Neutral Citation No. [2017] NIQB 56 | *Ref:* **STE10325**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* ***14/6/2017***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

ES (a minor) by
RACHEL ANN SAVAGE her mother and next friend

Plaintiff:

-and-

EMMA SAVAGE, DARREN THOMAS McCORD
and W D IRWIN & SONS LIMITED

Defendants:

-and-

HUGH SAVAGE

Third Party:

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STEPHENS J

Introduction

[1] The plaintiff, ES, then two years and almost three weeks, now four years and nine months, (sustained catastrophic injuries in a road traffic collision which occurred at approximately 8.10 a.m. on Thursday 21 August 2014 on the Rubane Road, Kircubbin, County Down. The plaintiff was travelling as a rear nearside passenger in a blue Volvo motor vehicle model S40 SD ("the Volvo") which was being driven by her paternal aunt, Emma Savage, ("the first defendant") in the direction of Rubane. Darren Thomas McCord ("the second defendant") was driving a long wheeled based Ford Transit van model 350 ("the van") in the opposite direction towards Kircubbin. W D Irwin and Sons Limited ("the third defendant") are the owners of the van and it had engaged the driving services of the second defendant through an agency known as "Drivers Hire" for the purpose of making bread deliveries. It is common case that a high energy frontal collision occurred between the Volvo and the van causing substantial damage to both vehicles.

[2] The nature of the injuries to the plaintiff meant that the assessment of damages should await the passage of some time so that greater definition can be brought to a number of issues including the medical prognosis. The parties agreed and I ordered that the issue of liability should be tried as a preliminary issue.

[3] I have not visited the scene of the collision but rather I have relied entirely on the evidence as given in court.

[4] I attach in a schedule to this judgment various photographs.

[5] Mr Dermot Fee QC and Mr Morrissey appeared on behalf of the plaintiff, Mr Simpson QC and Mr McMahon appeared on behalf of the first defendant, Mr Ringland QC and Mr Spence appeared on behalf of the second and third named defendants and Mr McNulty QC and Mr Michael Lavery appeared on behalf of the third party. I am grateful to all of the counsel involved for the care, attention and tone with which they conducted the litigation and delivered their submissions.

The liability issues

[6] The plaintiff as a passenger will succeed in full in relation to the issue of liability.

[7] The primary liability issue is whether one or other or both of the drivers were guilty of negligence. It is common case that the collision occurred on the first defendant's side of the road but the explanations given by the drivers as to why the collision occurred are diametrically opposed. In effect the first defendant states that at all times the Volvo was on its correct side of the road and that the van, having come round a bend, did not straighten up, but rather continued to steer to the second defendant's right hand side, so that it crossed over on to first defendant's side of the road where the collision occurred. In effect the second defendant states that the first defendant's Volvo swerved or drifted on to his side of the road so that he took avoiding action in the heat of the moment by driving the van on to the incorrect side of the road but that the first defendant having realised that the Volvo was on the incorrect side of the road had also gone back on to her correct side of the road so that a collision occurred. In short each of the drivers blames the other.

[8] In addition to the issue as to which of these two accounts is correct there are a number of other liability issues which I will outline.

[9] The first defendant's case is that the Volvo was never on the incorrect side of the road but that if it was, that the second defendant should have avoided a collision, not by going on to his incorrect side of the road, but rather by braking, sounding his horn and driving partially onto the verge on his left hand side. On this basis it is contended on behalf of the first defendant that even if it is found that the Volvo was on its incorrect side of the road that there should be an apportionment of liability between the parties.

[10] Another liability issue relates to the forward facing Graco booster seat with a back support ("the Graco booster seat") on which the plaintiff was sitting. The Graco booster seat uses the vehicles own seat belt to both secure the seat to the car and to restrain the plaintiff in the seat. One part of the seat belt strap is attached through a belt routing system in the headrest and then is available to go over the plaintiff's left shoulder. The lap part of the seat belt strap is available in the usual way to go across the plaintiff's abdomen performing the dual function of restraining that part of the plaintiff in the seat and securing the seat in the car. The seat belt is secured in the usual way by inserting the plate at the end of the webbing into the buckle which is secured to the car on the plaintiff's right hand side.

[11] At the date of the collision the plaintiff weighed 11.6 kg and the Graco booster seat in the Volvo in which the plaintiff had been placed was only suitable for a child over 15 kg. It is common case that as the plaintiff was not within the weight range for the Graco booster seat that it was not a suitable seat for her. A suitable rear facing child seat, given the age and weight of the plaintiff, could use a harness with three straps. A suitable forward facing child seat, given the age and weight of the plaintiff, would have been one which did not utilise the Volvo's own seat belt to restrain the child but rather one which was secured to the Volvo and then had a harness for the child integral to the seat, with five straps all secured at a central fixing point. There would have been a strap over each shoulder, with two lap straps one from each side and one strap coming up from underneath between the plaintiff's legs. Such a child seat would have secured both of the plaintiffs shoulders, her abdominal area and finally the crotch strap would have prevented the plaintiff in an impact from slipping down in the child seat.

[12] The second and third defendants in their defence and in a Notice of Contribution and Indemnity to the first defendant, both served on 7 May 2015, alleged that the plaintiff was in a child seat which was not suitable for her and which "may have caused or contributed to her injuries." The first defendant, whilst recognising that as the driver of the Volvo, she had a responsibility to the plaintiff to restrain her appropriately for her age and/or weight, and that the plaintiff was not so restrained, denied that there was any material difference in the injuries sustained by the plaintiff by being placed and restrained in an incorrect child's seat. However in addition the first defendant obtained leave to and has brought, third party proceedings against the plaintiff's father, Hugh Savage, ("the third party") on the basis that whilst he did not travel in the Volvo, he had placed the plaintiff in the Graco booster seat and he saw and expressed his satisfaction with both the seat and the restraint of the plaintiff. The first defendant contends that the plaintiff's father owed a duty of care to the plaintiff so that if it is found that some of the plaintiff's injuries would have been prevented or diminished by the use of the correct child seat that both the first defendant as driver and the third party as a parent are jointly liable.

[13] Further issues arise in relation to the restraint of the plaintiff on the booster seat in the Volvo.

(a) Immediately after the collision occurred a Mr Kelly came on the scene. He recounted to the police that he found that the seat belt was not over the plaintiff's left shoulder but rather was under her left arm. The second defendant alleges that if that was so before the collision occurred then the seat belt was not correctly positioned to provide the maximum level of restraint. The second defendant alleges that the seat belt was not correctly positioned, that the first defendant was responsible for positioning the seat belt and for checking that it remained in position and this failure contributed to the injuries that the plaintiff sustained.

(b) The Graco booster seat utilises the Volvo's seat belt but to do so appropriately there is integrated into the headrest of the seat a seat belt guide which ensures that the seat belt is in the correct position. This belt routing system is highlighted in red so that the webbing of the seat belt is threaded through the guide bar and is retained in position. Mr Kelly states that after the collision he was asked by the emergency services to take the Graco booster seat out of the Volvo with the plaintiff sitting in it. In order to do this he released the seatbelt plate from the buckle but he did not have to remove the webbing from the seatbelt guide in the headrest. His evidence is that not only was the seatbelt under the plaintiff's arm but also that the top of the Graco booster seat was not properly secured.

The police investigation

[14] Constable Jenny Green was the investigating police constable who attended at the scene on the date of the collision. Mr David Nicholson, forensic scientist, also attended as part of the police investigation at approximately 12.00 p.m. on the day of the collision. Photographs were taken on that day and subsequently. However due to the grievous injuries the plaintiff had sustained the investigation was referred to the Specialist Police Unit dealing with serious road traffic collisions. That Unit was unable to take on the investigation and so it was referred back to Newtownards Police Station and assigned to Constable Toner. Interviews were conducted but in the event no one was prosecuted.

Road conditions

[15] The road surface was dry. The weather was cloudy and windy. The Volvo's lane was 2.8 metres wide. The van's lane was 2.9 metres wide. The collision occurred at a point after the van had steered around what was a right hand bend for the second defendant. The national speed limit applied. There was a hedge on the

Volvo's left hand side. There was a grass verge and some hedging on the van's left hand side though there was a drop into a field on the other side of the hedging.

The evidentiary position and the speeds of the Volvo and the Van

[16] The only direct witnesses as to how the collision occurred are the two drivers who each give conflicting accounts. There was debris on the road at the point of impact but this does not assist in analysing which account is correct as is it clear from the position of the vehicles after the collision that it occurred on the first defendant's correct side of the road. It was also clear from the position of the vehicles after the collision that not only was the Volvo on its correct side of the road but also that it was being steered straight ahead. It was not angled as a result of being steered from the incorrect side of the road to its correct side of the road. Accordingly if it had been on the incorrect side of the road it had to have come back to the correct side, straightened up on its correct side and then been driven on its correct side going straight ahead.

[17] The only mark on the road surface is a short gouge mark made when the front of the Volvo went under the front of the van causing the Volvo's sump to come into contact with the road surface and then creating a short gouge as the Volvo was pushed back a short distance by the van. The gouge is of assistance as it was common case that for all practical purposes the position of the Volvo and the van after the collision was at the point of impact. Accordingly if one approximately calculates the combined speeds of both vehicles from the damage caused to them then one can calculate the approximate speeds of each vehicle immediately prior to the impact occurring taking into account the weights of each and the fact that for all practical purposes the forces in the collision were equal and opposite. Mr Nicholson calculated, the trial proceeded on the basis of and I find that the combined speed of the vehicles at the point of impact was approximately 80 mph. There was a dispute as to the weight of the van, in relation to which I accept the evidence of the second defendant's expert and find that at the moment of the collision the Volvo was travelling at 52 mph and the van at 28 mph.

Evidence as to the consequence for the plaintiff of being incorrectly restrained in an inappropriate child seat

[18] The second defendant alleges that the use of an inappropriate child seat for and restraint of, the plaintiff caused or contributed to her injuries. The first defendant whilst acknowledging that the plaintiff ought to have been in a child seat with a five point harness contended that the plaintiff would have sustained the same injuries even if properly restrained.

[19] It was agreed, and I directed, that this issue should also be heard and determined at this stage.

[20] The first defendant obtained a report from Professor Michael Vloeberghs, Consultant Paediatric Neurosurgeon at Nottingham University Hospital and the

second defendant obtained a report from Mr Gavin Quigley, Consultant Neurosurgeon at the Royal Hospitals, Belfast. There was a meeting by telephone conference call between those experts on 8 February 2017. It is apparent from their reports and the minutes of the telephone conference call that their opinions differed.

[21] Among the injuries which the plaintiff sustained was an unstable fracture of C5/6, a disc injury at the level C6/7 and catastrophically a stretching injury to the spinal cord at the level of T3 which has caused tetraplegia. Professor Vloeberghs gave evidence that in young children the weight of the head is much greater in proportion to an adult and that 15%-20% of the plaintiff's body mass would have been around the surface of her head. That a five point harness with a strap over each shoulder would not make any difference to the mobility of the plaintiff's head and this was the cause of the cervical fracture, the disc injury and the stretching of the spinal cord. He concluded that the plaintiff's tetraplegia would have occurred in any event even if she had been restrained within a five point harness. This was an opinion with which Mr Quigley disagreed and his views were being put to Professor Vloeberghs in cross-examination by Mr Ringland. However it became apparent that the reasoning of Mr Quigley, as articulated in Mr Ringland's cross-examination, had not been included in Mr Quigley's expert report, and was based on documents which were not before the court, including references to an MRI scan about which there might be the need to obtain the views of a consultant radiologist and that the reasons had not been discussed in the expert's meeting. The first defendant would have been prejudiced if the cross-examination continued. I gave a number of directions including that Mr Quigley prepare a further medical report and I adjourned the issue as to whether the inappropriate restraint of the plaintiff has caused or contributed to her injuries.

[22] The plaintiff's injuries were not restricted to her cervical spine and spinal cord but also included, amongst others, abdominal injuries. The second defendant obtained a report from Mr W A McCallion FRCSpaed, Consultant Paediatric Surgeon at the Royal Belfast Hospital for Sick Children. In his report he noted the evidence of Mr Kelly which was that the plaintiff had been restrained in the Volvo by the car's own seatbelt but that it had been tucked under her left arm rather than over her left shoulder. His view was that this had effectively converted three point fixations in the car seat to a lap belt with the upper part of the belt traversing across her abdominal region that is across the area occupied by the pancreas and spleen. He considered that the injuries to the base of the plaintiff's right lung, the plaintiff's spleen and pancreas were caused by violent compression of each viscus between the seatbelt anteriorly and the bony skeleton posteriorly.

[23] Mr McCallion had not given evidence prior to the adjournment of this aspect of the case but on a provisional basis it appears that he is of the opinion that some of the plaintiff's abdominal injuries were contributed to by the lack of a five point harness and the inappropriate position of the seatbelt under the plaintiff's left arm. In view of the fact that this aspect of the second defendant's case has been adjourned

and Mr McCallion has not given any evidence I will do nothing further apart from articulate the issue.

Credibility

[24] As Gillen J stated in *Thornton v NIHE* [2010] NIQB 4 the "credibility of a witness embraces not only the concept of his truthfulness i.e. whether the evidence of the witness is to be believed but also the objective reliability of the witness (that is) his ability to observe or remember facts and events about which the witness is giving evidence." In assessing credibility I seek to pay attention to, amongst others, the factors set out by Gillen J in that case which included the following:

a) the inherent probability or improbability of representations of fact;

b) the presence of independent evidence tending to corroborate or undermine any given statement of fact;

c) the presence of contemporaneous records;

d) the demeanour of witnesses for example does he equivocate in cross examination;

e) the frailty of the population at large in accurately recollecting and describing events in the distant past;

f) does the witness take refuge in wild speculation or uncorroborated allegations of fabrication;

g) does the witness have a motive for misleading the court; and

h) weighing up one witness against another.

[25] I remind myself that the Court of Appeal in England and Wales in *R v G* [1998] Crim LR 483 (transcript 23 January 1998) said that "A person's credibility is not a seamless robe, any more than is their reliability." The court might take a different view as to the credibility or the reliability of a witnesses' evidence in relation to different issues, for which see also *R v H* [2016] NICA 41.

[26] I will consider the credibility and reliability of a number of the persons involved in this action when setting out and dealing with the evidence.

The first defendant's evidence

[27] The first defendant, an auxiliary nurse, then employed in the Ulster Hospital Dundonald, had finished an 11 hour night shift from 8.30 p.m. on 20 August 2014 until 7.30 a.m. on 21 August 2014. Her brother-in-law, Hugh Savage, the third party,

and an electrician, lived in Lisburn but had been and was then still working on a construction site in Dundonald. Some 2-3 months prior to 21 August 2014 an arrangement had been made that on occasions the plaintiff's father would bring the plaintiff in his van on his way to work in Dundonald so that the first defendant could take the plaintiff to her home so that she could be looked after by the plaintiff's paternal grandmother, who lives some five minutes from the first defendant's home. The transfer from the father's van to the first defendant's car took place in the McDonald's car park near to the Ulster Hospital and this had occurred on some five occasions prior to 21 August 2014.

[28] The first defendant gave evidence that on 21 August 2014 after collecting the plaintiff she drove from Dundonald down the Ards Peninsula to Kircubbin after which she turned left towards Rubane. She states that as she travelled at some 35 to 40 mph the second defendant drove the van on to her side of the road and the collision occurred.

[29] A number of serious issues arose in relation to the evidence of the first defendant. I have taken all of them into account. However I do not propose to deal with all of them in this judgment but rather to illustrate.

(a) The first defendant's mobile telephone

[30] The first defendant had a mobile telephone in the Volvo when the collision occurred and there was no hands free device for the use of the mobile. After the collision the handset was seized by the police who subsequently examined it and extracted information from it. There was no evidence as to whether the times on the handset were correct nor was there any evidence as to the call record maintained by the first defendant's service provider. The handset established that there were six calls made by the first defendant to her husband during the journey from the Ulster Hospital on 21 August 2014, the majority of which did not connect. The first defendant states that she only stopped on one occasion to make a telephone call during the course of this journey. The handset establishes that she must have been dialling and then listening for the dial tone and also talking on her mobile phone whilst driving. The first defendant admitted doing this during the course of her evidence. She stated that the mobile telephone when not in use was on the front passenger seat beside her. The use of the mobile telephone is to be seen not only in the context that it dangerously distracts her attention whilst driving but also in the context that the first defendant had just finished an 11 hour night shift and was entrusted with safely transporting the plaintiff. The use of a mobile telephone was an entirely inappropriate standard of driving by the first defendant. However it has not been alleged, let alone established, that the first defendant was "on" her mobile telephone at the time of the collision by which I mean that it has not been established that the first defendant was dialling out or was connected to another number or was speaking on her mobile telephone at the time of the collision. However it has been alleged that the first defendant could still have been distracted by her mobile telephone by for instance reaching across for it or looking down at or by picking it

up in order to start to dial a number. Such activity on her part could provide an explanation as to why the Volvo swerved or drifted on to its incorrect side of the road.

(b) Inappropriate child seat and child restraint in the Volvo

[31] The first defendant made the case against the third party that he bore responsibility for the use of an incorrect child seat and child restraint in the Volvo. I set out the background to this issue.

[32] On 21 August 2014 the first defendant's son was nearly three years old. Some 6-8 weeks prior to the collision the first defendant changed her car from a Toyota to the Volvo. The first defendant and her husband had fitted a five point child seat in the Toyota. That was the car seat that had been used for the plaintiff on all the previous occasions on which the first defendant collected the plaintiff from Dundonald. I find that the plaintiff had only previously travelled in a car driven by the first defendant in a child seat with a five point harness. However after the first defendant had changed her car she and her husband had visited Forestside to purchase a new child seat and they were assisted in their choice by a salesman. They not only obtained advice from the salesman but whilst in the shop placed their son in a number of different child seats before making an informed decision to purchase the Graco booster seat. The previous child seat with a five point harness was taken out of the Volvo though it was retained in their home.

[33] There was no evidence that prior to the meeting in the car park on 21 August 2014 between the first defendant and the third party that the first defendant had informed the third party that the child seat had been changed.

[34] The Graco child seat came with a manual and with a notice on the back of it. Both the manual and the notice stated that "To use this Graco booster seat your child MUST meet ALL of the following requirements." Both the manual and the notice then listed a number of requirements which included your child must be "approximately 3-12 years old" and "weigh between 15-36 kg." The first defendant's son was approximately 3 years old but the first defendant knew or ought or to have known that the plaintiff was just 2 years old. The third party did not have access to the manual and even if he had seen the Graco booster seat in the Volvo when transferring the plaintiff to the care of the first defendant on 21 August 2014, he could not have seen or read the sticker containing the warning as this was on the back of the Graco booster seat and not visible given that it was in position in the Volvo. Furthermore there was no evidence that the first defendant informed the third party that the seat was only suitable for a child of approximately three which the plaintiff was not or that she informed him that it was only suitable for a child with weight in excess of 15 kg, which the plaintiff was not. That is information which the first defendant either had or ought to have had through reading the warning sticker, reading or having the opportunity to read the manual and through the selection process in the shop.

[35] The evidence that the first defendant gave was that as both she and the third party were standing in the car park in Dundonald she told him that she only had her son's car seat in the car and enquired of him as to whether he was happy with that. She stated that he not only replied that he was but also that it was the third party who placed the plaintiff in the car seat and secured the seat belt before kissing her goodbye. That account is denied by the third party and I will presently resolve the evidential conflict. However for present purposes I determine that if this conversation took place at all then it took place at an inappropriate time. The plaintiff had always been in a five point harness in the first defendant's car and the third party ought to have been told by the first defendant the night before that there was now only a Graco booster seat in the Volvo which was only suitable for a child of approximately three and with a weight of or above 15 kg. If the third party had been told then alternative arrangements could have been made either not involving the plaintiff being transported by the first defendant or by the provision of a suitable child seat of which there was one in the first defendant's house and two under the control of the third party. I also determine that the question "are you happy with this" was inadequate as the warnings of which the first defendant knew or ought to have known should have been but were not passed on by her.

[36] The third party's evidence was that prior to the first occasion on which the plaintiff was carried in the first defendant's car from Dundonald there had been a discussion about the child seat in the first defendant's car as to whether they needed to supply her with a child car seat to which the first defendant replied that she had a five point car seat in her car. That on 21 August 2014 the third party and the first defendant met in the car park and he lifted the plaintiff out of the child's car seat in his van and handed one bag to the first defendant who then moved to the passenger side of her car with the plaintiff and the bag. The third party then left without seeing the plaintiff being placed in the Volvo by the first defendant. He stated there was no conversation about the child seat, that he did not place the plaintiff in the Volvo or in the Graco Booster seat. Furthermore that he did not secure the plaintiff's seat belt.

[37] The first defendant in her interview with the police was asked "did you fasten E into the child seat with a seat belt prior to commencing your journey?" The answer to that question was "yes", and she read over and signed that account.

[38] In the first defendant's police interview some nine weeks after the collision she had plenty of opportunities to make this allegation against the third party but she did not do so.

[39] On the basis of comparing the evidence of and the demeanour of the first defendant and the third party I prefer the evidence of the third party whose evidence I accept in its entirety.

[40] On the basis of the first defendant's account to the police on the day after and nine weeks after the collision and on the basis of her demeanour in court I consider that her evidence that it was the third party who secured the plaintiff in the child seat was incorrect to her own knowledge. I also consider that her account as to what occurred in the car park on 21 August 2014 in so far as it conflicts with the account of the third party was incorrect to her own knowledge. I note that the allegations against the third party emerged at a stage when the specific focus of the criminal investigation was on the use of an inappropriate child seat.

(c) The first defendant's 11 hour night shift

[41] As I have indicated I have found part of the first defendant's evidence to be untruthful. I consider that her untruthfulness is not confined to one area. For instance she was asked by the investigating police officer as to whether she felt tired after her 11 hour nightshift and she replied

> "No. You're more alert after night duty, well I am anyway. We get a break in work. We get an hour's sleep break too."

The first defendant in her evidence gave details as to the amount of work she would have done over the 11 hours of her nightshift and she accepted that this answer that she had given to the police was incorrect. I consider that at the time that she gave this answer it was incorrect to her knowledge. I find as a fact that she was tired at the end of her night duty, though not excessively so. I give careful consideration as to whether this is another reason why the first defendant could have swerved or drifted on to the wrong side of the road.

(d) Overall assessment of the first defendant

[42] I have found that the first defendant was not truthful in relation to a number of issues but my overall assessment of her is that she is not a fundamentally dishonest individual so that I should reject every aspect of her evidence. I will treat the rest of her evidence with considerable caution on the basis that she was prepared to put some matters forward that she knew were incorrect.

The second defendant's evidence

[43] The second defendant presently 37 years of age obtained his driving licence on 24 April 2013. He was a restricted "R" driver until 24 April 2014. Up to that date he had no experience of driving a van as opposed to a car. He secured employment as a driver for the third defendant through an agency known as "Driver Hire" which finds work for candidates in temporary and permanent driving jobs. The second defendant commenced work with the third defendant on its "Bangor run" in June 2014 working alongside the usual driver on that run so that he could learn the route. This was the first occasion on which he had experience of driving a van. He then worked on that run on his own for some one to two weeks whilst the usual driver

was on holiday. He was then moved to the "Newtownards run" which included the road he was driving on the day of the accident. Again he was instructed on the route and he then worked on his own on the route for some four weeks prior to the accident. The second defendant was a relatively inexperienced driver and his only experience of driving a van prior to the accident on 21 August 2014 was at the most from the start of June 2014, a period some 2½ months.

[44] The second defendant sustained a fractured sternum and a fractured ankle in this road traffic collision. Mr Joseph Kelly, who came on the scene of the collision minutes after it had occurred, found the second defendant lying on the road behind the bread van. This means that the second defendant must have got of the van most probably using the driver's door and had been attempting to get round to the driver's door of the Volvo. The second defendant told Mr Kelly "that stupid bitch was on the wrong of the road" (1/E/54). The second defendant required the administration of morphine when the ambulance arrived before being taken to the Ulster Hospital Dundonald. Constable Jenny Green (1/E/1) who attended the scene at 8.31 a.m. at which time there were two ambulances at the scene, observed the second defendant lying on his side on the road at the rear of the van. She states that the second defendant was wrapped in a blanket shivering excessively, pale and complaining of severe chest and leg pains. He had a punctured type wound to the back of his left hand which was bleeding quite heavily. The second defendant told her that "She was on my side. I swerved to avoid her and went on to her side. She has then corrected and we have collided" (1/E/2).

[45] These accounts to Mr Kelly and to Constable Green were given at a time when the second defendant was in considerable pain. They are not nor could they be expected to be detailed. It is apparent from both of them that he knew the gender of the first defendant and that he was blaming her for being on the wrong side of the road so that he had to swerve to avoid her.

[46] At 5.05 p.m. some nine hours after the collision, Constable Green attended at the Ulster Hospital and spoke to the second defendant. She cautioned him for the offence of causing grievous bodily injury by dangerous driving. She asked him four questions including "tell me what happened" and the second defendant replied to that question as follows:

> "I was coming up round the bend normally and she was coming round the bend the other way. She drifted on to my lane. Then I went on to her lane so that she wouldn't hit me. She then spotted me and corrected herself back on to her lane and she hit me. I don't think she braked much either. I don't think she was looking at the road to be honest with you. She was doing something to distract her cause her head was down and then she looked up and turned the wheel."

Constable Green then read the interview back to the second defendant and gave him the opportunity to add or alter anything. He then signed her notebook to confirm he was in agreement with the content. At the trial of this action the second defendant confirmed that the answers which he had given were his evidence as to what had occurred. He also confirmed the sequence which was that when he first saw the Volvo the first defendant was looking down and the Volvo was on his side of the road, he had steered his van to go on to the first defendant's side of the road before she looked up and then she steered to go back on to her own side of the road. The second defendant also accepted that this meant that the first defendant had to regain her own side of the road and then straighten up on her own side of the road in less time than it took him to travel from his own side of the road so that the front of his van was on her side of the road but the rear nearside wheel and a substantial portion of the van were still on the second defendant's correct side of the road.

[47] In his evidence the second defendant stated that he saw the Volvo on his side of the road that he took his foot off the accelerator to slow down but did not at that stage brake. He steered the van towards the incorrect side of the road and that as he saw the Volvo come back on to its correct side of the road it was at that stage that he braked though his evidence as to braking I find was equivocal.

Overall assessment of the second defendant

[48] I consider that at times during his evidence the second defendant had difficulty following the concepts about which he was being asked and was also having difficulty in remembering events surrounding this road traffic collision. When faced with difficulties in his account he resorted to an assertion or firm belief that it was correct despite those difficulties. My overall assessment of his evidence was an underlying firm belief that he considered that the only possible explanation for the accident was that the first defendant drove onto his side of the road and that he then drove onto her side of the road. I consider that he based his evidence as to what had occurred on that belief rather than that the evidence of what he saw or did led to that belief.

The third party's evidence

[49] I consider that the third party was a truthful and reliable witness. I accept his evidence.

[50] Insofar as it was tentatively suggested during cross-examination of the third party that he ought to have enquired of the first defendant as to the suitability of the child's seat in the Volvo I reject that suggestion. I find that the third party knew that a proper child seat had been used on all previous occasions, that the first defendant has transported the plaintiff. There was nothing to put the third party on notice of any change in circumstances. I do not consider it any breach of duty on the part of

the third party in such circumstances not to have made enquiries of the first defendant.

Analysis of the first and second defendant's conflicting evidence

[51] The first defendant starts with the considerable disadvantages that in relation to a number of issues I have found her to be an untruthful witness, I have found that she was tired, though not excessively so after an 11 hour night shift and I have found that she could have been distracted by her mobile phone. I approach her evidence as to what occurred just prior to the collision with considerable caution.

[52] The second defendant during the course of police interviews stated that he saw the Volvo swerve on to his side of the road by which he meant that he saw the Volvo leave its correct side of the road and move across to his own side of the road. However on the basis of the evidence of Mr David Nicholson, forensic scientist, and on the basis of the evidence of Mr Stephen Henderson, a forensic engineer specialising in the investigation of road traffic collisions, as to the view of the second defendant, I reject that evidence. I find that it would not have been possible for the second defendant to have seen the first defendant commence swerving on to his side of road given the topography, the sight lines and speeds of the vehicles.

[53] At trial the second defendant stated that he saw the Volvo with its two front wheels on his side of the road. He did not know the position of the rear of the Volvo and therefore could not say whether it also was on his side of the road. At interview he had said that the Volvo was not straddling the white line but rather than "the two front yes more than half the car was on his side of the road".

[54] I find that the most consistent account given by the second defendant at trial was that when he first saw the Volvo its two front wheels were on his side of the road and that the Volvo was still being steered across the road onto his side of the road. The second defendant stated that at this point he saw the first defendant with her head down and that he then began to steer towards her side of the road. The sequence was clearly given on a number of occasions that he was steering towards her side of the road at a time when she had her head down and did not see his van. That as he steered to her side of the road she looked up "acknowledged" the presence of the van and then that she steered back to her own side of the road in such a manner as not only to regain it but also to straighten up all within the same time as he took for the front and the majority of his van, though not the entirety of it, to go over on to her side of the road. On that account the second defendant performed one manoeuvre, namely steering to his right, in the same time that it took for the first defendant to look up, appreciate what was happening, steer to her left, regain her side of the road and then straighten up. The evidence of Mr Hunter, the second defendants' expert witness, was that this was not within the bounds of possibility as it would have taken the Volvo twice as long as the van to perform all those manoeuvres. Mr Nicholson, the forensic scientist, also stated that this was just not possible giving the simple explanation that it would take the Volvo twice as long

to perform these manoeuvres than the van. Furthermore that the response time for the first defendant would also increase the length of time for the driver of the Volvo to have performed these manoeuvres. On the basis of the evidence of Mr Nicholson and Mr Hunter and my own assessment of the situation, I reject that account from the second defendant as to how the accident occurred.

[55] Accounts given of how road traffic collisions occur are not necessarily precise and accordingly even though I have rejected the second defendant's detailed account of the circumstances of this collision I have considered whether there is some acceptable alternative scenario which though not given in evidence might be capable of belief on the balance of probabilities particularly bearing in mind my concerns as to the credibility of the first defendant, potential distraction from her mobile phone and her level of tiredness. Mr Ringland asked Mr Hunter in effect what scenario "might be right" in order to fit in with the time it takes for the Volvo to regain its correct side of the road and straighten up in the same time as it takes for the van to cross over on to the incorrect side of the road. I find that before it could possibly fit into the time sequence the first defendant would have had to have been steering back to her own side of the road from a position at which the Volvo was straddling the white line before the second defendant began to go to his right hand side. That was not the evidence of the second defendant. If it had been then he should not have steered to his right hand side. He should have been able to avoid the collision by steering and braking. I find that version of events improbable and I reject it.

[56] In assessing the evidence of the first defendant I have also given consideration to her explanation that the second defendant did not straighten the van up having steered around a right hand corner. The angle of the van after the collision might indicate that there was a greater degree of steering than would be accounted for by that explanation but it remained possible and I accept it as correct on the balance of probabilities.

[57] In relation to the primary liability issue as to whether the Volvo was on its incorrect side of the road I accept the evidence of the first defendant. I resolve the primary liability issue in favour of the first defendant by finding that the Volvo was on its correct side of the road and that the second defendant so controlled the van as to go on to his incorrect side of the road.

Factual findings

[58] I summarise the factual findings which I have made and also make further factual findings.

[59] The collision occurred on the first defendant's side of the road.

[60] I accept the first defendant's and reject the second defendant's account of how the collision occurred.

[61] The damage to the vehicles was consistent with a combined impact speed of approximately 80 miles per hour.

[62] I find that at the point of impact the Volvo was travelling at approximately 52 miles per hour and the van was travelling at approximately 28 miles per hour.

[63] Neither the first defendant nor the second defendant braked prior to the collision.

[64] The plaintiff had been placed in the Graco booster seat by the first defendant and the third party played no part in placing her in that seat or in securing the seat belt. I accept his evidence and I reject the first defendant's evidence that he approved of the Graco booster seat.

[65] I accept the evidence of Mr Kelly that the seat belt was under the plaintiff's left arm rather than over her left shoulder. I find as a fact that this was the position prior to the collision occurring and that the first defendant had positioned the seat belt in that way when placing the plaintiff in the Volvo.

[66] Mr Kelly gave evidence that the Graco booster seat was not properly secured in the vehicle in that the seat belt was not through the guide bar on the headrest. This was not mentioned to the police during the course of the initial investigation and the evidence emerged just prior to trial. On the balance of probabilities I am not persuaded that it is correct.

Conclusion

[67] I find that the second and third defendants are liable to the plaintiff.

[68] I have found negligence on the part of the first defendant in relation to the child's seat and the use of the seatbelt. The issue as to whether the first defendant is also liable to the plaintiff awaits determination as to whether this caused or contributed to the plaintiff's spinal or abdominal injuries.

[69] I enter judgment for the third party against the first defendant.

[70] I will hear counsel in relation to costs.

[71] A copy of this judgment should be sent to the medical witnesses dealing with the issues as to whether inadequate restraint of the plaintiff in the Graco booster seat caused or contributed to the plaintiff's injuries so that their opinions are based on these factual conclusions in so far as they are relevant to that issue.

[72] I will give further directions in relation to the outstanding issues in this action.

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Views of bread delivery van

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View towards Rubane on Rubane Road