THE HIGH COURT

[2025] IEHC 20

[Record No. 2019/6149P]

BETWEEN

JAMES THOMAS MAHER

PLAINTIFF

AND

KEITH MORIARTY AND PATRICK MORIARTY

DEFENDANTS

JUDGMENT of Mr Justice Liam Kennedy delivered on the 17th day of January 2025.

Introduction

1. This personal injury claim (and a counterclaim for damage to the Defendants' vehicle) arises from a road traffic collision between the Plaintiff's Suzuki GSF600 Bandit motorcycle and the Toyota Ford Transit van driven by the First Defendant and owned by his father, the Second Defendant, on 1 August 2017. Liability is contested, as are general damages. Special damages are agreed on both sides (I shall refer to the First Defendant as "the Defendant", since the Second Defendant's only real role is in respect of the counterclaim for the damage to the van. Likewise, for brevity, I will refer to the van as the Defendant's vehicle, although technically it is the Second Defendant's).

The Accident

2. The collision occurred at the junction of Ardmoniel and Langford Street in Killorglin, County Kerry ("the Junction"). The Plaintiff was riding his motorcycle from his father's home at 42 Ardmoniel Heights. The Defendant was travelling in the opposite direction, coming from Killorglin on Langford St. A 50kph speed limit applied, and the accident occurred between 10pm and 10:30pm. It was a dry night. There is street lighting and ample opportunity for each party to see the other's approach.

3. To understand the context, it is helpful to have regard to the schematic appended to this judgment. It was prepared by the Defendant's experts and shows the Junction and, in broad terms, the locus of the collision. The final position of the van is shown (as an orange rectangle) on Langford St, although, as is explained below, there is an issue between the parties as to whether the alignment of the vehicle was precisely as is suggested in the schematic. However, the schematic does show that, in physical terms, Ardmoniel and Langford St continue into each other but. unlike Langford St, Ardmoniel is a minor road. Its access to the Junction is controlled by a stop sign (to which the Plaintiff was subject), requiring all Ardmoniel traffic to yield to traffic entering the Junction from the other two directions, Langford St or Farrantoreen Rd.

4. For traffic which, like the Defendant, was coming from Killorgin on Langford St, the major route through the Junction involved veering right onto Farrantoreen Rd. However, there was also the option of continuing straight onto Ardmoniel (which would have avoided the path of the approaching Plaintiff, on the other side of that road). The Defendant, however, intended to veer right onto Farrantoreen Rd and he had the right of way.

Particulars of Negligence and Contributory Negligence

5. The Plaintiff advanced six particulars of the Defendant's alleged negligence, including: (a) driving on the wrong side of the road; (b) failing to keep a reasonable look out; (c) failing to stop, slow down, swerve or otherwise avoid the collision; and (d) driving at a speed that was excessive in the circumstances. The Defendant responded with 26 particulars of the Plaintiff's alleged negligence, several of which essentially mirrored the Plaintiff's particulars but with the addition of, in particular: (i) failure to stop at a stop sign; (ii) emerging from a minor road onto a main road without stopping or braking when he knew (or ought to have known) that it was dangerous or unsafe to do so; (iii) driving straight across the main road without stopping; (iv) failing to yield right-of-way; (v) driving onto the path of the Defendants' vehicle; and (vi) breach of the Plaintiff's obligations under the Roads Act 1993 and the Road Traffic Acts and Regulations. The Defendant also pleads *res ipsa loquitur*.

The Plaintiff's Evidence

6. The Plaintiff had been riding for less than a year. He had undertaken some training above and beyond the minimum required to secure his provisional motorcycle licence. In July 2017, he bought a second-hand motorcycle (which was more powerful than his previous motorcycle) and arranged for it to be serviced. He collected his acquisition from the garage on 1 August 2017 and rode it to his father's home. After spending a few hours with his father, he left for his own home. He was wearing full protective gear. His head lights were on, and his helmet carried additional lights. His jacket was adorned with reflectors. The collision occurred shortly after his departure, the Junction being the first intersection he came to.

7. The collision resulted in his hospitalisation for 5 days. His extensive injuries will be considered below. As a result of his head injuries he has no memory of the accident, rendering him dependant on the results of the Gardaí examination of the scene, and on photographic and expert evidence.

8. As noted above, the Plaintiff was subject to the stop sign as he approached the Junction. He knew it well, having grown up on the road. Over the years he had regularly walked, cycled and, more recently, ridden his motorcycle through the Junction. He was extremely familiar with its layout and signage. He said that he always complied with the stop sign and checked for traffic before entering the Junction:

> " *I know that junction, I know there's a left hand turn, there's a blind turn coming from Farrantoreen. You're not going to take that at speed, like that's a kamikaze kind of deal.*"

9. When asked how he would normally approach the Junction, the Plaintiff replied:

> "*Well you'd come up, you'd stop at the stop line, check that left to make sure nobody's coming at you and then proceed across the road, straighten up and back down towards Killorglin.*
>
> *Q. And would you have a good view of the road down towards Killorglin when you're stationary at the junction?*
>
> *A. Yes, yes, absolutely.*"

10. He was asked to enlarge upon this issue in his cross examination and emphasised that he would "*not have gone shooting across that junction at any sort of rate of speed".* When it was put to him that either he didn't see the Defendant's van at all or that the Plaintiff must have assumed that the Defendant was going to go straight down Ardmoniel just because the two cars ahead of him had done he reiterated that he had *"zero recollection of the two cars or the van"* but that he knew the junction, including the blind turn for traffic coming from Caragh Lake towards Farrantoreen on his left. He emphasised what he would have done every single time at that junction, whether on foot, on a bicycle, or on a motorcycle.

<u>The Defendant's Evidence</u>

11. The Defendant is from Glenbeigh, Co. Kerry. He had had a long day, having risen at approximately 7am to start work in Dingle at 8am where he worked for 12 or 13 hours (finishing around 8:30/9pm), before driving through Killorglin, approximately an hour's drive. He stopped in Killorglin to collect a takeaway meal to take to his sister's home. She was living

in the direction of the Caragh Lake Road in Farrantoreen. While she had only been there for a couple of months, the Defendant said he was familiar with the road. He says he was wearing his seatbelt, but his forensic expert concluded that it was not being worn, or not correctly.

12. Much of the focus at trial concerned the Defendant's statement to the Gardaí that his Toyota Ford Transit van was impacted by the motorcycle colliding with his passenger side, which shunted his vehicle across the road. This is important because his van ended up entirely on the wrong side of Langford Street (from his perspective) and his account - if accepted - would have countered the suggestion (which he denied) that he was on the wrong side of the road, *"cutting the corner"* as the collision occurred.

13. At the trial on 24 June 2024, almost seven years after the accident, the Defendant's recollection had evolved significantly, although he was defensive and inconsistent in his account. He said that: (i) he had no recollection of having seen the Plaintiff's motorcycle travelling down Ardmoniel; (ii) he become aware of the motorcycle when it entered the Junction just before the collision (but his evidence was difficult to follow on this point, and he also had told the Gardaí and suggested in evidence that he had seen what must have been its lights as it came down Ardmoniel); and (iii) he sought to avoid the motorcycle by steering to his right and this explained his vehicle's position (on the wrong side of the road).

14. The Defendant's varying accounts were challenged on the basis of their inconsistency and on the basis that: (a) the motorcycle physically could not have shunted the Defendant's far larger vehicle across the road as he originally told the Gardaí; (b) his alternative explanation was implausible, as it suggested that, confronted by the approaching motorcycle, he drove onto the wrong side of the road (into its lane), whereas the obvious and far safer option would have been to veer left, which would have avoided the collision; (c) his (varying) insistence that he only saw the motorcycle just before the collision, making it difficult to believe that he executed an evasive manoeuvre which explained the location of his van on the wrong side of the road;

and (d) the impact on the van was not consistent with his claim that the motorcycle collided with the passenger side of the vehicle.

15. The Defendant's evidence was not clear or consistent as to the circumstances of the accident. For example, in his evidence in chief, he said that:

"*I was coming around the turn, I just seen the lights in the distance at the motorway and all of a sudden they were on top of me, the two cars in front of me continued on straight. Before that I was taken out to the right there after where the taxis were and the motor bike just came into the passenger side of me. When I seen the light I kind of swerved to try and avoid it a bit.*

Q. What was the impact like?

A. It was strong. The van lifted like."

16. He described his evasive manoeuvre later in his evidence in chief:

"*I was coming along here, out this way, motorbike came up out of Ardmoniel. When I seen the light close to me, I veered across this way to try and avoid the motorbike*."

17. The Defendant's account was vigorously probed on cross examination and it was put to him that he had been working for 1 up to 16 hours at the time of the collision and that his own barrister had stated that coming round the turn he saw the light of the Plaintiff's bike and swerved to avoid it, to which he responded:

"*A. I seen the light in the distance at first, like and then I took no more notice. I was watching the road. The main road like where I was travelling myself.*

Q. Yes?

A. I didn't expect the bike to come on me that fast.

Q. You didn't expect the bike - so- hang on, are you telling the court you saw a bike?

A. I seen it in the distance at the start but then all of a sudden it was alongside me.

Q. Where did he disappear to?

A. He came, I was watching my own road like."

18. The Defendant was asked where the Plaintiff's bike had disappeared to. He insisted that he was watching his own road and didn't know. He responded to the challenge that his

statement to the Gardaí (three days after the event) did not reference his seeing the motorbike and gave a different account – that he had got a belt to the passenger side of the van and had gone across the road with a bang. The Defendant was unable to satisfactorily explain why his oral testimony did not match his Garda statement.

19. Denying that he was distracted as he rounded the bend, the Defendant expanded on the events leading up to the collision, the Defendant stated at one point that he didn't see the bike until it hit him but then acknowledged that he saw what must have been its lights "*at the last second"* to which it was put to him

"Q. Now it's the last second, is it. Your evidence was "I saw the bike light in the distance." That's your exact evidence?

A. Ah this is when I was coming up the main road. I seen a light way off.

Q. So what happened to it?

A. I don't know, I weren't watching down that road. I wasn't going down that road so I didn't have to watch down that road. I was watching for traffic coming in the road I was going taking out.

Q. Well you've indicated there were two cars in front of you?

A. They continued on left.

Q. Yes?

A. And the bike was just there right stuck in the side of it.

Q. When did you first see the bike?

A. When it hit me.

Q. So you never saw it before you hit you?

A. No".

20. The Defendant acknowledged that the Plaintiff's motorbike would have had to travel 50 metres across the junction to get to the point at which the collision occurred and explained that he never saw him because the bike was going at speed. He was repeatedly challenged as to how he would know what speed the bike was travelling at if he didn't see it and he repeatedly insisted that the bike lifted the van off the ground. The cross examination continued:

"Q. ... I'm going to suggest to you Mr. Moriarty, on your evidence is, you didn't see

the bike until it hit you.

A. Yes.

Q. *That's the first thing and I'm going to suggest to you, that is indicative of you cutting the corner here, isn't that correct?*

…

Q. *Yes. And so you went on to the incorrect side of the road for that reason, isn't that so?*

A. No.

…

Q. *If you'd seen the bike, which you should have Mr. Moriarty?*

A. Right.

Q. Do you agree you were driving at speed but you could have brought your vehicle to a halt prior to the collision?

A. No bother, yes.

…

Q. *Do you also agree, Mr. Moriarty, if you look at the photographs…There's plenty of space at the left-hand side if you're driving slowly within the speed limit to veer the van. Isn't that correct, to the left-hand side, isn't that correct?*

A. Right.

…

Q. With an unencumbered view, there's plenty of space to move to the left, isn't that correct?

A. Yes.

Q. And slow your vehicle down prior to any collision, isn't that so?

A. *Yes".*

21. The Defendant denied being distracted and, in response to the suggestion that his statement to the Gardaí was a more accurate version because, for whatever reason the Defendant didn't see the bike, he insisted that "*The bike came on at speed".* The Defendant was also challenged on why he was able to subsequently provide more detail to his engineer two weeks after the event which he had not given to the Gardaí in his earlier statement. The Defendant apparently told the engineer on 2nd October 2017 that:

"While he's about to negotiate the particular bend, the plaintiff emerged at high speed

from the minor road travelling on a motorbike."

How were you able to tell that to your engineer two weeks after the event and you couldn't tell that to the guards. You shrug your shoulders again.

"The insured believes he veered to the right in an attempt to avoid the motorcycle."

What do you mean you believe. You did or you didn't?

A. That's what I did, yes.

Q. But there was significant impact. So again, we're in a situation where you tell the guards one thing, you tell the engineer something completely different. So now you do see the vehicle approaching. What's the case Mr. Moriarty?

A. In that second I seen the bike and I veered.

Q. Ah no, no, no. That is not what you told the guards and what you've told us now three minutes ago, you didn't see it until it impacted with you. I'm going to suggest to you Mr. Moriarty, you lost sight of the bike, for whatever reason. You might have been distracted within the van, you mightn't have been paying attention, you might have been tired?

A. I was doing what I was supposed to do, I was watching my road".

The cross examination continued in the same vein.

The Plaintiff's Expert Evidence

22. Having no memory of the collision, the Plaintiff relied on his forensic expert to reconstruct and explain the circumstances. There was no dispute about the fact that the Defendant's vehicle ended up the wrong side of the road. The Plaintiff's case was that the Defendant must have "*cut the corner*" as he sought to turn to the right (into Farrantoreen Rd), as he was on the wrong side of Langford Rd when the collision occurred. The Defendant's alternative explanations were that the speed of the motorcycle impacting the side of his Ford Transit van shunted it onto the wrong side of the road, or, *per* his later explanation, that his steering to his right in a vain attempt to avoid a collision accounted for his vehicle's final resting place, an explanation complicated by the lack of clarity in his evidence as to when he saw the motorcycle and became concerned about the risk of a collision.

23. The Plaintiff called a forensic engineer, Mr Fogarty, who testified that:

a. the Plaintiff approached from Ardmoniel, the minor road. Accordingly, although going straight ahead (towards Killorglin), he was required to stop and give way, whereas traffic from Killorglin *via* Langford St could either proceed straight ahead onto the minor road, Ardmoniel, or turn right in the Junction onto Farrantoreen Rd. The Defendant was coming from Killorglin and seeking to follow the latter route, the primary route through the Junction;

b. the accident occurred approximately in the centre of the Killorglin-bound lane, which had a width of 4.7m. The distance between the solid white centre line and the Ardmoniel stop line was 7.7m;

c. the significant impact to both vehicles was obvious from the photographs;

d. on the basis that the Plaintiff's practice was to halt at the stop sign before entering the Junction, he would only have travelled 12-15m from the stop sign to the collision locus, and he could not have reached a sufficient speed to explain the damage experienced by both vehicles, unless the Defendant was travelling at speed. The photographs revealed a very significant impact, suggesting that the Defendant brought the vast majority of the speed into the collision.

e. if he stopped at the stop sign, it was reasonable to assume that the Plaintiff would have travelled to the accident locus at an average speed of 10kph. It would have taken him approximately 4.85 seconds to reach the accident locus;

f. given the 50 kph speed limit, the Defendant should have been able to bring his vehicle to a stop in 25 metres/2.9 seconds (including reaction time). The Defendant would have had ample time to stop before the collision, if he were travelling within the speed limit and keeping a good lookout;

g. although the Defendant told the Gardaí that he saw the Plaintiff travelling up from Ardmoniel, he did not confirm that he saw the motorcycle entering Langford Street. He ought to have seen the Plaintiff before the collision;

h. the Defendant's suggestion that his Ford Transit van was shunted across the road by the motorcycle was improbable given the weight disparity - it was more likely that the Defendant drove his own vehicle onto the wrong side of the road;

i. the photographs suggested that the Defendant must have been travelling at significant speed at the moment of impact;

j. the Defendant's statement that he was impacted on the passenger side of his vehicle was inconsistent with the photographs, which showed that the motorcycle went into the front of the vehicle; and

k. although the collision occurred after 10pm, both parties would have had a good view of each other as they approached the Junction and would have had no difficulty seeing each other's headlights.

24. When asked about the suggestion that the Defendant's van was third in a line of traffic and whether that would have impacted the Plaintiff's view, Mr Fogarty replied that the Plaintiff would have had a clear view for 250 metres of the road which the Defendant and other two vehicles came up, and that cars with lights on coming from Killorglin would have been in clear view for 40-60 metres for vehicles approaching the Junction from Ardmoniel. He agreed that, if the Defendant was correct in his contention (that the Plaintiff just pulled out through the Junction, without stopping), it would mean that the Plaintiff did so "*in the teeth of two approaching vehicles and the defendant's vehicle*".

25. Mr Fogarty considered that the final orientation of the van was not consistent with the explanation that it was caused by the Defendant's evasive manoeuvre – turning onto the wrong side of the road. There was a lot of space to the Defendant's left and Mr Fogarty noted that that

the accident wouldn't have occurred if he had kept to the left. He also concluded that the final orientation of the Defendant's van was "*not indicative of somebody swerving to the right in an emergency situation to avoid a motorcycle coming from the left"*. He also dismissed the suggestion that the motorcycle was likely to have pushed the van onto the wrong side of the road, as suggested in the Defendant's Garda statement:

> *"A. ...Obviously the van is eight times heavier than the motorcycle. So the motorcycle is not in my view going to push the van across entirely onto its incorrect side of the road, no.*"

26. Asked whether the Defendant should have been able to avoid the accident, Mr Fogarty responded that:

> "*A ...He certainly could have went to the left. That's I suppose the easiest way of avoiding the accident.*
>
> *Q. Would he have been able to stop fully within the 25 metres you've talked about?*
>
> *A. I suppose that depends. If what he says is correct and the plaintiff came flying out across the junction, he may not be able to stop but if the plaintiff came out as he says he normally does, then he would be able to stop.*
>
> *Q. If the defendant had been paying a proper or keeping a proper lookout, is it reasonable to suggest he should have seen the plaintiff before there was a collision?*
>
> *A. Oh certainly. Again if you look at photographs 10 and 11, Judge, I mean at that stage he's facing straight up towards the junction which the plaintiff came out of. So the plaintiff is directly in front of him. He should have no difficulty in seeing him.*"

27. Mr Fogarty also responded to comments in the Defendant's forensic reports (which, in the event, were not put into evidence with the Defendant relying purely on the oral testimony of his experts) about the reason for the van being on the wrong side of the road:

> "*Q. ... It says "there is no direct physical indicator as to this, other than it was likely to have been a reaction by the driver to the sudden developing hazard, that the motorcycle was approaching the stop line and the realisation that the motorcycle was not going to stop at the stop line." Is that consistent with having no view of the plaintiff before collision?*

A. I mean to be reactive and to swerve to the right you need to see the motorcycle coming towards you and coming across the white line and presenting a danger. You need to see all that to be reactive and to turn to the right.

Q. So if the court is satisfied from the defendant's evidence that he had no view or did not see the plaintiff until the impact occurred, then this puts the proposition or the explanation as to why he ended up on the incorrect lane somewhat askew, doesn't it?

A. Yes.

...

Q. It may have been the case that he applied more steering to the right to place distance between him and the emerging motorcycle. Looking at the photographs of where the vehicles ended up and the orientation of the Ford Transit, does that version of events seem reasonable to you?

A. Well, I think, as I've said already, the orientation of the van, it's not at a severe angle. So it doesn't look to me like he's turning sharply away from any hazard on the left.

Q. The report also notes that there was no evidence of braking at the scene. What can we extrapolate from that if anything?

A. Well, I suppose that is an indication that he didn't realise the danger until it was happening."

28. On cross examination, the possibility was put to Mr Fogarty that the Plaintiff may have seen the three approaching cars as he approached the Junction and wrongly assumed that all three were continuing straight down Ardmoniel:

"*Q. It's what happened. The two cars did go straight down Ardmoniel Road.*

A. Two cars did?

Q. Two cars.

A. Not the third.

Q. Not the third. And this man drove out into the teeth of the third vehicle because he mistakenly assumed it was going straight as well.

A. Well I mean I don't know what he assumed and he doesn't know but all I can say is if somebody did that, if someone was to drive out there you have a clear view of vehicles coming up towards you, it's a crazy manoeuvre.

Q. But you saw the van was going was going to go around the bend towards

Caragh Lake would have been absolutely suicide for him having stopped to pull out into the face of a van that is on the main road.

A. Sorry, say that again now.

Q. Either he assumed that the van was going straight down Ardmoniel Road like the other two cars, or else, having stopped at the junction and seen this van straight in front of him, he decided to cross the road in front of the van, knowing the van was on the main road, going towards Caragh Lake, an absolute suicide manoeuvre.

A. To pull out in front of the van, well the van was there to be seen, I can't argue with that.

Q. And he did pull out in front of the van. You can't argue with that either?

A. He did pull out in front of the van, yeah."

29. Mr Fogarty was also cross examined as to about the plausibility of the Defendant having veered right to avoid the oncoming motorcycle:

"*A. Well, I mean, what I'm saying is, he had, if he did keep left, there is loads of room on the left. And certainly if he did keep left, the accident wouldn't happen".*

30. Mr Fogarty also, fairly and properly, unequivocally acknowledged that *the Plaintiff should also have seen the traffic approaching the Junction* before moving off the stop line and onto Langford Street.

<u>The Defendant's Expert Evidence</u>

31. Although both sides exchanged expert reports in the usual way, the Defendant's counsel eventually indicated that the Defendant's reports would not be put in evidence, simply relying on the experts' oral testimony.

Mr O'Connell's Evidence

32. Much of the cross examination of Mr O'Connell, a litigation engineer, focussed on the Defendant's account to him 13 days after the event, which Mr O'Connell described as "*a clear narrative as to what he was saying on the day*" and which he admitted was different to his evidence in Court. The cross examination continued:

"*Q. ... on this account that you were given, the Defendant is maintaining that he*

had sight of the Plaintiff, isn't that correct?

A. He had some sight.

Q. Some sight. Sufficient to be able to assess that he was travelling at high speed?

A. How we reached that conclusion, I didn't interrogate him on that, but the view I formed was that happened over a very short timeframe, and in response to an impending emergency, he veered to the right, which is what he told me on the day.

Q. And then the next phrase I find quite curious, the insured believes that he veered to his right?

A. Correct.

Q. In an attempt to avoid the motorcycle which was emerging at high speed. That's a very unusual selection of words in the context of taking instructions from the Plaintiff, and it's quite a deliberate use of the word 'believes'?

A. That's what he indicated to me.

Q. So he wasn't in a position when giving you instructions some 13 days after the accident to emphatically state as a matter of his version of events, that he did veer to the right in an attempt to avoid the motorcycle emerging at high speed. He stated it as a belief?

A. It's written as I recorded it."

33. There was a lengthy passage of cross examination (which I considered inconclusive) in which Mr O'Connell reiterated his view that the motorcycle was travelling at speed but acknowledged that the force of the collision depended on the speed brought by both vehicles. However, Mr O'Connell did not accept the Defendant's claim that the impact of the motorcycle lifted the van off the ground. He considered that the Defendant's alternative explanation, that he veered to the right to avoid the oncoming motorcycle, was possible. The cross examination probed Mr O'Connell's dismissal of the Defendant's explanation to the Gardaí:

" *Q. Why would he, before he ever spoke to you, when he was speaking to the guards give that very version?*

A. I don't know, I can't, all I can say is what he told me on the side of the road on that date in August of 2017 is precisely recorded in my report.

Q. I agree, that is exactly what's recorded and it's exactly contradicted by what he told the guards some 10 years earlier. "I got [*a belt*] *from the Ardmoniel side of the*

passenger side of the van, I went across the road with the bang"?

A. Yeah. Where it was clearly indicated to me that his belief was that he veered across to this particular position.

Q. There was plenty of room to the left here?

A. There is room, absolutely, but I think in relation to that, in my experience, that if you perceive something under a very short timeframe coming from your left-hand side, then your natural tendency will be to try and avoid that particular impending incident and to veer away from it, wrongly or rightly. I think that's a natural tendency and it's something that I would think most people would do."

Mr Davin's Evidence

34. Mr Davin, a forensic collision engineer, concluded from the photographs that the initial contact was to the near side or left of centre of the front of the van (not the side, as the Defendant had told the Gardaí). He noted that the evidence suggested that the Defendant wasn't wearing the seatbelt correctly at the time of the accident. He did not consider that the damage to the vehicles was consistent with the motorcycle having come from a standing start at the stop sign and simply reaching a speed of 15-20kph and suggested that there was speed involved in the incident. He advanced a speculative theory based on the direction of the damage to the van and the angle at which the motorcycle might have been approaching the intersection and also sought to contend that his client's explanation that he had crossed over to the wrong side of the road in an attempt to avoid the collision was plausible:

"*A…. So, if the car or if the motorcycle continues out into the junction, it means that as the van driver is approaching, there's a kind of a little bit of confusion maybe. I think the technical term that is often used is a violation of expectancy, or expecting one thing to happen and something else happens, and you have to deal with that. And there is a possibility, therefore, and it has been shown in the past in some instances, where drivers have tried to get away from the impending hazard, and so to put some distance between them and the hazard itself. But it does look like the, and it is the case that the motorcycle made first contact just to the left of, or sorry, just to the right of the front left chassis leg. And there's a diagonal alignment there, a slight diagonal alignment.*

Q. Finally, could I ask you, it's common case that the Defendant's vehicle was on the, ended up on the incorrect side of the road on the bend. We've considered that in terms of the dynamic of the crash. What is your view on it?

A. It is speculative but it is quite possible that in this kind of state of emerging emergency situation that there is going to be an impact that he may have swerved to the right or turned, steered to the right to get away from it, from the motorcycle coming. So just to minimise the impact to himself really, I suppose because that's self-preservation."

35. Mr Davin was cross examined about the Defendant's statement to the Gardaí, accepting that it was an investigation into a serious, potentially fatal, accident. He was asked about the Defendant's explanation to the Gardaí that:

"*Q. … "The cars continued on Ardmoniel Road, and I could see lights coming up the Ardmoniel Road in the distance as those cars rolled down. I continued on the main Caragh Lake Road, and as I passed the Ardmoniel junction, I got a belt from the Ardmoniel side to the passenger side of the van. I went across the road with the bang." So that's the version that the Defendant saw fit to give to an investigating garda officer who was potentially looking into whatever criminal charges…potentially. And that's the version he gave there. And I have to suggest to you that that is a particularly useful version for him in the context of what may well be an investigation into whether he had been guilty of any oversight or perhaps negligence, criminal, or whatever else. Isn't that correct? Because he's saying that he got a belt on the passenger side of the van and went across the road. In other words, he was driven across the road by an impact with the passenger side of his vehicle and that of the Plaintiff's motorcyclist. Is that what that statement is saying?*

A. On the face of it, yeah, it sounds like it, Judge, and we know that the physical evidence doesn't particularly match up with that very well."

36. Mr Davin was also asked about the Defendant's statement to the Gardaí in terms of what he said he could see:

"*Q. And he's also stating he can see lights coming up the Ardmoniel Road in the distance of the cars drove down. In other words, he's in this statement also suggesting that he has a good view of what's going on at the junction. Isn't that correct?*

A. Well, he can see the lights coming up, so he knows there's something coming up

to the junction, yes.

Q. See, that's a markedly different scenario to what he has now given in his evidence in this case, which is to suggest that he had no sight at all of the Plaintiff. No sight, and the only time he became aware of them is when the collision occurred. That's a markedly different state of affairs, and one which may have been looked at differently in the context of a criminal investigation if that had formed part of his statement. Isn't that correct?

A. That is correct, Judge, yes."

37. Mr Davin, quite properly, acknowledged that some of his evidence was speculative:

"*Q. Insofar as you've done your best, Mr. Davin, insofar as you've done your best to bring your years of experience to bear on this case, you've been quite fair in suggesting that some of your remarks really are speculative, isn't that correct?*

A. That is correct, yes.

Q. And in relation to the notion that people may very well have an indication to veer to the right on sight of an approaching hazard, you fairly concede it's speculative, it's been shown in the past with some research, real-world incidents verified by evidence, you're saying that it really comes to the height of a possibility, I'd suggest, a speculation that you're making, having looked at everything?

A. Yeah, it's based on experience, Judge, that's all. I've attended numerous traffic collisions in the past, bearing in mind each collision must be assessed individually on their own merits. I'm just saying that it is a possibility that it could have, yes."

38. He also unequivocally acknowledged that, notwithstanding his theory as to the angle of the impact, the impact was to the front of the Defendant's van:

"*Q. And it's clear even though you have located the angular nature of the damage, it's very clear that the damage was frontal. It may very well have been at a slight angle driven from near side to off side, but the damage is all frontal to the Defendant's vehicle?*

A. There is absolutely no doubt on that, Judge, it is to the front of the vehicle.

Q. And insofar as the Plaintiff ended up on the bonnet or in the windscreen, it's pretty much maybe slightly biased towards the passenger side of the windscreen, but fairly central, I would have to suggest, is where he ended up?

A. Yes."

39. Mr Davin was also challenged on his conclusions as to the motorcycle's speed:

"*Q. ... you put some store in the fact that the bike remained close to the front of the van at the point of impact where they came to rest. Isn't that correct?*

A. Yes.

Q. And I think you extrapolated from that or inferred from that, that this suggested there was quite a bit of speed or energy brought to the collision by the bike having regard to its proximity in the immediate aftermath?

A. Yes.

Q. But I think you also in your report at figure 25 at page 16 of your report, if I could ask you to have a look at that. Figure 25 shows the secondary damage to the nearside engine crank case cover on the motorcycle?

A. Yes.

Q. And you say, "the grind marks displayed are consistent with the motorcycle sliding a short distance on the motorway". That's a new variable, isn't it, that suggests that whatever one may infer from it, it's suggesting now that on your examination and observation that the motorcycle may very well have been pushed a considerable distance, well not considerable, but some distance up the road from the scratch marks?

A. It is a short distance.

Q. A short distance, could it be 4 to 5 metres?

A. I wasn't at the scene and I don't have the length of the marks, so I can't answer that question.

Q. But we do know that it isn't as simple as just stating that the bike and the --

A. It didn't fall over at the front of the van.

Q. It didn't fall on the front and remain in that position?

A. Yeah, yeah.

Q. It was in itself pushed up the road by reference to what you observed?

A. Yeah. There is a considerable mass difference between the two vehicles."

40. A discussion as to the speed the motorcycle might have attained from a standing start by the time of the collision showed the difficulty of drawing conclusions, but also highlights the enigma as to why the Plaintiff entered the Junction, given his view of the oncoming traffic:

"*A. It really depends. It really depends because a motorcycle like that, taken off normally, yeah, you're going to have, you could have a low speed, but if you were to come out energetically, but then you have a very short distance and you have this low*

wall here in front of you. So if you come out say taking an alignment with your front wheel at the centre mid distance on the stop line, and then accelerate out fast, you have this low wall here to contend with. So, it may not, if you're coming from a standing start, it's unlikely he would have pulled out so quickly because in reality, they should be able to see each other, if the motorcycle is stopped at the stop line. And the van is approaching along the road, both drivers should be able to see each other at that point. And why would he pull out onto the roadway with the van? And if it's the case that the van is on the wrong side of the road, why in double that, why would you go into that area where there's danger approaching from your right-hand side?

Q. Well, it all depends on the approach of the Defendant's van. If you take the logic, which is the unfortunate consequence of where the vehicle's ended up, namely that the Defendant's van is entirely orientated and situated on its incorrect side of the road, it depends on the approach taken by the van as to what possible view the motorcyclist had as to what his intended direction of travel was going to be, isn't it?

A. I think we have photographs there on the scene. There's a nice view there, composite photograph number 5, Mr. Fogarty's. And if you're taking that from the stop line, I think we can see that it's the backs of those cars we can see. So if it's dark or if it's dusk and there's something approaching, you can clearly see that there's headlights coming at you on the wrong side of the road. So the only, coming up towards the junction that you're stopped at on the wrong side of the road. So you're not going to drive out into the path of the vehicle approaching you on the incorrect side of the road. Similarly, you're not going to drive out there with the van approaching on the correct side of the road. If you're stopped, you're in out of the way, you're in out of harm's way. Why would you go out there into danger?"

41. Mr Davin was also challenged on his explanation that the position of the Defendant's vehicle might be the result of his attempted evasive action:

"*Q. ... But the defendant's vehicle, where it ended up in the short distance, given that both parties could see each other, is entirely situate on its incorrect side of the carriageway. And you, in fairness, have done your best and admittedly, speculatively, to say there could be good reasons for doing that. But he could equally, if he was faced with an emergency, have gone to the left, couldn't he? That's more speculation, but it's equally valid, isn't it?*

A. It is, and often times with collisions people have gone, in the past -- so you take a typical say collision where vehicles travelling on a dead straight section of road and a vehicle veers across onto the incorrect side of the road. The other person sees that vehicle crossing onto their side of the road and then moves over to their incorrect side of the road to avoid the hazard that's coming towards them. They run out of room, and there's a head-on collision. But so we don't know in each individual case what's going to happen. We don't have the physical evidence of marks on the ground here with this."

42. Mr Davin acknowledged that the Defendant cutting the corner was also a plausible explanation for his position on the wrong side of the road, but noted that that would still not explain the Plaintiff's decision to enter the Junction in the face of oncoming traffic. While both parties have criticised the other, this exchange confirmed the inexplicability of both parties' behaviour:

"*Q. The inconvenient fact for the defence in this, and the expert job you've done in trying to come up with theories and possibilities, the unfortunate issue here is that the Defendant is at all times wholly within and gently orientated to the right, within his incorrect side of the carriageway. Isn't that correct? And we have two versions now from the Plaintiff* [*sic*]*, one which he gave in an exculpatory fashion of himself to the Garda to state that the reason he was on the incorrect side of the road is that he was effectively, went across the road with a bang. In other words, it was the bang from the motorcycle that pushed him across the road, despite the massive mass difference between the two. So that's the exculpatory statement we have from him. And then we have the evidence from him, in evidence, that he didn't even see the motorcyclist. I mean, I have to suggest that one very simple proposition arises from all of that, which is he was either well on his way travelling over, cutting the corner on the right-hand side of the road before the approach of the Plaintiff, or soon after the Plaintiff emerges, he continues travelling in that direction, cutting the corner. Isn't that equally plausible in all of this?*

A. Equally plausible and it still doesn't over come the question as to this is a hazard to the motorcycle. Why did he go out there? If he was stopped at the stop line and could see this happening with the van approaching, why did he leave the safety of behind, on the minor road at Ardmoniel and drive out onto the main road when the van was coming from his right hand side.

Q. A valid question. And equally how can a motorist who says he's travelling within the speed limit, who says he sees lights up ahead, how is it he can't take a simple turn to the left or avoid the collision, or bring his vehicle to a stop over the 25 metres that he should be able to bring his vehicle to a stop when faced with an emergency? That's another question in the case, isn't it?

A. And he was here this morning, and you could have him, yes, Sir."

43. I asked Mr Davin about the evidence of inexplicable behaviour on both sides - why didn't the Defendant react, see the motorcycle and stop, but, equally, the conundrum that, if the Plaintiff was approaching and had stopped before entering the Junction, he should have seen the Defendant. I noted that the evidence suggested that both of them should have seen the other and both of them should have stopped, and observed that, if all drivers always behaved rationally, there would be fewer accidents. However, I noted that, from the Plaintiff's perspective, he was approaching a stop sign and he may have assumed that the line of three cars was veering off apparently going straight down Ardmoniel, as the first two vehicles were in fact doing (which would mean that their paths would not cross). Equally, from the Defendant's perspective, he was behind two other cars. which were turning off the main route, and he was presumably looking to get past them so he could continue on the main route to dinner at his sister's house. I asked Mr Davin whether it was possible that the Plaintiff and the Defendant were both focussed on the cars turning left into Ardmoniel rather than each other:

"*A. It's a very good question, Judge. There is that possibility, yes, and if it's the case that the first car has come down, say from a motorcyclist's point of view, the first car has come down, the second car has come down, there is a possibility that maybe there was just a momentary misjudgment, and same with the van driver, that there is a misjudgment at that second. And I think generally we refer to that as driver error. It's a thing that you just make that wrong decision at the wrong time. And it's a possibility.*"

The Medical Evidence

44. Dr Kevin Ryle's 21 January 2019 report summarised the Plaintiff's injuries including:

- fracture of the base of the right 5th metacarpal

- comminuted fracture of the left distal radius and the ulna styloid process
- laceration of the left anterior ankle/lower leg
- soft tissue to the groin area/pelvis
- head injury.

45. Dr Ryle noted that the Plaintiff had:

- been hospitalised for five days and off work for two months
- had approximately three GP visits, two or three specialist visits and two or three physiotherapy sessions.
- Had undergone surgery to both wrist fractures and had received the ongoing analgesia following discharge from hospital.

46. Dr Ryle's report noted the Plaintiff's then present complaints (approximately 17 months after the accident) as including:

- difficulty with memory, low mood - he was a keen photographer taking regular landscape pictures but was unable to continue this in the aftermath of the accident
- difficulty finding the right words to say in conversations.
- occasional sharp pains in his left wrist
- weakness in his right hand when holding heavy objects (needing to wear a wrist support when carrying his camera apparatus

47. Dr Ryle's clinical findings included scarring on the Plaintiff's left wrist, right hand and anterior ankle, reduced movement on flexion and extension left wrist, scarring on right hand and left anterior ankle. The clinical impact on the Plaintiff's mental health, continence and lifting and carrying ability was described as moderate whereas the impact on his speech was described as mild. Dr Ryle was uncertain as to whether the Plaintiff would fully recover.

48. The 8 September 2020 report of Mr Gary O'Toole, Consultant Orthopaedic Surgeon for the Plaintiff confirmed that:

a) the Plaintiff had complete amnesia as a result of the accident.

b) The Plaintiff had had ongoing memory issues - these had improved over the three years since the accident but he still had short term memory issues where he could not remember conversations after being involved in them.

c) The Plaintiff's left wrist had sustained a fracture of the left distal radius and required open reduction and internal fixation under general anaesthetic on 2 August 2017 but now moved well and he had made a good recovery from that injury.

d) The Plaintiff's right hand involving a fracture of his left metacarpal had also made a good recovery but he can hear a crepitus when making a fist.

e) The groin issue and soft tissue injury around his groin has recovered well and he reports no disfunction in that area.

f) The Plaintiff has a 4cm scar over his left distal tibia and has no issues with his left ankle joint.

g) The Plaintiff is able to live at home and can undertake domestic chores and normal activities. He has not returned to motorbike riding.

h) Initially after the accident the Plaintiff had severe difficulty sleeping his descriptions are consistent with PTSD but he made a good recovery and was sleeping normally as at the time of the report (three years after the accident).

i) If he is carrying a heavy camera for his work the Plaintiff needs to use a left side and wrist support but it has not generally impacted his activities.

49. Mr O'Toole's clinical examination was generally positive in terms of the Plaintiff's recovery but noting the "well healed" surgical scar on his left wrist from the surgery and the crepitis on his right hand (which otherwise had a full range of painfree motion). The report concluded that the Plaintiff had made a good clinical recovery from all his injuries including the brain trauma and from the operations. It noted that the Plaintiff is limited in his activities

as a filmmaker but took compensatory measures to overcome the challenges. More than three years had elapsed since the accident and Mr O'Toole did not expect his symptoms to improve in the future.

50. A further report from Dr Kevin Ryle dated 12 January 2023, more than 5 years after the accident, noted the Plaintiff's positive report of his progress, including a 98% improvement in the pain and weakness in his left wrist and right hand but he still had difficulty with push-up exercises due to the pressure on his left forearm and wrist. The report described the Plaintiff's previous memory difficulties with in the aftermath of the accident as "now unnoticeable" but noted that he writes everything down to prevent memory difficulties.

51. Dr Ryle's clinical description of the effects of the accident notes a mild impact on the Plaintiff's mental health, concluding that he had made a good recovery and could generally work without any restriction. However, the report noted that the Plaintiff had occasional pressure sensations in his left wrist with certain activity and his left wrist remained mildly reduced and was unlikely to improve further.

52. Three medical reports were filed on behalf of the Defendant, two by Mr Burke dated 06 December 2019 and 13 April 2022 and one by Mr Gleeson dated 21 November 2023. Mr Burke's first report noted that the ankle wound and groin abrasion had healed and the main persisting injuries to both of the Plaintiff's hands and that he needed to use a wrist brace to protect his right hand when carrying video equipment and that the right arm would tire if he was carrying a video camera for a prolonged period of time whereas the left hand was temperamental with twinges and discomfort.

53. Mr Burke's examination noted:

- a slight reduction in wrist flexion and lateral wrist tilt on the lefthand side and on the left palm aspect of the distal forearm.
- a healing incision which was still somewhat red and florid.

- no apparent neurological loss on the left hand
- full mobility in his metacarpophalangeal and interphalangeal joints apart from a slight loss of flexion at the wrist joint.
- a full range of motion in righthand wrist and finger joints
- small marks on the fifth finger showing the incision point of k wires.
- the radiology showed that the right wrist had healed and that the left hand fracture had been satisfactorily reduced and internally fixed with a buttress type plate.
- The fracture of the ulnas styloid had also gone on to heal as had the distal radius on the left and the fifth metacarpal on the right.

54. Mr Burke considered that:

a) the fracture surgery had been successful, restoring full functionality.

b) On the left side the comminuted interarticular fracture of his distal radius had been anthemically reduced and internally fixed. However, there was certainly an impact on the radial carpal joint to the left side that exposed the Plaintiff to the possibility of future arthritis. Mr Burke put the possibility of needing future surgical intervention for degenerative arthritis in the wrist as 10-15% in the long term.

55. Mr Burke's second report noted that:

a. The Plaintiff's right hand can "get a bit achy" when he is holding a heavy camera for a prolonged period of time and he requires a wrist support.

b. His examination revealed a slight deformity around the fifth finger on the right side and on the left side in respect of his styloid of the ulna.

c. There was scarring on the volar aspect of the Plaintiff's left wrist.

d. The Plaintiff had made a good recovery and that the risk of arthritis in his left hand was more theoretical than certain. He estimated the possibility of requiring

intervention for arthritis in his left wrist as 5 to 10%, a slight reduction from his previous estimate.

56. Mr Aidan Gleeson's 21 November 2023 report was to a similar effect, describing the Plaintiff's health, including his mental health as normal. He concluded that the Plaintiff . had made an excellent recovery and did not expect him to develop secondary osteoarthritis at the left wrist.

Discussion- Liability

57. The only eyewitness accounts were from the Defendant. However, subjective recollections of road traffic accidents are not always reliable, and he did not appear to be objective or accurate about the events giving rise to the collision. He was defensive and inconsistent, and I am unconvinced by his explanations. In particular, his explanation to the Gardaí about being shunted across the road was: (i) disavowed by both side's experts; (ii) inconsistent with his own later explanation; (iii) contradicted by the photographs; (iv) factually incorrect to the extent that he asserted that the motorcycle went into the side of his van, when it clearly went into the front; and (v) inherently implausible. As the Defendant's expert, Mr Davin, observed (in a considerable understatement), in respect of the Defendant's claim that the motorcycle moved the van across the road, "*the physical evidence doesn't particularly match up with that very well*". Perhaps, with the shock of a sudden collision, the Defendant's impression was that the motorcycle went into the side of his van, moving it across the road, but the objective evidence does not suggest that that is what actually occurred, and I do not believe it to have been the case. Nor am I persuaded by the Defendant's explanation in Court that he was on the wrong side of the road because he attempted to avoid the collision. This contradicted his account to the Gardaí seven years earlier, and appeared difficult to reconcile with his (inconsistent) testimony as to when exactly he saw the motorcycle.

58. On the basis of the evidence as a whole, particularly the photographic evidence but also the expert testimony, I do not consider that an evasive manoeuvre is a credible explanation for the final resting place of the Defendant's vehicle. I take Messrs O'Connell and Davin's point that drivers can panic under pressure and make decisions which may appear counterintuitive after the event (with the benefit of calm reflection and hindsight). Accordingly, I have reflected on that possibility. However, although the Defendant's experts maintained that the Defendant's explanation *could* explain the vehicle's positioning, they did not satisfy me that that was the more likely explanation. Furthermore, and bearing in mind the role of expert evidence as outlined by Murray J. in *Ryan v Dengrove* [2021] IECA 38, it was not clear to me that the opinions they expressed on this point were based on objective forensic analysis or examination or on their independent expertise. Indeed, they both acknowledged - appropriately - that such comments were speculative and that the Plaintiff's alternative theory was as plausible. They also admitted that there was no evidence that the van had sought to brake, which seems inconsistent with the suggestion that the Defendant saw the threat and sought to avoid it. Furthermore, Mr Davin acknowledged that marks on the road might be consistent with the motorcycle having been pushed up the road by the van, which could be consistent with the Plaintiff's theory of the accident, but he could draw no definite conclusions as he had not examined the accident scene (and the forensic evidence seemed in conclusive on this issue). Accordingly, the Defendant's experts' evidence on this issue was inconclusive and speculative and I do not regard it as corroborating the Defendant's explanation (which I find unconvincing) that his vehicle's position - entirely on the wrong side of a busy road entering a major junction – was due to his attempt to avoid the oncoming motorcycle.

59. Even making allowances for a panicked reaction, the Defendant's alternative evasive manoeuvre explanation also seems implausible. It would have involved an experienced driver steering onto the wrong side of the road towards, rather than away from, the oncoming

motorcycle, when there was ample scope to move to his left, away from danger (a decision which would have avoided the collision). The natural instinct of any experienced driver was more likely to have been to slow or stop, while staying within their lane or moving to the left. The evidence suggests that, if the Defendant had adopted that course, the accident would have been adverted. The Defendant's experts' equivocal comments on the alignment of the vehicles did not persuade me. It appears that the experts' reports served by the Defendant (but subsequently not put in evidence) suggested that veering right to avoid the oncoming Plaintiff would have made sense, if the Defendant had already committed to turn right and continued that manoeuvre in an unsuccessful attempt to avoid the Plaintiff. However, the locus of the collision is difficult to reconcile with this theory, since the Defendant should not have been committed to turning right at the point at which the collision occurred. If he had been so committed, it could suggest that the Defendant was cutting the corner when he first saw the Plaintiff. In any event the Defendant elected not to put in evidence the reports which they had served on the Plaintiff.

60. For completeness on the subject of alignment, I should note an issue in respect of the schematic of the Junction showing the collision locus. I had asked the parties to furnish a soft copy of the same, being a simplified version of a document produced in evidence, preferably on an agreed basis for inclusion in this judgment. One of the Defendant's experts, Mr Davin, provided the schematic as requested. The Plaintiff's solicitors made clear that they accepted the same save in one respect. Their expert noted that the van's final resting place was shown at more of an angle than in Mr Davin's previous report (which is significant in terms of the Defendant's different explanations of the incident). I propose to avail of the schematic as providing a broad overview of the Junction layout and the position of the vehicles, while noting that the important detail of the exact final alignment of the Defendant's van is disputed. I do not need to determine that issue in further detail for the purposes of this decision.

61. All three experts agreed that considerable speed had been involved in the collision and that this was contributed by both vehicles. No firm conclusions can be drawn in respect of the precise speed of either vehicle, since each side's experts appeared to be influenced by competing factual premises reflecting their respective instructions, premises which could not be objectively established (on either side).

62. In my view, the most likely explanation for the final resting place of the Defendant's vehicle is that he was "*cutting the corner*" (possibly to get past the two preceding vehicles which were turning down Ardmoniel). This would explain the Defendant's position on the wrong side of the road when the accident occurred. My conclusion is reinforced by two features of his testimony – firstly, his repeated statement that he saw the motorcycle before the Junction but did not keep it in view and, secondly, his repeated emphasis on watching Farrantoreen Rd. Indeed, both parties appear from their own testimony to have been concentrating on Farrantoreen Rd, rather than on the possibility of a hazard from the other direction. This ties in with the Defendant's repeated statement that he was watching his own road and didn't expect the Plaintiff to "*come on me that fast*". As he put it, "*From the hill there I only seen the light but then I was watching my own road*". When cross examined further about his earlier claim to have seen the bike light in the distance, he said he saw a light "way off" but he was not watching that road as he wasn't going down that road. He was watching the road he was taking.

63. The Defendant added that he never saw the bike before it hit him (which is difficult to reconcile with his taking evasive action). His right of way did not entitle him to cut the corner or to travel on the wrong side of the road. It is unlikely that the accident would have occurred if he had been travelling at a safe speed within his lane and keeping a proper look out.

64. On the other hand, it is equally clear that the Plaintiff also contributed to the collision. The Plaintiff's counsel and experts did not argue otherwise. He was very open about his lack of recollection and was an impressive witness. In terms of assessing his testimony as to his

"usual" practice, it is relevant to note that he had taken steps which suggest he generally adopted a safety-first approach. These include: (a) his use of full motorcycle protective gear (without which his injuries would have been even more traumatic); (b) his replacement of the back protector in his jacket with Class 2 RST armour; (c) the level of lighting on his motorcycle and his helmet, and the reflectors as part of his motorcycle gear; and (d) his having undertaken more than the mandatory initial basic training. I accept the Plaintiff's testimony that he was very familiar with the road and Junction, and that his *usual* practice was to stop at the stop sign. However, that does not mean that he necessarily did so, on this occasion.

65. The Plaintiff acknowledged that he was travelling on the minor road, subject to the stop sign and required to give way to all oncoming traffic. Having come to a halt (as he should have), he should not have entered the Junction until the way was clear. All three experts agreed that, if the Plaintiff had come to a halt at the stop sign, he should have been able to see the Defendant's approaching vehicle (and the two preceding it). Accordingly, he should not have entered the Junction until the way was clear.

66. While I accept the Plaintiff's evidence as to his normal practice, the fateful day was his first opportunity to give his new motorcycle a proper run. It would not be entirely surprising if he were less cautious than normal. Furthermore, it was a more powerful machine than he was used to. His acceleration may have been greater than intended or he may have exercised less control over an unfamiliar machine.

67. I am satisfied that the likely explanation for the collision is that both parties were at fault. If either of them had complied with their responsibilities as road users, the accident would have been avoided. Given the location of the vehicles and the impact, and the expert evidence, I do not accept that the collision happened following the Defendant's attempt to take evasive action. It is more likely that, tired and hungry after a long, hard day's work, followed by a lengthy drive, looking forward to relaxing with his sister over the chicken dinner which was

cooling on the seat beside him, the Defendant was cutting the corner to get through the Junction and to get past the cars in front of him, which were going straight down Ardmoniel. Likewise, the likely explanation from the Plaintiff's perspective is that, as he approached the Junction, he was focused on making sure that nothing was coming from Farrantoreen Rd, and that, as far as Langford St was concerned, he must have seen that both leading vehicles coming out of Killorglin were heading straight on to Ardmoniel on his right, meaning that their paths would not cross. The Plaintiff probably jumped to the natural (but flawed) conclusion that the line of cars were all going in that direction, leaving the way clear for him to enter the Junction and onto Langford St (not appreciating that the third vehicle in the chain of traffic from Langford St, the Defendant's Ford Transit van, was turning right, meaning that their paths would cross). The Defendant's counsel advanced this theory in cross examination (insofar as it concerned the Plaintiff) and the Defendant's expert, Mr Davin, acknowledged the plausibility of the scenario (as regards both parties) when I put it to him.

68. This scenario becomes even more persuasive in the light of the repeated emphasis in both parties' evidence as to their focus on potential traffic from Farrantoreen Rd, which the Plaintiff repeatedly described as a blind bend for traffic coming from Ardmoniel. Both parties needed to watch for traffic from that direction. However, the Plaintiff also had to be on the lookout and to give way to traffic from Langford Street, and the Defendant also should have been checking for traffic coming from Ardmoniel, even though he had the right of way in that regard. I suspect that the Plaintiff was probably concentrating on making sure that nothing was coming from the "*blind*" bend on Farrantoreen Rd, and, perhaps subconsciously, discounted the traffic from Langford Street, because it seemed to be heading straight onto Ardmoniel (meaning that it would not cross his path).

69. By contrast, although his evidence was inconsistent, the Defendant informed the Gardaí, and reiterated in evidence, that he saw the Plaintiff in the distance before he reached

the Junction, without suggesting that he continued to observe him. If he had continued to observe him, then presumably the Defendant would have slowed or stopped, and the accident would have been averted. I am not convinced by the Defendant's explanation that the Plaintiff disappeared and then reappeared with such speed that it was impossible to avoid the collision (but that it was nevertheless possible to take evasive action which put the Defendant entirely on the wrong side of Langford Street, where the collision occurred). It is far more likely that he saw the Plaintiff approaching but, consciously or, perhaps more likely, unconsciously, discounted him, assuming that he would stop, since Langford St had the right of way and the Plaintiff was subject to a stop sign. This would explain why the Defendant, having seen the Plaintiff's lights, failed to keep him in view. His focus may have been on getting around the two cars in front of him and making sure nothing was coming from Farrantoreen Rd as he turned in that direction. While he had right of way, he still had a responsibility to keep a look-out and travel at a safe speed for the conditions. He should not have left his lane, particularly since he was or should have been aware of the approaching motorcycle.

70. Based on the evidence as a whole, I am satisfied that the accident would not have occurred if the Plaintiff had come to a complete halt and ensured that the way was clear in both directions before entering the Junction. However, it would also have been avoided if the Defendant had stayed in his lane and waited for the cars in front of him to pass into the minor road, checking the way was clear before he turned right and certainly before he moved out of lane. Accordingly, the collision was due to fault on both sides.

71. I am satisfied that neither party kept a proper look-out and, while there is no evidence that either was exceeding the speed limit, I am not convinced that either party was travelling at an appropriate speed for the conditions and for the Junction, or with sufficient care and attention in the circumstances of the Junction. I cannot conclude that the evidence established that the Plaintiff failed to stop at the stop sign, but I am satisfied that, if he had been proceeding with

due skill and care and keeping a proper look out in both directions, then he would not have entered the Junction until the way was clear.

72. The Defendant's right of way did not give him licence to leave his lane and this decision was, in my view, a major, perhaps the major, cause of the accident. The accident would not have occurred if he had been driving at a safe speed for the conditions and keeping a proper look-out and, most importantly, if he had stayed in-lane. I am also satisfied that, when he became aware of the oncoming motorcycle on Langford St, he could and should have avoided the collision by veering to his left, where there was ample space.

73. Since both drivers seem to have committed errors of judgment and shown a want of care, it is difficult to apportion fault on any basis other than 50/50. I think that would be a fair division, but if I were unable to reach a conclusion in that regard then, in view of my conclusion that both parties were negligent, the same result would be obtained by virtue of s. 34 (1)(a) of the Civil Liability Act 1961, which provides that:

> "*Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff ... and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant: provided that –*
>
> > *a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;*"

However, I do not need to invoke this provision because, on the basis of the totality of the evidence, I am satisfied that both parties were equally at fault.

The Plaintiff's Injuries

74. The Plaintiff was hospitalised for five days and off work for two months. His injuries included:

(a) multiple fractures, including both:

- to the base of the *right* fifth metacarpal, and
- the comminuted fracture of the *left* distal radius fracture and the ulnar styloid process;

(b) his serious head injury;

(c) laceration to the left ankle/lower leg;

(d) soft tissue injury to the groin area/pelvis.

There was a large degree of common ground between the medical reports, which were consistent with the Plaintiff's evidence, including as to serious fractures and their ongoing effects and the Plaintiff's eventual recovery. The Plaintiff was extremely fortunate to survive the very serious accident which nevertheless resulted in hospitalisation and an extended recuperation, enduring pain, not only during his hospitalisation and his two months off work, but also in the years that followed, as a result of his multiple fractures in particular. His work and life were impacted for several years by (fortunately reasonably limited) symptoms of memory difficulties, insomnia, PTSD, poor mental health and continence difficulties. It is a mark of the Plaintiff's character and fortitude that, happily, he eventually substantially recovered from most injuries (by and large), save for residual scarring, and reduced flexion/strength in his left wrist in particular (which impacts on his work as a self-employed filmmaker and leaves him with a 5-10% risk of developing arthritis in future in his left wrist as a result of the accident).

75. The Plaintiff tended to downplay his injuries. His testimony was aptly described (by the Defendant's counsel) as commendable in its directness and honesty. Although he has generally recovered reasonably well (after several years), ongoing effects - apart from not returning to motorbiking – include: (i) an inability to do push-up exercises due to the pressure on his left forearm and left wrist; (ii) needing to write everything down to counteract memory

difficulties; and (iii) emotional "ups and downs" (although his previously documented low mood has improved). No further treatment is currently anticipated**.**

76. The 2019 report by Mr Burke (instructed by the Defendant's solicitor) noted (in a wider review of the Plaintiff's multiple injuries) that:

> "*On the left hand side, he has a comminuted intra articular fracture of his distal radius and while this has been anatomically reduced and internally fixed it follows however, that there is certainly a blemish on the radial carpal joint on the left side that leaves him disposed to the possibility of arthritis occurring in the future. However, as the upper limb is not a load bearing apparatus in humans, it is likely to be sometime before any issue arises in this regard. I would put the possibility of him requiring surgical intervention in the future for degenerative arthritis in the wrist as being 10% to 15% over the very long term.*"

77. Mr Burke's supplementary report of 13 April 2022 noted that:

> "*…this young man has gotten a very good recovery from these injuries that were sustained in the high velocity accident. Functionality is close to 100%. While he may retain a theorical risk of arthritic change occurring in his left hand, I feel that is likely to be more theorical than certain.*
> *I would estimate the possibility of him requiring intervention for arthritis in his left wrist at this stage as being between 5% and 10%*."

78. Mr Gleeson's November 2023 report (also on the Defendant's behalf) similarly noted the Plaintiff's full recovery from his concussive head injury after approximately 1.5 years and from the fractures of his left distal radius, ulna styloid, and right fifth metacarpal.

<u>Submissions as to General Damages</u>

The Plaintiff's Submissions on Quantum

79. The Plaintiff's counsel noted that this is a serious multiple injury case. The Plaintiff is lucky to be alive. The Book of Quantum suggests that an award in respect of the main injury should generally determine the upper limit of damages. However, citing Noonan J. in *Meehan*

v. Shawcove Limited [2022] IECA 208 ("*Shawcove*"), he argued that the Court should take a holistic view and place the Plaintiff's constellation of injuries and their cumulative effect within the spectrum in a way that is proportionate both to the maximum and to awards made to other Plaintiffs (to paraphrase Noonan J.). Proportionality is the guiding principle, and Counsel cited the criticisms in *Shawcove* of the limitations of the Book of Quantum recommendations in the context of complex multiple injury cases.

80. Counsel noted that, viewed in isolation, the Book of Quantum award for the Plaintiff's complex left wrist fracture (which required surgery and internal fixation, leaving him with lingering deficits in relation to how he protects that wrist and uses his other wrist) might merit an award in the €54,200 to €70,100 or €68,400 to €78,000 ranges, depending on whether the injury was classified as a "*moderately severe*" or as a "*severe and permanent*" wrist fracture. Counsel submitted that some indicia for the latter range resonate with the Plaintiff, insofar as the category deals with someone who has had extensive surgery, as was the case here. However, the category was not as on point in relation to arthritic and other elements.

81. Counsel accepted that part of the logic behind the Book of Quantum was to avoid overcompensation for multiple injuries. However, he argued that the situation was different for an individual, such as the Plaintiff, who injured both hands. The simultaneous injury to both hands should be an aggravating factor. Counsel accepted that it was impossible to simply aggregate these individual factors but submitted that, given the seriousness under each heading of the injuries in this case, the case necessarily extended beyond one simple categorisation and the limits imposed thereby, whether it was viewed by reference to the wrist fracture or the prolonged severe loss of consciousness, each of which, *in isolation*, might suggest an award in the €74,000 – €78,000 range, at most. It was submitted that, given: (i) the combination of injuries; (ii) the fact of two serious simultaneous hand injuries; and (iii) the need to allow for injuries which are not addressed in the Book of Quantum, the appropriate figure should be

much higher and the Court must be at large - subject to proportionality - to diverge considerably from the top figures in the Book of Quantum, because of the undoubted severity of the injuries.

The Defendant's Submissions on Quantum

82. Having very fairly commended the Plaintiff for the directness and honesty of his evidence, Counsel for the Defendant submitted that page 15 (dealing with concussion) was the relevant section of the Book of Quantum. Noting that the Book of Quantum only describes a loss of consciousness in terms of a period of time, Counsel submitted that the Court must assess the effect of that loss of consciousness but that, on the evidence, the injury might be described as moderate, as distinct from severe. Citing page 44 of the Book of Quantum with regard to the wrist fractures, the Defendant submitted that, having regard to the evidence, it is a question of judgment as to whether the case is:

- "*Moderate*" - a simple, minimally displaced fracture with full recovery expected of treatment; or
- "*Moderately severe*" - multiple fractures that have resolved but with ongoing pain and stiffness, which impacts on the movement of the wrist.

83. However, he submitted that one of those two categories is applicable, rather than "*severe and permanent*". He agreed that there is no guidance to be gleaned from the Book of Quantum in relation to the other injuries that the Court has to consider and noted the conclusion of one of the experts called by the Plaintiff, Mr O'Toole, in respect of the Plaintiff's injuries:

> "*He has gone on to make a good clinical recovery from all his injuries and the brain trauma he suffered at the time of the accident seems to have also made an excellent recovery.*"

84. Counsel also noted Mr. Burke's conclusion, that:

> "*... this young man has gotten a very good recovery from these injuries that were*

sustained in a high velocity accident. Functionality is close to 100%. but he may retain a theoretical risk of arthritic change occurring in the left hand. I think l it is likely to me more theoretical than certain.

I would estimate the possibility of him requiring intervention for arthritis with the left wrist at this stage as being between 5% and 10%."

85. Similarly, Mr. Gleeson, orthopaedic surgeon, concluded:

"*1. [the Plaintiff] suffered a concussive head injury, but he has made a full recovery. He did so after approximately 1.5 years.*

2. He suffered a comminuted fracture of his left distal radius with an ulnar styloid fracture, the former fracture being treated with open reduction and internal fixation. He has made a full recovery from that injury.

3. He has also made a full symptomatic recovery from the fracture at the base of the right fifth metacarpal. He has a slight dorsal bony prominence, but it is not of any clinical significance.

4. He also sustained soft tissue injury to his scrotum from his genitalia striking the fuel tank at the point of impact, but there is no evidence, from what he tells me today, that he suffered a significant bony pelvic injury or a testes rupture."

86. In addition to *Shawcove,* the Defendant relied on the observations of Ms. Justice Irvine, as she was, in *Payne v. Nugent* [2015] IECA 268 ("*Nugent*").

Authorities as to Quantum

87. In *Nugent*, Irvine J. observed at para.16 that:

"*... an award of damages for pain and suffering cannot restore the victim to the physical or mental status they enjoyed prior to the infliction of their injuries. In this context it is important that compensation, when awarded by the court, in respect of pain and suffering should be reasonable and proportionate in all of the circumstances.*"

88. She added at para. 17 that:

"*...while it cannot be stated that there is a cap on general damages for pain and suffering, from the awards made in recent times there is at least a perception that the very upper range for compensation of this type rests in or around the €400,000 mark. The most*

catastrophically injured members of society who suffer great pain and distress, and who may never work or enjoy the benefits of a loving relationship and who may remain dependent upon the care of others for fifty or sixty years or indeed the whole of their lifetime are regularly awarded general damages for pain and suffering in the region of €400,000. So, one of the questions I ask myself when considering whether an award made in this case was reasonable or proportionate is whether the trial judge could have been within the appropriate range when he awarded the plaintiff a sum that placed her injuries in terms of value approximately one-sixth of the way along an imaginary scale of damages for personal injuries which ends at €400,000 for the catastrophically injured plaintiff."

89. In *Shannon v Sullivan* [2016] IECA 93 Irvine J. observed:

"43. Most judges, when it comes to assessing the severity of any given injury and the appropriate sum to be awarded in respect of pain and suffering to date, will be guided by the answers to questions such as the following:-:

(i) Was the incident which caused the injury traumatic, and if so, how much distress did it cause?

(ii) Did the plaintiff require hospitalisation, and if so, for how long?

(iii) What did the plaintiff suffer in terms of pain and discomfort or lack of dignity during that period?

(iv) What type and number of surgical interventions or other treatments did they require during the period of hospitalisation?

(v) Did the plaintiff need to attend a rehabilitation facility at any stage, and if so, for how long?

(vi) While recovering in their home, was the plaintiff capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependent in al or some respects, and if so, for how long?

(vii) If the plaintiff was dependent, why was this so? Were they, for example, wheelchair-bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependent?

(viii) What limitations had been imposed on their activities such as leisure or sporting pursuits?

(ix) For how long was the plaintiff out of work?

(x) To what extent was their relationship with their family interfered with?

(xi) Finally, what was the nature and extent of any treatment, therapy or medication required?

44. As to the court's assessment as to the appropriate sum to be awarded in respect of pain and suffering into the future, the court must once again concern itself, not with the diagnoses or labels attached to a plaintiff's injuries, but rather with the extent of the plain and suffering those conditions will generate and the likely effects which the injuries will have on the plaintiff's future enjoyment of life.

45. It is not possible to catalogue all of the elements to be considered and potentially addressed by a trial judge in a personal injuries case. However, a judge must act rationally and take into account, in summary, the severity of the injury, how long it has taken the plaintiff to recover, whether it has short-term or long-term consequences and if so the impact on the plaintiff's life in all its different aspects including his family, his work his sports or hobbies or pastimes, in addition to any other features that are relevant in the plaintiff's particular circumstances".

90. *Shawcove* focussed, *inter alia*, on the correct approach to the assessment of damages for personal injuries involving multiple injuries, including proportionality in that context. Having described the serious injuries sustained in a lift accident, Noonan J. noted how the Courts seek to ensure that general damages awards are proportionate:

"*35. … All the authorities are at one in considering that a key aspect of the court's approach is proportionality. Proportionality in this context means that the award of damages must be proportionate to the maximum that may be awarded in the most serious cases, €500,000, and must also be proportionate in the context of other awards of damages for greater, lesser or similar injuries.*"

91. Noonan J. noted that the appeal raised the issue of the issue of proportionality in a multiple injury case, with particular regard to the "cap" on general damages and the function of the Book of Quantum, and he cited Clarke C.J. in *Morrissey v HSE* [2020] IESC 6:

"*46… Having reviewed the evolution of the general damages limit, the Chief Justice considered that there may be categories of case at that limit which, while quite different in terms of the actual injuries…ought properly be regarded as of the most serious kind attracting the maximum amount. He then returned to the question he had raised above (at p. 117):*

"14.28 I should say that I have come to that view while considering that the proper approach to the limit for damages for pain and suffering is the one which sees that limit as the appropriate sum to award for the most serious damages. This is therefore the sum by reference to which all less serious damages should be determined on a proportionate basis, having regard to a comparison between the injuries suffered and those which do, in fact, properly qualify for the maximum amount. ... While it is not possible to conduct a precise mathematical exercise in deciding whether particular injuries are, for example, half as serious as others, nonetheless it seems to me that respect for the proper calibration of damages for pain and suffering requires that there be an appropriate proportionality between what might be considered to be a generally regarded view of the relative seriousness of the injuries concerned and the amount of any award. But those very same considerations also recognise that it may be possible to regard injuries of very different types as being broadly comparable. ...

47. It is clear from the foregoing that the Supreme Court has taken the view that the sum of €500,000, set in Morrissey, does not represent a "cap" on the damages that may be awarded for any particular injury but is rather the maximum amount that may be awarded for the most serious injuries, even where those injuries differ in character and type…I am satisfied that an important aspect of the proportionality test now long recognised by our courts is the application in effect of a "sliding scale" which ranges from the least to the most serious injuries. This approach is also reflected in the judgment of this Court in Nolan v Wirenski where Irvine J. said (at para. 31):

"31. Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries."

48. Irvine J. continued (at para. 42):

"42. As Denham J. advised in M.N v. S.M. damages can only be fair and just if they are proportionate not only to the injuries sustained by that plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. As she stated at para. 44 of her judgement 'there must be a

rational relationship between awards of damages in personal injuries cases.' Thus, it is important that minor injuries attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into the other lesser categories. In this regard, just because a judge describes an injury as significant this does not mean that the damages must be substantial. Any injury to an otherwise healthy individual is significant. However, when it comes to assessing damages, what is important is how significant the injury concerned is when viewed within the whole spectrum of potential injuries to which I have earlier referred."

49. She returned to this theme in Shannon v O'Sullivan (at para. 34):

"34. As to how a court should decide what is proportionate in terms of damages, I believe it is useful to seek to establish where the plaintiff's cluster of injuries and sequelae are to be found within the entire spectrum of personal injury claims which includes everything from very modest injuries to those which can only be described as catastrophic. While this is not a mandatory approach, it is a useful yardstick for the purposes of seeking to ensure that a proposed award is proportionate. This type of assessment is valuable because minor injuries should attract appropriately modest damages, middling injuries moderate damages, severe injuries significant damages and extreme or catastrophic injuries damages which are likely to fall somewhere in the region of €450,000. The exercise is also valuable because awards of damages must be proportionate inter se and every injured party who receives an award of damages should be in a position to look to other awards made in respect of different injuries and conclude that their award was fair and just having regard to the relative severity of each."

50. I respectfully agree with these views. I think any party who receives an award of damages for personal injuries should be able to look at other awards and readily understand why they were higher or lower or the same as the award that that particular plaintiff receives."

92. Noonan J. noted that while the Book of Quantum can be of considerable assistance where the injury lends itself clearly to a well-defined category:

"*52. ... The quest for consistency however becomes inevitably more difficult in multiple injury cases but that is far from suggesting that the Book of Quantum becomes redundant simply because there is more than one injury involved. As I commented in Griffin v*

Hoare [2021] IECA 329 (at para. 64):

> *"64. It has also been suggested from time to time that the Book of Quantum may not be of assistance in cases involving multiple injuries. It does at least, as Woulfe J. observes, state that it is not appropriate to simply add up values for individual injuries but to make an adjustment within the value range. Many, if not most, personal injury claims involve more than a single injury in the sense of a particular insult to an identified part of the body. The Book of Quantum, and indeed the Personal Injuries Guidelines that have recently replaced it, would be of little value if they were to be viewed as applying only to a single injury."*

53. Having said that, it has I think to be recognised that in complex multiple injury cases, such as the present, the application of the Book of Quantum or indeed the Guidelines may prove considerably more problematic. A variety of potential approaches might be adopted. One such is advocated by the Book of Quantum itself (at p. 10):

> *"4. Consider the effect of multiple injuries.*
>
> *If in addition to the most significant injury as outlined above there are other injuries, it is not appropriate to simply add up values for all the different injuries to determine the amount of compensation. Where additional injuries arise there is likely to be an adjustment within the value range."*

54. What this appears to suggest is that the court should attempt to identify "the most significant injury" which of course in many cases may not be possible. If it is however, the Book of Quantum suggests an adjustment "within the value range" and presumably, the value range being referred to here is the range for the most significant injury. That was the view taken in the judgment of Faherty J., speaking for this Court, in O'Sullivan v Brozda where she said (at para. 173):

> *"173. While this court is cognisant that both the jurisprudence already referred to (and the Book of Quantum to some limited extent) emphasise that the appropriate way to compensate a litigant for multiple sites of injury is to make an adjustment in the overall award (in other words to adjust upwards the relevant band of damages in the Book of Quantum for the principal injury), this approach cannot be viewed as set in stone." (My emphasis)*

55. Indeed, I would go further and suggest that in principle, this approach cannot be correct. To take an example, if one were to say that the clearly identified principle or most significant injury was in the €10,000 to €20,000 value range set out in the Book of Quantum, assume then that the injury is at the top of that range such as would merit an

award of the full amount of €20,000, it cannot be correct to suggest that the plaintiff can be entitled to no additional compensation for all his or her other injuries because the limit has been reached in the most significant category."

93. Having noted the different approach advocated in the Personal Injuries Guidelines and having reviewed the approach in England and Wales, Noonan J. concluded that:

"*64. Placed within an Irish context, I think the important point to be taken from these authorities is that whatever individual categories of injury a plaintiff may have suffered, and whatever the values attributable to those categories may be, the court must strive to take an holistic view of the plaintiff and endeavour to place the plaintiff's particular constellation of injuries and their cumulative effect on the plaintiff within the spectrum in a way that is proportionate both to the maximum and awards made to other plaintiffs. 65. I think this is what the trial judge attempted to do in arriving at a global figure for damages rather than seeking to break it down into individual categories. I do not think there is anything wrong in principle with that approach, particularly where the Book of Quantum does not appear to me to give a great deal of assistance, not least because it has the potential to vastly overvalue the plaintiff's injuries.*"

94. In order to determine what level of award might be proportionate, Noonan J. carefully analysed the Court of Appeal's decision in *Zhang v Farrell* [2021] IECA 62 ("*Zhang*"), where a 29-year-old student had suffered a left knee injury consisting of a total ACL and partial MCL rupture, both of which were surgically reconstructed. She made a good recovery, although the knee remained mildly unstable, and she was at risk of developing degenerative changes. She suffered a disruption of the sacro-iliac joint (which was settling) and a severe psychiatric injury, which led her to develop a number of symptoms, including irritable bowel syndrome with incontinence which required her to be near a bathroom at all times. She also developed fibromyalgia, involving general muscle and joint pain and headaches. She suffered from panic attacks, insomnia, forgetfulness, confusion, depression and anxiety. She had ongoing back and neck pain. Although her psychiatrist was more pessimistic, the trial judge held that she would probably be able to return to full time work after about seven years. She suffered extreme

mental health issues due to the accident and very significant PTSD. The trial judge assessed her general damages at €170,000 (€95,000 to date and €75,000 for the future). She recovered almost €300,000 more in respect of additional items and special damage. The Court of Appeal rejected the plaintiff's appeal for a higher award.

95. Noonan J. also considered the Court of Appeal's decision in *Quinn v Masivlaniec* [2021] IECA 247 ("*Masivlaniec*"), where a 37-year-old woman suffered life threatening bowel injuries, requiring over a week in intensive care and an exploratory laparotomy, involving an extensive midline incision which showed perforations of the small bowel and a tear in the small intestine. The bowel was resected and anastomosed. She was left with a 14-centimetre midline scar. She was at risk of future bowel obstructions requiring further surgery. Her symptoms included significant constipation and abdominal pain which was likely to recur and get worse in the future. She also suffered a very significant wrist injury, with both radial and ulnar styloid fractures with dislocation. Some years after the accident she continued to complain of pain and reduced lifting and carrying capacity. Her wrist was likely to deteriorate into the future, developing osteoarthritis and requiring a fusion, necessitating prolonged rehabilitation and limiting future movement. Her psychiatric injuries improved with treatment but did not disappear. The trial judge assessed her injuries individually and assigned damages to them, awarding €210,000 for general damages. The special damages were modest. Noonan J. noted that the Court of Appeal reduced general damages to €175,000 (€135,000 for pain and suffering to date and €40,000 for the future), observing that:

> "*both the plaintiff in Zhang and Quinn suffered serious injuries with lifelong consequences, injuries which were going to impinge to a significant degree on each plaintiff's ability to live a normal life*".

96. Many of Noonan J.'s comments in *Shawcove* are equally applicable here. He noted that:

> "*73. … the plaintiff has made an extraordinary recovery from what were, by any standards, very serious injuries. Much of the credit for this recovery is due to his own*

motivation and drive which are clearly exceptional. He has fastidiously followed all medical advice given to him to rehabilitate himself and has done so with great success. By the time his case came to trial, he had for some years resumed what was to all intents and purposes a normal, healthy and happy life. He is not subject to any physical limitations in terms of carrying out the normal activities of daily life save to a relatively minimal degree. His career has gone from strength to strength, albeit I accept of course that his upward trajectory was stalled somewhat by the accident and he may yet encounter some relatively minimal disadvantages in terms of any future changes of employment he may pursue. Thankfully, to date however, this has not materialised and he appears to have been successful in pursuing every promotion or alternative employment that he sought by competitive process.

74. I do not for a moment seek in any way to minimise the seriousness of the plaintiff's injuries and I acknowledge the enormous trauma, pain and disruption of his life he had to endure, particularly in the early years after the accident. ... Again, I accept entirely that the plaintiff has been left with a degree of unpleasant and discommoding discomfort and pain both in his back and both his knees, more particularly the right. I also recognise that these injuries have meant that the plaintiff has lost much of the pleasure he had previously derived from the many sporting activities he enjoyed. He is entitled to be compensated for all those things.

75. He is also entitled to be compensated for the fact that he will have to undergo difficult, demanding and painful surgery on multiple occasions in the future in relation to his knees. It is virtually certain that he will require a total knee replacement on the right side within the next five years and before he reaches the age of 50. He is likely to require a revision of that surgery about 20 years thereafter when he is likely to have retired. The evidence of Mr. Collins is that the plaintiff is likely to have some operative procedure on his left knee, likely later in life during retirement, but it is not probable that he will require a total knee replacement on the left side".

97. Noonan J. considered that the High Court's general damages award was too high:

"*77. It seems to me that an award of damages at the level of €300,000 would normally be reserved for cases where the plaintiff is left with a serious and permanent disability of such severity as to compromise his or her ability to carry out the normal activities of daily living to a significant degree. It may also involve the plaintiff being unable to work as prior to the accident, at least where the employment concerned requires physical*

abilities no longer possessed by the plaintiff. Damages at this level have in the past been awarded also in cases where there may be no major physical disability, but the plaintiff has for example been the victim of serious and sustained sexual abuse, or have had their life expectancy adversely affected. Essentially, such plaintiffs will have had their lives destroyed to a significant extent by what has befallen them, even if it has not necessarily resulted in physical disability or incapacity at the level of the most serious injuries.

78. Looked at in that context, the plaintiff herein could be viewed as a person who despite suffering significant injuries, has recovered to the extent of leading a normal and rewarding life, albeit one that is subject to some limitations which, in the overall scheme of things, could not be viewed as severe. ...

79. In my view, the appropriate award for general damages in this case is €200,000. That sum is, in my judgment, proportionate, in the sense already explained, to the maximum and to other awards. Given the level of trauma suffered by the plaintiff in the early years at least and the fact that a period of 10 years elapsed between the accident and the trial, I do not think that the sum of €125,000 for pain and suffering to date is unreasonable. I would however assess the figure for pain and suffering into the future in the sum of €75,000."

Discussion - Quantum

98. The Plaintiff was extremely fortunate to survive the serious accident, enduring pain, not only during his hospitalisation and his two months off work, but also in the years that followed, in particular, due to his multiple fractures. It is a mark of his character and fortitude that, eventually, he substantially recovered from most injuries, save for scarring, and reduced flexion/strength in his left wrist in particular (which will inevitably continue to impact his work as a self-employed filmmaker) and the modest but not insignificant risk of requiring future surgery for arthritis in his left wrist.

99. He suffered traumatic injuries. He lost consciousness for a significant period, was hospitalised for five days and off work for two months. His injuries included his serious head injury, multiple fractures, including both wrists (one requiring surgical intervention), laceration

to the left ankle/lower leg and soft tissue injury to the groin area/pelvis. His ongoing psychological *sequalae* (most of which, fortunately, have largely eased), include amnesia, PTSD, difficulties with finding the right word and with remembering conversations and events of a few minutes earlier. His work and life were significantly impacted for several years although, fortunately, he eventually recovered well in most respects.

100. I have reflected on the *Shannon v Sullivan* criteria, with the following conclusions:

a. the accident was traumatic, and must have caused much distress to the Plaintiff and his family both at the time and in the months that followed.
b. He required hospitalisation for five days.
c. In terms of pain and discomfort during that period he had to recover from severe injuries affecting different part of his body, and his mobility and affecting him both physically and mentally.
d. He required surgical interventions for his wrists.
e. There is no evidence that he needed to attend a rehabilitation facility other than various consultants, physiotherapy and GP visits but it appears from the medical reports that he needed to be cared for by his father while recuperating until he was able to return to living independently as he had been before the accident.
f. Limitations have been imposed on the Plaintiff's activities. Initially these appear to have been significant but now appear to be modest.
g. The Plaintiff was out of work for two months following the accident.

101. The Plaintiff tended to downplay his injuries. His testimony was aptly and fairly described by the Defendant's counsel as commendable in its directness and honesty. Although he has generally recovered as well as could have been hoped for after such a serious accident (admittedly after several tough years and after changes to his lifestyle and working practices), ongoing effects - apart from not returning to motorbiking – include:

(i) emotional "ups and downs" (although his previously documented low mood has improved);

(ii) needing to write everything down to counteract memory difficulties; and

(iii) an inability to do exercises due to pressure on his left forearm and left wrist

No further treatment is currently anticipated**.** It is difficult to apply the Book of Quantum given the range of injuries and because it offers no guidance with respect to the: (a) psychological; (b) scarring; or (c) soft tissue injuries.

102. I will first consider the injuries which **are** covered in the Book of Quantum.

a. In all the circumstances, I would classify the head injury as severe, with a guideline range of €41,600 to 74,000. Viewed in isolation, I would award **€60,000** in respect of the head injury.

b. I would classify that the fractures to the left wrist as moderately severe, with a Book of Quantum range of €54,200 to €70,100, even leaving aside the modest arthritis risk. Viewed in isolation I would award **€60,000** under this heading.

c. Viewed in isolation, I would consider that the fractures to the right hand should be classified as minor (with a range of €19,300 to €36,800) but I would place those injuries at the top end of that range because they are significantly aggravated by the injury to the left hand and therefore I would award **€25,000** under this heading.

103. Of course, the Book of Quantum warns against simply aggregating such individual items (which would suggest a figure of **€145,000**), as do *Shawcove* and the authorities helpfully analysed therein which could result in overcompensating the Plaintiff. I also need to consider the significant aggravating factor of the simultaneous injuries to both wrists, which might have led me to increase the Book of Quantum figure by €20,000 taking the total to €165,000. However, taking an aggregated approach I would reduce the Book of Quantum injuries to €140,000.

104. On the other hand, it is also necessary for me to take account of injuries not covered by the book of quantum, notably the scarring, the soft tissue injuries and, most importantly the psychological sequalae. I would be inclined to allow €7,500 for the first two items in total and €45,000 for the psychological issues (poor mental health, difficulties, insomnia, PTSD,

incontinence and emotional issues etc), taking the total to €192,500. Furthermore, although no loss of earnings claim was advanced, in view of the evidence and the ongoing impact of the injuries on the Plaintiff and his activities it would be unfair to ignore the ongoing impact on him in his personal and professional life and in terms of the opportunities which he will now be less able to pursue. The Court cannot ignore the fact that, despite the Plaintiff's substantial eventual recuperation (and his not pursuing a loss of earnings claim), he was off work for two months and ultimately changed employment, becoming self-employed. Furthermore, the Plaintiff must live with ongoing consequences of the accident which does impact his work, including the risk of needing surgery for arthritis in the years to come. In those circumstances I consider that it is appropriate to award €40,000 for loss of opportunity. Accordingly, I consider that an aggregate award of €232,500 would be appropriate by way of general damages for the past and future pain, suffering and loss of enjoyment of life and of opportunity suffered by the Plaintiff. This figure seems to me to be proportionate, based on a holistic view of the Plaintiff's injuries, placing his injuries and their cumulative and ongoing effects within the spectrum in a way that is proportionate both to the maximum and also to awards made to other laintiffs. In particular, I have contrasted his case to the awards in *Shawcove* itself and in *Zhang* and *Masivlaniec.*

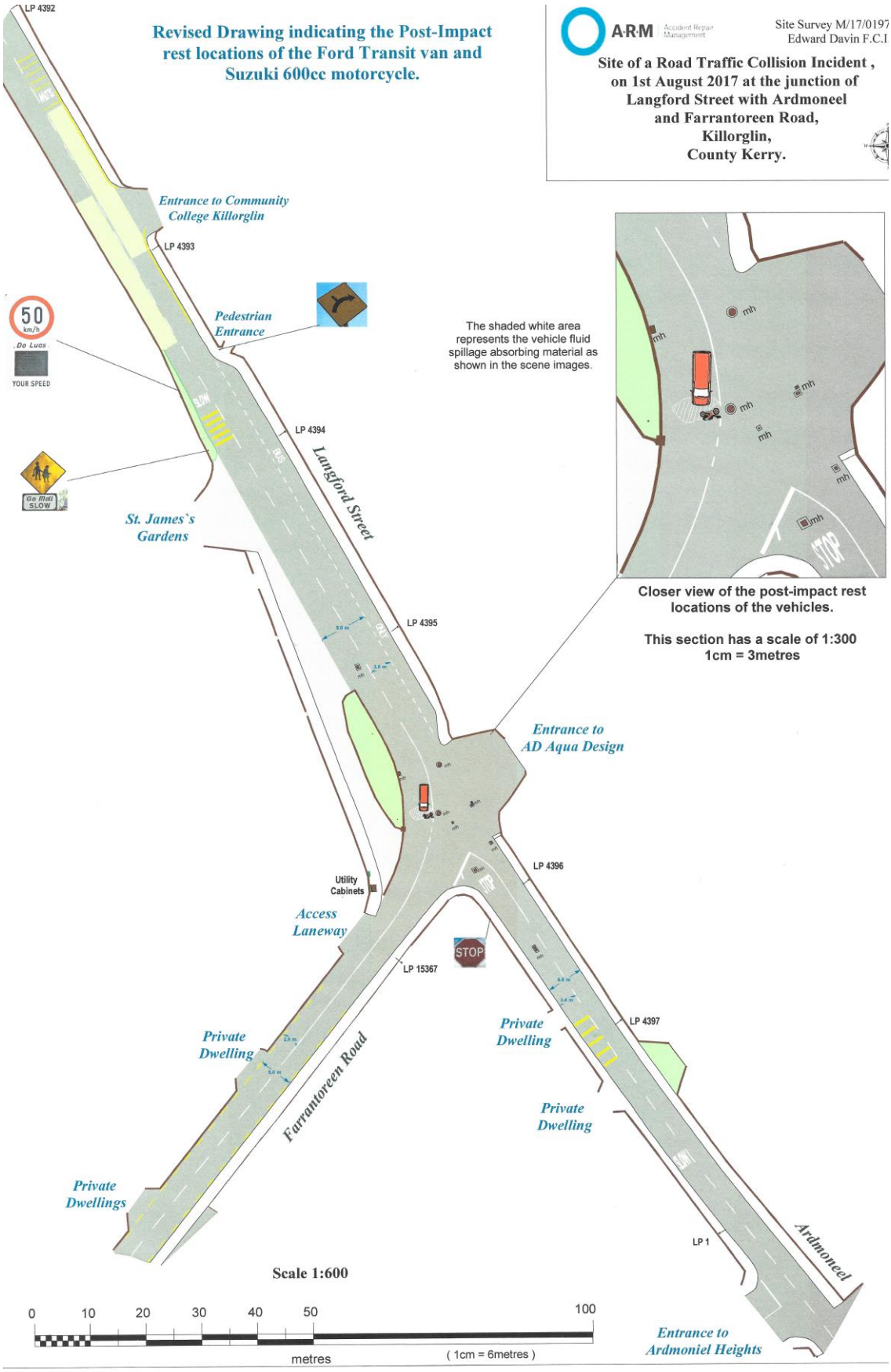
105. Accordingly, I propose to award general damages of €232,500 to the Plaintiff, together with the agreed special damages of €11,823.00. The award is to be reduced by 50% by contributory negligence.

106. In terms of the counterclaim, it follows that the Defendants have a valid claim for the agreed costs associated with writing off their car and associated costs. However, any liability on the counterclaim must be reduced by 50% to reflect the Defendants' contribution. (The counterclaim was advanced on behalf of both Defendants and I have therefore reduced the award to reflect the First Defendant's negligence. If any point was to be taken that, there should

be no deduction for contributory negligence because the losses were sustained by the Second Defendant whereas the contributory negligence was on the part of the First Defendant, then it would be necessary to consider whether the Second Defendant was vicariously liable for the First Defendant's negligence and/or in any event the Plaintiff would presumably contend that on the basis of my judgment it followed the First Defendant was liable as a concurrent wrongdoer for a 20% share of the loss sustained by the Second Defendant. However, the Defendants have not suggested that they wish to take any such point).

107. In the circumstances, it seems that the Plaintiff is presumptively entitled to his costs of the proceedings, and the Defendants are entitled to their costs on the counterclaim; however, the proceedings will be listed for a short hearing on a date to be confirmed (remotely if necessary) in order to confirm the position as to costs and to deal with any other orders required to conclude the proceedings.

APPENDIX:


Revised Drawing indicating the Post-Impact rest locations of the Ford Transit van and Suzuki 600cc motorcycle.
A·R·M Accident Repair Management
Site Survey M/17/0197
Edward Davin F.C.I
Site of a Road Traffic Collision Incident , on 1st August 2017 at the junction of Langford Street with Ardmoneel and Farrantoreen Road, Killorglin, County Kerry.
LP 4392
Entrance to Community College Killorglin
LP 4393
Pedestrian Entrance
50 km/h
Do Luas
YOUR SPEED
Go Mall SLOW
St. James`s Gardens
LP 4394
Langford Street
LP 4395
The shaded white area represents the vehicle fluid spillage absorbing material as shown in the scene images.
Closer view of the post-impact rest locations of the vehicles.
This section has a scale of 1:300
1cm = 3metres
Entrance to AD Aqua Design
LP 4396
Utility Cabinets
Access Laneway
STOP
LP 15367
Private Dwelling
Farrantoreen Road
Private Dwellings
Private Dwelling
LP 4397
Private Dwelling
Ardmoneel
LP 1
Entrance to Ardmoniel Heights
Scale 1:600
0 10 20 30 40 50 100
metres
(1cm = 6metres)