Neutral Citation Number: [2022] EWHC 2436 (QB)

Case No: QB-2020-004517

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

Before:

HER HONOUR JUDGE HOWELLS
(Sitting as a Deputy High Court Judge)

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Between:

ANDREW EVANS	**Claimant**
- and -	
R&V ALLGEMEINE VERISCHERUNG AG	**Defendant**

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- -

Sarah Crowther KC (instructed by Penningtons Manches Cooper LLP) for the Claimant
Pierre Janusz (instructed by DAC Beachcroft Claims) for the Defendant

Hearing dates: 25th – 29th July 2022 (inclusive)

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Approved Judgment

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HER HONOUR JUDGE HOWELLS

HHJ Howells:

1. On the 22 September 2020 the claimant Mr Evans was on a motorcycling holiday in the Black Forest in Germany. At the time Mr Evans was an experienced motorcyclist who was well used to driving on the continent and hence on the right-hand side of the road. At about 3.30 in the afternoon, he was approaching a right-hand hairpin bend. It is his case that, as he did so, he became aware of a car driven by Mr Günther, who is insured by the defendant, approaching in the opposite direction. He believed that Mr Günther's vehicle was on the wrong side of the road i.e., approaching in the claimant's own lane, effectively cutting the corner. He therefore deemed it necessary to take emergency evasive action, applying his brakes hard, and turning to the left to avoid a collision. Unfortunately, despite this action there was a collision between the claimant and Mr Günther's vehicle. The defendant in this matter is the insurance company of Mr Günther against whom a direct right of action is provided under German law. The issue of liability is very much in dispute between the parties. It is that issue which I now determine by this judgment following a trial of that preliminary issue this week.

2. It is the defendant's case that their driver was in no way to blame. It is said that Mr Günther was at all relevant times on his correct side of the road and in fact the collision occurred on his side of the road. It is the defendant's case that the accident was caused by the claimant effectively driving too fast for the road conditions and losing control of his motorcycle upon his approach to the hairpin bend. It is said that this accident was caused entirely by Mr Evans and not through any fault of the defendant's insured.

3. It is worthy of note that this matter has had some procedural issues raised in the course of the trial. I mention them because, not only did they cause delay to the progress of the claim, but they also had an impact upon the evidence before the court.

4. Firstly, there was an application from the defendant before me to allow additional video evidence prepared by the defendant's accident reconstruction expert in the weeks leading up to trial but after the joint statement of experts. I refused this application. However, in the light of issues raised within it the defendant, on the morning of day two of the trial, made an application to amend their defence and to specifically plead that the speed of the claimant was excessive for the road conditions. For reasons given in the judgment on that application I allowed that amendment. As a result of that amendment the claimant's own reconstruction expert was permitted to provide further evidence in written and oral form to specifically address the question of speed which had not been a highlight of his evidence beforehand.

5. A further application was made by the defendant in relation to 2 of their witnesses namely Mr Günther the driver and the defendant's German law expert Mr Tomson. On the first day of trial, I was told that neither of those witnesses (who are German citizens and residents) were present in the UK and the intention was they should give evidence by way of video link from Germany. In principle this was not objected to by the claimant, but it was said that the procedural requirements under Practice Direction 32 of the Civil Procedure Rules and specifically the practice note set out at page 1171 of the 2022 White Book needed to be complied with. The defendant reserved their position overnight particularly as I suggested that arrangements might be able to be made for those two German witnesses to fly into the United Kingdom so that they could give their evidence in the usual way before the court. On the morning of the second day it became apparent that the witnesses were not present and as such a formal application

was made by counsel for the defendant to hear their evidence by video. It became clear as set out in my earlier judgment on this matter that the foreign office had indicated that they had a diplomatic objection to that; the German government had stated that they would not allow German nationals to give evidence by video in courts of foreign jurisdictions. As such the foreign office says (in an email that was read to me by counsel) that they too objected. Nevertheless, an application was made for me to ignore the diplomatic objection and hear such evidence. I refused that application. Nevertheless, it was agreed by all parties that Mr Günther's evidence and the evidence of Mr Tomson could be admitted under the civil evidence act and the question then would be what weight ought to be given to it.

6. Having set out that procedural background by deal with the law in this matter.

7. This is a case where the accident happened in Germany. The claimant is British and resident in England, but the defendant insurance company and their insured are German. There have been attempts to reach agreement as to the principles of German law which need to be applied in this matter. In fact, in closing submissions, it became clear that what was described as a "sliver" of difference between the parties on the German law, was no difference at all. I therefore set out below what is the agreed position as to German law.

8. It is common ground that pursuant to Regulation 864/2007 ("Rome II") the law applicable to the claim in tort arising out of the accident is German law. The approach in respect to this is illustrated in the judgment of Simon J in *Yukos Capital v Oil Company Rosneft [2014] 2 CLC 162; [2014] EWHC* at paragraphs 25 – 30.: specifically, the Court is required to determine the foreign law as a question of fact on the basis of the evidence deployed by the parties, according to the usual civil standard. This applies to all questions of liability including any question of contributory negligence. The **burden** of proof is therefore governed by German law pursuant to article 1(3) of Rome II.

9. It is also agreed that procedural matters are governed by the law of the forum i.e., the law of England and Wales. In light of the decision of Dingemans J in *Marshall and Pickard v MIB and others [2015] EWHC 3421 (QB),* paragraph 25, the standard of proof to be applied is that of the law of the forum, English and Welsh law i.e., the balance of probabilities

10. The defendant's liability to the claimant as insurer of the car is dependent on the issue of whether the owner (and in this case driver) of the car (Mr Günther) would be liable to the Claimant under the law of Germany. The applicable principles of German law are now agreed.

11. The parties each had permission to rely upon expert evidence on the question of German law. I have had the opportunity of considering their experts reports and the very brief joint statement prepared. I had an opportunity of hearing the evidence of the claimant's German law expert Mr Frese who gave evidence with the assistance of an interpreter. However, the reasons I have given above I have not heard nor been able to assess any oral evidence of the defendant German law expert Mr Tomson. I found the evidence of Mr Frese to be persuasive and measured. As the parties now reach agreement as the principles to be applied. I need to say nothing further however on that issue

12. Turning to the principles of German law against which I determine this matter: this summary is significantly taken from the skeleton argument of Ms Crowther QC which I understand to now be agreed.

- Under German law, liability in road traffic cases can be either fault-based or strict liability. It is common in practice to use the strict liability system, which is centred on the principle that it is the obligation of every road user to always behave in such a way that no one else is harmed, endangered, or to the extent that it is unavoidable, hindered, or inconvenienced (§1 German Road Traffic Act or StVO) (the so-called 'defensive driving principle')
- §7 section 1 of the German Road Traffic Law (StVG) provides that each user of a motor vehicle is strictly liable for damage to the person of any other unless force majeure applies under § 7 section 2. This is not a force majeure case.
- In cases involving more than one user of a motor vehicle, each owes the other the §7(1) duty and in this situation §17 StVG applies, which requires the court to apportion the damage, 'the obligation to pay compensation and the extent of the compensation to be paid depend on the circumstances in the relationship of the vehicle holders to each other, particularly on the extent to which the damage was caused mainly by one or another of the parties.'
- It was accepted that there was a burden upon the claimant to establish that it was the driving of Mr Günther which caused an emergency reaction by Claimant: i.e., on the facts of this case it is accepted that the claimant has to established on the balance of probabilities that Mr Günther was driving on the wrong side of the road: Ms Crowther accepts that if she cannot establish this, the claimant's case fails.
- If the claimant satisfies that burden, in a case where there is not enough evidence on which the court can apportion the damage, an apportionment in line with inherent operational risk is made, which is often 50/50. Operational risk is the risk which arises as a result of using a vehicle in traffic.
- However, if the Court is satisfied that one of the parties contributed more (or exclusively) to the causation of the damage, through fault, then the Court has discretion to apportion liability as it sees fit, including by making a finding of 100% liability for or against a party if it considers that the operational risk of one driver has been extinguished by the causative contribution of the other.
- All drivers on German roads are required by §2 section 2 StVO (Highway Code) to always keep as far to the right as possible, although this is interpreted as meaning 'reasonable right-hand driving' which allows drivers and riders to approach the middle of the road if this is necessary for safe driving or riding.
- Where an accident is caused by subjectively reasonable defensive or evasive action on the part of a driver, responsibility for the accident is always attributable to the vehicle which triggered the reaction. Where a driver has given another road user subjective reason to fear that without a reaction a collision will ensue, he is responsible for the damage caused by the reactive action on the part of the other road user

- On the facts of this case, Mr Janusz accepted in submission that, if the claimant satisfied that court that Mr Günther was on the wrong side of the road, and that caused the claimant to take emergency evasive action, this was not a case where he could contend that the principle of operational risk should operate to mean that there was less than 100% apportionment in favour of the claimant (in English law terms, he said there would be no reduction for contributory negligence, but then reframed that according to German law principles as above)
- Although the skeleton arguments and the experts' reports dealt with the different operational risks of different vehicles, this is not an issue which requires any determination in this case. I have read the German law authorities provided to me by counsel but, given the agreed principles and the parties positions I do not need to refer to them further.

13. It is against that legal background that I then determine the issues of liability in this matter. Essentially, the question for me to determine is whether the claimant has established, on the balance of probabilities, that the defendant's driver, Mr Günther was on the wrong side of the road on his approach to the bend. If so, and that then caused the claimant to take emergency evasive action, the claimant's case succeeds. If the claimant cannot establish this on the balance of probabilities, it is accepted that his case fails. The essential factual issue for me to determine is what caused the claimant to brake and brake hard, at what is referred to in the reports as the signal point, causing his wheels to lock and causing him to move across from his lane, into the opposing lane.

Lay witness evidence

The claimant

14. I had the opportunity of hearing Mr Evans give oral evidence and be cross examined. He impressed me as an entirely honest and straightforward witness. The key challenge to his evidence was as to what recollection he had in relation to the accident. This is based upon that that after the accident the Claimant was in an induced coma for three weeks. Further when he prepared his witness statement he stated (para 30) "Everyone around me was speaking in German. I did not really know what had happened or why I was there. They told me that I had been in a motorbike accident and I remember saying that I could not have been. I was allowed to speak to Sarah (his wife) on the telephone and she told me what had happened. I could not get the pieces together in my head and it all felt very surreal. I simply could not believe that I had been involved in an accident."

15. It was therefore put to the claimant in cross-examination that insofar as he could recall any details leading up to the accident that was probably a reconstruction on his part not deliberately or consciously but from dreams or flashback images he may have had. The claimant in my judgment was very clear in relation to this and said that that was not the position. He had a clear recollection of the day leading up to the accident. This is set out in his witness statement and confirmed on oath. He simply could not remember the immediate circumstances of the accident when he was in collision with the defendant's vehicle. His evidence was that matters came back to him and that he had a clear recall. I have weighed this up very carefully. I note that in his witness statement prepared for this case he made it clear in paragraph 31 that: "I get more and more recollections of

what happened all the time, but I still cannot remember the point of impact or the fall. I can remember the manoeuvre and the car, but then I can't remember anything else, until I woke up in hospital"

16. As such it has always been his case that he remembered the circumstances and the manoeuvre of the defendant's car but not the point of impact.

17. I have taken into consideration that the claimant's wife, whose evidence was provided in written witness statement form only and was not called to give oral evidence, states at para 20/21: "I first spoke to him on the Friday of that week. It was very emotional from my part. He was just screaming, asking me to tell him what is happening, and he was utterly distraught. I told him he had an accident, but he did not know what had happened. I said I will tell you on Monday when I see you, but he was saying tell me now. I tried to tell him, but he was not really listening and was just in full panic mode.

> "21. I told him what the police had informed me over the phone on the night of the accident, when they said, "the accident was Andy's fault as he was on the wrong side of the road and hit the oncoming car". Andy's immediately reply to me was "no way had that happened, just no way!". He was adamant from the beginning that the police's version of events was incorrect."

18. Mrs Evans was not in Germany at the time; it very difficult situation for her with her husband being in intensive care. Of course, this all happened during covid lockdown and she was unable to visit her husband as she wished. However, her statement does confirm that she flew out when her husband had regained consciousness having previously visited when he was in a coma; her statement gives no further history of her husband's recall of the accident. I take from that untested evidence that even at the outset the claimant was challenging the assertion that he had been on the wrong side of the road and was responsible for the accident. That would support the claimant's assertion that he recalls and has always recalled the background to the accident but only had difficulty recalling the immediate impact.

19. Weighing all of these matter and having heard the claimant give his evidence I am satisfied that the claimant's recall is a clear one. Of course, there is a possibility that anyone can reconstruct the circumstances of an accident over time and simply because someone gives a compelling account it does not mean that such an account is necessarily an accurate one. There is a natural tendency to retell a story in a way that is favourable for oneself. However even taking all of that into consideration, the Claimant impressed me as an honest and straightforward and credible witness. His detail recollection was impressive. Details about stopping to get a cherry cake and being unable to go into the shop because he didn't have a mask was convincing and compelling. His explanation that he rode for pleasure not full speed again was persuasive. He said that he was perhaps selfish in that he enjoyed going away on his own and having in effect "me time". He enjoyed the scenery and the journey of driving around the Black Forest and was he said in no rush. There is reference in the witness statements to him being out for a "trundle". Further he is not a motorcyclist who he said rides for speed. He challenged, in I found a very persuasive way, the assertion made that the wear on his tyres indicated that he was a "risky" rider, responding in what I found be a measured and well-reasoned manner that he simply used all of the tyre as was good practice.

20. I therefore accept on the balance of the evidence of the claimant was a careful and experienced motorcyclist. That is supported by a number of witness statements prepared by friends of the claimant who were not called to give evidence but confirm this. Of course, even the most experienced and careful of motorcyclist can on occasions make mistakes. The question in this case is whether that is what the claimant did or not.

21. The point I take from the claimant's evidence which I accept are as follows: –

- he was not any rush on the day in question
- he was enjoying the scenic ride
- he was an experienced rider
- he had a Tom-Tom sat satellite navigation device on his motorcycle which he used on occasion to see the road layout ahead. I recognise that the claimant's witness statement did not explicitly state that he used his tom-tom to gauge the road ahead, rather using it for his return journey to guide him back to his camp site. However, on balance the claimant's evidence was clear as to this. Further the photographic evidence in the police report clearly shows that the tom-tom was operational at the point of the accident and showed the layout.
- that the tom-tom showed him the road layout including the bend which he was approaching. He stated that he would glance down at it to ensure what the road layout was ahead. That appears to me to be convincing evidence and compatible with the impression I gained of the claimant being a careful and considered motorcyclist.

22. The claimant's clear evidence was that he saw the defendant's vehicle driven by Mr Günther approaching him on the wrong side of the road i.e., on his side of the road. He said that he has a clear recollections to that. It was put to him that he would not have been able to see that because of the presence of trees, a traffic barrier on the side of the road and because he would have been focusing on the road itself. He, in my judgment, gave a clear and compelling answer when he explained the height of the vehicle would have been above the tarmac and so would have been clear to be seen. The claimant stated that the photographic evidence in the bundle from the experts does not accurately reflect his viewpoint as he was positioned on a motorcycle nearer the middle white line than the photographer: that, in my judgment is a forceful point. His recollection was that he did see the Defendant's vehicle and assessed that it was on his side of the road.

23. In his witness statement the claimant stated; "I would estimate that I was about 100 metres away from the bend, when I first saw a Mercedes car coming towards me on my side of the road." He accepted that his calculation of distance in his original statement of 100 metres may well not have been an accurate one and at that point he expressed some confusion as to whether he referred to distances in metres, yards or feet. In cross examination the Claimant stated that this was a "guesstimate" and that trying to remember details, yards, and feet was "not my forte", he was trying to remember events not distances.

24. It may be that this was an adaptation of the claimant's evidence taken into consideration the agreed fact within the reconstruction experts' report that the claimant would not have been able to see the defendant's vehicle from a distance of a hundred metres or yards. Nevertheless, the clear impression gained from the claimant's evidence is that

he did see the defendant's vehicle approaching on the wrong side of the road and it was that which caused him to take emergency evasive action. I do not consider the Claimant's evidence to be undermined by this mistake as to distance. This court is well used to witnesses guesstimating wholly incorrectly distances.

25. I am reinforced in my confidence as to the claimant's recollection by the sketch plan he drew in the November after the accident which is contained in the bundle at p48. At that stage the Claimant did not have the benefit of photographs or reconstruction evidence: his illustration however is largely consistent with the positions subsequently plotted by the reconstruction experts. This is not a determinative point, but it adds credence to the claimant's account that he had a good recollection.

26. Overall, I considered the claimant to be an honest and convincing witness who had good recall of the circumstances leading up to the incident if not the incident itself. If the claimant had wanted to mislead the court he could have of course and said that he recalled further matters. It is not suggested by anyone that the claimant was trying to mislead. On the question of whether his evidence was persuasive, on balance I found that it was.

27. Other lay witness evidence: as stated the claimant produced number of witness statements from other motorcyclists who stated that the claimant was a capable motorcyclist with considerable experience of riding in Europe. The defendant did not have the opportunity of testing this evidence by cross-examination but in any event I give it a limited weight only. There is unlikely to be any significant challenge that the claimant was an experienced cyclist. That does not of course mean, as stated above that he could not have made a mistake.

28. Turning to the lay evidence of Mr Günther who was the defendant's driver. I set out the history as to why Mr Günther was not called to give evidence. I do not know why arrangements were not made for him to attend court in person. I do not draw any adverse inferences from his non-attendance given it seems the solicitors have made the brave assumption he would be able to give evidence by video. Nevertheless, the claimant has not had an opportunity to challenge Mr Günther's evidence by cross-examination. There would have been significant challenge to what is said in his statement. It is said on behalf of the defendant that I should nevertheless place considerable reliance on Mr Günther's evidence because he, according to his statement, knew the road well and the police accepted his version of events. It is correct to say that the German police investigation did not include any evidence gathering from the claimant and as such they appear to have been wholly unaware of his case that Mr Günther approached by cutting the corner. I cannot confidently rely upon the German police report therefore in respect of findings in respect of the accident cause.

29. It is correct to say that there was nothing in the physical findings on the road surface which supports the claimant's assertion that Mr Günther was on the wrong side of the road (the experts agree the evidence is neutral on that point.)

30. However, insofar as it is directly contrary to the claimant's evidence and not supported by any other evidence in the case (such as accident reconstruction evidence) I have to treat Mr Günther's evidence with care and give it limited weight. I say that not only because it was unable to be tested in cross-examination but because there are a number

of critical inconsistencies between the witness statement of Mr Günther and the police statement provided by him after the accident

31. In the police statement taken shortly after the accident Mr Günther's account of the accident was as follows:

> "I was driving my car uphill from Erzgrube towards Schernbach. I was driving about 60–70 km/h. Along an extended left bend a motorcycle suddenly came towards me. The motorcycle was driving in the middle of the road and suddenly tipped, for whatever reason, into my lane and then slid into the front of my vehicle. I myself fully applied the brakes until I almost came to a standstill and steered the car slightly to the right. However, I wasn't able to get entirely out of the way. I don't think that the motorcyclist was travelling too quickly. I think it was a driving error. Maybe the driver was distracted. But that's pure speculation. The motorcyclist was unresponsive after the collision. He was wheezing loudly from the mouth and nose. Fortunately, the emergency services then came relatively quickly and took care of him. I myself was not injured. That is all I can say about it."

Of note, that post-accident account had the motorcyclist being initially in the middle of the road, then tipped and sliding in front of Mr Günther's car. There was a denial that the motorcycle was travelling too quickly.

32. In his (untested by cross-examination) witness statements for these proceeding Mr Günther said that

- He was driving home from work on a road he knew well.
- The weather was fine and sunny and the road surface dry.
- "I normally drive on this road at between 60 and 70 km/h, and reduce speed still more on curves, which make this necessary".
- "Shortly before the accident I was driving round a sharp bend. Initially I was travelling as usual at 60 to 70 km/h, but I then reduced my speed to 40 km/h in order to drive round the bend"
- "As I was leaving the bend, I saw Mr. Evans for the first time. His motorcycle was on his carriageway, but his motorcycle had already fallen over, while, as a result, he was sliding along forwards in my direction on the surface of the roadway."
- "I did what I could to avoid a collision. I was driving relatively slowly, but I stood on the brake and tried to steer as far as possible towards the right-hand side of my carriageway. There was hardly any room to change direction, however, because the steep inclines to the woodlands were on my side of the road. It was therefore not possible for me to be able to change direction fully, and Mr. Evans impacted against the front side of my vehicle."
- He explicitly denies that he had cut the corner, stating it was impossible to do so

Further, he stated:

> "To be honest, I do not know what the reason was which led Mr. Evans to fall from his motorcycle. This cannot be attributed to me, however, in the sense that I did something wrong. I was travelling slowly and carefully through the bend, and I brought my vehicle to a standstill in my carriageway, in front of Mr. Evans's motorcycle, which had gone out of control and slithered into the front of my vehicle."

33. I note that Mr Günther believed his vehicle was at a standstill at the point of collision. I also note that there appears to be a clear difference in the police account and the statement of Mr Günther as to the position and action of the claimant's motorcycle when he first saw him. In his statement he asserts that the claimant was already on the carriageway having fallen over. This is markedly different from the account provided after the accident to the police. Further, there was a different position between the 2 accounts as to the speed that Mr Günther took when approaching the bend (whether he reduced his speed or not). In his police statement he made no mention of his position in the road (nor is there any evidence that he was asked as to this). These are all significant issues which, in the absence of explanation which could have been provided orally, I need to look at with care. I conclude that these issues are such that Mr Günther's evidence is significantly flawed.

34. Conclusions I draw from this evidence: in so far as there is a direct conflict between evidence of the claimant and the defendant's driver, I accept the evidence of the claimant. However, that evidence still has to be considered in the light of the accident reconstruction evidence in this case.

Accident reconstruction evidence generally

35. At this stage, it is appropriate to comment on the usefulness of accident reconstruction evidence in a case of this nature. This court is well used to assessing witness evidence as to road traffic accidents. In the case of *Liddell v Middleton* 1996 PIQR (an authority well known to these courts and often referred to), Stuart-Smith LJ gave some useful guidance as to the proper approach for a court to take in respect of such evidence.

> "In some cases expert evidence is both necessary and desirable in road traffic cases to assist the judge in reaching his or her primary findings of fact. Examples of such cases include those where there are no witnesses capable of describing what happened, and deductions may have to be made from such circumstantial evidence there may be at the scene, or where deductions are to be drawn from the position of vehicles after the accident, marks on the road, or damage to the vehicles, as to the speed of a vehicle, or the relative positions of the parties in the moments leading up to the impact.
>
> In such cases the function of the expert is to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence of the marks on the road, the damage or whatever it may be. What he is not entitled to do is to say in effect 'I have considered the

> statements and/or evidence of the eyewitnesses in this case and I conclude from their evidence that the defendant was going at a certain speed, or that he could have seen the plaintiff at a certain point'. These are facts for the trial judge to find based on the evidence that he accepts and such inferences as he draws from the primary facts found. Still less is the expert entitled to say that in his opinion the defendant should have sounded his horn, seen the plaintiff before he did or taken avoiding action and that in taking some action or failing to take some other action, a party was guilty of negligence. These are matters for the court, on which the experts' opinion is wholly irrelevant and therefore inadmissible."

36. I accept that this is the correct approach to take and is one which I adopt in respect of the expert evidence in this matter. That evidence is useful, but there are many aspects of the expert evidence in this case which do not help me. Fundamentally, where there is necessary scientific criteria and assistance beyond the skills of the ordinary lay man, I am entitled to utilise the expert evidence to assist me and to determine the factual evidence. However, in terms of findings that can be based on factual evidence alone, that is ultimately a matter for me to determine.

37. The claimant relies upon the expert evidence of Mr Mottram; the defendant on the expert evidence of Dr Weyde. They have each prepared a report and a joint statement (and an additional note in Mr Mottram's case for reasons set out above). Dr Weyde's evidence had been translated from its original German.

38. It is unfortunate that at this stage I need to mention how the defendant expert evidence of Dr Weyde was presented before the court. Dr Weyde is a German expert engineer who speaks English to a very high level. He did not seek the assistance of an interpreter to give oral evidence. His report had originally been written in German and then been translated and was certified as correct. However at the commencement of his oral evidence he was keen to make the point that he did not accept that the translation was wholly correct. Over the course of perhaps an hour he went through in significant detail some minor and some more significant amendments to the translated versions. He said that he had provided these corrections to his instructing solicitors. During a short adjournment it became apparent that there had been a discussion between the parties previously when the joint statement of the experts was being prepared and the defendant solicitors had confirmed that the certified translation was the correct one. How it came about therefore that Dr Weyde was seeking to amend or correct the certified translation remains unclear. The defendantäs solicitors had stood by the certified version. As such that is the one that I was bound to consider (it would not be fair on the claimant to do otherwise in circumstances where they had no opportunity to check that the translation was correct). I do not reflect upon this to conclude the Dr Weyde's evidence is weakened by this unfortunate situation. I do however reflect that it was entirely unsatisfactory and caused delay in the conduct and progress of this trial.

39. A further point that should be made in relation to Dr Weyde's evidence is that he is certified as an expert within the German courts; it was explained by him that the approach there is a different one. Dr Weyde explained that in Germany he would be appointed as a single expert for the court (as opposed, as he said, as an expert for the defendant) and in effect his conclusions are likely to be determinative. He therefore

made assumptions in favour of the claimant rather than the defendant in such circumstances. Whilst Dr Weyde's approach in this case was of course as a CPR Part 35 expert I recognise in assessing his evidence, that his evidence did appear to be seeking to be determinative.

40. It is useful to start by looking at what is agreed between the experts in this case. The experts joint report was prepared by exchange of emails and was apparently prepared in English and therefore no translation issues arose.

41. It is agreed:

- Based on the physical evidence taken from the police photographs on the day that there was a short tyre mark that was traceable, made by one of the tyres on Mr Evans' motorcycle, which crossed a white line marking on the road's centreline at a point about 10 to 12 metres away from the collision point.
- Mr Evans started braking when his motorcycle was on his correct side of the road.
- His motorcycle was upright or almost upright, and was not at a critical angle or on its side, when it crossed the white line
- A longer braking mark was then produced by the motorcycle's tyres, when at least one of the wheels was 'locked' (stopped rotating) because Mr Evans applied the motorcycle's brakes sufficiently hard to 'lock' the wheel(s).
- It is agreed that this hard braking led to a fall of the motorcycle to its right side, and that the motorcycle was sliding into the collision, i.e. the motorcycle was definitely not in an upright position anymore when the impact occurred. (I note that this evidence ties in with the evidence provided by Mr Günther to the police, that when he saw the claimant's motorcycle it was upright on its own side of the road; it differs from Mr Günther's witness statement however)
- This shows that the Claimant had a reason to brake hard (although the experts disagree as to what that reason may be)
- Para 4.4 joint statement: "In summary, Mr Mottram considers it most likely that Mr Evans braked hard in response to seeing Mr Günther's car on the wrong side of the road (i.e. in Mr Evans' lane) as the car came around the bend in the road. Dr. Weyde states that it is technically possible that Mr. Günther could have been on the wrong side of the road, even if there is no specific evidence for it, but points out that it is technically not possible to clarify why Mr. Evans braked."
- My reading and interpretation of that comment is that there is no physical evidence as to why Mr Evans braked (although there is his own recall); the expert agree that the evidence as to where Mr Günther was on approach is neutral. As such, the expert evidence cannot be determinative of where the Defendant's insured's vehicle was on its approach.
- Dr. Weyde considers that Mr Evans "tried to take this right-hand curve at an excessive initial speed and he only realized this when he entered the curve and therefore braked too hard."

42. Each of the experts were cross examined at some length and appropriate detail as to their reports and the difference between them.

43. Mr Mottram's evidence: Mr Mottram had produced a report (and supplemental) plus video and photographic evidence of the scene. His conclusion in effect was that upon

the claimant's approach he would have been able to see that there was a hairpin bend ahead and he would have been able to see from his positioning the approach of Mr Günther. Re reiterates this in the joint statement: "when heading in the direction in which Mr Evans travelled, there is a clear view of the road on the right, around and 'beyond' the right-hand bend, at a lower level. That is, when approaching the bend in Mr Evans' direction, the route of the bend can be seen clearly, and there is no doubt that the road is about to bend through about 180° to the right. Further, it is notable that there are no warning signs on the approach to this particular bend, that warn of a bend ahead, and there are no arrow signs on the bend. Mr Mottram suggests that is because it is obvious where the road runs, well before the bend is reached."

44. He commented in evidence on the police photographs which he said showed the approximate claimant's approach. He accepted that when he took photographs and videos there was more foliage on the trees and therefore there was a slightly different position albeit he reiterated that it was possible to see around the corner to the hairpin bend and see the approach of oncoming vehicles.

45. There was some discussion in his evidence as to whether the parties had agreed what the signal point was and Mr Mottram was content with the range the Dr Weyde put forward of 20 to 25 m away from the collision point albeit his precise calculation of 22 m. As stated the experts agreed that it would have been impossible for the claimant to see Mr Günther from 100 metres back but Mr Mottram asserted that he certainly was able to see him before the signal point; he said that Mr Evans had made a conscious decision to move before that point because the tyre marks on his side of the road showed a decision to make hard braking, it was on his lane and only afterwards did the hard braking go out of control. The experts had agreed that the motorbike was upright when it crossed the white line or in any event not a critical angle on its own side of the road. That suggested to Mr Mottram that the claimant had reacted to something which caused him to take emergency evasive action whilst he was still in control of his vehicle and on his side of the road.

46. Mr Mottram was vigorously cross-examined as to whether his calculations might be mistaken such that there ought to be a longer period between the reaction point and the signal point to reflect a period when the effect of braking had not yet had an impact. Mr Mottram was prepared to accept that that could be up to 1 second but noted that Dr Weyde had given a shorter period. He accepted therefore that both the claimant's and defendant's vehicle could be slightly further back on their approach. However, that did not cause him to conclude that they would have been out of each other's line of visibility. He was also cross-examined at some length as to whether the defendant's vehicle was stationary or not at the point of collision (albeit, the difference it made of perhaps 50cm may not have any real impact on decisions I need to make). He gave, what in my judgment was clear and compelling evidence that the damage to the car and motorcycle were consistent with the claimant hitting a stationary vehicle. The direction of marks on the road were compatible with the motorbike bouncing back from striking a stationary vehicle. Further the marks on the car tyre were consistent with the motorcycle hitting the tyre. The positioning of the scuff marks on the tyre was consistent with the vehicle being stationary. He did not accept the analysis by Dr Weyde that the vehicle was moving and said that if it had been moving the tyre would have rotated such that the impact point on the tyre would have been in a different position.

47. Taking his evidence as a whole I note that Mr Mottram was prepared to make sensible concessions for example in relation to the delay set out above and lines of sight et cetera. Nevertheless he retained his position that the balance of the evidence supported the claimant's position, and that it was much more likely that the claimant had reacted whilst on his own side of the road to a vehicle coming towards him on his side of the road. That also coincided with the angle of the defendant's car when it came to a stop.

48. Dr Weyde's oral evidence had the initial difficulties which I have set out above. Dr Weyde was less willing to make concessions than Mr Mottram. He was quite rigid in his interpretation of matters. An example of this is the perhaps peripheral issue as to whether the defendant's car was stationary at the point of impact. Both experts agree that it makes probably very little difference to the circumstances of the accident. Nevertheless, Dr Weyde was insistent that the positioning of the marks on the defendants car tyre justified his position that the car was still slightly moving at the point of impact. He introduced in cross-examination the assertion that the defendant's insured's tyres could have locked and the car could nevertheless have moved forward to explain the positioning of the scratch on the tyre. I'm afraid that I found that part of his evidence entirely unpersuasive.

49. Dr Weyde had relied upon a relatively poor-quality photograph within the police report of the claimant's motorbike tyre to reach the conclusion that the tread on it was consistent with the claimant carrying out a sporting ride or risky riding. There was some discussion as to whether this was a correct translation. Dr Weyde then started commenting on his own experience as a motorcyclist. He said that the person riding this bike is more likely to have a higher inclination to lateral acceleration indicating a large worn pattern of tread on the edge of the tyre. He was asked whether he accepted the claimant's comments that this was indicative that he was a confident and competent rider; he then said that it didn't mean that the claimant was a risky rider, it was just typical of a person or indicated a person who would take risks. I am troubled by that aspect of the evidence. If the marking on the claimant's tyre was said to be an important factor it is critical that that evidence was put clearly and objectively. It appears to me that Dr Weyde had raised the flag of the claimant being a risky driver but then appeared to pull back from that. I remind myself that an expert's duty is to be objective, and I am concerned that in relation to this point Dr Weyde was not being so.

50. I have carefully reconsidered all of the experts' evidence in written, video and oral form for the purpose of this judgment. Having considered it overall I did not find Dr Weyde's evidence of real assistance. I have to reach the conclusion, I am sorry to say, that Dr Weyde was making assumptions rather against the claimant rather than in favour of him. The conclusion I draw is that he appeared to be seeking to pick apart Mr Evans' evidence rather than analysing things independently.

51. As against that I found Mr Mottram to be a more measured and careful expert in his approach to the court. His evidence corresponded, in my judgment with the photographic evidence on the day from the police. Having said all of that I have to take the evidence in the round in determining what happened in this case. Whilst expert calculations assist in certain cases, on the key determination in this case, as to the cause of the Claimant's emergency braking the expert evidence has limited value.

My findings

52. As set out above I found the claimant to be a compelling witness and his recollection that he saw Mr Günther on his side of the road on approach was a forceful one.

53. Would he have been able to see Mr Günther? I have carefully considered the photographs. The photographs at p448 onwards from the police on the day in question of course do not show directly the claimant's viewpoint (they are at a different position in the road) but they do provide a very good picture of what Mr Evans' would have been able to see on the day: in fact if, as he said, he was more towards the white line than the photographer his view around the bend would have been rather better.

54. In my judgment having looked at photographs and to some degree the video taken a number of months later it is apparent that there is a sharp right turn ahead of the claimant on his approach. That can be drawn from the fact that the road disappears to the right. There are low level metal highway barriers again bending to the right that one can see through the trees. Also, one can to a more limited degree see between the trees as to where traffic is oncoming. The claimant's point that he would have been riding towards the midpoint of the road where it was safe to do so means that his angle of view would be better. I therefore also accept the claimant's position that he knew that there was a sharp bend ahead from consideration of his TomTom device. Accepting all of that the claimant's account is that he saw Mr Günther coming on his side of the road.

55. It is said by the defendant that this could not possibly be in the position because Mr Günther's vehicle would have been further around the bend. However, looking at the police photographs again in my judgment it is clear that a vehicle approaching on the wrong side of the road could be seen. Further I accept the claimant's evidence that it would be capable of being assessed as to whether it was on the correct side or not. Looking at photographs at page 445 and 446 a police vehicle can be seen on approach and in my judgment it would be readily determined which side of the road it was on from its angle and positioning. I accept that my view looking at photographs in the cold light of a courtroom and that of a mobile motorcyclist at the scene is not directly comparable. The claimant would have had a dynamic view.

56. I am supported in this conclusion not only by the claimant's own evidence but those parts of the reconstruction evidence which are agreed. It is accepted that the claimant's reaction and brake marks start when his vehicle was upright on his side of the road. Therefore, it must have meant that there was something some distance back (adding in reaction time and some of the delay to have full braking effect) which would have caused him to apply his brakes. That was an initially controlled movement. It was only when the full application of the brakes was applied and the vehicle crossed the line that the bike slid onto its side. In my judgment that is wholly consistent with the claimant's case and fits with the expert evidence.

57. I therefore find as follows:

    i) that the claimant was approaching this junction at a reasonable speed for the conditions. There is no direct or persuasive evidence before me which would counter that finding.

ii) the claimant saw that there was a sharp bend ahead from a combination of his view as a rider and checking his tom-tom on approach

iii) that upon his approach he saw Mr Günther's vehicle approaching from the other direction on his side of the road

iv) at that point he was upright and in control of his motorcycle on his side of the road

v) he had to take emergency evasive action because the vehicle was coming towards him in his carriageway

vi) as a result he crossed the line entered into Mr Günther's lane, as shown by the tyre marks on the carriageway and his bike toppled over

vii) Mr Günther at the same stage (or probably just before reacted), realising that he was cutting the corner or crossing into the other path. He therefore started going back into his own lane. That is entirely consistent with the various trajectories of travel that the experts are presented in this case

58. In conclusion therefore in my judgment I find that the claimant took emergency evasive action because Mr Günther was approaching in his lane cutting the corner. I have considered the possibility that the claimant was simply going too fast and lost control of his vehicle going around a bend too quickly, however I reject that. First of all there is no witness evidence to support it. Neither the claimant nor Mr Günther make that assertion. Mr Günther himself in fact to the police said that the claimant's vehicle was not travelling at excessive speed for the road conditions. Further the markings on the road do not indicate that the claimant was going at significant speed. Did he simply misjudge the bend and lose control? On balance I reject that assertion. I accept that the claimant knew that there was a bend ahead because it was there and obvious to be seen. In the absence of excess speed there would have been no reason for him to lose control. As Dr Weyde himself conceded on behalf of the defendant if the claimant was simply approaching the bend he could have reduced his speed by a couple of kilometres per hour and safely gone round it. There is therefore no cogent or persuasive evidence to support the defendant's theory that the cause of this accident was the claimant losing control of his vehicle because of the sharpness of the bend or his speed on approach. The alternative scenario which is that as the claimant himself says Mr Günther was approaching on the wrong side of the road cutting the corner has forensic potency. I find that that is what caused this accident.

59. In all of the circumstances therefore I am satisfied on the balance of probability that the cause of this accident was the approach by Mr Günther, the defendant's insured, for whatever reason going into the claimant's lane. The claimant had no choice but to take emergency evasive action. The claimant prior to that had been driving within the speed limit and at appropriate speed for the road conditions. He was not to blame.

60. For the reasons set out above and applying the principles of German law as I do I find that this accident was caused by the actions of the defendants insured. In the light of the correctly conceded position that if I were to make such a finding there should be no division of fault for contributory negligence, or its equivalent, judgment should therefore be entered for the claimant for 100% of the value of this claim.