Neutral Citation Number: [2005] IEHC 184

THE HIGH COURT

[Record No. 2002 No.5647P]

BETWEEN

STEPHEN LYNCH

PLAINTIFF

AND

THE MOTOR INSURERS BUREAU OF IRELAND

DEFENDANT

Judgment delivered by Mrs. Justice Macken on the 10th of May, 2005

1. The plaintiff was involved in an accident on 24th May, 1999 in which he suffered injuries as a result of the alleged negligence on the part of the driver of another motor vehicle. The defendant is sued under the provisions of an agreement made between it and the Minister for the Environment, dated 31st December, 1988 ("the Agreement") pursuant to which the defendant may be liable to a party injured by the negligence of the driver of an untraced vehicle.

2. The background leading to the plaintiff's claim can be summarised briefly. On the morning of 24th May, 1999 the plaintiff was driving a red van from his home in Donegal towards his place of work. Somewhere between Ballyshannon and Bundoran, in Co. Donegal, on the public road identified to the court as the N15, at Finner, while driving in the direction of Bundoran, he skidded on the roadway and crashed, as a result of which he suffered injuries.

3. When the vehicle skidded, it travelled over the far side of the road, hit the corner of a house and its low garden wall which was demolished, returned to the middle of the road, and eventually stopped, ending up straddling the middle of the road, but facing in the direction from which it originally came. The plaintiff says the reason why his van skidded was because there was an oil spillage on the roadway caused by an unknown owner or driver of an untraced vehicle.

4. The plaintiff was injured which necessitated his being taken to hospital, but he was released on the same day and returned by car to his home in Donegal. He did not examine the road before being taken to hospital, but he did do so later that afternoon on his return journey home, after it had been sanded or gritted. The locus of the accident was examined subsequently by expert engineers on behalf of both parties.

5. The defendant entered a full defence to the claim raising two related defences. In the first place, it pleads that pursuant to the terms of the agreement, on its correct interpretation, the defendant has no liability whatsoever because the plaintiff has not brought himself within its terms and cannot do so. Further, it pleads that on the specific facts of the accident, as pleaded, it has no liability in any event, because the plaintiff cannot establish any negligence on the part of the unknown driver of the untraced vehicle.

6. The first of the defences raised by the defendant is a purely legal issue as to the correct interpretation of the agreement and I propose to deal with this initially, since if the defendant is successful on this plea, then that terminates the case and the plaintiff has no remedy against the defendant. Essentially the case made by the defendant is that the agreement in the form in effect at the relevant date, on its correct interpretation, is limited. Mr. Barton, S.C. for the defendant, contends that the agreement does not cover all vehicles, and in particular does not cover those vehicles which are exempt from its terms pursuant to Clause 11 of the agreement. Clause 11 reads as follows:

> "(a) M.I.B. of I's acceptance of liability in respect of vehicles the use of which is required to be covered by an approved policy of insurance shall extend to vehicles owned by or in possession of the State or of an "exempted person" as defined in … the Act only so long as there is in force an approved policy of insurance purporting to cover the use of the vehicle."

7. The defendant also invokes s. 4 of The Road Traffic Act, 1961 in support of its contention that the liability of the defendant exists only in respect of a vehicle which is required to be covered at law by an approved policy of insurance. According to this argument, the Road Traffic Act, 1961 provides that compulsory insurance is not required for certain vehicles. For example, sections of that Act such as Sections 56, 60, 61 68 and 69 define persons who may be exempt from having to hold compulsory insurance. These sections include drivers of vehicles owned by semi state bodies such as Coras Iompair Eireann, Iarnrod Eireann, Bus Eireann, and several others, all of whom are exempt because, as in the case of State owned vehicles, including those owned by Government Departments and State agencies, such as Garda Síochána and defence forces vehicles, all are covered by a scheme operated by the Government on an indemnity basis, outside the scope of the agreement. In these circumstances, it is the Minister for Finance, and not the defendant, who pays the compensation or damages in appropriate cases of negligence.

8. Mr. Barton submits therefore that before any plaintiff, including Mr. Lynch, can invoke the provisions of the agreement, he must first be able to establish that the vehicle in question is not a "state vehicle" nor is being driven by an "exempted person" as defined in the above Act, but rather is a vehicle in respect of whose driver compulsory insurance is mandatory pursuant to s. 4 of the Act of 1961. Because the plaintiff has not established his entitlement to rely on the agreement, by failing to prove that the indemnity provisions do not apply, no liability to the plaintiff arises under it. If the intention or the agreement were otherwise, the agreement would say so. Clause 11 therefore must be understood in that context.

9. Counsel for the plaintiff, Mr. Walsh, S.C., accepted that while the burden is on the plaintiff to establish facts which if true would constitute negligence on the part of an untraced driver, the agreement cannot be interpreted in such a way as to render the task of the plaintiff impossible. He submitted that if the defendant's argument were correct, no earlier case should have succeeded, and he submits that this is not the intention or the import of the obligations found in the Second Council Directive on the approximation of law relating to insurance against civil liability in respect of the use of motor vehicles, of 30 December 1983 (84/5/EEC) ("the Second Directive on Motor Insurance") which the agreement transposed, at least in part, into Irish law. He argues that there is no onus on a plaintiff to disprove first that no exempted person or no state vehicle is involved, before liability can be invoked against the defendant, and therefore the defendant's argument on a restrictive interpretation of the agreement cannot succeed.

10. I do not agree with the interpretation of the agreement proposed on behalf of the defendant which I consider would lead to such a restrictive application of its terms, as to make it highly unlikely that a plaintiff, in circumstances such as arise in the present case, could ever successfully invoke it.

11. Article 6 of the agreement reads as follows:

> "In the case of an accident occurring on or after the 31st day of December, 1988, the liability of M.I.B. of I. shall extend

to the payment of compensation for the personal injury or death of any person caused by the negligent driving of a vehicle in a public place, where the owner or user of the vehicle remains unidentified or untraced."

12. The wording of this clause covers all Motor vehicles, whether traced or untraced, even when the driver is unknown, including those under the terms of clause 11 of the agreement, provided only that they are covered by an approved policy of insurance.

13. Clause 3 of the agreement sets out the conditions precedent to the liability of the defendant in the face of a claim. None of the sub clauses of this clause obliges a party to establish that a vehicle is either a "state vehicle" or is or was being driven by an "exempted person" as those terms are defined in The Road Traffic Acts.

14. It is true that Clause 3(4) of the agreement obliges a party to endeavour to establish if an approved policy of insurance exists in respect of the vehicle involved in an accident, but this sub clause also sets out the manner in which the obligation is to be fulfilled, that is to say, by "demanding or arranging for the claimant's legal representative to demand, insurance particulars (including policy number if available) of the user or owner of the vehicle in accordance with the provisions of s. 73 of the Act." This could hardly be complied with in the case of the unknown driver of an untraced motor vehicle.

15. It is equally the case that Clause 3(7) of the agreement obliges a person bringing proceedings to take all reasonable steps against any person against whom he might have a remedy for injury or damage. I read that obligation as being no more than one which is intended to ensure that all appropriate parties who might have a liability are proceeded against. Its object is self evident. In the case of an accident allegedly caused exclusively by the unknown driver of an untraced vehicle, this obligation cannot be fulfilled either.

16. No other relevant express or implied obligations are imposed upon a claimant, apart from the accepted obligation to establish facts constituting negligence on the part of the unknown driver of a vehicle.

17. It is undoubtedly the case that the agreement covers those vehicles in respect of which compulsory insurance is required at law. The fact however that state vehicles, or those owned or in the possession of semi state bodies or in respect of whom there are "exempted persons", as drivers, are not obliged by law to be covered by an approved policy of insurance pursuant to the Act of 1961, not because they are exempt from any insurance, but rather because they are covered by a different or independent scheme of indemnity, is not a factor which, of itself, could constitute a limitation on the right of claimants, including the plaintiff in the present case, to invoke the terms of the agreement. The correct interpretation of clause 11, which is invoked by the defendant, is not that it limits the right of a person to make a claim, but rather that it extends the liability of the defendant even to those vehicles or persons otherwise normally covered by the State indemnity scheme, subject only to an approved policy of insurance being shown to exist.

18. An interpretation of the agreement which would have as its effect the removal from the plaintiff of the right to proceed against the defendant unless the plaintiff could first establish, on the balance of probabilities, a negative, that is to say, that the vehicle in question was not a state vehicle, as defined, or was not driven by an exempted person, as defined, would mean that clause 6 of the agreement would have to be given an interpretation which is at odds with the very wording of the clause itself. It would further have as its effect that, where a vehicle remains untraced, such as in the case of so-called "hit and run" accidents, or in the present case, the agreement could never be invoked, or could only be invoked in circumstances of singular coincidence.

19. Further, in principle an agreement of this nature is intended to cover all persons to whom damage has been caused by the negligent driving of an untraced vehicle, the driver of which is ordinarily obliged by law to be insured. If, however, motor vehicles owned by the State, or persons in possession of motor vehicles as exempted persons, as defined, are not to be subject to the agreement, because, although they would ordinarily be required to be covered by certificates of insurance, they are covered by a different system of indemnity, which alternative scheme is operated by the parties to the agreement as their own choice and for their own benefit, that is a restriction which can only affect the parties to the agreement who have agreed those provisions, namely the Minister who is authorised on behalf of the Government to enter the agreement, and the Bureau itself, on behalf of its members. Since the agreement exists for the benefit of parties other than those covered by the exemption, that restriction cannot be read as having an adverse effect on those other beneficiaries of the agreement, such that it obliges all complainants first to disprove the applicability of the invoked restriction.

20. And finally, such an interpretation would scarcely comply with the objectives of the Second Directive on Motor Insurance, which was introduced for the purposes inter alia of ensuring that a body exists to guarantee that the victim of injury will not remain without compensation where the vehicle which caused an accident is unidentified. The limitations or restrictions provided for in that Directive do not include a restriction of the type invoked by the Defendant here. An interpretation which would so fly in the face of the wording and intent of that part of the agreement relating to claimants such as the plaintiff, as well as with the intent or objectives of the European Community legislation which is at least in part transposed by the very agreement, cannot be considered a correct interpretation.

21. If the defendant, as it is fully entitled to do, wishes to limit the plaintiff's right to invoke the agreement in the present case, by alleging that his remedy may lie against another party, such as the State or a semi state body, or against an exempted person, then it is for the defendant to establish facts which, if true, would permit the court to find that the negligence was caused by a person and/or a vehicle which falls outside the scope of the agreement. In the present case, no such facts have been adduced by the defendant.

22. The defendant did seek to introduce evidence that, because of the location of the accident, and its particular proximity to Finner Camp, to and from which Department of Defence vehicles are regularly travelling, the court should accept that the substance on the roadway where the accident occurred possibly came from such a vehicle. In that regard, while counsel for the plaintiff was prepared to accept that defence force vehicles do travel on the road in question to and from Finner Camp, there was no evidence before the Court that even if they did, the type of substance found on the roadway was a substance which is used by any such vehicles.

23. I find therefore that the plaintiff is entitled to invoke the terms of the agreement, without the alleged restriction operating against him.

24. I now turn to the second aspect of the case, which concerns the alleged liability of the defendant for the injuries to the plaintiff. From the above summary of the accident, it is clear the plaintiff claims his injuries are due to the negligence of the unknown driver of, in this case, an untraced vehicle, because, he claims, there was a spillage of an oily substance on the road where the van skidded, and that that deposit of an oily substance was due to the negligence of the driver, who caused or permitted the oily substance to escape from the untraced vehicle.

25. In that regard the defendant again denies any liability whatsoever. It pleads and argues the plaintiff cannot succeed because, it

says, the facts do not establish any form of negligence on the part of anyone. In support of this plea the defendant invokes the jurisprudence of this Court and of the Supreme Court on the matter, to which I will return.

26. The parties are at complete odds, both on the facts and on the correct application of the law. The plaintiff alleges that the evidence which he will adduce is sufficient to establish negligence, the defendant, on the contrary, alleging that no negligence can be proved on the part of the unknown driver of the untraced motor vehicle. In the circumstances, the parties to the action agreed that I would first determine the question of the liability of the defendant, if any, and leave over the question of damages until the determination of such liability. This judgment therefore concerns, apart from the interpretation issue dealt with above, only the question of liability on the material facts agreed between the parties, or established on the evidence.

27. On behalf of the plaintiff, I had the benefit of hearing the plaintiff, an off duty Garda who shortly after the accident had a similar experience at the same place, certain gardaí and a fire officer who attended the scene of the accident, as well as an expert engineering witness. I will deal with the extent of the defendant's evidence and its witnesses in due course.

28. First, as to the plaintiff, he said that he left his home in Co. Donegal at about 6.30 a.m. in the morning of 24th May, 1999 and travelled towards his workplace. He was between Ballyshannon and Buncrana when the accident happened. His evidence was that there was a quite long stretch of straight road after Ballyshannon, then a slight bend or curve as the road reaches Finner. He said that it was raining in Ballyshannon but dry by the time he got to Buncrana.

29. His evidence can be summarised as follows. He was travelling at about 60 miles an hour on the straight stretch of road. He eased up his foot on the accelerator to bring the speed to about 50 mph as he was coming into the bend. The plaintiff said that just into the bend near a 30 mile per hour sign, he applied his brakes and the car "went from under" him, spun around, and eventually ended up as set out at the beginning of this judgment.

30. Precisely where he braked, and how far into the bend he was when he did brake, or where exactly he skidded were all challenged by the defendant, but the plaintiff maintained his position on these. He said that when he had the accident he was doing about 35 miles per hour. This too was challenged strongly by the defendant who put to him that he was driving at a much higher speed and that this speed was the sole cause of the accident. The plaintiff denied this equally strongly. The plaintiff, while shocked – and he was accompanied by another worker at the time, who had fainted – was able to get out of the car, sit on the wall of Finner Cottage – and a short time later was taken to hospital. He was discharged from hospital on the same day and returned home.

31. Asked what he considered had caused the accident, he said he had seen nothing which would have warned him about any problem, that initially he did not know exactly what had caused it, but later discovered on his return journey home from the hospital, that it was an oily deposit on the road which had caused the skid. His girlfriend had driven him home and he gave evidence by reference to photographs which she subsequently proved in evidence.

32. In cross-examination, he admitted he was not wearing a seat belt (a matter which he had previously admitted in his reply to a notice for particulars filed on his behalf). He considered that the oily substance was black, and rejected the proposition that it was a grey blue, and also the suggestion that the dark patches which he saw on the road under sand on his way home were water. He agreed he had not checked where the oil patches commenced and ended.

33. He described his car, in cross examination, as being "badly bashed". He agreed there were bits of the vehicle found in the wall of Finner Cottage that the van was damaged on both sides, but more on the left front passenger side, that it was not capable of being driven from the accident, and was eventually a "write off". He denied, however, that this meant he had been going too fast, or that he was travelling a more than 50 miles per hour, or that the reason he could not control the van after it skidded was because he was travelling too fast.

34. On balance I found the plaintiff to be a truthful witness, with an open and considered demeanour in the witness box. He did not answer without thinking, and he disclosed openly that he was not wearing a seat belt, no doubt fully appreciating its consequences. He corrected counsel for the defendant in relation to a suggested speed of 30 miles per hour, saying that he had already admitted he was travelling at about 35 miles per hour.

35. The next witness for the plaintiff was Ms. Susan Armstrong, a Garda who was off duty on the morning in question, who gave evidence in her private capacity. She had been travelling towards Bundoran, when on reaching the same point in the road saw a red van stopped across the middle of the road. She put her foot on the brake, having been travelling at about 30 miles per hour up until then without encountering any problems, and without any road holding problems when the car "went out of control". She said it spun round and ended up facing back towards Ballyshannon. It had crossed over to the other side of the road a bit, then back, collided with a pole on her correct side which stopped its travel, causing damage to the right wing of the car.

36. Cross-examined on behalf of the defendant, she said there was no evidence of what counsel called a "rainbow" effect, although she was familiar with this phenomenon, from her experience as a garda in relation to traffic accidents. She estimated that her car had travelled about 2 or 2 and a half lengths car distance before being stopped by the pole. The car was in a fit state to be driven and she continued on her way. On being re-examined, she agreed that at the time she made her statement to the gardaí, she had included in it the fact that on getting out of her car she had noticed oil on the road.

37. Her evidence was given originally by reference to the photographs mentioned above and to others. In the course of the evidence, several photographs were produced in court including those furnished on behalf of the defendant, taken by a fire station officer at the scene of the accident. One of these was relied on by the defendant as establishing that the location of the oil on the roadway was more likely to have been significantly distant from the spot at which the plaintiff and this witness said they had started to skid. I have to say that this particular photograph was very difficult to decipher, and suffered from the fact that it included quite an amount of other traffic as well as fire tenders and personnel, and so forth. This is not in any way to criticise the witness who took the photograph, because it became clear from the evidence that the only way the traffic flow could be controlled and the traffic kept away from the oil spillage while it was being dealt with was by diverting the traffic to the far side of the road, and it was then that the photograph was taken.

38. However, it also became very clear that the exact spot, and more importantly the exact pole, which stopped Miss Armstrong's car after she skidded was not clear from this photograph, as two different poles were being referred to. The significance of this was that, if the oil spillage started at the spot working back from where a particular pole was in the photographs, as contended for by the defendant, the oil probably could not have caused either the plaintiff's accident or that of Miss Armstrong. However, if Miss Armstrong's car had stopped after approximately 2 or 2 and a half car lengths, as she said, and was stopped by another pole, then this would support her evidence and that of the plaintiff as to where the oil spillage commenced, and they skidded, namely, around

the 30 mph speed limit sign. In the circumstances I allowed her to be recalled, against objection on the part of the defendant, to give evidence by reference to another photograph produced by the defendant after her evidence had finished, and where the position of the pole and its identity was clearer. She then identified a metal traffic pole indicating that the road was about to narrow, in photographs taken by Ms. Kelly, the engineer for the defendant, indicating that the road was about to narrow as the one she eventually collided into. This was hidden, or partly hidden, behind a fire tender or other vehicles in the photograph originally referred to and taken by the fire officer.

39. Although challenged by the defendant about the exact pole in question, and about the fact that she had, outside court, identified a different pole, she said under oath she was 100 per cent certain of the pole in question, indicating that it had been a "silver metal pole" which had caused her car to stop, and which she had previously referred to in her evidence as being a "silver metal pole"..

40. Garda McDonald gave evidence next. He was attached to Ballyshannon Garda station and on routine patrol from there to Belleek near the Border and was driving from Clyhore at the Border as far as Bundoran, about 11 miles in total. His colleague drew his attention to oil on the road similar to a diesel. There were several patches between Clyhore and the scene of the accident although he couldn't recall the exact locations. The first spillage he said was about a quarter of a mile in from the Border and there were further "observations" of spillages on the road back towards Bundoran. They were about three feet long and about a foot wide and he concluded that a leaking oil or diesel spillage was the source of the blobs or patches. At the accident scene, he directed traffic but did not go beyond the scene of the accident, and did not check the substance itself at the accident site.

41. In cross-examination he is said that he had observed the oil patches and a rainbow effect and shortly after that he and his colleagues were directed to go to Bundoran to the scene of the accident. There was no difficulty in driving but he believed that the driver would have reduced speed by about 20 mph as a precaution for safe driving although he did not specifically recall this. This was he said the usual practice of the Gardaí.

42. Garda Kevin Garvin gave evidence that he was called to the scene of the accident by a Garda Crohane. The road on the left hand carriage was very slippery and there were heavy patches of oil on the road. He became aware that there had been an apparent oil spillage from across the border to Bundoran. He did not carry out any further inquiries as to who might have caused the spillage.

43. In cross-examination on this latter point, he said he did not think he would secure evidence as to the cause of the spillage unless somebody had observed the actual spillage at the particular time and he had no lead on that at all. He had examined the spillage at the scene of the accident himself by stepping on the substance and it was extremely slippery. This witness had confirmed that it was safe enough to drive at the national speed limit in the area immediately prior to the locus of the accident and that he did not himself need to drive more slowly on the morning of the accident. He had been driving at approximately 50 miles an hour. While he confirmed that he had seen the "rainbow effect" on roads when rain falls on tarmacadam he had not seen this rainbow effect in that particular area, nor in the conditions in which the accident occurred.

44. In re-examination he confirmed that in his opinion there had been an oil spillage. Mr Barton S.C. for the defendant objected to counsel for the plaintiff taking any opinion evidence from this witness on the basis that he was not a expert. Mr. Keane, S.C. said the questions posed were put to the witness on the basis that he was the senior Garda officer investigating a possible crime, and he was not being questioned as an expert. I permitted the question to be put to the witness on that basis that the defendant could address me on the value to be attached to the evidence in due course, it a having already been established by the defendant that the garda in question had been investigating motor vehicle accidents for a very long number of years.

45. This witness also produced a sketch he had drawn of the accident scene and he had taken the several measurements indicated on it. He believed that there had been some further oil patches as far as a corner called O'Gorman's corner, 500 metres towards Bundoran from scene of the accident but without any apparent danger after that area, but nothing further on the road that caused him to proceed with his investigations beyond that point.

46. Garda Crohane then gave evidence for the plaintiff. She received a report of accident involving a motor vehicle at 8.05 a.m. in respect of which she made a report. She had also received information from Gardaí about an oil spillage from the Border. This traffic report was given by her to North West Radio for publication and concerned a serious oil spillage from the Border as far as Bundoran.

47. Mr. John Anderson, engineer, was the final witness for the plaintiff. He visited the scene of the accident on 22nd May, 2002, prepared a map and some photographs. On the basis of the evidence given by Garda McDonald, his view was that it indicated an intermittent spillage of sorts which suggested that a vehicle, perhaps a tanker, was carrying a quantity of oil along the road and the oil or whatever liquid it was, slopped about inside the tanker and spilled out, its momentum carrying the oil forward along the highway's left lane.

48. He considered that it was indicative of oil being carried by a mechanically propelled vehicle given that the spillage had occurred over a distance of between 10 and 13 miles. This evidence was objected to by Mr Barton S.C., for the defence who contended that the evidence, as it existed, was that there we certain number of patches over a distance between the Border and Ballyshannon. I permitted him to give the evidence.

49. Mr Anderson suggested that the fact that the major spillage took place at the accident site, suggested a vehicle which was decelerating into the curve, causing the contents of the tanker to spill over onto the road. He was surprised that the Garda who had noticed the spillages from the Border area had not also noticed if the spillages took place at curves. He said it was significant that there was a long straight stretch of road, that coming into the corner there was a national speed limit of 60 mph but that this speed then reduced directly to a 30 mph speed limit, which meant that a mechanically propelled vehicle not only had to travel round the curve but also would have to brake and that would cause the contents to slop around and likely spill over.

50. His theories as to how the substance in question might have escaped were first, that if it was a bulk delivery tanker, the cap on the tanker on filling had not been replaced securely or perhaps wasn't there at all. An alternative situation was that the vehicle had stopped to top up fuel at a service station and again either the fuel tank cap had come off or hadn't been secured properly.

51. Secondly, he said that nowadays all vehicles are fitted with a fuel gauge and while he did not measure the quantity of fuel which had likely spilled, he assumed that over the 12 mile distance this would have been fairly considerable and the driver should have noticed this on his fuel gauge. Mr. Barton also objected to this evidence on the basis that on the evidence before the court was merely that there were six or seven patches that had been noticed at some place between the Border and Ballyhannon, and this witness was trying to give evidence on the basis that there was so much oil or whatever spilt that it would actually register on a gauge.

52. In response Mr Keane, S.C. said no evidence had been given of six or seven patches and that the evidence which had been given in the case concerned patches or blobs over an 11 mile distance. He said it was the plaintiff's case that there was a considerable spillage over that stretch of road. Mr Barton however contended that this was an assumption made by the witness, as was it also an assumption that what had been seen on the road came from a vehicle, the Garda indicating a view that it had come from a vehicle, but in reality, there was no evidence that it had actually come from a vehicle. I accepted that Mr Barton's argument that the witness's evidence would have to be confined to expert engineering evidence. However, it was my view that the engineering evidence so far was that if a driver of a vehicle was losing considerable amounts of oil over a stretch of road, then he ought to notice this by reference to his fuel gauge, and this was expert evidence which this witness was entitled to give.

53. Mr Anderson's then dealt with the behaviour of a vehicle encountering a spillage of that nature in the normal course of events. He said that if the spillage occurred on a straight section of the route there was a good chance that a vehicle would cross it quite safely, provided that a change of direction didn't occur or if the driver didn't attempt to brake. Here however not only was there a corner but also a reduction to the 30 mph speed limit already mentioned. And so a driver going into it would decelerate and once the driver attempts to decelerate on an area of oil, the wheel traction is almost nonexistent. In that event, the chances are that the vehicle would carry out an uncontrolled turn or spin, and the driver would effectively lose control of the vehicle.

54. He explained that rubber is a hydrophobic and therefore does not absorb water. Some of the oily substance might fall off, or ablate, by being thrown off the rotating wheel. Nevertheless there would be left on the surface of the tyres sufficient oil adhering to them to reduce traction considerably.

55. He considered that the evidence given by the Plaintiff was consistent with skidding by the vehicle on an oily substance on the road explaining that the skid had started on asphalt which had the oily substance overlying it causing the initial skid, but then the vehicle continued across the road onto a grass verge which was wet, and again which would have very little traction on it. A driver would have no control over the vehicle from the point where the skidding actually started to where it collided with the wall of the house.

56. This witness said he understood the plaintiff to say he was travelling at about 30 – 35 miles per hour, at the time of the skid. Under cross examination, and carrying out a calculation on the basis of where the defendant says the car commenced to skid, Mr. Anderson said this would result in a speed of approximately 40 mph, but not more. There was no evidence of any skid marks. He therefore did not agree with the defendant's proposition that the plaintiff was driving at a high speed, or in excess of 50 miles per hour. He also rejected the suggestion by the defence that merely because the van was not driveable from the scene of the accident but had to be towed away and was later written off, this established that the driver was going too fast. There was no evidence at all as to the damage to the car, other than damage to its skin. While it was possible to determine pre-impact velocity from damage done to a vehicle, including this vehicle, the information which could establish that was not available from manufacturers. The same damage to a car could arise at speeds of 20 or 30 miles per hour. The only thing which could be said on the evidence was that the vehicle was unable to loose energy sufficiently by contact with the road to stop , but nothing more.

57. In re-examination, Mr. Anderson said he would not expect to see the phenomenon of "fatting up" except on new roads, or where the road has been resurfaced, and when the road had heated up, and that as it was early in the morning in late May that condition would not be expected. He also said that if the plaintiff had skidded at the point suggested by the defendant, he would have expected to see evidence of skids marks. There was nor even a reference to any skid marks in the Garda sketch, and there was no evidence of any such skidding, only a reference to a tyre mark in the wet grass on the verge.

58. Mr. Anderson's evidence completed the case for the plaintiff.

59. The defendant indicated at that stage that it intended to apply for a direction, according to the principles in *Hetherington v. Ultra Tyre Services* [1993] 2 I.R. 535, Mr Barton stating that he assumed the court would defer ruling on his application until all of the evidence had been heard and therefore he formally requested the Court to defer ruling on his application until then.

60. The first witness for the defence was Mr. P.J. Clancy, the station officer of the local fire services at Bundoran. His area of responsibility stretched from Bundoran to Finner Camp about two miles north of the town. He had requested the fire services from Ballyshannon to check the road from there to the scene of the accident north of Bundoran. There were two officers and six crew involved. He positioned the fire tenders on the roadway at a point to ensure it that his fire crew was protected from oncoming vehicles, that is to say by driving past the vehicle involved in the accident and parking on the Ballyshannon side of the accident working behind it, with the Ballyshannon fire tender marking off the other end of the spillage site.

61. His evidence can be summarised as follows. He noted a spillage of some type of oil on the road which in his opinion was of a heavier type than he would normally be used to seeing, such as petrol or diesel oil. It did not have any rainbow effect which is found when there is rain on the road on top of hot weather. He took the view that approximately 100 square feet of roadway was covered and that it was a small spillage in a confined area where the accident occurred.

62. In cross-examination he accepted that when he spoke to the defendant's engineer in late 2003 his indication to her of the extent of the oil spillage was that it had started somewhere around the 30mph speed limit pole and went past Finner Cottage. He also accepted that when he signed off his report shortly after the accident that report described the spillage as "large".

63. Although he said that it on his way back to the station he had not seen any further evidence of spillage, he also accepted in cross-examination that at the time when he returned to the station the road had rapidly dried and so further small spillages would be more difficult to see. And he accepted that this type of oil spillage would usually come from a vehicle and in such circumstances there would not be a continuous oil slick but blobs on corners or on rough patches where traffic is braking, and in such circumstances no oil spillage might occur on a straight stretch of roadway. The next witness for the defence was the station officer at Ballyshannon fire station at the time of the accident. He had been asked by Bundoran fire station to check the road from Ballyshannon to Bundoran for oil spillage, and between the scene of the accident and Bundoran. He travelled from Ballyshannon to the scene of the accident and beyond and found no oil spillages. He did not see the actual spillage at the scene of the accident. He also said that Ballyshannon fire station was not involved at all in the clean-up of the oil spillage at the scene of the accident and therefore did not park their tender so as to mark off the distances between the commencement and termination points of the oil spillage.

64. He believed that the photograph produced in evidence by the defendant was one showing the Ballyshannon fire tender in motion, travelling at about the scene of the accident towards Bundoran. He had stopped his tender only to confirm to the Bundoran fire station personnel that he had not found any oil. His fire station was not otherwise involved in the cleaning up operation.

65. He did not hear of any other spillages between the border and Ballyshannon from the area around the Edenery in County

Fermanagh, but agreed in cross-examination that he was not asked to check the road between Ballyshannon and the border and didn't do so, that occasionally there are spillages between there and Border, and that he would normally hear about them if there had been an incident such as an accident. In the same context he confirmed that if the weather is good the oil spillage would dry off or work its way off with traffic.

66. Paul Kelly, a driver mechanic who was at the time of the accident he was a fire fighter with Bundoran fire station, then gave evidence. He confirmed that the Bundoran fire tender had been placed in a fend-off position on the right lane facing towards Ballyshannon. He noticed the oil, because the crew were wearing Wellingtons and that the road was very slippery. He said that the substance was thicker than the normal spills, and was dark grey like normal oil. To his knowledge there was no sign of any rainbow effect on it. He considered it to be a large spillage in that it covered a lot of the left-hand lane of the road.

67. The last to witness for the defence was Ms. Anne Kelly, an engineer. She said she is very familiar with the road leading back into Bundoran from Fermanagh and across the Border to Ballyshannon, which is a regional road, whereas the road between Ballyshhannon and Bundoran is a national primary route. The standard of the road from Ballyshannon to the Border is of a much lower quality as regards realignment and maintenance than on a national primary route. Different sections of Regional roads are maintained by surface dressing on an annual basis, whereas national primary routes tend to have larger operations, covering larger sections of the roadway and the surface composition is stronger.

68. She was familiar with the term "fatting up", and gave a very helpful explanation of this, indicating that the fatting up process can occur for several months after a road has been resurfaced, and that the diluent which is used to make the road surface more workable, once it is released, produces the same effect as is found with diesel or petrol on a wet road surface, once the road has heated up.

69. As to the distances concerned at the scene of the accident and the relationship between the speed signs, Finner Cottage and the motor vehicle, she said that the pole in the centre of Mr. Clancy's photograph was about opposite the corner of Finner Cottage which was struck by the plaintiff. The fire tender appears to be some distance on the Bundoran side of the pole and the other tender appears to be quite close to the pole. The distance from the pole to the speed limit sign is about 65 yards and therefore the wall is much closer to the pole then it is to the speed limit sign. In the circumstances the plaintiff should have "missed" the oil spillage altogether, if her measurements were correct.

70. She was of the view that, on the plaintiff's engineer's first proposition of a substance splashing around in a tanker and escaping through a missing or improperly fitted cap, if the substance was a thick substance it would be closer to solid and therefore would tend not to move around easily, but she accepted that she did not have any first-hand knowledge of the viscosity of the liquid in question. However, her view was it would be unlikely to behave in the manner described by the plaintiff's engineer.

71. As to the second possibility that there might be a leaking valve, she said that if there was a leaking valve she assumed the oil would fall out under gravity or escape through the bottom of a vehicle rather than coming out of the top, in which case one would expect to see a continuous leak, not a single spillage as appeared to be the case here. She assumed that the driver would see some sign of the fluid being lost, on a large road tanker. She did not think there was any real connection between what was described as being on the roadway between the Border and Ballyshannon and what was at the scene of the accident. She assumed that the latter was some sort of lubricating oil, possibly gear oil or engine oil, and she understood what had been seen between the border and Ballyshannon had a rainbow effect.

72. She had been involved in a number of investigations and accidents of this sort, having investigated approximately 1000 traffic accidents over a number of years. On the question of speed, she gave evidence in chief both on the basis of damage to the car, and on the basis that it was written off. Objection was made to the admission of this evidence because this witness had not examined the motor vehicle, did not to inspect it in any way, and was not in a position to give any evidence herself on the matter. Mr Barton for the defendant said that as the witness had heard the evidence that the van had cost £7500, was undriveable and was towed from the scene, and was eventually written off, she should be entitled to give this evidence. He said the witness had seen photographs of the damage to the wall of Finner Cottage, had access to the Garda statements as to the nature of the damage to the vehicle and was in possession of all necessary evidence to give an opinion. He also submitted that Mr Anderson as an expert witness for the plaintiff had given evidence in relation to possible or probable speeds and that she should also be permitted to give evidence in relation to the speed of the vehicle. I permitted, with reservation, questions to be asked in this regard. The witness said that the greater the damager to the car, the greater the speed of an impact situation. She considered it consistent that a vehicle which had demolished a 25 foot wall was then undriveable.

73. In her opinion the plaintiff had indicated that he braked as he was coming toward the bend, and since the commencement of the bend is approximately 100 to 110 yards from the house which he hit, she was of the opinion that since the Fire officers had indicated they had found oil closer to the house, the plaintiff's car must have started to go out of control long before he had come to the 30 mph sign. On that basis, and based on her experience alone, she suggested that the speed of the vehicle when it went out of control was considerably in excess of 30 miles an hour in terms of the distance travelled and the impact with the house which caused cracking and structural damage and demolished a 25 ft wall, ending up a further 15 yards further on. This confirmed her understanding of the fact that at a tyre mark was found in the grass margin measuring 30(35) feet.

74. This witness agreed with the plaintiff's counsel that there would be a certain amount of residue of oil on the tyres, but she took the view that this should come off onto the surface of an uncontaminated road, and clear off the surface of the tyres. She accepted she would have expected to see skid marks on the other, uncontaminated side of the road where there was no oil present. If the plaintiff had been travelling at 30 to 35 mph she would have expected, because the car was travelling diagonally, that it would have travelled approximately 70 ft. If the plaintiff was correct in what he says, then she would have expected that the vehicle would have stopped on impact with the house, causing it to expend whatever energy was remaining having travelled over 70 or so feet.

75. As to the significance to be attached to the fact that another driver just a short time later had experienced a similar situation, Ms Kelly took the view that what that witness had described was consistent with a speed of 30 miles per hour. The reason for this was because the car travelled two-and-a-half to three car lengths and thereafter struck a pole, the impact of the pole being such to have caused very little damage to the car and allowed it to be driven afterwards. Ms. Kelly accepted however that this might depend also on how the car hit the pole.

76. Counsel for the defendant said its position as to the significance of the second accident was that the car had behaved in a peculiar way on this particular stretch of the road, travelled a certain distance (a far less distance) than the Plaintiff, at a speed which the driver said was a 30 mph, after which the driver had collided with the pole, their being a lot less damage to her vehicle and she not been injured and the vehicle been driveable once it had stopped on contact with the pole. On the other hand, the plaintiff on

his own evidence should have been in a position to come to a halt sooner if driving at the speed at which he alleges he had been driving, or would have come to a halt when the car hit the corner of Finner Cottage.

77. Ms. Kelly gave as her view that the speed at which the Plaintiff had demolished the low wall would be in the order of 25 to 30 miles per hour at that point. She therefore said that going back through the oil spillage and through the uncontaminated side of the road and through the grass margin, she would expect that the car would lose 10 to 20 miles per hour, perhaps 20 mph in terms of distance travelled. She said that if the car had turned around this would also slow the vehicle and thereby further reduce its energy in terms of forward momentum and going through the grass would also do so.

78. This witness was asked about her knowledge of Finner Camp, and the type of vehicles which are used there and she responded that there are normally army type of vehicles going in and out of the camp. This evidence was objected to b Mr Keane on behalf of the plaintiff who indicated that he was not on notice. After some exchanges, he accepted that this road is used, inter alia, by defence vehicles.

79. In cross examination, Ms. Kelly accepted that she had worked from the details as she understood them, in the plaintiff's statement to the gardaí, and from Mr. Clancy's indications to her in late 2003. She conceded that if the plaintiff had commenced braking in or around the 30 mph speed limit sign, this might make a difference to the conclusions she had drawn as to speed, and that in Mr. Glancy's report to her in October 2003, he had indicated that his recollection of the oil spillage was that it had commenced in or around the same speed limit sign. She accepted that if the oil spillage commenced around that speed limit sign and continued past Finner Cottage that would be an extensive oil spillage. She also agreed that there were no skid marks anywhere on the road, including on that part of the road which was not contaminated by the oil spillage, and that if a car had been travelling at the rate she suggested the plaintiff was travelling, skid marks would be found at least on that part of the roadway.

80. As to the oil in question, she did not know what it was, but from the description given did not think it was a fuel oil. In relation to her evidence in chief as to fatting up on roadways, she did not know when the road between Beleek and Ballyshannon had been resurfaced prior to the collision, nor whether it had been resurfaced subsequently. She accepted that, in all likelihood, the spillage at the place of the accident came from a vehicle of some sort, that it could be a fuel tank, or cargo being carried on a vehicle, or a leaking valve, but that it was likely it would have come from a moving vehicle. She considered it less likely it leaked from the vehicle itself, because of the substantial quantity involved, because in that event it would affect the drivability of the vehicle, but suggested that it could have come from a container on a vehicle, or from a crashed vehicle which was being towed or carried on a trailer.

81. She also accepted the theory propounded by the Plaintiff's engineer that if a tanker was almost empty or there was a small amount in it, a leak may only occur at a time when the contents are pushed around when braking or turning. She repeated her understanding of Garda McDonald's evidence that what he had seen was consistent with fatting up on the road between the Border and Ballyshannon.

82. This ended the evidence on behalf of the Defendant.

83. Having regard to the evidence, I have to come to a conclusion as to whether or not there was any negligence on the part of the driver of the untraced vehicle, since, according to the decision of The Supreme Court in Rothwell v. Motor Insurers Bureau of Ireland [2003] 1 I.R. 268, proof of negligence remains an essential prerequisite in any case in which damages are claimed against the defendant pursuant to the terms of the Agreement.

84. I start my consideration of the question of negligence initially in relation to the question as to whether what was found at the accident scene was a small, single spillage, or whether it was a continuation of what was seen by Garda McDonald between the Border and Ballyshannon, and was thereforepart of a fairly continuous spillage that would or was likely to have come to the notice of the driver, or which he ought to have noticed.

85. I am satisfied, on the balance of probabilities, that what was seen by Garda McDonald between the Border and Ballyshannon were patches or blobs of oil of some sort, dropped or leaked from a vehicle, and constituted an oil spillage, as reported by Garda Crohane to NorthWest Radio, and that it was not a simple series of patches caused by the only alternative proposed by the defendant, that is to say, the phenomenon of "fatting up". That phenomenon occurs undoubtedly when the diluent mentioned above is used to make the surface material more easily spread on roadway. The road surface then hardens over a period of time, but when the road heats up, this allows an escape of an oily substance, and creates, when it merges or mixes with rain, or water on the road, a rainbow effect. But all parties agree that for this phenomenon to occur, there must have been (a) a reasonably recent road resurfacing; (b) rainy weather; and (c) a roadway which has heated up through warm weather. No evidence was presented that between the Border and Ballyshannon, at the intermittent stages mentioned as containing the blobs or patches of oil, the road had been resurfaced within a period of a few months. There was undoubtedly rainy weather. But even allowing for the possibility or likelihood of some road resurfacing having taken place, there was little or no chance of the last of the essential requirements being met. My understanding of a road heating up is that one has to wait for the sun to appear, or for enough heat to be available even through cloud cover, so that the road surface actually becomes warm, and at that stage then there is the consequent escape of oily substances described above.

86. Here the accident took place at about 7.50 a.m., and it would have been earlier or certainly no later when Garda McDonald was between the Border and Ballyshannon. That is not a time of the day when it is usually sufficiently warm for the heat to have had an effect on the road, even in the summer. The accident occurred on the 24th May, and while it is sometimes warm at the end of May, no evidence was tendered to suggest it would have been so warm on that day, in particular at that time of the day, that the fatting up phenomenon would have occurred.

87. Moreover, it is seems quite odd that if the substance which was seen by Garda McDonald was as a result of "fatting up" as suggested, this feature would not also be apparent on both sides of the road between the Border and Ballyshannon, assuming resurfacing took place. Usually a road, save where the route dictates a particular camber, will fall slightly towards each side to allow rain to fall off, leaving, in wet weather, some pools or wet surface on both sides of the road. I queried Ms. Kelly on this, and she confirmed to the court that the fatting up phenomenon would be evident on both sides of the road. Yet all the evidence was to the effect that the oily substance was seen on one side of the road only, whether between the Border and Ballyshannon, or at the scene of the accident.

88. In addition, there was evidence that a traffic report was sent to NorthWest Radio about a serious oil spillage between Bundoran and the Border. While several gardaí gave evidence, it was not suggested that that report had been generated by Garda McDonald or his colleague, and therefore I have to assume that it may well have reached Garda Crohane independently, from other garda sources or drivers coming across the same patches or blobs. While this is not a factor which of itself establishes that there was or was not "fatting up" it does seem very coincidental that serious oil spillage was reported to have existed from the Border south to Bundoran, if

it was in reality no more than what the defendant's witnesses in evidence described as being an ordinary and regular, but harmless phenomenon on Irish roads, and which all gardai or fire station personnel accepted was well known.

89. Finally, on this aspect of the matter, although it was established to my satisfaction that no such oil was found between Ballyshannon and Bundoran, it was also agreed or conceded by all the relevant witnesses, it would be more usual to find spillages at bends or corners or where a vehicle had to brake. And it was also accepted by the same witnesses that, on the contrary, there is a long straight stretch of roadway between Ballyshannon and the scene of the accident,

90. I am also satisfied that the oil spillage could properly be described as being a series of patches or blobs about 3 feet long and one foot wide along the route, or on those parts of the route from the Border to Ballyshannon where it was found, and also that at the scene of the accident it was made up of several patches, sometimes referred to as blobs, possibly but not definitely on the evidence, larger than those found between the Border and Ballyshannon. And further, where it occurred at the scene of the accident, on the evidence even of several of the defendant's witnesses, it was a large spillage, and also on the evidence given. While Mr. Glancy for the defendant at first indicated that it was a small spillage, and that it occupied only about 100 square feet of the area at Finner Cottage, he did concede that his report at the time of the accident described it as being large, and that in November 2003 he had also described to the defendant's engineer as commencing in or around the 30 mph sign and continuing past Finner Cottage. I accept that witnesses' recollections at a time so removed from the event, during the course of a court hearing, may not always be accurate. However, his evidence as to the placing of fire tenders from Bundoran and Ballyshannon in fend off positions was also contradicted by the person in charge of the Ballyshannon fire tender on the day in question, and so I am of the view that it is more prudent to accept the matters as recorded by Mr. Glancy at the time of the accident, or as reported by him to Ms. Kelly in 2003 as being more reliable, to his recollections as given in his evidence.

91. It was suggested by the defendant that the substance at the accident scene was heavier than what was seen elsewhere. No one actually took any samples of the oily substance, either between the Border and Ballyshannon or at the scene of the accident. According to Ms. Kelly she did not think, from its description, that it would exhibit a rainbow effect, and others accepted it did not appear to have such effect, but Ms. Kelly accepted she did not know the viscosity of the oily substance in question, and nor did anyone else, and therefore there was no evidence as to whether the substance could or could not have exhibited the rainbow effect often found on roadways. The most than can be said from the evidence is that the substance appeared to be heavier than diesel or such fuel.

92. Having regard to the foregoing evidence, I am satisfied, on the balance of probabilities, that the oily substance in question was part of an oil spillage which continued from the Border intermittently to Ballyshannon and at the site of the accident, and that the absence of similar blobs or patches between Ballyshannon and the accident spot is explicable by virtue of the type of roadway between Ballyshannon and Bundoran. I find therefore that it was not a single isolated small spillage only occurring at the site of the accident.

93. I now consider whether, given my finding that the oil was part of a spillage as described above, the Plaintiff has discharged the onus on his to establish that, even in such circumstances, the spillage was caused by the negligence of the driver of the untraced vehicle. As to whether that oily substance came, as the plaintiff says, from a vehicle travelling along the road and losing oil, it is the preponderance of the evidence of the witnesses for both parties that this is the likely source of the oil spillage. There is a much greater difficulty in relation to the manner in which such oily substance might have escaped from such a vehicle, and as to whether the said escape could reasonably be found to have been caused by negligence.

94. Mr. Anderson proposed two possible routes of escape. While it might be said that these possible routes are not highly persuasive, I do not need to be convinced that they are so, but only that they are two reasonable possibilities, either one having as its result the likelihood that the leaking oil would be noticed, or ought to be notice by the driver. On one of these, if the oil was a particularly heavy oil, or if the oil carrier was not particularly full, the defendant's engineer disputed that the oil would slop out at all, even if no cap had been placed on it, or it had originally been in place but, after loading, refilling or emptying, had not been replaced correctly. She accepted that this could arise on braking, and did not deny that it would be noticed.. As to the second possible route of escape, namely via a leaking valve of some type, she considered there would be a slow continuous leak in that event. However, she did accept that it was likely that this would become known to a driver, as was also the evidence of the plaintiff's engineer. Her reservations as to whether these likely escapes would be noticed by the driver were affected however by her understanding that what occurred at the scene of the accident was an isolated occurence, and not connected with the oil seen by Garda McDonald in areas between the Border and Ballyshannon, although I have now found that they were part of the same spillage.

95. While there is no clear factual evidence available upon which to conclude that either alternative was the definite cause of the oil on the roadway, I am of the view that the plaintiff has established, on the balance of probabilities, sufficient facts which, at least on the second proposition put forward on his behalf, would constitute negligence, the first being also reasonably possible, but perhaps less likely. Unlike the case of Rothwell, supra, the circumstances are not those in which the oil spillage is a single spill, nor a small spill of about a few pints, as in that case, nor of circumstances in which the spillage could reasonably have occurred with or without negligence on the part of the unidentified driver of the untraced vehicle. The preponderance of the evidence is such as to suggest the spillage of the type in question, over the distance involved, would have been or ought to have been noticed by the driver of the vehicle.

96. Having regard to the foregoing matters established, I am satisfied that the Plaintiff has established negligence on the part of the untraced driver.

97. The remaining matter to be considered is whether, notwithstanding the foregoing, the plaintiff's injuries did not arise from the foregoing circumstances at all, but rather because he was driving too quickly. Firstly I find that he skidded because of the oil on the road. In the course of the evidence it seemed to me that there was a division, perhaps even a misunderstanding, between the witnesses as to where precisely the bend or curve started, depending on whether it was the engineering evidence which was being tendered or the evidence of the plaintiff, Garda Armstrong, or even some of the other witnesses. The measurements taken by the defendant as given in the evidence, and applied to establish the likely speed of the plaintiff, were taken from what might be called the very beginning of the curve, in engineering terms. However, what all other witnesses seemed to be talking about was that somewhere into this bend. This is where the bulk of the evidence, including that of Mr. P. J. Clancy for the defendant, suggests the oil slick began.

98. I am satisfied also from the evidence of Garda Armstrong that this is where the oil commenced. While Ms. Kelly suggested the Plaintiff should have "missed" what was undoubtedly an oil spillage, because he said he skidded coming into the bend, the coincidence of such a spillage being on the bend, and causing another driver to skid, but not the Plaintiff, who allegedly skidded for some other reason, namely speed, seems coincidental indeed. I believe the explanation lies in the fact that different witnesses understood "the

bend" and where it commenced in different terms, or with different expertise.

99. The Plaintiff admitted he had been driving at about 35 mph. There was no evidence of any skid marks on that part of the road where there was no oil. It was accepted by all relevant witnesses on behalf of the defendant that if the plaintiff had been driving at the speed the defendant proposed – and which in turn was calculated on the basis that the plaintiff had commenced skidding at a point much further back than the 30 mph speed sign – there would undoubtedly be skid marks on that part of the road which was uncontaminated, but none were found and none appeared on the map prepared at the scene of the accident on the day in question. But it was accepted by the defendant's engineer that if the skid had commenced at the point which the plaintiff and Garda Armstrong say they skidded, this would affect the speed at which the defendant suggested the plaintiff was driving.

100. I am also satisfied that there was no evidence before the Court upon which it could be said that the damage to the vehicle established that the plaintiff was driving too fast, or at least substantially faster than his admitted speed of 35 mph. It is true the vehicle was badly damaged and could not be driven from the accident scene, and it is also true that it was eventually "written off." But it does not follow automatically that because it could not be driven from the scene, this was because the damage to it was caused by excessive speed. And the same applies to the fact that it was written off eventually. There are several reasons why a vehicle might have to be towed away, rather than being driver, or might eventually be written off, none of which establish that it was damaged by reason of speed. No one gave evidence of having examined the vehicle on behalf of the defendant, and Mr. Anderson's contention that manufacturers do not provide information necessary to enable an appropriate calculation to be made on the basis of skin damage to the car, was not challenged.

101. Having regard to the foregoing findings that the oily substance was deposited on the roadway by the negligence of the driver of the untraced vehicle. Having regard to these findings, I reject the application of the defendant for a dismissal of the Plaintiff's claim.

102. I find also as a fact, on the evidence, that the accident was caused by the skid, and that the plaintiff, while driving at between 30 and 35 mph in a 30 mph speed zone, was not, on the balance of probabilities, driving at a speed higher than this, and that this speed, even if taken as being 35 miles per hour, did not contribute materially to the accident or to his injuries. I do, however, take into account the fact that the plaintiff was not wearing a seat belt, as he ought to have been. In that regard I find that the contributory negligence arising from this on the part of the plaintiff should be fixed at 15%. Since I have heard evidence only on the issue of liability, and no medical evidence, I fix that contributory negligence in respect of such damages as he may have sustained arising from his failure to wear a seat belt.