Neutral Citation Number: [2022] EWHC 583 (QB)

Case No: QB 2020 000368

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2022

Before:

Miss Sarah Crowther QC sitting as a Deputy High Court Judge

- -

Between:

DANIEL LAMBERT (BY HIS LITIGATION FRIEND MRS CHARLOTTE WILLIAMS)	**Claimant**
- and -	
MOTOR INSURERS' BUREAU	**Defendant**

- -
- -

PHILIP MEAD (instructed by **HUDGELLS LLP**) for the **CLAIMANT**
LUCY WYLES (instructed by **WEIGHTMANS LLP**) for the **DEFENDANT**

Hearing dates: 21st, 22nd and 23rd February 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SARAH CROWTHER QC

Miss Sarah Crowther QC sitting as a Deputy High Court Judge:

INTRODUCTION

1. I am asked to determine as a preliminary issue liability between two motorcyclists in a serious accident on 5 November 2017 during a motorcycle track event at a circuit then known as Circuito de Jerez, in Spain. In that accident, the Claimant, Daniel (sometimes known as Danny or Dan) Lambert, sustained multiple injuries, including a brain injury. Mr Lambert is unable to conduct these proceedings himself and is represented by his Litigation Friend and daughter, Mrs Charlotte Williams.

2. The accident happened towards the end of the back straight of the track approaching turn 6, then known as Dry Sac. The Claimant's case is that he was 'cut up' when another motorcyclist, Mr Prentice, overtook him on his right-hand side, and pulled in by moving across his path from right to left too close to the front of his motorcycle, leaving him with nowhere to go. The Defendant says that the Claimant was the author of his own misfortune, because due to previous events he had become flustered and failed to apply his brake in readiness for the Dry Sac turn when he should have. Had he been riding correctly, there would have been space and time for the overtaking motorcycle to pass him before the Dry Sac turn.

3. Both Mr Lambert and Mr Prentice were participants in the track event, organised by a UK based track day operating outfit called Track Sense, which was scheduled to take place between 4th and 6th November 2017. Participants including Mr Lambert and Mr Prentice paid a fee to Track Sense under a contract on Track Sense standard terms and conditions pursuant to which accommodation and transport of motorcycle equipment were supplied. Participants made their own private travel arrangements between the UK and Spain.

LEGAL FRAMEWORK

4. The Defendant is the Motor Insurers' Bureau ("MIB"). At first blush it seems unusual that MIB might be potentially liable in respect of a motorcycle track event in Spain. It is therefore worthwhile setting out briefly how this comes to be. First, at the time of the accident neither the machine ridden by Mr Prentice nor that of Mr Lambert was insured in respect of third-party liability risks. No criticism of either party arises out of that fact. Indeed, Mr Hill, the owner of Track Sense stated in his agreed witness statement that third party motor insurance for motor sport is not, to his knowledge at least, commercially available in the UK.

5. Secondly, at the time of the accident, the *Motor Insurance (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 ("*the 2003 Regulations*")* were in force as part of the law of England and Wales, pursuant to the UK's then obligations as a member of the EU, particularly as required by the Fourth Motor Insurance Directive. It is common ground that, in light of the decision of the UK Supreme Court in *Moreno v MIB [2016] UKSC 52*, a UK resident party injured in a motor accident is entitled to claim compensation from the Motor Insurers' Bureau in certain circumstances.

6. Those circumstances are, broadly speaking, that the guarantee fund of the member State in which the accident occurred would be liable to compensate the injured person

on the facts of the individual case, when applying the rules of the local law which govern such actions by injured persons against the local guarantee fund. In other words, if Mr Lambert can show that the Spanish guarantee fund would have been liable to him in respect of the accident, he can claim such compensation from the MIB as would have been payable by the local guarantee fund. It is common ground in this case that the scope of the insurance obligation for use of motor vehicles under Spanish law extended to cover participation in the track event, notwithstanding the fact that it was not on a road or other public place.

7. Therefore, whilst the law applicable to the Claimant's claim is English law, it is necessary to have regard to Spanish law to determine the preliminary issues, Spanish law being the law which would have been applicable to any hypothetical claim which Mr Lambert might have brought against the Spanish guarantee fund.

8. It is further worth noting from the order of Deputy Master Fine dated 12 February 2021, that the parties have agreed that the material scope of the Spanish applicable law is that it applies to all 'substantive' issues in the case. The approach agreed by the parties therefore means that although, strictly speaking, the Spanish law is not the applicable law as a result of the choice of law rules contained in Rome II Regulation EU 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"), the material scope of the Spanish applicable law to the preliminary issues is the same as it would be under Rome II.

9. I have taken the approach that the effect of the parties' agreement is therefore that by analogy to Article 1(3) of Rome II, matters of evidence and procedure are outside the scope of the material substantive law and fall to be determined in accordance with English law as the law of the forum. Equally, on an analogous basis to Article 22(1) Rome II, Spanish law will apply insofar as it contains rules which raise presumptions of law or determine the burden of proof.

10. I adopt the principles set out by Simon J in *Yukos Capital v Oil Company Rosneft [2014] 2 CLC 162; [2014] EWHC at paragraphs 25 – 30* regarding how an English court ought to approach the task of using the principles of a foreign law to determine a dispute before it, which, insofar as relevant and adapted to the present case can be summarised as:

    a. The Court is required to determine foreign law as a question of fact on the basis of evidence deployed by the parties according to the usual civil standard (paragraph 25).

    b. It is not the Court's function to interpret codified provisions. Rather, the Court must determine how the Spanish courts would interpret the Spanish Civil Code (paragraph 26).

    c. The burden of proving the Spanish law rests on the party seeking to establish that law and the task of the expert evidence is 'to interpret its legal effect, in order to convey to the English court the meaning and effect which a court [of Spain] would attribute to it, if it were to apply correctly the law of [Spain] to the questions under investigation by the English court' (paragraph 27).

d. The degree to which the English court can put its own construction on the foreign code arises out of and is measured by its right to criticise the oral (or written evidence) of the expert witness; and once the foreign law is before the court, the court is free to scrutinise the witness and what he [or she] says as it can on any other issue of fact (paragraph 27).

e. If there is a clear decision of the highest foreign court on the issues of foreign law other evidence will carry little weight against it (paragraph 27).

f. The court is entitled and may be bound to look at source material on which the experts express their opinion (paragraph 28).

g. Considerable weight is given to decisions of foreign courts as evidence of foreign law, but the Court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does not accurately represent the foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively decided (paragraph 29).

11. It follows from the above, that, once I have ascertained the Spanish law (as a question of fact) in accordance with the above guidance, it remains the function of the English court (and not the expert witnesses on foreign law) to apply such law to the facts of the case before it. This is the approach I have taken when considering the Spanish law evidence and reaching my conclusions upon it.

THE ISSUES FOR DETERMINATION

12. The issue which I am asked to determine is defined in the order of 27 September 2021 as being,

> "The matter be set down for a preliminary issue hearing to consider the liability of the rider, Mr Prentice, and any contributory fault against the Claimant."

13. I am grateful to the parties' representatives for collaborating effectively to reduce the amount of contested evidence and issues in the case.

14. In the original pleadings, there are two issues which are not now pursued by MIB. The first was limitation, which is recorded by the order of Deputy Master Fine on 12 February 2021 as no longer being in issue. The second, was whether Regulation 9(2) of the 2003 Regulations imposed a pre-condition to MIB liability that a formal request for information of the type suggested by Regulation 9(4) ought to have been made by Mr Lambert before issuing his claim. Miss Wyles, Counsel for MIB, indicated to me on the first morning of the hearing that this point was not pursued by MIB and therefore I shall say no more about it.

SPANISH LAW

The experts and issues

15. Ms Romero gave evidence for the Claimant. She gave the impression of an experienced and practical personal injury lawyer, well used to handling cases of

accidents and injuries before the Spanish courts, albeit that she did not profess any specialism in 'sporting activity' cases. Mr Vazquez on the other hand, took an approach which was more grounded in wider principles of the general law and had professional experience of sports law issues, but did not exhibit the same level of experience in finding successful arguments before courts in personal injury claims.

16. I am satisfied that both experts were looking to assist the Court and that their evidence was reliable and independent.

17. Ultimately, for reasons which I set out below, the issues between them were very narrow. Mr Vazquez contended that the Claimant's accident was within the scope of the legal risk which he was assumed to have accepted in participating the track event. Ms Romero said that the assumed risk was limited to those risks arising out of Mr Lambert's own actions and not those of third-party participants. In the end, as the experts agreed that this issue is really one of application of the Spanish law principles to the facts of the case, it is one for the court to determine rather than for expert evidence, although I have taken their respective views into account when forming my own.

Sources of spanish law

18. Miss Wyles, Counsel for MIB, helpfully arranged for the experts to give oral evidence on this topic, which in the event was agreed. Spain has a civil law system. Liability in non-contractual obligations is codified under the Civil Code, under which there is no general doctrine of precedent and therefore jurisprudence is not generally a source of law. However, where there is consistent caselaw of the Supreme Court in interpretation of the Civil Code, this is binding as precedent on the lower courts. In practice, where there are two cases of the Supreme Court which decide the same point of principle the same way, this is considered binding precedent. Cases decided at regional Court of Appeal level are taken into account in practice by Courts but have no binding effect.

Non-contractual obligations in sports activity accidents

19. I make the following findings as to the Spanish law, which are in large part based on the agreement which is recorded in the joint statement of the experts dated 23 September 2021 as clarified during their respective oral evidence:

    a. The general legal regime of non-contractual civil liability is principally based on Articles 1902 to 1910 of the Spanish Civil Code ("SCC"). The general rule is that anyone who by an action or omission causes damage to another person either by fault or negligence is obliged to compensate the damage caused.

    b. The burden is on the Claimant throughout to establish each of the four necessary elements:
        i. Commission of an unlawful act or omission by the tortfeasor.
        ii. Fault or negligence on the part of the tortfeasor.
        iii. Damage as a result of the harm. Damage must be both real and effective.
        iv. A causal link between the unlawful act or omission and the damage.

c. Article 1104 SCC provides a default standard of care or diligence which is that of the 'good parent'. This standard itself will vary depending on the type of activity at stake. However, in some situations, a different standard of care can apply where a specific rule applies.

d. The standard of diligence in sporting activity cases, such as motorcycle track events, is lower than the 'good parent' diligence standard. The standard of diligence in sporting cases comprises a duty to show the diligence of 'a good sportsperson or athlete'. This standard of diligence equates to behaviour which is commonly considered as usual and appropriate in the specific modality of the sport in question.

e. In cases where the damage is attributable to the victim's exclusive fault or negligence, there will be no liability. In cases where such fault or negligence on the part of the victim contributes to the causation of the damage, under Article 1103 SCC, the court will either apportion liability or reduce the amount of the damages awarded to reflect the degree to which each party contributed to the damage.

f. In the context of sporting activity, there is also a doctrine known as 'risk assumption' pursuant to which participants in a sporting activity assume the risk of suffering damage that is inherent or incidental to the sport in question. Where damage is sustained by an injured party as a result of an act or omission which was within the assumed risk, no liability arises. The doctrine was established in concurrent decisions of the Spanish Supreme Court of 17 October 2001, appeal 1771/1996 (Case 6 in the Spanish authorities bundle) together with that of Judgment 270/2006 of 9 March 2006, appeal 2947/1999 (Case 8) and is therefore binding precedent.

g. If conduct for which the injured person has assumed the risk contributes to causation of the damage, there is no liability for such damage, regardless of whether the conduct amounted to 'fault' on the part of the injured party.

h. It is a matter for the court to determine on the facts of each case whether the damage caused has arisen within the scope of the assumed risk. The factors to be taken into account by the court in forming that assessment are all the facts of the particular case including:

    v. If the specific act or omission was performed in the course of a sporting activity, in which case the risk assumption doctrine applies.

    vi. If the specific act or omission complained of complied with the sporting regulations and, if not, if the conduct at stake can be considered as normal in that specific sport (by which is meant conduct within the limits of acceptable behaviour in the sport at stake). A distinction must be drawn between slight negligence on the one hand and gross negligence or intentional fault on the other. The experts agreed that an act or omission which was

considered unusual, inappropriate, or disproportionate in the sport will fall outside the assumed risk.

vii. The type of damage which was inherently likely in the activity in question and how serious that was.

i. It has been held by the Spanish courts that motor racing is a high-risk sport.

20. I further find that even where there is some risk assumed by a participant in a sporting activity, if the act or omission of the defendant increases or aggravates the risk, then the risk assumption doctrine will not apply in respect of liability for the damage caused.

21. The point at paragraph 19(h)(iii) above was agreed in the joint statement but was nevertheless clarified by Ms Romero in her oral evidence, which I accept, as meaning that the Spanish court forms an assessment of the seriousness of potential injury which is inherent to the activity when considering whether a particular harm sustained fell within the assumed risk. So, for example, receiving kicks to the legs is an inherent part of football, but a much more serious kind of injury is not. Equally, I accept the evidence of Mr Vazquez that in a sport where catastrophic injury might be expected, then this criterion carries relatively little weight in the assessment of the assumed risk.

22. It emerged from the oral evidence of both experts, that in the commentaries some scholars have sought to draw a distinction between cases of so-called 'unilateral' risk assumption meaning situations where the courts have held that the risk assumed by the injured party is limited to the extent of her own actions in an event and 'bilateral' risk assumption for the cases where participants have been held to accept the risks associated with the actions of others as well. I accept Ms Romero's evidence, with which I did not understand Mr Vazquez to disagree, that where a sport has an inherent element of physical contact or competition, such as football, basketball or boxing, the participants assume the bilateral risk that others might cause them damage during sport.

23. On the other hand, (and again this seemed to be common ground between the experts), in a sporting activity where contact was not expected, the risk assumed would be limited solely to one's own actions, or 'unilateral'. Mr Vazquez was at pains to explain that these labels do not feature in any of the caselaw, but are applied by academics, however he did not disagree with the substance of the analysis. It seems to me that the labels are in line with the cases to which I was directed and have some use in terms of assisting in the application of the principles, therefore.

24. One further point on which the experts were agreed, but which needs to be mentioned to explain an important point of distinction applicable to several of the cases to which reference was made in the reports, is that different principles of Spanish law apply where a participant in a sporting activity raises a claim against an organiser of that activity as opposed to a claim between participants. In these 'organiser' cases, the Spanish courts have taken a different approach to liability issues. They have adopted a reversal of the burden of proof which in the jurisprudence is justified by the policy of 'theory of risk'. In other words, where an organiser puts on an activity which has inherent risk then it is for the organiser to show that any damage caused to a participant is not his fault. I find that this principle has no bearing on the issues which

I must decide, and I take no account of it when considering the application of Spanish law to this case: here it is for the Claimant to prove his case throughout. As we will come to see, however, it is important to bear this feature in mind when considering the example decided cases to which I was referred.

Disputed areas – assumption of risk

25. Mr Vazquez in his report at paragraph 48 put the assumption of risk very broadly, suggesting that, 'Spanish Courts tend to consider that in this sport [motorcycling], accidents and crashes form part of the game, falling within the normal risks of the sport.'

26. In doing so, he relied on an example case of the High Court of Murcia of 21 January 2003 in which it was held that an organiser of a motorcycle event would not be liable to a rider who had been injured in an accident caused by 'the foreseeable pull of the track' (report paragraph 49). However, I am not persuaded that this case supports the broad proposition put forward by Mr Vazquez. It seems to me that this case illustrates an application of the general principles above, but in the context of a claim against the track occupier in respect of an accident said to have arisen due to the state of the track. In fact, the claimant was successful in that case because, as Mr Vazquez points out, the occupier of the track failed to establish that it had taken all the reasonable precautions. Because the accident was caused by a hole in the track which posed a foreseeable risk of danger which caused an increase or aggravation of the risk inherent in using the track, the damage caused therefore fell outside the motorcyclist's assumed risk. In my judgement what this example case tells us is that contrary to Mr Vazquez's suggestion, there are limits on the scope of the risk assumed by participants in motorcycle events. I would accept that, insofar as an accident arises out of the participant's own error in riding, whether negligent or not, this would therefore fall within the scope of the assumed risk. But it is clear to me that the Spanish courts do not simply consider all accidents and falls to be inherent to the risks of the sport of motorcycling, but rather they assess the risk by reference to the specific circumstances of the individual case.

27. Nor do I find helpful Mr Vazquez's reliance on Judgment 403/2015 of the High Court of Murcia, of 9 July 2015. The issues there for the court in respect of assumption of risk were very different to the present case. That case concerned a Moto Cross competition, where a driver lost control of his motorbike and crashed against a pole. That pole became detached and was thrown into the crowd where a spectator was injured. The issue before the court was the spectator's claim in negligence against the rider. It was specifically held that there was no fault or negligence on the part of the rider, but the key point to my mind is that there does not appear to have been any consideration by the court of the scope of any risk assumed by the spectator in attending the event. Indeed, it would seem from the fact that negligence of the rider was being considered, that the court did not think that the spectator had assumed all risks of injury due to accidents by riders.

28. Mr Vazquez in his report also referred to some other decisions concerning go-karting (High Court of Madrid, judgment 113/2013 of 7 March 2013 and High Court of Castellon, judgment 285/2002 of 13 September 2002 as well as Supreme Court judgment 857/2009 of 22 December 2009). All three cases are 'organiser liability' cases and so are of very limited use in assessing the assumed risk in the current case.

In the latter case, a 17-year-old competitor in a cycling race on a public road through a mountain pass which was marked as a 'dangerous descent' came off on a curve and fell into a ravine suffering catastrophic injuries. He claimed against the race organisers, on the basis that there was loose gravel where he had been riding. The court said,

> 'the risks related to race safety that correspond to the organiser are different from those that the competition itself generates. They are risks that, differently, the cyclists know and assume voluntarily as part of their activity, which prevents transferring to the organisation the consequences that arise from a fall suffered in the course of the race, since the damage occurred as a consequence of the inherent danger of an activity under the control of the victim, who exposed himself to it by descending the pass.'

29. It can be seen from this that the assessment of risk arising out of the exigencies of participation as between competitors or for themselves is viewed differently in Spanish law to the risks assumed by the participant vis-à-vis the organisers. The statement of the Court regarding the assumed risk of the cyclist pertains solely to the risk he assumed himself of cycling beyond his own limits. In that sense this decision is consistent with the decision of the High Court of Murcia of 2003, but it does not assist me particularly in the question which I have to answer which concerns acceptance of the risk of mistakes of others nor in the context of motorcycle track events.

30. One line of cases which I do consider to be analogous to an extent, is the skiing cases. Ms Romero set them out in her report, including Court of Appeal of Barcelona of 30 March 2007 in which a child skier was located in a transition slope between a blue and red run. An uphill skier descending the red run encountered a sudden drop in gradient and ice and lost control, falling down the slope and into the child. In that case, the court indicated that although skiing 'entails a certain amount of risk, he who practises the sport with normality can reasonably expect other slope users to act with skill and care and be aware of their own limits in practising the aforementioned sport, with aim to avoid causing damages to others.' Other examples of these principles in practice were given by Ms Romero in the Court of Appeal of Cantabria 22 January 2003, court of Appeal of Huesca (Criminal) 16 July 2002 and Court of Appeal of Asturias of 22 November 2006.

31. Whilst there are obvious differences between the sport of motorcycle track eventing and skiing, it does seem to me that in several material respects they raise similar issues in terms of assumption of risk. Both sporting activities involve circulation of participants in a relatively free form in which it will be necessary and reasonable for participants to overtake each other and be overtaken. Furthermore, there are some skiers for whom the thrill of speed is a significant motivating factor, whereas for others the fresh mountain air and gentle exercise are the only considerations. It is also an amateur sporting activity where it cannot be assumed that all users of the slopes have the same skill and ability level as others. However, it is clear that the Spanish law expects circulating skiers to ski within their limits and that skiers do not necessarily assume the risk of other skiers not being in a position to control their skis or making mistakes or taking risks which cause danger to other skiers.

THE TRACK EVENT

32. There is a witness statement of Anthony Hill, who traded as Track Sense and contracted with the participants for the provision of the Track Event in Spain. His evidence was agreed, although I bear in mind the fact that as the organiser of the event he is not entirely disinterested or independent when he gives his opinion on questions of risk allocation and safety. I have also read the reports of motorcycle experts, Mike Edwards, for the Claimant and Steve Parrish for the Defendant, together with a joint statement which they produced following without prejudice discussions. Other witnesses of fact, Mr Burbidge, Mr Robertson, and Mr Simpson also gave evidence about track events. With the exceptions of Mr Prentice and Mr Lambert, all the witness evidence was agreed.

33. Motorcycle track events in the UK are often one day. When European trips are organised, the events tend to be over 2-3 days. Riders arrange to have their bikes transported to the circuit and ride them around racetracks which are built for professionals in professional events. In the words of Mr Simpson, the track events, 'allow for amateur riders to ride around a top circuit on their own bikes just like an amateur golfer looking to play a course like St Andrews.'

34. The structure of the European track events is that each rider will enjoy several 20-minute sessions on the track per day and the sessions are organised into groups, based on performance. Whilst sometimes these groups are slightly euphemistically known as 'novice, intermediate and advanced,' it is clear to me on the evidence that the track event operator, Track Sense, does not undertake any meaningful riding skills analysis, but that the sole factor considered when placing in groups is speed. Therefore, the group names should be more as Mr Burbidge suggests in his witness statement, 'slow, intermediate and fast,' although in fact, there were four groups at the Jerez track event. Both Mr Lambert and Mr Prentice were in Group C. There is some evidence that Mr Prentice was slightly faster in his lap times than Mr Lambert, by about 3 seconds or so, but it is clear to me that both were suitably and properly placed in the correct group.

35. The overwhelming evidence is that there is no competitive element between riders at a track event. Mr Simpson, a motorcycle instructor who had provided tuition to Mr Prentice in the past, states, 'one point that is always made [at the safety briefing is] that a track day is not for racing.'

36. As Mr Prentice put it in his statement, 'It doesn't really matter what group you are in as you're not racing, you're focussed on what you are doing'. Mr Hill explains what they are in fact doing in his statement when he says, 'the riders are pushing themselves and taking advantage of being able to ride their bikes at the speed they were designed for.' He does not suggest that it is any part of the track event experience to rank riders against each other.

37. Mr Parrish's evidence was along similar lines when he described track events generally as follows,

> "Track events are becoming extremely popular as riding powerful motorcycles on public roads is rather futile and not a great deal of fun. Spain's excellent tracks and warmer weather conditions have become

> popular as the circuit hire is very reasonably priced for the track day companies. Giving riders an opportunity to hone their skills and motorcycle craft in a safe environment, getting to know their limits and the motorcycle's limits they are happy with."

38. Whilst I accept the evidence of Mr Simpson in his statement that overtaking is 'part and parcel' of the event because some riders are faster than others, there is no pressure in my view for riders to pass each other in track eventing. Whether and when they do overtake is a matter of personal choice, which ought to be exercised well within the limits of their own ability. Whilst some riders will wish to push their limits in terms of lap times and therefore wish to overtake slower riders more often, others will be content to enjoy the relative freedom of speed and absence of traffic. It is entirely up to them. That said, I am satisfied that some participants do take the improvement of their times very seriously and that there is considerable skill involved in riding heavy and powerful bikes against the clock and this may be a factor which drives up the number of overtaking manoeuvres.

39. Track Sense issued standard terms and conditions to participants which were emailed to Mr Lambert together with joining instructions. The copy in the trial bundle is dated 4 September 2018 (after the events in question) but it has not been suggested that these terms and conditions were in any way different to the ones in place at the time. In my view these terms and conditions support Mr Lambert's case in respect of assumption of risk. They show that the expectation was each rider would exercise skill and care to avoid injury to other participants, whilst assuming risk in respect of their own conduct vis-à-vis Track Sense as organiser. I have emphasised the wording which I consider important, but in context, the terms and conditions state,

> "**IMPORTANT NOTE:** Please read carefully.
> These are the Terms and Conditions by and subject to which Track Sense ("TS") …agrees to provide and allow a motorcycle rider ("Rider") to participate in a motor cycle Track Day or Track Days ("Ride") and by and subject to which TS agrees to obtain other Ride related services at the request of the Rider or customer. Prior to participating in the Ride and/or making use of any other requested service, you are required to enter into a **legally binding** agreement confirming that you agree to do so subject to the Terms and Conditions set out here. (Original emphasis)
>
> **THE RIDE:**
> 1. The Rider accepts that riding a motorcycle and participating in the Ride, on whatever racing circuit, track, road or other surface or terrain and whether on public or private highways and regardless of the circumstances or conditions, in inherently dangerous and that it is consequently very difficult for TS to insure against risk of injury or other damage. The Rider therefore and hereby variously agrees, warrants, undertakes and accepts that in participating in the Ride, whether on a public or private highway or at or on such route or course as may be taken for the purposes of the Ride, he is (a) voluntarily exposing himself to and **will assume all and any risk** of damage or loss or personal injury whether **to his person**, property or otherwise howsoever (b) solely responsible for the manner in which he rides (c)

> **under a legal obligation at all material times to ride with reasonable care and skill in relation to himself and others** (d) responsible for ensuring that he wears appropriate protective clothing that is reasonably fit for its intended purpose (e) under a legal obligation to and **will take all steps reasonably required to ensure that nothing he does, or fails to do, will adversely affect the health and safety of TS or other participants** in the Ride or any third party and (f) solely responsible for injury, damage or loss that he causes to others." (Emphasis added)

40. I also heard evidence about how frequent collisions are in track events. Mr Hill in his statement suggests that they are relatively common, although he does not descend into any details and does not give any examples or data in support of his general assertion. As I have already said, I treat his evidence with some caution on this topic, because it seems to me that he potentially has an interest in suggesting that collisions are a common or unavoidable feature of track events.

41. I found the evidence of Mr Parrish, the Defendant's motorcycle expert to be much more convincing than that of Mr Hill on this issue. He said that given the likelihood of severe injury to a rider, due to their vulnerability, relative lack of protection and high speeds, it was in everyone's interests to avoid encountering other riders or their motorcycles. I infer from this that riders will generally exercise caution rather than risk contact, perhaps primarily out of self-protection rather than wholly altruistic reasons, but I find that contact with other riders is not an expected or inherent part of motorcycle track events. On the contrary, whilst it is foreseeable that such contact might occur, in the ordinary course of events, riders would not expect to come into contact with each other. Contact with others is very much the exception in my view and not the rule.

42. A somewhat semantic disagreement arose as to whether track event motorcycling is properly described as a sport or a hobby. I am not persuaded that anything turns on the distinction in this context, rather, I find (to the extent that it was seriously disputed by the Claimant), that motorcycle track events are a sporting activity and that liability in this case falls to be judged under the liability regime in sporting activity cases.

THE 'NORMS' OF OVERTAKING

43. It is common ground that there are no written rules, guidelines or codes of conduct which govern riders in motorcycle track events.

44. The Claimant's case is that there is, however, a custom and practice in motorcycling track events that it is the responsibility of the overtaking rider to ensure that sufficient space was available to the overtaken rider throughout the whole of the overtaking manoeuvre, including not only the pass but also when pulling back in front of the overtaken rider.

45. In support of this Mr Mead, Counsel for Mr Lambert, relied on the evidence of Mr Edwards, who is an experienced professional competitive motorcyclist and instructor. In his report he stated,

> '1.36 One major thing that is covered during the rider's briefing is the subject of overtaking.
>
> 1.37 Dependent on the trackday organiser, there can be different explanations of the rule.
> 1.38 The rule generally states when overtaking, it is advised to give the slower rider plenty of room, usually suggesting a 2 metre or 6-foot gap between machines.
> 1.39 It is additionally suggested that the rider should overtake on a straight section of the track, not as they enter a corner.
> 1.40 This is because one rider could cause another rider to change speed or direction, known as "sitting them up" at a critical time, and can interfere with the rider's cornering manoeuvre.
> 1.41 It is generally accepted that it's the overtaking rider's responsibility to pass another rider without causing any effect to the speed or direction of the rider they are passing.
> 1.42 There is no rule book for riding etiquette on trackdays. An online search of information relating to riding behaviour on circuit has found the following references to overtaking.
> 1.43 – 1.46 …
>
> 1.47 It is generally accepted that it is not the responsibility of the rider who is being overtaken, to let the other rider past."

At sections 1.43 to 1.46 of his report, Mr Edwards gave links to various online sources which set out further details of the correct way in which to carry out overtaking, and which in my judgment support the broader guidance set out above. I do accept the submission of Miss Wyles that some of the source material guidance stepped more into the territory of suggestions for best practice or good technique, but to my mind that does not undermine Mr Edward's point that there is an irreducible minimum, as expressed in the paragraphs of his report which I have set out, that responsibility for ensuring that there is time and space for the overtake to take place safely rests with the overtaking rider.

46. Part of the justification in Mr Edwards' evidence for responsibility resting with the overtaking rider, is because use of mirrors is generally discouraged on track to reduce distraction, because the rider's focus should be on what is in front of him or her. Track cycles such as the ones in use at the material time do not have mirrors and even where standard road bikes are used, the mirrors are quite often removed or taped over for track use. Additionally, riders wear protective crash helmets which further reduce their fields of vision.

47. As a result, riders know that other riders are generally wholly unaware of what is happening behind them on track. The only way that overtaking can work safely therefore is if the overtaking rider, coming from behind, has responsibility for ensuring that there is enough time and space for the overtake.

48. This all makes considerable sense to me, both as expressed by Mr Edwards based on what I accept to be his considerable riding experience and, but also in accordance with logic. I was therefore somewhat surprised to find there was disagreement between Mr Edwards and Mr Parrish on that point. Mr Parrish states that in fact it was

'not up to [the overtaking rider] to offer sufficient space on track…it was the [overtaken rider's] responsibility to give the [overtaking rider] the required space to complete his overtaking manoeuvre and avoid the collision.'

49. Mr Parrish does not give any source in support of his opinion on this point and does not identify any online or other guidance which conflicts with the materials which Mr Edwards relies upon. When faced with cross-examination, he was bound to modify his opinion to accept that it could not possibly be correct that a rider whose vision is limited to a forward cone could in any way be responsible for ensuring that a rider behind him had space and time to pass. However, he sought to maintain that responsibility for the overtaking manoeuvre passed to the rider being overtaken immediately at the point when the riders were abreast.

50. I cannot accept that proposition. It cannot be right that a rider whose focus is on the track ahead is subject to a responsibility to change line, slow down or steer to accommodate an overtaking rider of which he is likely to have no advanced warning at any time. That strikes me as a recipe for danger. I prefer the evidence of Mr Edwards and find that it is a general norm of motorcycle track eventing that the responsibility to ensure that there is sufficient time and space to pass rests with the overtaking rider throughout the duration of his manoeuvre. Whilst I can see that a rider being overtaken might have a responsibility not to respond to the overtake by creating a danger which was not there when the manoeuvre commenced, that does not, in my view, extend to an expectation that he will modify his own behaviour in order to make what was already an inherently dangerous manoeuvre by the overtaking rider into a safe one.

51. To the extent that it is necessary, I derive further support for this conclusion from the 'crib sheet' of track day safety briefing notes appended to the statement of Mr Hill. In those notes it states that when **overtaking** (i.e. not when being overtaken) the rider should give space and be courteous and that overtake on straights is safer. It also encourages riders to look ahead. Moreover, there is no suggestion in the evidence of Mr Prentice that he thought the general rule was that it was for Mr Lambert to give him space to overtake – indeed at paragraph 25 of his statement Mr Prentice states that believed he had given enough space, demonstrating that at least in the early part of the manoeuvre his understanding was that it was his responsibility to give enough space. Also, Mr Simpson, the instructor on whose evidence the Defendant relied, also stated that he coaches students that when overtaking they 'must do their best to ensure other riders are given room to manoeuvre.' Again, there is no hint of a suggestion from Mr Simpson that there was any onus on Mr Lambert to create space to allow the overtake to succeed.

THE FACTS OF THE ACCIDENT

52. In addition to the witness evidence, I had the benefit of video footage of the accident. All the footage was derived from a video sports camera which Mr Lambert had fixed mounted to the fuel tank of his motorcycle. There were several clips of footage from the Claimant's camera, subjected to various editing changes:

    i. Claimant's edited YouTube footage available at the time of writing at https://youtu.be/DkXTnZyWkX0

ii. Defendant's edited YouTube footage available at the time of writing at https://www.youtube.com/watch?v=R2I4Rz5D3nU
iii. Edited footage prepared by Mr Edwards
iv. Edited footage prepared by Mr Parrish

53. The accident occurred at about 4pm in the afternoon on 5 November 2017. The weather was fair and road conditions were dry. The circuit of the track at Jerez is a Grand Prix standard track with a length of 4.428km which was completed in 1985. Laps are completed in a clockwise direction and the accident occurred towards the end of the back straight, heading into turn 6 (Dry Sac) which is a right-hand hairpin bend (fig 1, Edwards). The back straight is approximately 612m long. It is the fastest part of the track. The accident occurred in Mr Lambert's second lap of the track.

54. The basic facts of the accident are largely uncontentious, and I find that they are these. There were three motorcyclists riding along the back straight. As they exited turn 5 (a right-hand turn) and entered the back straight, all three started to accelerate, intending to reach to speeds of about 150mph. Mr Lambert was positioned at the front of the group and on the left-hand side of the track. Mr Robertson, who was slightly behind Mr Lambert, moved to the centre of the track to overtake Mr Lambert. Mr Robertson completed his overtaking manoeuvre just before the 300m mark before turn 6 and pulled back in front of Mr Lambert to the left-hand side.

55. Mr Lambert then went to overtake Mr Robertson 'back' as it were or to 're-take', pulling into the centre of the track in a manoeuvre which Mr Prentice, who was the rear-most rider at this stage, described in both his statement and evidence as 'swerving out', 'putting himself close to Mr Prentice's left side' (statement paragraph 21). Mr Prentice was on the right-hand side of the track throughout and was from the exit of turn 5 up to this stage positioned slightly behind both Robertson and Lambert.

56. Mr Robertson was the first motorcyclist to start reducing his speed and braking in anticipation of turn 6. He started to actively brake relatively early at approximately 300 metres before Dry Sac, well before the gantry over the track. Mr Lambert then also started to reduce speed, by closing the throttle. Mr Lambert went from a top speed of about 150mph and 'rolled-off' approximately 35mph using engine braking.

57. For a moment, all three cycles were riding abreast. However, Mr Robertson on the left-hand side was by this stage travelling more slowly than the others and started to drop back in relation to them.

58. Mr Prentice went to overtake both Mr Lambert and Mr Robertson on the approach to turn 6. He moved past the other two bikes which, as I have said, were slowing down already, and then moved over across the path of Mr Lambert to the left-hand side of the track, in readiness for the upcoming tight right-hand bend. As he moved left, he was also starting to brake. There was a dispute as to whether Mr Prentice was actively braking as he passed Mr Lambert and started to move to his left. Mr Prentice said he only started to brake after he pulled across, however, I accept the evidence of Mr Parrish that Mr Prentice's speed was about 5-10 mph faster than Mr Lambert at this point although his rate of deceleration was greater, which to my mind suggests that Mr Prentice was applying his brakes before or as he moved past Mr Lambert.

59. Mr Lambert reached for the brake lever and applied his brakes very shortly before the accident occurred shortly after Mr Prentice becomes visible in the camera footage ahead of Mr Lambert. Although a great deal of analysis has been undertaken by the experts in seeking to determine the precise timings of when Mr Lambert started to brake (for the purposes of assessing his reaction time), as I explain below, I do not consider this material to the cause of the accident.

60. The accident occurred when the front tyre of Mr Lambert's motorcycle came into contact with the rear tyre of Mr Prentice's cycle. Mr Lambert was thrown off his motorcycle, although the bike righted itself and carried on upright for a short while and Mr Prentice can therefore be seen on the left-hand side of Mr Lambert's motorcycle. Mr Prentice carried on around turn 6 and was unaware of what had happened until he was later flagged down by the track marshals who had closed the track.

Mr Lambert's evidence

61. Mr Lambert seemed to be a somewhat fragile character. It is hard to imagine him riding a powerful track motorcycle and I can only assume that he has changed quite radically since his accident. Although he was doing his best to answer questions and he clearly was an honest witness, it was apparent to me that he was struggling at times and did not always appear to follow the gist of relatively straightforward questions, such as his confusion when it was put to him that this was not a 'road traffic' accident because it had not occurred in the ordinary course of circulation on public roads. I therefore treat his evidence with some caution.

62. Nevertheless, it seemed to me that Mr Lambert was an experienced rider who had ridden road bikes since the age of 14, later commuted to and from work using motorcycles and in 2007 had taken up the hobby, as he called it, of track motorcycling. His bike was a standard track cycle which had not been adapted to suit the track.

63. Although he had no recollection at all of the day in question, indeed his last memory before the accident was of being at Gatwick airport ready to depart for Spain some two days' previously, he had been on track days before and knew what to expect in terms of safety briefings and how the sessions would run. He appeared to accept that it was 'not forbidden' to overtake on straights prior to bends, although it was not entirely clear to me whether he meant 'straights prior to bends' or simply 'prior to bends' and in any event, it is not part of his case that it was forbidden to overtake.

Mr Prentice's evidence

64. Mr Prentice was also a truthful witness in my view and also an extremely experienced rider of motorcycles including at track events. He frankly admitted that he had had something of a sleepless night worrying about giving evidence and looked a little nervous at the beginning before getting into his stride. Towards the end of his evidence, Mr Prentice's demeanour changed somewhat, and he appeared to become a little frustrated with the questioning, audibly muttering 'ridiculous' under his breath when it was suggested, quite properly, to him that one explanation for the accident was that he had not watched where Mr Lambert was carefully enough.

65. He stated that he did not know whether there was a collision between the rear of his motorcycle and the front of Mr Lambert's motorcycle. Considering the agreed expert evidence that the presence of smoke (and which can be seen on the video footage) demonstrates that there was physical contact between the two vehicles, his reluctance expressly to concede that the vehicles must have collided does demonstrate in my view an element of wishful thinking. He is, perhaps understandably, struggling to accept his role in an accident which has had serious consequences for Mr Lambert.

66. Another example of wishful thinking was his insistence that the video footage was not representative of the true distance between the rear of his vehicle and the front of Mr Lambert's. Even taking account of some degree of potential foreshortening effect due to the camera lens, this evidence had an air of unreality about it. I prefer the evidence of Mr Edwards who referred to his own experience of using similar cameras for training and instruction of motorcycle students, that in practice such footage would not distort the depth to any significant degree and that the footage shows that this was a very close pass.

67. In my judgement the real nub of the matter emerged when he said in cross-examination that,

> "It was reasonable for me to expect Mr Lambert to brake and I knew he was braking and it meant to me that I was sufficiently in front of Danny and I could brake."

68. Later on in his evidence and to similar effect he stated,

> "I would expect it was reasonable to assume he was moving left after I passed him."

69. He explained that his reason for moving to the left after overtaking was that 'it was the safer option for me to be more left to be on more tyre' meaning that as he took the steep right-hand bend, he would be more upright.

The expert evidence of Mr Edwards and Mr Parrish

70. The expert witnesses Mr Edwards and Mr Parrish had taken very different approaches to the same brief. Miss Wyles correctly pointed out that the order giving permission had stated that the experts should address, 'the actions alleged to have been taken by Mr Prentice'. Ironically, Mr Edwards addressed this issue only briefly in his report and the experts in their joint statement did not touch upon the issue. Even more unfortunately, Mr Parrish in his report concentrated on the actions of Mr Lambert (for which permission was not given) and the joint statement almost solely focussed on this point too. I therefore gave permission in the course of the hearing for cross-examination of the experts by both counsel to extend beyond the areas of disagreement in the joint statement in the interests of justice so that all the issues identified by the pleadings and in the original expert reports could be considered.

71. Mr Edwards gave the impression of being an extremely capable and experienced motorcyclist, but not a very experienced expert witness. This, in my judgement, explains why his report did not address in full all the details of Mr Prentice's conduct and the lopsided joint statement and not, as suggested by Miss Wyles, that criticisms

of Mr Prentice were a recent invention on Mr Edwards' part. Notwithstanding his relative inexperience as a witness, he struck me as an extremely straightforward and knowledgeable motorcyclist with considerable relevant experience in teaching intermediate riders such as Mr Prentice and Mr Lambert with good understanding of their competencies and capabilities.

72. Mr Edwards' theory of the accident was that after Mr Robertson had completed his overtake of Mr Lambert and had pulled back to the left-hand side of the track, Mr Lambert responded by re-taking during which he was a little surprised by how early Mr Robertson chose to brake, which caused some momentary confusion or 'fluster' on Mr Lambert's part. The 'flustering' can be seen on the footage as Mr Lambert repeatedly opens and closes the throttle because he seems to be undecided about whether to speed up or slow down.

73. What, according to Mr Edwards, Mr Lambert in fact did was to close the throttle and 'roll-off' about 35mph of speed using engine braking. Mr Edwards' evidence was that he did not think that Mr Lambert's decision to start active braking was influenced by the overtaking manoeuvre of Mr Prentice, but that it was coincidence and Mr Lambert had probably decided to start braking at that point anyway.

74. He was pressed on the question of whether Mr Lambert would have had sufficient track space to reduce his speed to the 45mph or so which would be the speed at which an intermediate rider would negotiate turn 6 and was clear that there would have been. He did, however, accept in cross-examination that if Mr Lambert had started to actively brake earlier, either alone or in combination with some steering back to the left-hand side of the track, there would have been space for Mr Prentice to pass in front of him without incident. In his view the cause of the accident was Mr Prentice's decision to overtake.

75. Mr Parrish gave his evidence in a quietly understated but confident manner. He also has considerable relevant experience in the motorcycling world, including working as a freelance instructor on track days. His analysis of the case rested almost solely in my judgement on his opinion that Mr Lambert had already missed his 'braking point' for turn 6 and that he was, regardless of the actions of Mr Prentice, destined to miss the turn and end up in the gravel trap. Mr Parrish had been unable to conduct testing of the Mr Lambert's motorcycle which was damaged beyond repair in the accident or of the circuit and therefore his opinion was based exclusively on the fact that in the 'sighter lap' which Mr Lambert completed immediately before the accident; he had started braking at about the point of the gantry roughly 200m from turn 6.

My findings as to what happened in the accident

76. I prefer the evidence of Mr Edwards on the question of whether Mr Lambert had already missed the chance to brake in time safely to negotiate turn 6. As he pointed out, each rider will ride each lap differently and this lap was not only the first 'flyer lap' (as Mr Edwards called it) but also the circumstances were very different to the 'sighter lap' because Mr Lambert had been engaged in the overtaking and re-taking with Mr Robertson. There is no justification in my view for Mr Parrish's inference that because Mr Lambert braked around 200m before turn 6 in lap 1, that any later braking would leave him unable to make the turn. I accept Mr Edwards' judgement (based on his experience in teaching and watching intermediate riders) that an

intermediate rider could have decelerated and safely managed the turn from the point at which he had started to brake. I consider that Mr Parrish has also failed to take adequately into account that in fact Mr Lambert had been braking using his engine. To my mind Mr Edwards is right that Mr Lambert would have had time to brake and negotiate turn 6 had the accident not occurred.

77. Rather, I find that the immediate and predominant cause of the accident was Mr Prentice's decision to overtake and his failure to re-assess that decision as events unfolded down the back straight. In my judgement, Mr Prentice already from the exit of turn 5 had it mind to overtake Mr Robertson and Mr Lambert on the approach to turn 6. For this reason, he positioned himself to the right-hand side of the track, which as Mr Parrish said in his evidence, is the safer overtaking line when coming up to a right-hand bend. I also find that his plan was to rely on relatively late braking to complete his overtake: he would pull to the left at the end of the straight ahead of the others by leaving his braking later.

78. What happened next should have caused him to re-consider and abort his overtake. It is clear from his evidence that following the overtake of Mr Lambert by Mr Robertson, Mr Prentice was taken aback by the re-take manoeuvre of Mr Lambert. He was also, according to paragraph 21 of his statement, surprised by how far Mr Lambert pulled into the centre of the track. It should have been apparent to Mr Prentice that he ought to be re-assessing whether the overtake was still feasible. I find that he remained committed to his original plan and did not take the opportunity to reassess.

79. In light of his evidence that he was aware that he needed to rely on Mr Lambert braking in order for there to be space for him to pass across the front of Mr Lambert left to right, this was, in my judgement, an unnecessarily risky manoeuvre by this stage of the straight. In undertaking it Mr Prentice showed complete disregard for not only the requirement to give space but also the possibility that such a close pass could upset or destabilise Mr Lambert. In fact, of course, Mr Lambert was braking, using first his engine and then later his brakes as well. I accept the evidence of Mr Edwards that the active braking from Mr Lambert was not in response to Mr Prentice's manoeuvre, but rather was coincidentally the point in time when Mr Lambert would have braked regardless of what Mr Prentice did or didn't do. I say this because the braking reaction time period available, although technically within what might be humanly possible, is very short. I bear in mind that although Mr Prentice is visible on the camera footage, it is likely, as Mr Edwards suggests, that Mr Lambert's field of vision through his helmet would have been narrower than what can be seen on the film, so there would have been even less time in reality for Mr Lambert to react to Mr Prentice appearing on his right-hand side.

80. Moreover, as his evidence developed, it became clear just how much reliance Mr Prentice was placing on his assumptions about Mr Lambert's riding in order for his manoeuvre to be safe. The assumption made by Mr Prentice was not only that braking would take place, but how hard and how soon it would be. In other words, for the overtake to be successful, Mr Lambert would need to brake in the precise manner that Mr Prentice anticipated. I find that because he was actively braking, Mr Prentice wrongly assumed that the deceleration of Mr Lambert was also due to active braking. In practice, as Mr Prentice was aware, his manoeuvre was only safe if Mr Lambert

braked and slowed considerably and possibly also if he started to move further left in order to negotiate turn 6 closer to the racing line.

81. That is not, however, the end of the matter. It is necessary to give consideration to whether the acts or omissions of Mr Lambert's riding made any causative contribution to the accident. In this context, I have given very careful consideration to the evidence about Mr Lambert being flustered and confused once he had passed Mr Robertson. I find that what caused Mr Lambert's confusion was that he was surprised by Mr Robertson's reaction to his re-take manoeuvre. Mr Robertson slowed down relatively early for turn 6 and my impression of the footage where Mr Lambert's hands are twisting repeatedly on the handlebars is that he was discombobulated because he was in two minds as to what Mr Robertson's intentions were and whether it was safe to pull in and to slow down in front of Mr Robertson or whether he needed to give more space.

82. My view is that this short period of confusion led Mr Lambert to take a slightly longer line of overtake around Mr Robertson than he had perhaps intended and to delay braking somewhat later than he would have otherwise done had he not become confused. Whilst this delay in active braking was not fatal to negotiating turn 6, as Mr Parrish suggested, it nevertheless had the effect that at the point when Mr Prentice started to pull from right to left to complete his overtaking manoeuvre, Mr Lambert was travelling faster than he would have been had he been able to react calmly to the situation. I accept the evidence of Mr Edwards that by the time he started actively to brake, Mr Lambert had regained his presence of mind sufficiently to decide what to do and respond appropriately, but the period of indecision did have the effect of delaying the start of his active braking.

83. I also accept the evidence of Mr Edwards that had Mr Lambert braked earlier and, as I find, as he originally intended following his re-take of Mr Robertson, then there would have been sufficient space and time for Mr Prentice to pass across in front of Mr Lambert without collision.

MY CONCLUSIONS

The scope of the assumed risk in this case

84. Drawing all the strands together, in my judgement, the risk assumed by Mr Lambert vis-à-vis other track eventers in participating in the track event was 'unilateral' in that it extended to the risk of injury arising out of his own acts and omissions. However, it did not include any assumption of risk of contact from other riders because of the latter's failure to follow the norms of the activity.

85. Applying the factors specifically identified at paragraph 19(h) above to the assumption of risk analysis:

    a. In my assessment the general risk assumed by participants in motorcycle track racing as between each other does not extend to contact between motorcycles. Such contact is relatively infrequent and the participants are required to exercise diligence to avoid contact with each other and in practice do so.

b. Further, and in any event, I find that the act complained of, namely the decision of Mr Prentice to overtake when he could not give sufficient space to do so without relying on Mr Lambert braking and/or steering as he assumed, went significantly outside the norms of motorcycle track eventing which require the overtaking rider to have sole responsibility for the safety of the whole manoeuvre. The breach of the overtaking norm was sufficiently gross to fall outside the assumed risk.

c. Moreover, even if there had been an assumption of risk of some contact due to mere inadvertence or 'pure accidents', the act of Mr Prentice increased and/or aggravated that risk to take it outside the risk assumed by Mr Lambert.

d. In circumstances where any contact between motorcycles poses a high risk of severe injury, I do not consider that the severity of injury sustained makes any difference to the assumption of risk assessment in this case.

Breach of the good 'motorcycle track eventer' standard

86. The conduct of Mr Prentice in my judgement fell below the standard of a 'good sportsperson' or specifically in this case a 'good motorcycle track eventer'. It needs to be borne in mind that Mr Prentice, of all the riders, had the best view of what was going on as the three motorcycles proceeded along the back straight. He could see everything ahead of him unfold between Mr Robertson and Mr Lambert. In failing to re-assess his intended overtaking manoeuvre as he proceeded along the back straight, in particular in light of the decision of Mr Lambert to re-take Mr Robertson and the reduced lateral space then available for his manoeuvre given how far to the centre of the track Mr Lambert pulled out, I find that Mr Prentice did not exercise the diligence of a good track eventer. These were significant changes to the situation, in my judgement and warranted re-assessment of whether an overtake was achievable and safe. In addition, Mr Prentice needed to now factor in that to overtake safely and get back onto a suitable line to negotiate turn 6, he was now in a position where he needed to pass across the front of another motorcyclist in order to get to the left-hand side of the track, rather than just tuck in at the front of the line. And all of this was in circumstances where the remaining distance available along the back straight was diminishing.

87. In any event, he badly misjudged the amount of space which the overtake would need, because, as I have found, he relied entirely on the precise manoeuvre which he assumed Mr Lambert would do, namely active braking and movement to his left. Taken altogether, the overtaking manoeuvre was not safe and was in breach of the general norm in that it required Mr Lambert to brake more sharply and/or move further to his left than he was otherwise on course to do in order to make what was inherently a risky and dangerous overtake a safe one.

88. In light of my finding that Mr Lambert had assumed the risk of his own actions when participating in the track event, it is not necessary strictly speaking for me to consider whether his conduct fell below the diligence standard of the 'good track eventer'. This is because, if conduct for which the injured person has assumed the risk contributes to causation of the damage, there is no liability for such damage, regardless of whether the conduct amounted to 'fault' on the part of the injured party. The only question is whether Mr Lambert's conduct contributed causatively to the accident.

89. I am satisfied that a contributory cause of the accident was the period of delay in applying active braking which arose out of the time when Mr Lambert was flustered as he was passing Mr Robertson. Whether that 'fluster' amounted to lack of diligence of a good eventer or not, I find that but for that fluster, Mr Lambert would have applied his brakes earlier than he in fact did. Consequently, as I also accept the evidence of Mr Edwards that earlier braking would have avoided the collision, it is inevitable that I must conclude that the acts or rather the omission of Mr Lambert to apply his brakes sooner contributed to the accident occurring.

90. Mr Lambert was riding towards the edge of his limits as an amateur rider, but he was entitled to do that, indeed that is what the sporting activity is partly for. He found himself in a relatively unusual situation when Mr Robertson had started the back straight with an overtake, but then appeared to drop back relatively early in the straight once re-taken. When assessed against the standard of a good event rider, I find that the delay in deciding how to respond by Mr Lambert was within the limits of diligence which such a good rider should expect to profess on a track day event. It was a manoeuvre which was not executed perhaps as well as Mr Lambert would have liked, but it was one which he was entitled to make and would have completed successfully but for the dangerous overtake of Mr Prentice. However, for the reasons I have given, that is not the test under Spanish law.

Apportionment of responsibility

91. I must then turn to the question of what proportion of damage was caused by Mr Lambert's actions for which he had assumed the risk and what was due to the lack of diligence by Mr Prentice, for which he had not.

92. The evidence of the Spanish law experts is that apportionment of contributory negligence is based on the extent to which the conduct of each party 'contributed to the damage' which I find to be a test based on causative potency. I note also that the law gives a general appreciation to the courts to apportion causation. For the reasons set out above, I am clear that the overwhelming causative factor in the circumstances of this accident was Mr Prentice's overtaking. Without that, none of the other events would have mattered at all and the accident would have been completely avoided.

93. In my view the assumed risk of Mr Lambert for his own actions made a much more modest causative contribution to the accident.

94. Doing the best that I can, in my judgement Mr Lambert's actions were 25% causative of the accident and Mr Prentice's 75%. It follows that Mr Lambert's claim for damages against MIB succeeds to the extent of 75% of his loss or damage.

FINALLY

95. May I take this opportunity to thank both counsel for their assistance which has been most helpful.