THE HIGH COURT

[2012 No. 10878 P]

BETWEEN

JOHN HEAPHY

PLAINTIFF

AND

PHILIP MURPHY, JAMES SIMMS AND THE

MOTOR INSURERS BUREAU OF IRELAND

DEFENDANTS

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 7th day of March, 2018

Background

1. A road traffic incident occurred on 15th May, 2010 at the entrance to Hollywood Estate, Cork City, Hollyhill, Cork.

2. The evidence of Martin O'Donovan, registrar of the Criminal Circuit Court, Cork, Co. Cork was of the recorded conviction against Philip Murphy on 16th December, 2017 of dangerous driving causing death under s. 51(1) of the Road Traffic Act, 1961 as amended by s. 51 of the Road Traffic Act, 1968. The particulars of the offence were that Philip Murphy did on the 13th May, 2010 at Harbour View Road in the County Borough of Cork, drive a mechanical vehicle in a public place in a manner, including speed, which, having regard to all of the circumstances, including the condition of the vehicle, the nature and condition and use of such space and the amount of traffic which there then actually was and might reasonably be expected to be therein, was dangerous to the public, thereby causing the deaths of Derry O'Callaghan and Cornelius Dolan deceased. This witness detailed the particulars in similar terms of the conviction handed down on 16th December, 2017, to James Simms in relation to his driving of a mechanically propelled vehicle.

3. The plaintiff gave evidence that he is a married person with three children living at Blarney Street, Cork, Co. Cork and that his family of origin lives at 50 Hollywood Estate, Cork. The plaintiff confirmed that he was not staying at his mother's house on the night of the 15th May, 2010, that he and his friends had been drinking in the Hollywood Estate. They moved from the green to no. 49 because Cornelius Dolan (since deceased) was on curfew. The plaintiff describes what happened as follows: that at 11 or 11:30pm two vehicles came into the estate at high speed, skidded and suddenly stopped. The plaintiff described a scene which caused him fear and to run away and take cover. One vehicle was the black Volkswagen motor vehicle which was driven on the occasion of this accident by the first named defendant. He described three people getting out of the second vehicle with hoods on their faces shouting "Grab a Heaphy, grab a Heaphy". This witness says he saw the boot of that motor vehicle open and he heard the cars revving, wheels spinning and people shouting. He later believed, from a discussion with his sister, that Darren Lenehan had been taken away in the boot of that car. This plaintiff agreed that he had given a statement to the gardaí (admitted for the purposes of this case) that 50 Hollywood Estate was his address for the purposes of his statement. The first vehicle, a red Ford Mondeo, was registered to a James O'Sullivan purporting to have an address at 50 Hollywood Estate, the plaintiff's mother's address. The plaintiff did not know who James O'Sullivan was and he says that he himself does not drive. He described his friend, the second defendant, Mr. Simms, living "everywhere, being honest," that he comes and goes, but he denied that Mr. Simms lived at 50 Hollywood Estate.

4. This witness describes his concern to assist Darren Lenehan whom he believed to have been taken in the boot of the Volkswagen car at that point. His evidence was that the second defendant did not want to drive at the start but that he encouraged him. This witness accepted that Mr. Simms, the second defendant, was "off the road", had previous convictions, had escaped from Shelton Abbey and that he was delighted to have been let go when he and the said defendant were stopped earlier in the day at a Garda Síochána road check.

5. The plaintiff agreed that he got into the black Volkswagen being driven by the second defendant with his own young son and wearing no seat belt, knowing that the driver was not insured, knowing that this was a crime, accepting that he understood that if a person drives without insurance and is convicted, they will be disqualified from driving and denying that he knew that Mr. Simms had a history of that kind of driving. The plaintiff confirmed that he was a front seat passenger in the red Mondeo and that although he was charged with threatening a third party arising out of these events on that night, he was acquitted by direction of Cork Circuit Court jury on 28th June, 2011. The plaintiff, while he accepts that the second defendant was a family friend, contends that the first defendant wasn't a friend and he argues that he cannot understand how the case could be made that he knew that the first named defendant did not have insurance. The plaintiff in his evidence confirmed that he was a passenger in the red Ford Mondeo being driven up Kilmore Road by the second defendant and that Shane, his brother, was in the back seat, and that CJ Dolan and Derry O'Callaghan were also in the back seat of the car. He said that there was a black car just behind them with speed revving and he confirmed that it was the Volkswagen Golf in the photograph shown to him. He described them as being in Churchfield Way Lower at that point and said that the first named defendant was in the driver's seat of the second vehicle. At that stage the two vehicles were on Kilmore Road. He contends that the second vehicle started lowering the lights and the car was revving and that he was asking the second defendant to stop and let him out of the Ford Mondeo at that stage. He also claims that there was a taxi at the entrance to Hollywood Estate which "gave them the lights". He describes the car in which he was a passenger being driven to the right into the entrance of Hollywood Estate and that they were nearly in there and that there was a kind of a ramp which slows you down. He said he doesn't remember any more and woke up in hospital. Prior to that, when they were in Churchfield Way Lower, he looked out of the window of the vehicle. He believed his friend to be in the boot of the other vehicle. He could not confirm whether he himself got out of the red Ford Mondeo, although under cross-examination he did describe them as getting out of the car. He described the other vehicle reversing, saying those in the first vehicle thought that the driver of the second vehicle was going to run over the top of them so they got into their vehicle and went away. This witness agreed that there was a hurley in the car in which he was travelling and, although he agreed to going over to the second vehicle to find out whether his friend was in the car, he claimed that the second vehicle reversed back at which point he got back into the first vehicle and they drove away. He denied breaking the windscreen of the second vehicle with a hurley although a person was seen with a hurley breaking the window.

6. This witness accepted that there was trouble brewing between the occupants of the two vehicles and that at that stage in Churchfield Way Lower he knew his friend was not in the back of the Volkswagen. This witness also accepted that he had convictions for driving offences in the past regarding tax and insurance. He used the words "my car" when describing leaving the scene in Churchfield Way Lower and wanted to go home, claiming that there was no revenge in his mind, rather to see whether his friend was safe. His logic in relation to the ownership of the second named defendant's vehicle was that since James Simms had the keys of the

car, it was therefore his car, even though it was registered in the name of one James O'Sullivan.

7. This witness gave evidence that when they were going up Kilmore Road, people in the first vehicle asked Mr. Simms to let them out of the car but that he refused to stop the vehicle. This witness further indicated that on one other occasion he asked Mr. Simms to slow down the car but that he kept going. He said it was dull and dark as he was looking back at that point. This witness was adamant that the first vehicle being driven by the second defendant was slowing down and that it indicated in relation to the turn into Hollywood Estate. This witness does not deny that he was part of the incident, but he excused his involvement on the basis that he wanted to save his friend.

The evidence of Mr. Brian Twomey, Consultant Engineer, Paul Twomey and Associates
8. This witness gave evidence of forty years experience as a chartered engineer and as a managing partner in his firm. He described what happened, with reference to photographs taken with a 50mm lens which he described as equivalent to an eye view of a driver. This witness showed, with reference to photographs taken, a significant impact. He also confirmed that the first thing to have happened in the accident was the impact of the two vehicles. By his estimate it was a 90 degree turn into Hollywood Estate but he believed that the majority of 60 to 70 degrees of that turn would have been completed at that stage by the first vehicle. He put that vehicle at or about the ramp and certainly not beyond the ramp. On his evidence, following the impact, the Ford Mondeo then went towards that front boundary wall and turned so that it rotated because it was itself turning at that junction. He said that there must have been a slower car and a greater speed to cause the amount of physical damage to the front and back, prior to the damage of the houses. He referred to Exhibit 1, Photograph 4, Tab 1, which showed the final resting position of the motor vehicles and said that, in simple terms, the damage to the red Ford Mondeo was not as great at the front right and that this indicated to him that the impact between the two cars was significant and was the first thing to have happened in the accident.

9. Under cross-examination this witness agreed that the chalk marks on the road might not belong to either of the cars. This witness would not accept that as a matter of probability the red Ford Mondeo would have lost control and probably hit something in any event. He argued that the parties were familiar with the particular turn and felt that they were travelling at an "appropriate speed". The garda evidence was put to this witness in relation to the first vehicle going out of control in any event but he did not accept this.

The evidence of Mr. David Harrington, motor assessor
10. This witness described himself as a practising motor assessor for 37 years, a member of the Institute of Road Transport Engineers, the Society of Operation Engineers, and an affiliate of the Institute of Automotive Engineer Assessors. He said the red Ford Mondeo had suffered a very severe impact to the right hand rear corner and that all of the floor panels, rear panel, right-hand side panel and rear suspension were all driven forward and slightly to the left. He found damage to the left side, the left hand front wing, left hand front door, left hand rear door and the roof and side panel area, consistent with striking a wall or a pillar. He felt that the damage to the left hand front wing, left hand side door, rear door and left hand rear panel was all the result of the vehicle hitting the house. He did find damage on the right hand wing, which he believed was more consistent with hitting a house rather than hitting a motorcar.

11. This witness believed that the most serious damage was caused in the vehicle-to-vehicle collision. He believed that in particular the red Ford Mondeo would have been turning slightly and that the Volkswagen Golf came into its side and pushed all of the left hand rear corner. Having done that, it rotated clockwise and shot off into the house. The garda evidence was put to this witness that the vehicles appear to have been travelling at speed, particularly the first vehicle, and as a matter of probability appeared to go out of control, that damage would have resulted and that the vehicles would have crashed. This witness was asked whether, if no impact had occurred between the two cars, the Red Mondeo could have crashed anyway. His evidence was that if it was travelling at a speed or an excessive speed and had intended turning into Hollywood Estate and was going too fast, the likelihood was that it would have gone out of control. This witness took the view that the red Ford Mondeo was travelling significantly slower than the Golf which impacted into the back of it causing the damage. He said that if they both had been travelling at a similar speed or the same speed they would have been "at tip and away". He felt that the photographs showed that the Ford Mondeo was travelling at far less speed than the Golf. This witness was asked, if the Red Ford Mondeo was going at an unacceptable speed as a matter of probability, whether it would have gone out of control or whether there would be any impact at all. His response was that at excessive speed there would have been an impact.

The evidence of Garda Sheila White
12. Garda Sheila White was called to give evidence. She said that her patrol car came up Blarney Road and approached the junction of Harbour Road and Kilmore Road and that the Ballincollig patrol car was right in front of them. They were sitting there when a red saloon type car went through the junction followed very quickly by the black Golf. They were travelling at approximately 120kph. Garda Michelle Quinn called out that there had been a collision and they arrived at the scene within five or six seconds. She confirmed that the two cars involved in the collision were the same two cars who had just passed the junction.

13. Garda Aidan Barry gave evidence and he confirmed that he observed two cars from the Kilmore Road drive straight through the junction, at excessive speed. He confirms the speed as they came from Kilmore Road in to Harbour View Road at approximately 120 mph, an excessive speed, and he said that the gardaí were visible in two marked patrol cars but that at the speed the two cars were travelling they would not have been able to stop anyway. He said that Hollywood Estate is 200-300 metres from the junction to the right from where the gardaí were stopped. This garda witness also confirmed that he was still stopped at the red lights when he heard the crash. He said the time was four to five seconds.

14. Detective Garda Michelle Quinn, gave evidence that on the 13th May, 2015, along Harbour View Road a call came over the radio again at 11:30pm saying that all was quiet on the Hollywood Estate. She said they were in Harbour View Road and Hollywood Estate was just approaching on their left hand side and she saw two cars just coming around the corner driving at speed, a red Ford Mondeo and behind it a Volkswagen Golf. She said they were definitely going at excessive speed for the area. It is a built up area with a 50 kilometre speed limit, as far as she knew, and they were far exceeding that speed. She said that initially when she saw the red Ford Mondeo it was on the right side of the road and that it then proceeded to cross over to the incorrect side on the left hand side of the road. The Volkswagen Golf then hit the back of the Mondeo on the back driver's side causing it to go over the embankment and hit the wall. This witness said that the Ford Mondeo was going at ferocious speed, and that she thought it was going to go out of control. She thought it was either going to hit the garda car or they were going to end up in the middle of the collision or she thought there was going to be a serious accident, which happened. She said she formed the view beforehand that they were both driving excessively and erratically at speed. This witness under cross-examination confirmed that the impact occurred when the Ford Mondeo was actually on the ramp. This witness accepted that by virtue of the force of the impact, one vehicle had to be going quicker than the other, namely the vehicle coming from the rear. She was also asked whether, considering the impact, the Volkswagen hit or struck the rear right hand side of the Mondeo with greater force. She accepted that that was the case and said it struck the right hand side of the rear of the Mondeo and that the Mondeo hit the wall and then spun clockwise, faced the other way then and then hit the wall or the house. Under re-examination this witness confirmed that, before the Ford Mondeo was struck by the Volkswagen, it

was going at ferocious speed. She accepted that it had a forward momentum when it was making that turn before it was ever struck.

15. Garda Thomas Keane says he approached the Hollywood Estate driving slower then normally, between 30 and 40 kph, because he was not familiar with the area. When he was coming towards the estate he observed a red Mondeo coming at speed towards the garda car. It was attempting to turn right into Hollywood Estate and it appeared to him that, in doing so, it veered over to the left hand side and lost control. Then, within a split second, the Golf hit the back of the vehicle. The Mondeo was going to hit the gable end of the wall on its left hand side and it was faced down to where the car stopped. He described both cars as travelling at excessive speed. He thought initially that the Ford Mondeo was going straight and then he said that suddenly it sort of spun, lost control, in his opinion, and was hit from behind by the Golf. He said that the Golf, as it was turning, appeared to lose control and hit the back of the Mondeo. He says he cannot say whether, if it had not been hit from behind, it would have gone out of control or not, but he said he did agree that there was nothing in what he saw which rebuts the proposition that the Ford Mondeo had completed the turn and was on the ramp. This witness says that his opinion was that the Ford Mondeo wobbled before the impact from the Volkswagen. This witness agreed that the impact from the rear by the Volkswagen occurred when the Mondeo was about to go onto the ramp and he said that he accepted that it was hit at the back by the Volkswagen.

Garda Malcolm Walsh
16. He said he observed two vehicles turning right into the Hollywood Estate at speed and he observed the second vehicle, a black Volkswagen Golf, rear-ending the first vehicle, a Red Mondeo, and that both vehicles collided with each other and crashed against the side of the house. He said that both cars were travelling on the wrong side of the road at speed, heading for where he was parked or so he thought. He said that they turned into the estate unexpectedly, with no sign of an indicator. He said that they weren't leisurely, they were like rally drivers, just speeding down the road. He said that one car was travelling right behind the other and that there was no question of catching up and that there was a smack on impact.

Service on the first and second defendant
17. Correspondence was sent to the first and second defendants on the 5th December, 2011. In January, 2017 the MIBI indicated that they wanted the first two defendants decreed. The application was then made to renew the special summons and that was extended on 20th March, 2017 for a six month period. Correspondence was then sent by Eamon Murray & Company Solicitors by letter dated 10th December, 2011 addressed to James Simms, care of the Governor Limerick Prison, regarding their client John Heaphy and essentially calling upon James Simms to admit liability in respect of the accident on 13th May, 2010. Failing that, he would be named as a defendant and prosecution would follow. Mr. Philip Murphy received a letter from David O'Mahony of Eamon Murray and Company Solicitors in exactly the same terms addressed care of Governor Limerick Prison dated 5th December, 2011. Difficulties ensued in relation to locating the defendants and a private investigator was engaged who spent five to six weeks looking for Mr. Simms. He had four addresses for him but was unable to locate him. The matter was adjourned to 31st October, 2017 to allow for service on Mr. Simms of the Personal Injury Summons and the issue of the motion for judgment in default of appearance was heard before the court against Mr. Simms.

18. The court accepted service on James Simms of the renewed personal injuries summons by way of advertisement in the Cork Examiner. When the case was heard from 3rd- 4th July, 2017 before the High Court in Cork, no appearance had been entered into on behalf of the first and second named defendants. However, the plaintiff did not have proof of service on either defendant on this occasion. Having heard the witnesses and evidence in the case, this aspect of the case was adjourned for mention to 31st October, 2017 to allow the plaintiff to serve the first and second named defendants.

19. An *ex parte* application was made to this Court on 9th October, 2017 seeking judgment in default of appearance against the first named defendant and substitution of service of the personal injuries summons by advertisement on the second named defendant. With regard to the first named defendant, an affidavit of service of David O'Mahony, solicitor for the plaintiff, demonstrated that the former was served on his sister at her address at 9 Orchard Court, Blackpool, on 23rd August, 2017. His sister undertook to serve the proceedings on him. There was no appearance on behalf of the first named defendant on 9th October and judgment in default of appearance was granted.

20. With regard to the second named defendant, an order was made giving leave to serve by way of notice of advertisement, whereupon the defendant had eight days from the publication of the advertisement within which to enter an appearance.

21. The case came back before the court on 31st October, 2017 where the plaintiff moved a motion for judgment in default of appearance against the second named defendant. The motion was grounded on the affidavits of David O'Mahony, solicitor for the plaintiff, which stated that an advertisement was placed in the Irish Examiner on 12th October, 2017. No appearance was entered into on behalf of the second named defendant within eight days. Judgment was reserved on this issue. Despite judgment having been given against him the first named defendant did make an appearance in court, having been brought up from Cork Prison, and gave evidence.

22. Mr. Simms had had the Personal Injury Summons served on him in July, 2017. In the meantime he was served with a motion for judgment in default of appearance and the court granted the orders sought in that on 9th October, 2017. The matter then before the court in relation to Mr. Philip Murphy was for the assessment of damages. Mr. Murphy was in custody but he had wanted to address this Court and therefore a production order was sought and granted.

The Evidence of Mr. Philip Murphy
23. This witness confirmed his address as 53 Orchard Court, Blackpool, Cork and indicated that his sister has accepted service of the personal injury summons at 9 Orchard Court, Blackpool, Cork. This witness also confirmed that on 9th October, 2017, judgment was entered in default of appearance against him on behalf of the plaintiff. This witness's recollection of the accident was that the driver of the Ford Mondeo hit the brakes and that he collided with the back of it. He confirmed that the Ford Mondeo was struck first by the car he was driving, the black Volkswagen Golf, and that it spun in a clockwise direction and then hit the gable wall. He agreed that he had served six years in relation to a conviction concerning this accident.

24. By way of background to this incident, he told the court that the incident began when his own brother telephoned his mother's house, because his brother had indicated that there were people outside the door of his mother's house which was in Spriggs Road. It had been mentioned to him that the Heaphys were there and that that house was threatened to be petrol bombed. However, when he arrived there, there was no one there. He was driving home to Knocknaheeny and came upon and followed the red Ford Mondeo car. This witness did accept that he knew the driver of the red Ford Mondeo and identified him as James Simms. He denied an earlier statement to gardaí that the plaintiff had been in the passenger seat of the red Ford Mondeo vehicle. Although this witness denied that the red Mondeo had been chasing his vehicle looking for someone in the boot of his car, he agreed that there was an incident where the windscreen of the black Volkswagen Golf was smashed in with a hurley, and that this happened in Churchfield Avenue. This witness did recall telling An Garda Síochána that it was a front seat passenger who hit the windscreen of his vehicle with a hurley and

that he followed the car because of that.

25. Although this witness gave evidence that he did not intend to seek revenge on those who were in the motor vehicle i.e. the red Ford Mondeo, he did admit being angry as he followed this vehicle and that he had an intention to catch up with them and to seek revenge. Although he denied it was his intention to ram the first vehicle when he caught up with it, he didn't have any reasonable explanation for what the point was in catching up with them.

26. This witness agreed that it was correct that it was a Heaphy who broke his windscreen. He agreed with what Mr. Heaphy said, which was that this witness had tried to reverse into Mr. Heaphy and roll him over up in Churchfield. In addition this witness agreed that the plaintiff had beaten him up in the past and that the plaintiff was convicted of assault. His belief was that the plaintiff was serving time at present for an assault on him which occurred in 2015 when he suffered a belt with a slash hook and he confirmed that it was the plaintiff John Heaphy who gave him the belt of a slash hook and that he suffered a fractured leg as a result.

The plaintiff's legal submissions
27. The plaintiff's submission is that the immediate and approximate cause of the collision was the driving of the first named defendant. The plaintiff further submits that clause 5(2) of the MIBI Agreement of 29th January, 2009 does not exclude him from relying upon a right to compensation as against the first named defendant.

28. The plaintiff asserts that there is no evidence of a joint enterprise between the plaintiff and the first named defendant, nor is there any authority in law or support on the facts of this case for the proposition that the first named defendant owed no duty of care to the occupants of the Ford Mondeo vehicle driven by the second named defendant. In addition, the plaintiff repudiates the defence's claim that he should be precluded from recovering damages by reason of the fact that he was engaged in a type of criminal activity. It is submitted that there is no evidence of such criminal activity and that, in any event, s. 57(1) of the Civil Liability Act 1961 establishes that it is not a defence merely to show that a plaintiff is in breach of civil or criminal law. In addition, the plaintiff submits that this case does not come within the narrow circumstances where public policy offers a defence. The plaintiff claims that the injuries he sustained were caused by the collision of the Volkswagen into the back of the Ford Mondeo and not because of the swerve action of the Ford Mondeo into the Hollywood Estate. The plaintiff says that it is proved by the evidence of the motor assessor, the consultant engineer and the gardaí. The plaintiff referred the court to two cases on causation; *Conole v. the Redbank Oyster Company* [1976] I.R. 191. In that case, the defendants were well aware that the boat which had been manufactured for them was unseaworthy and unsafe but despite this the captain took some 50 children out in this boat leading to the boat capsizing and to the drowning of nine children. The Supreme Court held that the boat owner was entirely liable and declined to make an order for any contribution by the manufacturer. Henchy J. stated that:

> "the direct and proximate cause of this accident was the decision of the defendant … to put to sea with passengers when they had a clear warning that the boat was unfit for the task. The defendants were the sole initiators of the causative negligence…"

29. He had stated earlier in the decision:

> "Of course, the defendants are entitled to say that there would have been no accident if the manufacturer had not been in default in supplying an unseaworthy boat. However, as far as the negligence that resulted in the drownings is concerned, any such default by the manufacturer would have been *a causa sine qua non* and not a *causa causans*".

30. The plaintiff uses this authority to support the plaintiff's claim that the earlier driving of the second named defendant was overtaken by the subsequent and more decisive negligence of the first named defendant in rear ending the Ford Mondeo. The plaintiff's counsel also refers in their legal submissions to the case of *Hayes v. Minister for Finance* [2007] 3 I.R. at 190. In this case An Garda Síochána pursued a motor cycle at speed. The plaintiff was a pillion passenger on the motor cycle who suffered personal injuries and the death of her unborn child when the driver of the motor cycle collided with an oncoming car. The plaintiff won her action in the High Court for damages by reason of the garda negligence in giving chase and causing a bad driving decision by the driver. This decision was reversed in the Supreme Court on a number of grounds. Relevant to the instant case was the finding that the nature of the driver's negligence in colliding with the oncoming car amounted to a *novus actus interveniens* and this was the proximate and immediate cause of the plaintiff's injuries. Kearns J. in fact found that there was not any want of care on the part of the gardaí in that the car pulled back immediately before the collision, but said that even if there had been some negligence in continuing the pursuit of the motor cycle, it was not causative of the plaintiff's injuries nor did it contribute to them in any way. He said "it seems to me that any sensible application of the principles in *Conole v. Red Bank Oyster Co*. must lead to the conclusion that the effective negligence leading to the accident was that of the motor cycle".

31. The plaintiff relies on this line of reasoning to conclude that the earlier driving of James Simms, the second defendant, was not effective in this case. It is argued that just as Kearns J. dismissed the reason why the driver of the motor bike was driving in the way he was, the original role of John Heaphy in urging James Simms to follow the Volkswagen was remote from the violent rear ending which occurred in the end. Anything could or may have happened in the meantime and that act did not make any legal causative sense. It is further argued that even if the plaintiff is incorrect and the actions of the second defendant or the plaintiff did play a causative role in the crash, this would not absolve the first named defendant from the substantial role in causing the accident.

32. The plaintiff then refers to the defence under clause 5 of the MIBI agreement of the 29th January, 2009. In the *Law Society of Ireland v. MIBI* [2017] IESC 31 at para. 26, O'Donnell J. states that the 2009 Agreement now satisfies an important obligation under Directive 2009/103/EC which requires the State to make provisions for "a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified". It is clear that the scope of the exclusions of liability must be within the scope of Directive. The plaintiff's Counsel argue that one such exclusion arises under clause 5.2 of the Agreement which provides as follows:

> "5.2 Where at the time of the accident the person injured or killed or who sustained damage to property voluntarily entered the vehicle which caused the damage or injury and MIBI can prove that they knew that there was not in force an approved policy of insurance in respect of the use of the vehicle, the liability of MIBI shall not extend to any judgement or claim either in respect of injury or death of such person while the person injured or killed was by his consent in or on such vehicle or in respect of damage to property while the owner of the property was by his consent in or on the vehicle".

33. The plaintiff then concedes that he cannot recover under the terms of the MIBI Agreement of the 29th January, 2009 for damage, including personal injury, caused by the driving of the second named defendant, James Simms. The plaintiff to his credit openly admitted that he knew he was not insured.

34. Applying the terms of this defence under clause 5 of the MIBI Agreement to Philip Murphy, the first named defendant, the plaintiff contends that it is equally clear that clause 5.2 only applies in relation to the driving of the vehicle in which the injured party is travelling and that this is clear from the phrase, "voluntarily entered the vehicle which caused the damage or injury". The plaintiff argues that there is no evidence whatsoever that the plaintiff knew that Philip Murphy, the first named defendant did not have a valid policy of insurance and nothing of the kind was even suggested to him.

35. In terms of public policy considerations it was argued on behalf of the plaintiff that he was cross-examined vigorously on two points:

1. Originally urging the second named defendant to drive the Mondeo in pursuit of the Volkswagen.

2. In remaining in the vehicle while it was travelling at speed.

In the case of *Alan Anderson v. Thomas Cooke and Brian Cooke* [2005] 2 I.R. 607, the plaintiff was a passenger in a car owned by the first named defendant and driven by the second named defendant which was involved in an accident. The defendants asserted that the plaintiff should not recover because he was present in the vehicle for the purposes of taking photographs of the speedometer while the car was travelling at maximum speed for posting on an internet website. It was claimed that this rendered him a party to an illegal enterprise and that the defence of *volenti non fit injuria* and *ex turpi causa* precluded him from recovering damages. Finnegan P. agreed and dismissed the plaintiff's claim. However it is pointed out in the submissions that the High Court has since said that he did so on very specific and narrow grounds, setting a high bar for a defence of this kind.

36. It is argued that the plaintiff cannot in this case show any agreement with Philip Murphy, the first named defendant, whether on originally leaving the estate in the Mondeo to pursue Darren Lenehan or at any time, to him being rear ended at speed.

37. In *Tevlin v. McArdle and MIBI* [2014] IEHC 436, the plaintiff was a passenger in an uninsured car driven by the first named defendant. The issue was that he knew the driver was intoxicated when he voluntarily entered the vehicle and as a result of his intoxication the driving was irresponsible and at excessive speed. Cross J. held that in spite of this the driver still owed the passenger a duty of care. He also held that there was no means by which public policy prevented the plaintiff from recovering damages against the intoxicated driver. He held that *Anderson v. Cooke* "resulted from a highly unusual set of circumstances that are unlikely to be repeated…". The plaintiff was however guilty of contributory negligence and his award was reduced by 35% in respect of the intoxication.

38. In *Shaughnessy v. Nohilly and Nohilly* [2016] IEHC 767 Barton J. took a view on the narrow scope of public policy. In this case the plaintiff suffered injuries during an affray and one of the questions of fact was whether the plaintiff and his friends started the affray. The plaintiff passed a car connected with the defendants and shouted something at them. The defendant notified her family who arrived and became involved in the affray. The defence argued on basis on the principle of *ex turpi causa non oritur* action. Barton J. stated that the onus to prove this defence rests with the defendant and he observed that:

> "Even without the benefit of the precepts and principles deriving from Article 40.3.2 of the Constitution, it is clear from the decisions in other common law jurisdictions, that a complete bar to recovery by way of defence on the basis of the *maxim ex turpi causa* should only be permitted in very limited circumstances: See *Wasson v. Chief Constable, Royal Ulster Constabulary* [1987] N.I. 420 and *Hall v. Herbert* [1993] 2 S.C.R. 159. The basis and exercise of the power to bar recovery on the ground of the plaintiff's immoral or illegal conduct is founded in the duty of the court to preserve the integrity of the legal system; the exercise of that power should be confined to circumstances in any given case where concern for that matter arises".

39. In *Wasson* the plaintiff was involved in a serious riot before he was struck by a police officer who fired a plastic baton round. The plaintiff's damages were reduced by a finding of 50% contributory negligence. In *Shaughnessy*, Barton J. apportioned the fault against the plaintiff at 40% and reduced the damages accordingly. The plaintiff also submits that the MIBI is in no better position than other defendant in invoking a defence of public policy. They cannot say that the compensation is paid by tax payers and therefore they are entitled to some broader defence than would be open to other defendants. The plaintiff states that this suggestion was not made in *Tevlin v. McArdle and MIBI* and further that this was not held to be the case in the U.K. decision of *Delaney v. Secretary of State for Transport* [2014] EWHC 1785. The court here was concerned with the U.K. equivalent of the Agreement, which also followed Directive 2009/103/EC. This case involved much more egregious behaviour, where a drug dealer was injured during the course of a criminal joint enterprise. The court stated:

> "The understandable reaction might be: there must be some rule of public policy, reflecting public revulsion, which bars such a claim. The short answer is that there is not. The Court of Appeal held in terms that the insurer's public policy defence failed on these facts, and that must be the end of that matter in terms of domestic law. The relevant European Directives clearly state that there are only certain limited exceptions to liability in these circumstances, and that too must be the end of the matter as a matter of Community law."

40. The plaintiff concludes that the immediate and approximate cause of the collision was the driving of the Volkswagen vehicle. It is argued that there is no evidence of a joint enterprise and no authority for excluding the plaintiff from recovering damages by reason of the fact that he was allegedly engaged in a criminal activity. It is argued that there are no public policy reasons to exclude the plaintiff from recovering damages even if the facts as asserted by the MIBI are accepted, and the outcome should be an apportionment of damages.

Submissions of the third named defendant

41. The third named defendant, the MIBI, is being sued on the basis of the MIBI Agreement of 29th January, 2009 ("the Agreement"), which provides for compensation for victims of road traffic accidents, involving, *inter alia*, uninsured vehicles.

42. The MIBI claims that John Heaphy, the plaintiff, contributed to his own injuries due to:

(i) voluntarily assuming the risk of injury by travelling in the vehicle;

(ii) being involved in an illegal venture (the defence of *ex turpi causa*); and

(iii) not wearing a seat belt.

43. Regarding (i) voluntary assumption of risk, it is argued on behalf of the third named defendant that it was quite clear that the

plaintiff instigated and arranged for the second named defendant to drive the red Ford Mondeo, with the plaintiff travelling as the front seat passenger for the purposes of pursing the black Volkswagen Golf, being driven by the first named defendant and that he did so in spite of being aware that the second named defendant was uninsured.

44. The MIBI also submits that from the plaintiff's statement and evidence, he had the opportunity to leave the vehicle and to cease his involvement in the venture he had instigated when the vehicle had stopped at Churchfield Way Lower. However, he voluntarily continued to travel in the vehicle.

45. It is argued that the plaintiff's evidence is not credible and the following should not be relied upon:

> (i) that there was no animosity between the plaintiff and the first named defendant;
>
> (ii) that his main purpose in persuading the second named defendant to drive the Ford Mondeo in pursuit of the Volkswagen was to help his friend;
>
> (iii) that the reason he did not get out of the car being driven by the second named defendant was because he feared for his own safety;
>
> (iv) that as the car passed the Apple Computer Complex it went through the roundabout nice and slow or that as it came up to the traffic lights at the end of Kilmore Road, it drove through the lights and back on to Harbour View Road slowly;
>
> (v) that the car in which the plaintiff was travelling was not being pursued by the first named defendant.

46. The MIBI submits that there is sufficient evidence before the court to support a finding of fact that the plaintiff was instrumental in organising and participating in a joint venture with the second named defendant and others for the purpose of actively pursuing and following the vehicle being driven by the first named defendant in circumstances where the plaintiff knew or ought to have known that he was placing himself and others at risk of injury. Furthermore the plaintiff took no steps to protect himself from being injured as he failed to exit the vehicle and/or failed to report his alleged fears of being injured by the first named defendant to the gardaí.

47. The MIBI further submits that the evidence supports a finding that the plaintiff displayed reckless disregard for his own safety by virtue of his actions and that there was contributory negligence. He willing participated in activities when he knew such activities might result in him suffering injury and he knew or ought to have known that collision was foreseeable, likely and probable.

48. The MIBI submits that s. 34(1) of the Civil Liability Act, 1961 ("the 1961 Act") provides that where it is proved that the damage suffered by the plaintiff was caused partly by negligence or want of care of the plaintiff, 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.

49. The MIBI submits that the plaintiff and the first and second named defendants were all part of an illegal venture which allows the MIBI to rely on the defence of *ex turpi causa*. The actions of the parties formed an integral part of the illegal and wrongful acts which caused the acts the subject matter of these proceedings.

50. However the MIBI accepts s. 57(1) of the 1961 Act "provides that it shall not be a defence in an action for tort merely to show that the plaintiff is in breach of the Civil or Criminal Law". However the MIBI submits that by reason of the special and exceptional facts of this case, the plaintiff is owed no duty of care by the drivers. These facts suggest that all the parties to the case were involved in a joint and illegal and criminal enterprise whereby the first and second named defendants were engaged in activities of pursuing or being pursued by each other in circumstances where there was evidence of animosity between the first named defendant and the occupants of the Ford Mondeo. The judgment of Finnegan P. in *Anderson v. Cooke* [2005] IEHC 221 is relied on in this regard.

51. Finnegan P. held in Anderson that the effect of s. 57(1) of the 1961 Act was "to modify but not to abolish the defence of *ex turpi causa*". He stated that "in *O'Connor v. McDonnell*, Murnaghan J. cited with approval the statement of the law by Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 341:-

> "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act if from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes: not for the sake of the defendant."

52. Finnegan P. held that it was not every crime committed by the plaintiff which would cause him to be non-suited, and stated that the maxim is more likely to have application in circumstances of joint illegal activity.

53. Finnegan P. also referred to the Australian case of *Gala v. Preston* [1991] 172 CLR at 243 where the plaintiff and three defendants had spent the day drinking and then stole a car. It was held in that case that the plaintiff and the first named defendant were engaged in a joint and illegal enterprise and that "the driver of the vehicle owed no duty of care to the plaintiff as the parties were not in a relationship of proximity such as to give rise to a relevant duty of care since it was not possible or feasible for a court to determine what was an appropriate standard of care to be expected in the circumstances".

54. Finnegan P. went on to say that there must be very specific circumstances to preclude a plaintiff from recovering damages as the mere fact that a plaintiff is involved in a criminal act is not itself a defence to tort and that this is supported by s. 57(1) of the 1961 Civil Liability Act. He dismissed the plaintiff's claim in this case on very specific and narrow grounds, holding that there was no prior agreement between the plaintiff and the defendant to waive his legal rights, and that the defence of *volenti non fit injuria* could not be relied upon.

55. Finnegan P. held that even in a case of a criminal act in which both the plaintiff and the defendant are jointly engaged, the court is required to inquire upon the basis of proximity whether a duty of care exists and if so, what duty arises on the part of the defendant to the plaintiff in the circumstances of the particular case. If the court is unable to determine this, then the plaintiff's claim will fail. He stated that "the denial of relief is related not to illegal character of the activity, but rather to the character and incidents of the enterprise upon which the plaintiff and the defendant are engaged and to the hazards which are necessarily inherent in its execution".

56. Thus the MIBI submits that the court ought to conclude that both vehicles were engaged in a high speed chase and that such

activity carried with it a high probability that one or both cars would go out of control or cause a collision. Each of the parties were fully aware of this probability but chose to proceed and to ignore the risks.

Seatbelt
57. The plaintiff was not wearing a seatbelt and the MIBI submits that the plaintiff would not have suffered such injuries of the kind and to the extent claimed had he been wearing a seatbelt. The MIBI points to *Hamill v. Oliver* [1977] I.R. 73 where the Supreme Court stated that:

> "any person who travels in the front seat of a motor car, be he a passenger or driver, without wearing an available seat belt must normally be held guilty of contributory negligence if the injuries in respect of which he sues were caused wholly or in part as a result of his failure to wear a seat belt."

Clause 5.2 of the agreement
58. The plaintiff admitted in evidence that he was aware that the second named defendant did not have insurance and that he voluntarily entered into the vehicle. Therefore the MIBI submits that their liability does not extend to any judgment which the plaintiff might obtain against the second named defendants.

59. Finally the MIBI submits that the evidence supports a finding by the court that all or at least a greater part of fault lies with the second named defendant due to the manner in which he drove immediately prior to the accident. Speed was a major factor in the accident and neither the engineer nor the motor assessor were in a position to rule out the occurrence of an accident if the vehicle in which the plaintiff was travelling had gone out of control. The MIBI submits that an accident in which the plaintiff would have suffered injuries was likely to happen even without any collision.

60. The MIBI submits that the court is entitled to:

> (i) dismiss the plaintiff's claim against the first, second and third defendants or alternatively;
>
> (ii) dismiss the plaintiff's claim against the first defendant and attribute liability for this accident to the second named defendant in addition to;
>
> (iii) a finding that the plaintiff was guilty of contributory negligence to a very substantial degree in (a) failing to wear a seatbelt and (b) voluntarily engaging in activities on the night in question which he knew were likely to expose him to risk of injury or damage.
>
> (iv) In the event of the court finding that both the first and second defendants are concurrent wrong doers then the plaintiff must receive, after due allowance for contributory negligence, a joint and several judgment against each defendant.

Findings of Fact
61. It is clear that this accident occurred when a black Volkswagen Golf, driven by the first named defendant, rear ended the red Ford driven by the second named defendant. It is clear from the evidence that the plaintiff was a close family friend of the second named defendant. This Court finds that the red Ford Mondeo wobbled and veered to the left and began to go out of control just before the impact. The Court accepts the evidence of Garda Keane. It is also clear that it was both foreseeable and high probable that both cars would crash in any event.

62. It is clear from the evidence that the Ford Mondeo was just approaching, or on, a speed ramp at the entrance to Hollywood estate, Hollyhill, Cork at the point of impact. By way of background to the case, and it is not disputed, Derry O'Callaghan, then nineteen years of age, was seated in the middle of the backseat of the Ford Mondeo motor vehicle. Cornelius John Dolan, then sixteen years of age, was seated on the left hand side of the car behind the plaintiff and John Heaphy was a front seat passenger. Shane Heaphy was seated in the rear of the car behind the driver (James Simms). Derry O'Callaghan suffered extensive injuries and died in Cork University Hospital the following morning. Cornelius John Dolan was pronounced dead on admission to Cork University Hospital immediately after the collision. The extent of their injuries and the extent of the damage to the rear of the Ford Mondeo testifies to the force of the collision. This Court recognises and accepts the evidence given that, on 16th December, 2010, both Philip Murphy and James Simms were convicted of dangerous driving causing the death of these two young men, contrary to the Road Traffic Acts.

63. There were a number of gardaí at the scene of the collision. Indeed, Detective Garda Michelle Quinn and Garda Thomas Keane witnessed the accident from an unmarked garda patrol car. The court accepts the garda forensic examiner's evidence who photographed the scene immediately after the collision and whose photographs were admitted in evidence, showing that the Ford Mondeo suffered extensive damage to the rear. Photograph No. 7, in particular, shows the rear of the Ford Mondeo pushed in but at an acute angle to its direction of travel. The car went on to a further, but less serious collision, with the gable wall of the house near the entrance to the estate. This second collision caused a scraping along the left hand side of the Mondeo and some frontal damage. It is further accepted by this Court that the forensic garda photographs taken of the scene showed brake marks along the path of travel of both vehicles from the east bound lane on Harbour View Road, turning right into Hollywood estate which garda witnesses confirm would not have been included in the evidence adduced before the Circuit Court were this evidence not linked to the collision. There is no evidence of slowing down by the Volkswagen and the only reasonable conclusion is that these brake marks were caused by the Ford Mondeo as it made the turn.

64. The plaintiff's evidence has to be viewed with great caution in a number of respects. This Court finds that he was quite aware that the second defendant had previous convictions and was "off the road", had escaped from Shelton Abbey, had been banned from driving, and yet earlier that day he had been a passenger in a vehicle driven by the second defendant when they were stopped by the gardaí and "let go". The plaintiff tries to argue on this basis that he therefore assumed his friend was in the clear on these counts.

65. The plaintiff's version of events is not credible with regard to the fact that the red Ford Mondeo, being driven by the second defendant on the occasion of the accident, was actually registered to the plaintiff's mother's address in the name of a James O'Sullivan whom he claimed was a person not known to him, yet he denied that the second defendant lived at his mother's address.

66. The plaintiff admitted that he got into the second named defendant's motor vehicle with his young son, knowing the second

defendant was not insured. He accepted that such an action, i.e. driving without insurance, was a crime and he understood the consequences of so driving. While the plaintiff claimed not to have known that the second defendant had a history of this kind of driving, given that he expressed the second defendant's delight at getting past the gardaí after being stopped without insurance, the plaintiff had to have known the truth of the situation i.e. that the second defendant was driving without insurance on the vehicle in question.

67. It is clear that the plaintiff admits that he went looking for the black Volkswagen vehicle being driven by the first named defendant and "got lucky". It is quite clear that at one point, stopped on Lower Churchfield Way, he must have been in a state of high alert given the aggression of the black Volkswagen reversing, and that those in the first car thought that the second vehicle was going to run on top of them, and that they therefore got back into their car and went away. At this point a hurley stick was used to break the windscreen of the Volkswagen. The plaintiff claimed not to know about that and not to have followed that vehicle; however the person who carried out this act was described by those in the second vehicle as being a front seat passenger in the Mondeo. The plaintiff's evidence is just not credible on this point.

68. In his evidence the plaintiff actually talks about walking over to what he describes as "my car" and says that he wanted to go home. His response to this when cross-examined was that the second defendant had the keys to this particular Ford Mondeo car and that therefore it was his car, not the plaintiff's. The plaintiff describes himself as being driven by his own wife who has a car when he needs to go somewhere. This witness admitted that he was part of what was put to him was the "entire outing" but he said he wanted to save his friend. However, it is clear from the evidence that when the two vehicles stopped in Churchfield Road Lower, he was aware that his friend was no longer in the boot of the Volkswagen vehicle, as he had thought, yet he continued to allow himself be carried in an uninsured vehicle knowing that this was the case.

69. The evidence of Mr. Philip Murphy is viewed with caution. He admitted that he collided with the red Ford Mondeo and that he spent six years in prison for driving the black Volkswagen Golf on the occasion of the accident. This witness confirmed the sequence of events, saying that the red Ford Mondeo was struck by his vehicle which then caused the first vehicle to spin in a clockwise direction and hit a gable wall. This witness claimed not to have done so on purpose. This Court is doubtful about his evidence on this point. It was quite clear from this witness's evidence that there was an atmosphere of conflict at the commencement of this entire incident. He describes his brother phoning his mother's house with his brother of the view that there were people outside the door in Spriggs Road. His explanation for going to that area was that there was supposed to be some kind of trouble there and that the Heaphys were there. He believed that there was a threat to petrol bomb his mother's house but that there was no one there. On his way home he followed the red Ford Mondeo. He claims that he only knew the driver of the red Ford Mondeo when they met in Churchfield. He identified that person as the second defendant and denied telling the gardaí that the plaintiff was in the passenger seat. His evidence in this civil action is a variance with his evidence to An Garda Síochána where it was put to him that he told the gardaí that the plaintiff was in the passenger seat of the vehicle in question. This witness indicated that the front seat passenger hit the windscreen with a hurley and that he followed the first vehicle because the hurley went through the windscreen. This witness admitted that after that point he followed the first vehicle because he was angry and wanted to seek revenge. He had no reasonable explanation for catching up with the first vehicle other than that it was his intention to ram that vehicle. It is clear that he was out for revenge. This witness agreed under cross-examination that the plaintiff was the front seat passenger in the first vehicle and that he was therefore the man who broke the windscreen and that he was a Heaphy. The character and incidents of this witness's evidence make it quite clear that what happened is outside the norm in a road traffic accident.

70. He gave evidence that the plaintiff had beaten him up in the past and that the plaintiff was convicted of assault. He thought that the plaintiff was at present serving time for that assault on him which occurred in 2015 when he described getting a belt with a slash hook. He confirmed to the court that it was the plaintiff who gave him that belt and that he had a fractured leg as a result.

71. The Court finds the plaintiff voluntarily assumed the risk of injury by travelling in the vehicle which had no insurance and in respect of which he knew that the driver was not insured. He took his young child in the vehicle. This Court accepts the evidence adduced by the plaintiff's expert witnesses, David Harrington, the motor assessor, insofar as he concluded that the first vehicle must have slowed down at or near the speed ramp in order for the collision to occur and that there was no expert witness to counter this thinking. His evidence is accepted in relation to the pattern of damage and is also in line with the evidence of Detective Garda Michelle Quinn who witnessed the accident and whose evidence is accepted by this Court. This Court finds as a fact that the plaintiff instigated and arranged for the second named defendant to drive the red Ford Mondeo with the plaintiff as a front seat passenger for the purpose of pursuing the black Volkswagen Golf being driven by the first defendant and that he did so despite the fact that he was fully and well aware that the second defendant was an uninsured driver. This Court finds as a fact that the plaintiff had an opportunity to cease his involvement in the venture he had instigated when the vehicles were stopped at Churchfeld Way Lower and that he voluntarily continued to travel in the vehicle even though he could have left the vehicle at that point.

72. This Court finds that the plaintiff's evidence is not credible nor could it be relied upon in relation to his contention that there was no animosity between the plaintiff and the first named defendant. This is clearly in conflict with the evidence of both the plaintiff and the second defendant who certainly indicated a history to this incident of animosity and difficulty.

73. This Court rejects the plaintiff's evidence when he asserts that the vehicle in which he was travelling passed the Apple Computer Complex, that it went through the roundabout "nice and slow" or that, as it came up to the traffic lights at the end of Kilmore Road, it drove through the lights and back onto Harbour View Road "slowly". This is not credible evidence and the Court has fully considered the evidence of the plaintiff's expert witnesses and of the gardaí who countered this and showed the reality that both cars were travelling at approximately 120 mph immediately prior to this accident and that the first vehicle had to have slowed in order for a collision to occur as described by the motor assessor and the plaintiff's own engineering evidence. This Court does not accept for one second the plaintiff's claim that the car in which he was travelling was not being pursued closely by the first named defendant.

74. This Court finds, having carefully measured all of the evidence and considered same in detail, that there is ample evidence to support a finding that the plaintiff was in fact instrumental in organising the entire outing for the purpose of actively pursuing the black Volkswagen Golf and following the vehicle being driven by the first named defendant. This occurred in circumstances where the plaintiff knew or ought to have known that he placed himself and others at risk of injury. This Court concludes that the plaintiff and the defendants had to have known that this collision was foreseeable, likely and probable.

75. This Court notes that the third named defendant accepts that s. 57(1) of the 1961 Act "provides that it shall not be a defence in an action for tort merely to show that the plaintiff is in breach of the Civil or Criminal Law."

76. This Court notes that it is a matter for the plaintiff to prove his case on the balance of probabilities. This Court has inquired into the basis of proximity and as to whether a duty of care exists and, if so, what duty arises on the part of the defendant to the plaintiff in the circumstances of this case. In examining this question regarding the defendants, this Court concludes that the plaintiff

was fully aware of the position he was placing himself in when he voluntarily assumed the risk in a joint enterprise, seeking out trouble which involved extreme hazards not only for the plaintiff but for others in the motor vehicle, two of whom died as a result of this accident and where this gave rise to two convictions of dangerous driving causing death. In assuming such a role, the plaintiff assumed a high degree of risk and hazard. It was highly probable that both vehicles engaged in a high speed chase which points to a high probability of both vehicles going out of control or causing a collision. The plaintiff and the defendants chose to proceed and ignore the risks.

77. Given that this Court has found that there was a joint venture and that there was a high degree of speed involved, in itself illegal, in circumstances where there was vengeful purpose, and looking at the character and incidents of the enterprise upon which the plaintiff and the defendants were engaged and the hazards which were necessarily inherent in its execution of the hazardous enterprise on the occasion in question, this Court finds that it was highly probable that the first named defendant's vehicle would have gone out of control or caused a collision and that the defendants and the plaintiff had to be fully aware of this probability. However, they still chose to proceed and ignore the risks. This Court notes that the plaintiff was not wearing a seat belt and that speed was a factor in the accident and neither the plaintiff's engineer nor the plaintiff's assessor where in a position to rule out the occurrence of an accident if the vehicle in which the plaintiff was travelling had gone out of control. The MIBI submits that an accident in which the plaintiff would have suffered injuries was likely to happen even without any collision. This Court accepts that proposition as a matter of high probability, applicable to the plaintiff's and to the defendant's involvement.

Conclusion
78. This Court does not accept the plaintiff's engineer's evidence when he declined to accept as a matter of probability that the Ford Mondeo would have lost control and probably hit something in any event, nor his evidence that the Ford Mondeo was travelling at an appropriate speed.

79. This Court is entitled on the evidence it has heard to conclude that the real and true cause of this accident was the fact that two vehicles were chasing one another over a long period of time in a joint enterprise in exceptionally dangerous circumstances and that the effective cause of this accident has to lie in this fact. This Court does not accept that the original role of the plaintiff in urging the second defendant to follow the first defendant's motor vehicle was remote from the crash which occurred in the end. This Court accepts in full the submissions made by the third named defendant and dismisses the plaintiff's claim against the first, second and third defendants on the basis that all were part of a thoroughly illegal venture, with aggression and revenge at its centre and a shared complete disregard for their own safety and for the safety of others to an extreme degree. This is a case both special and exceptional on the facts and this Court has a duty to uphold the integrity of the legal system and holds that the defence of ex turpi causa is warranted in this case. In all the circumstances, it was both foreseeable and probable that the red Ford Mondeo would have crashed in any event. Likewise, given the proximity of the second vehicle to it and the ferocious speed of both vehicles, it was highly probable that the black Volkswagen would also have crashed. In all the circumstances this Court cannot conclude or decide a duty of care existed from the defendants to the plaintiff and the plaintiff's case must fail.

80. The third-named defendant has raised the defence of *ex turpi causa non oritur* action and the onus of proof now rests with them. That burden is discharged by virtue of the conclusions of this Court and by virtue of the court's duty to uphold the legal system as set out in such limited circumstances as apply in this case. It is not in ease of the third named defendant that the court so finds but rather with respect to the court's own obligation as set out in paras. 44-61 herein and based on the court's findings of fact.