approximately 90-degree bend, the collision occurred. It is a blind bend and there is a crest in the road, which would prevent anyone travelling from the Saltburn direction from fully seeing the bend. The conditions on the road were fine and dry. As it happens, there was no advanced warning sign of the bend; there had been but it had been taken away. But the area was well-known to the claimant and it appears that the defendant also said that he knew the road. The defendant had no recollection of the accident itself as a result of his injuries. He only recollected matters up to about 15 minutes before. At the relevant point of the road it was about 7.2 metres wide.

3. A police constable, Derek Walton, attended the accident scene shortly after midday. He made a report and he gave oral evidence at the trial. Police photographs, which we have seen, were produced in evidence and there was in particular a reconstruction diagram which was provided by the defendant's expert, Mr Peter Sorton. On that diagram, Mr Sorton had shown a number of marks which Police Constable Walton had observed on the road when he attended the scene. Mr Sorton described those marks in his report and they may be summarised in the following way, using the letters which Mr Sorton put on to his diagram: (a) a tyre slide mark of about 4 metres, (b) a skid mark of about 28.4 metres, shown as a locked tyre mark on the diagram. That was followed by a gap, after which there began (c) a series of scrape marks consistent with the motorcycle sliding on the road while on its side, and then, 6.5 metres further on, there were (d), scuff marks for 2.7 metres.

4. Both Police Constable Walton and Mr Sorton gave oral evidence. They had made reports for giving evidence and also a joint statement, pursuant to the Civil Procedure Rules, which stated what they agreed and disagreed. In paragraph 1 that statement said:

"1. The report of Mr Sorton is primarily agreed.

2. The only areas of dispute remain as follows.

(a) PC Walton is unable to position the car at point of impact. Mr Sorton remains of the view that the car was on the wrong side of the road.

(b) PC Walton remains of the opinion that the damage caused to the car was by the rider and not the motorcycle although he does accept that the rider was still in contact with his motorcycle at the point of impact and that the damage to the door and sill, if caused by the motorcyclist's foot, could only occur when the foot is pressed against the side of the motorcycle.

Mr Sorton remains of the view that a large part of the damage to the car was caused by the motorcycle.

3. PC Walton's position is that he accepts that the motorcycle was on its own side of the road at point of impact, but feels unable to pin the position of the car down. He accepts that the point of impact is between the end of the skid marks and the start of the scratch marks.

Given the agreement that the foot had to be pressed against the motorcycle (assuming low damage to the car from the foot or footpeg) Mr Sorton's position is that the motorcycle had to be upright and therefore impact must have occurred well before the machine was sliding on its side."

5. The judge later recorded that both Police Constable Walton and Mr Sorton agreed that the defendant was travelling too fast, but that the motorcycle was on its correct side of the road at the point of impact.

6. The judge then made further findings that the car and the motorcycle were in contact at impact and that there was not just the defendant's body which was in contact with the car. From that, he concluded that the claimant's vehicle was on the wrong side of the centre line to a distance of about a

metre. He also accepted the view of the defendant's expert that the defendant must have seen the claimant's car and leant to his left to move the motorcycle over to avoid the car and that the motorcycle "high-sided", which I understand to mean that the motorcycle lost control but regained traction so that the motorcyclist did not fall to his on-side on the left verge, but the cycle righted itself and would have fallen to the off-side, but for the presence of the car.

7. The judge further held that the defendant was travelling at a significantly excessive speed for the road, in the region of about 60 miles an hour, braked and lost control of his motorcycle. He set out the defendant's expert evidence that the defendant would have been unable to avoid the accident, even if he had been travelling at what may be called the critical speed of 40 miles an hour.

8. The claimant's claim had been settled before trial. All that the judge had to deal with was the defendant's claim for damages, and he, the judge, in his conclusion, having set out some of the contentions, said this: *"But the fact of the matter is that the Defendant was approaching this blind bend at sixty miles an hour, and in my judgment the accident and its consequences resulted from the Defendant's excessive speed, and also from the Claimant's position in the road. I find that the Claimant was travelling at about twenty-five miles per hour.*

"In the circumstances in my judgment both of the parties were negligent and I assess their negligence as being equally causative and equally blameworthy, and accordingly in my judgment both are equally responsible in law for this accident."

9. The defendant was dissatisfied with that conclusion of equality of responsibility and sought permission to appeal on the following six grounds:

1. The learned judge failed to consider whether the accident occurred as a result of the negligence on the part of the appellant properly or at all.

2. The learned judge failed to consider the blameworthiness of the parties properly or at all.

3. The learned judge failed to have proper regard to the appellant's share in the responsibility for the damage.

4. The learned judge failed to determine whether evidence pertinent to the above matters was accepted or rejected.

5. The reasoning of the learned judge was deficient.

6. The decision was not just and equitable.

10. Mr Michael George, who has appeared for the defendant on this appeal this morning, submits that while it was correct for the judge to have concluded that the defendant was not in control of his motorcycle as he approached the corner, the judge failed to consider whether that lack of control caused or contributed to the damage complained of. If he had done, on the evidence of Mr Sorton, which the judge appeared to accept, then the right conclusion was that the defendant's excessive speed and lack of control did not cause or contribute to the damage complained of. It was for this reason that Latham LJ gave permission to appeal in this case, saying that it was arguable that the judge had not sufficiently explained how he came to his conclusion in the light of the defendant's expert evidence.

11. On analysis, the defendant's skeleton argument and his oral submissions, as put forward by Mr George on his behalf, fall, as I understand them, into three parts. Firstly, reliance is placed on Mr Sorton's evidence at paragraph 154 that there could be no question that if the claimant's car had remained on its correct side of the road, neither the motorcycle nor its rider would have coincided with the path of the car, and although the defendant would have been unable to ride the bend and, according to Mr Sorton, would probably have capsized, he would have slid over the road but only have damaged his motorcycle and his leathers, rather than himself.

12. Secondly, it is said that the defence expert had said that if the motorcyclist had been travelling at a safe speed, the accident would still have happened with the car in its position of 1 metre over the centre line. That would only be right, I observe, if one takes a safe speed as being 40 miles an hour on the expert's evidence.

13. The third submission is that even if the defendant's conduct was causative, the proportion selected by the judge of 50/50 was not correct and should be changed and was so incorrect as to amount to an

error of principle and should be changed to an apportionment of 75/25 in the favour of the motorcyclist.

14. As to the first of those submissions, it has to be accepted that the defendant was travelling so fast that he would have come off his machine in any event. That being the case, there is in my judgment no convincing explanation from Mr Sorton as to why it can be safely said that the defendant, coming off his motorcycle as he would have done, would not have collided with the car, even if the car was on the right side of the road, or indeed with some other solid object. It is pure speculation to suggest that he would not have suffered serious injury in that event. It is in my judgment not at all surprising that the judge did not deal specifically with that scenario, having decided that both parties had been negligent.

15. As to Mr George's second submission, it is all very well to say that the motorcyclist might, if he were travelling at a speed of about 40 miles an hour, not have lost control, but that, if that was the position, the accident would still have occurred because the car was over the centre line. The fact is that the defendant was a young man, going much too fast for the road. If he had been driving his motorcycle prudently he would have been going much more slowly, and there was no evidence from either of the experts about what a safe speed would be on this road with its right-angle bend and, indeed, the hill before the bend obscuring the view of that bend. It is in my judgment simply unhelpful to assume that the defendant would have been travelling at precisely the speed, if he were going at a safe speed, at which the accident would still have occurred, which is what the submission amounts to. Undoubtedly the judge held -- in my judgment, correctly -- that part of the cause of the accident was that the motorcyclist was negligently travelling far too fast for this road.

16. That leaves Mr George's third submission that, as he put it several times in his skeleton and in his responses to questioning from the court, much the majority of the blame was to be placed on the claimant, who was, as the judge found, approximately a metre over the notional central line. There was in fact no white line at this corner. It was suggested at trial that might have been because many people at this corner tended to go over the centre line of the road. The judge, however, was faced with the fact that both parties had in his view been negligent. It was not easy to which party was more negligent than the other. Obviously it was wrong for the claimant, travelling at 25 miles an hour in the car, to have gone over the centre line. It is not an uncommon form of negligence. The defendant, who, sadly, has been badly injured but obviously, before his injury, enjoyed riding country roads on his motorcycle at speeds which were far too fast for those roads, is self-evidently very negligent also. Not every judge might have decided that 50/50 was the right apportionment, but in my judgment it is impossible to say that that apportionment was not within the range of apportionment reasonably open to this judge.

17. I would dismiss this appeal.

18. **LORD JUSTICE CHADWICK**: I agree.

19. The appellant was injured in a road traffic accident on 14th April 2002. It is not in dispute that, in part at least, that accident -- and the damage suffered by the appellant -- was attributable to the fault of the respondent, whose vehicle was across the central white line at the time of the accident.

20. In those circumstances, the questions for the judge were, first, whether the appellant's damage was also attributable, at least partly, to his own fault in travelling at a speed which caused him to lose control of his motorcycle before he saw the respondent's vehicle; and secondly, if so, to what extent it would be just and equitable to reduce the damages which he would otherwise be entitled to recover from the respondent, having regard to his own share in the responsibility for his damage -- see section 1(1) of the Law Reform (Contributory Negligence) Act 1945.

21. The judge reached the conclusion that the accident did result, in part at least, from the fact that, by reason of his excessive speed, the appellant had lost control of his motorcycle before he saw the respondent's car. The effect of that loss of control was that, thereafter, the appellant could take no steps to avoid the accident.

22. It is suggested that the judge was wrong in failing to appreciate that there were no steps which the appellant could have taken to avoid the accident even if he had been in control of his motorcycle. But that, as it seems to me, is to ignore the fact that a safe speed is a speed at which the driver or rider of the vehicle is able to take steps to avoid accidents in circumstances where other road users may not be complying with their own obligations to drive reasonably. In my view, the judge's conclusion as to the appellant's partial responsibility cannot be faulted.

23. In those circumstances, the second question arose: to what extent would it be just and equitable to reduce the damages which the appellant was entitled to recover, having regard to his own share in the responsibility for those damages? The judge reached the conclusion, on the facts and evidence that he had before him, that this was a case in which the responsibility should be shared equally.

24. Like my Lord, I do not think that this Court can or should interfere with that assessment.

25. The appeal is dismissed.

26. **LORD JUSTICE CHADWICK**: Having dismissed the appeal, we now have an application that the respondent should have her costs of the appeal. That application is opposed in principle. It is opposed on the grounds that this was a case in which this court had earlier indicated that the matter was suitable for Alternative Dispute Resolution and had sent the parties the usual letter; and that the appellant had sought to take that suggestion forward, but had received no reply from the respondents. In those circumstances, it was submitted that the court should exercise its discretion to refuse the respondent the usual order which follows from successful opposition to an appeal.

27. We have been referred to the notes in the second supplement to the 2004 edition of Civil Procedure at paragraph 44.3.11 and, in particular, to the commentary there on the decision of this Court in **Halsey v Milton Keynes General NHS Trust** [2004] EWCA Civ 576. Factors relevant to a decision whether there should be a departure from the general rule include the nature of the case and whether **ADR** would have had a reasonable prospect of success.

28. We have been told by the respondent that alternative dispute resolution was likely to be of little help in relation to the narrow question of liability in this case because no schedule of special damage had been served by the claimant. So, it is said, it was impossible to take an overall view as to what the claim was likely to be worth and what would be an appropriate figure at which to settle it.

29. It seems to us that there is force in that view. An **ADR** which sought to agree whether liability should be 50/50, 75/25 -- or 74/26, as suggested in a Part 36 letter -- is likely to be a sterile exercise if the parties do not know, at least in broad terms, what quantum figure is to be apportioned in accordance with what they agree.

30. In those circumstances, we are not persuaded that this is a proper case in which to depart from the normal order. We have regard also to the fact that the respondent's costs of the appeal are comparatively modest.

31. The respondent is to have her costs of the appeal. We are invited to assess those costs summarily. This is a case in which it would plainly be right to do so. It is not proportionate to send the costs off to a further hearing for detailed assessment in circumstances where, so far as one can see, costs on the respondent's side are limited to a skeleton argument, a brief fee and perhaps some correspondence and attendance. But the only figure that is put before us is counsel's own brief fee at £3,600 excluding VAT. There is no schedule of solicitors' costs and disbursements.

32. We have in mind that the brief fee payable to the appellant's counsel is £2,500 excluding VAT; and to the additional fact that the respondent's counsel has had to travel from Yorkshire, whereas the appellant's counsel has not. In those circumstances we propose to adopt a pragmatic approach. We assess costs summarily in this case at £3,000 plus VAT.

Order: appeal dismissed. The appellant to pay the respondent's costs, summarily assessed in the sum of £3,000 plus VAT.

MR M GEORGE (instructed by the White Dalton Partnership) appeared on behalf of the Appellant
MS E O'HARE (instructed by Portner & Jaskel) appeared on behalf of the Respondent