

## THE HIGH COURT

[2014 No. 10724 P.]

BETWEEN

STEPHEN BURKE

PLAINTIFF

AND

STEPHEN MULLALLY, MICHAEL MCGINN,

NORTH DUBLIN MOTOCROSS LIMITED

AND

THE MOTORCYCLE UNION OF IRELAND LIMITED T/A

MOTORCYCLING IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Hanna delivered on the 13th day of January, 2017

**General background**

1. The plaintiff in this case was born on 25th November, 1987. He is a Mullingar man and lives there to this day. After an uneventful education he left school and, since that time, he has worked as a brick layer having been apprenticed to that trade. He was keen on sport. He was heavily involved in kayaking and has instructed others in this pursuit at home and abroad. Another great passion of his is the world of motor bikes in general and motocross in particular. His engagement over many years in this sport ultimately led him to the unhappy circumstances which give rise to this case. From an early stage in his life he always had bikes. He used to go on trips with friends riding over rough terrain through forests and the like. His most recent acquisition to pursue this sport was a Honda 250cc motorbike. He always utilised the necessary protective gear. Some years ago, a motocross track opened near to his home and he was a regular attendee, practising hard with a view to increasing his skills and progressing through the amateur ranks of motocross.

2. Motocross is an exciting and spectacular sport. A non participant can readily perceive the sheer thrill and excitement enjoyed by its *aficionados* at whatever level of involvement. During the course of the hearing, the courtroom was shown a video demonstrating what occurs at motocross events, be they practice or racing sessions. Though this video demonstration was with specific reference to the *locus in quo*, it amply demonstrated two things. Firstly, it is easy to appreciate the sheer thrill and exhilaration it excites in both participant and spectator. Secondly, as skill and competition levels increase, it is unquestionably a dangerous sport carrying with it the ever present risk of injury, even serious injury and perhaps worse. The sport, therefore, is controlled and supervised by both international and national bodies and both spectator and driver safety *inter alia* would seem an obvious priority at all levels of the sport from the most junior participants (starting from around six years of age) up through ranks apparently determined by perceived advancing experience and achievement. It is, however, undoubtedly the case that with the best will in the world, accidents can and do happen no matter what level of skill is attained by participants. A regulatory framework exists for the promotion and running of this sport and the various events, practice or racing. The material international body, the Federation Internationale de Motorcyclisme (FIM) sets out written standards, *inter alia*, for the conduct of the sport. In turn, the Motor Cycle Racing Association of Ireland issues handbooks governing the sport and the running of various events. These regulations or guidelines are put into effect by the local club. This club and the material national organisation are joined as parties in these proceedings along with the second named defendant, Mr. Michael McGinn. As chairman of the local club, the third named defendant, Mr. McGinn gave evidence at the trial in his own behalf and as representative of all other defendants apart from the first named defendant, Mr. Mullally. Mr. McGinn was the steward of the course present in that capacity on the day of the matters complained of.

3. On the 19th January, 2014, the plaintiff took part in a practice motocross event at a race track in Gormanstown, Co. Meath. This track was laid out in a disused quarry. That afternoon, as the practice session was drawing to a close, the plaintiff fell from his bike while negotiating a double jump on the eastern (sea) side of the course. He was then struck by another motor cycle driven by the first named defendant, Mr. Mullally, who was travelling behind him. The plaintiff suffered a life threatening chest injury, multiple rib fractures, a collapsed lung and bleeding into his chest. He sustained a fracture of his left clavicle, a fracture of his left shoulder blade and a left sided brachial plexus injury. As a consequence, he has been left with a severe brachial plexus injury, chest wall deformity, breathlessness and chronic neuropathic pain with life long implications and it is common case between the parties that he will require some level of on-going assistance for the rest of his life. The plaintiff seeks to recover damages for negligence and breach of duty and has brought these proceedings against Mr. Mullally, the motorcyclist who collided with him, the local and national organisations governing the sport and Mr. McGinn, the chairman of the local club, cited as second named defendant. The case proceeded before me over six days. Much of that time was taken up with medical and related matters dealing principally with the question of the extent of future assistance which the plaintiff might require and the future costs thereof together with the impact of the injury on the plaintiff's employment prospects and such implications as that might have for his future earning capacity. There is no doubt as to the significance of the extremely serious injuries which the plaintiff suffered in physical and psychological terms. The main conflict between the parties revolves around the issue of liability. A number of observations are appropriate.

(a) No issue arose as to the condition or structural suitability of the racing track. It was common case between the parties that the track was both suitable and appropriately maintained for the conduct of the sport and for the practice session in particular which was in progress when the plaintiff met his unfortunate accident. Indeed two days prior to the accident the track was graded, a process where a machine, similar to that of a bulldozer, uses a blade to level the terrain and fill in lower points on the ground.

(b) It is not disputed that there was a substantial number of people there on the day of the accident although the numbers had significantly dwindled by the time the accident occurred. The crowd comprised participants, officials of varying type and degree and spectators who, it being a practice session rather than a racing event, comprised family members, supporters and, no doubt, a coterie of devotees of the sport.

(c) There is controversy as to the presence of juvenile participants in the practice session. The plaintiff maintains some were present. The defendants deny this. The court was told that the juniors, riding automatic, low-powered bikes and

would practice or race on a foreshortened course. Again, the existence and location of such a foreshortened course was in dispute. The adult participants, obviously, drove much bigger and more powerful machines. The plaintiff was riding a Honda 250cc bike. Mr. Mullally, on the other hand was riding a 450cc machine which was slightly heavier than the plaintiff's bike and obviously more powerful. Participants in the session would have been riding bikes of different capacity and weight although machines with greater power and substance might not necessarily be the most effective in competitive racing. Experienced competitors might use bikes of the capacity of the plaintiff's machine against more powerful motor bikes to tackle more effectively the terrain presenting to competitors in races.

(d) Competitors were graded into three categories, namely A, B and C. Grading would be arrived on the basis of performance including lap times over the season. At race meetings, according to Mr. McGinn, competitors would often been drawn from all three categories to race against each other.

(e) This brings us to the substantial area of controversy in the case. As in any sport, publicly run events bring with them their *cuadrilla* of officialdom. In motocross, this can be extensive. Under the supervision and control of the clerk of the course are gathered, *inter alia*, the time keepers, officials, marshals and para-medical attendees. In the latter case these services were provided by the Red Cross on a voluntary basis. Two ambulances would attend race meetings and one at a practice session. One was present on the occasion in question.

(f) Central to the case was the absence of a "flag marshal" at the point on the race track where the plaintiff came to grief. However I will return to this in more detail later. Positioned beside the *locus in quo* and at various points around the race track were boxes referred to as marshal boxes. The purpose of these was to provide a panoramic stand point for a flag marshal whose function it was *inter alia*, to wave a warning flag to following drivers should a rider fall or some other danger present itself to the competitors in a place where such might not be immediately visible to them. For convenience I will adopt the illustrative enumeration employed by Mr Tony O'Keefe, consulting engineer and refer to these boxes as MB1 etc.

(g) The governing regulations provided that, at race meetings, at this particular race track, thirteen flag marshals should be on duty and, at practice sessions, that number would reduce to eight.

(h) An interesting feature of this case is that notwithstanding the presence of spectators, participants (who were around to twelve in number by this time), flag marshals and other officials there was a distinct absence of eyewitnesses as to what actually happened or its aftermath. We know that there was a significant number of people there, although one cannot put an exact figure on it. Further, we know that a number of people must have seen or heard the accident take place because the two ambulance men who, even though they had a panoramic view of the mound which the two riders involved had sought to clear, could not see the actual incident they nevertheless observed a number of spectators rushing towards the scene. Further, we know from the investigation carried out by Mr. McGinn and by interviews carried out by Mr. Parrish on behalf of the defence that a Mr. Boyle, a Mr. Mulligan and a Mr. Galvin were all identified as being persons who might have something relevant to tell us. For a variety of reasons, we heard from none of these. I make no comment one way or the other, other than to point this out. Such witnesses would have been available to both parties and it is, I find, perplexing that, apart from the plaintiff, no one gave eye-witness evidence of what occurred at the moment of impact.

(i) The other driver involved in the accident, Mr. Mullally, was sued and appears named as the first defendant. He was legally represented at the hearing. Notwithstanding being cited as a defendant in the proceedings, at no point of the plaintiff's case was any ascertainable case made out against Mr. Mullally. As far as the plaintiff's case went Mr. Mullally was as blameless at the end of that case as he was at its opening. As regards Mr. Mullally's co-defendants, no case was made against him seeking indemnity or contribution. No notice to this effect was served upon him. Accordingly, at the conclusion of the plaintiff's case and for the reasons set out in my ruling at the time the case against Mr. Mullally was dismissed leaving remaining only the issue of his costs. We didn't hear from Mr. Mullally after that.

(j) The only people from whom we heard and who came within the broad definition of eye-witnesses were Mr. Constantin Ivanov, a flag marshal positioned further up the track at the next marshal box, and Mr. Fogarty and Mr. Farrell, two ambulance volunteers who were positioned at the opposite end of a straight leading up to the jump where the accident occurred. Even though they did not see the actual impact their evidence is of significance and I will deal with same later.

(k) As I have already indicated, there was no dispute as to the standard, condition, and general suitability of the race track is in question. This much was confirmed by the evidence from Mr. Tony O'Keefe and Mr. Anthony Tennyson, consultant engineers and Mr. Stephen Parrish, himself an engineer and acknowledged expert in and commentator on motor bike racing with particular reference in this instance to motocross. All agreed that this was an exciting but dangerous sport and that the framework of rules and regulations surrounding the conducting of events be they race meetings or practice meetings took account of concerns for the safety of spectators, officials and participants alike.

(l) Apart from the issue of the provision and deployment of a marshal in the box adjacent to the crash and whether or not Mr. Mullally and the plaintiff should have been out on the course at the same time or in the general vicinity of each other (Mr. Mullally being a higher grade and more experienced rider riding a bigger more powerful machine) no other substantive complaint was made. It was accepted that no issue arose as to defective machines being allowed out or want of safety gear or checks. There was no complaint of any short-coming in the provision of emergency services. There was no suggestion that the course was too difficult for the plaintiff or that he was caused or permitted to do anything that he did not feel secure in doing.

(m) It seems to be that the following are material questions to be addressed in determining liability in this matter.

(i) Ought the plaintiff and Mr. Mullally to have been on the race track at the same time?

(ii) Was it the practice of the second to fourth named defendants (hereinafter referred to as the defendants) to provide a flag marshal in the marshal box at the scene of the accident (MB11) at practice sessions and race meetings? Was a flag marshal present earlier in the day in MB11?

(iii) Should a flag marshal have been deployed at MB11 in the circumstances?

(iv) Even if the defendants had provided the services of a flag marshal at MB11, would the presence of any such official have had any material effect on the outcome as regards the injuries suffered by the plaintiff?

#### The race track

4. The race track is constructed in what was once a quarry at Gormanstown, Co. Meath. It is bound by the Dublin - Belfast railway line (to the west) and the Irish Sea. The surface is gravel and is rough with an undulating character. The track itself is approximately 1.8 km long and forms ten loops generally about five to six metres wide increasing to approximately fifteen metres at the curves. It conforms to the requirements of the Federation Internationale de Motocyclisme (FIM). Along the way one meets mounds or humps in single and double formation which can be negotiated by participants either firmly adhering to the ground or cleared by jumping. There are mounds at the side of bends (described as berms) which can be utilised by racing participants to build up speed in order to take corners at a greater speed, rather than negotiating the often churned up level race track.

5. Next, an untutored bird's-eye sketch of the course. Competitors start with a short straight into a right hand hairpin bend (moving anti-clockwise) then into a slightly more leisurely horseshoe formation around again into a hairpin bend with a long gradual left hand tending straight stretch (described as a "sweeper") which would be the fastest part of the course. The riders are then confronted with a serpentine formation comprising a number of sequential hairpin bends and short straights until one enters (after a sharp left-hand bend) the straight where the accident occurred.

6. In this straight stretch which is approximately 200 metres long in a south to north direction adjacent to the sea shore the participant is confronted by three jumps within approximately the first 100 metres. The straight is completed with a mound-like jump followed by a sharp left turn. Two more bends and shorter straights (including a rather spectacular bridge-like jump) await the competitors before the lap's (and ultimately the race's) end.

7. Jumps and obstacles are essential challenges and adornments of a track and the aerial surmounting of double jumps entices rider and spectator alike. Inexperienced and junior riders would stick to *terra firma* for the purpose of taking this jump. The more experienced riders would endeavour to take the double jump in one go. I gathered from the evidence of Mr. Stephen Parrish that the particular double jump in question was one of the more spectacular offerings on the course although it is not entirely clear to me whether or not it was the highest jumping point. Mr. Tennyson located one elsewhere where he observed cyclists flying even higher in his estimation. Be that as it may, there is no doubt that this was one of the significant technical challenges facing cyclists negotiating this particular course, particularly if one felt sufficiently experienced or emboldened to take the double jump "at one go".

8. At the commencement of the straight as identified by me, and in close proximity of one to the other, are MB10 and one of the two ambulance points or stations on the course. The other ambulance station is to be found over near the starting area on the far side of the course. As already noted, on racing days two ambulance stations were employed whereas on practice days only one was required. The former arrangement was necessary so that, in the event of a mishap requiring the services of an ambulance, the racing could continue in the knowledge that ambulance services remained available. This was not considered necessary for practice sessions and no criticism is levelled at the defendants for that policy. From the ambulance position at the commencement of the straight up to the end of the double jump to which I have referred is a distance of approximately 100 metres and there one finds MB11. The marshal boxes are positioned specifically to give a good, panoramic view to the official occupant. However, according to Mr. McGinn, MB 11 was not manned on the day in question. Its purpose was to oversee automatic bikes used by junior participants in the sport. They would use a shortened course (known as the cut-off) which utilises an artery leading from the sweeper to which I earlier referred and connecting with the straight in which the accident happened just before the double jump. The automatic bikes would proceed through this cut off, turn left and drive over the double jump all the time observed by the flag marshal at MB11. That, we were told, was the function of MB11. On the day in question, the straight in which the accident occurred was governed by MB10 at one end and MB12 just before the left hand bend which concludes the straight.

9. The plaintiff's case centres on the requirement for a flag marshal at MB11 and whose absence (by design or otherwise) left Mr. Mullally unaware of the plaintiff's fall. The flag marshal, he asserts, having observed the plaintiff's predicament, would then have waved a warning flag and thus enable Mr. Mullally either to avoid the accident or so to adjust himself at least to render the outcome less serious. Messrs. Fogarty & Foley, the ambulance men, were located at the ambulance point in the vicinity of MB10. Mr. Ivanov was a flag marshal on duty at MB12, the last marshal box on the straight before the left hand turn. Mr. McGinn was stationed in or around the starting point and near the second and unutilised ambulance point.

#### The plaintiff Stephen Burke

10. The Plaintiff was examined by his counsel, Mr. Eugene Gleeson S.C. On the day of the accident the plaintiff asked Mr. McGinn if he could go out for the final practice lap. He was told he could proceed and off he headed around the course, along the "sweeper" and into the "loops" prior to the straight.

11. Having completed the sequence of hairpin bends he swung hard left into the straight. He says that he checked and did not observe anyone following. He then set about negotiating the obstacles ahead of him. He did one jump and then two jumps, the latter of which was the double set. He committed to the jump, accelerated and cleared the first and second second "humps" but landed on the far slope of the latter causing the bike to wobble and he fell to the right with the machine going to the left. He proceeded to get up. He had gotten onto his knees and as he stood he saw the first defendant's bike emerging from the jump and collided with him resulting in the serious injuries described.

12. This was not his first day at that track. He had been there on four previous occasions over approximately a five month period. On each time he visited the track he was required to sign a form in order to participate. He had attended at weekends, normally Sundays, with practice proceeding from 11a.m. to 4.30p.m. Each practice session would last approximately twenty minutes. The number of sessions would depend on how busy the track was on that day. There would be A, B and C categories as well as younger riders and quad bikes participating.

13. The plaintiff's motor cycle had a 250cc engine but as discussed earlier the size of the engine of the bike is not the relevant factor in racing. Though he never timed his laps, on average it took two minutes to complete a lap and he could complete seven or eight laps in a twenty minute session depending on how busy it was. This was a practice day with some gate starts, but not in the late session. On practice days there are up to 20 people participating in the various sessions from all categories. Children participate on their own segregated from the adult bikes.

14. The session started early at 11a.m. He had taken part in five or six sessions before the accident and had been approximately 40 times around the track without incident. The plaintiff was enjoying himself, building up experience and improving his fitness. He was going as fast as he could, overtaking some riders whilst others would overtake him. Each rider did what they felt they were confident

doing. If some fell they would be passed out. Some would have tumbles and falls. One would avoid people who had fallen, navigating the course how a rider judged to be safe. The plaintiff had work the next day and telephoned his girlfriend about going home but went out for one last session before the track closed. He did nothing different to what he had done before. He turned into the straight, where a number of jumps confronted him. Availing again of Mr. O'Keeffe's annotation I will refer to these in sequence as one single jump (J1), the first double jump (J2 and J3), the second double jump (J4 and J5) and a final single jump (J6).

15. He took J1. At this point the bike left the ground a small bit which to him was not much of a jump. People with not a lot of experience would simply drive over the hill, though he was experienced enough to give it a little jump.

16. J2 is designed for a rider to build up sufficient speed over a distance of 57 feet before attempting J2 and J3 which are presented as a double jump. Mr. Burke had completed the double jump every time. He accepted in cross-examination that this displayed a fair level of experience on his part as a less experienced rider would drive up and down the hills.

17. After jumps 2 and 3 there is a longer straight of 105 feet to increase speed on the approach to jump 4. Having accelerated there is a critical point where the rider commits to the jump. He cleared J5 completely and landed on the slope. Thereafter he fell to the right and the bike went to the left. Next thing he was hit. It did not happen in a "second or so". It was the plaintiff's evidence, from experience and a sense of self preservation that once a rider falls they attempt to get off the track as soon as possible, which he tried to do so.

18. He was aware that there was no flag marshal in the box referred to as MB11. It was put to the plaintiff that steward's box MB11 does not have a steward except when the automatic 50cc bikes are being ridden through the cut-off by the younger participants as evidenced by the remains of mounds of dirt and dykes on it. The plaintiff denied this. He had never seen the cut-off used by junior riders. A marshal was commonly present in MB11 when he was at the track and had been there during the day, although he couldn't say how often. No marshal was present there or in MB12 when he fell. On previous occasions, he didn't stop riding when he was saw there were no marshals there or raise the issue with Mr. McGinn.

19. It was put to the plaintiff that, if he and Mr. Mullally were close to one another, an intervention by a marshal would have made no difference and Mr. Mullally would have collided with him. The plaintiff disagreed, that was not what happened, and he wouldn't have taken the doubles with someone close behind him.

20. It was put to him that the ambulance people saw both the plaintiff and Mr. Mullally go over the jump at J4/5 and didn't reappear, that they ran up and then got the ambulance. The plaintiff disagreed as he could see to his left that there was no rider in his vicinity. It was put to him that when he fell and was then hit by Mr. Mullally and that this all happened in one or two seconds. The plaintiff disagreed that but said he didn't know how long it took.

21. He was asked about his account to Dr. James McCarthy on 8th December, 2014, that it all happened in a moment or two. The plaintiff said that he jumped, tumbled, stood up and the other rider hit him. Gerard Clarke S.C. also put a Dr. Conor Hearty's report to him where the plaintiff had informed the doctor that the accident happened very quickly. Such was also reported to Dr. Elizabeth Cryan, psychiatrist.

22. It was put to him that he saw the motorbike coming out of the corner of his eye and it happened very quickly. The plaintiff said that he was on his feet and he put up his arm. It was put to him that it was raining and they were up to 20 participants and there were about twelve at the time of the incident. The plaintiff said that there were a few. The plaintiff said that he started off by himself. He wasn't overtaken on this run. There was nothing unusual in overtaking or being overtaken. Earlier in the day there had been C riders only. He was told that the C's were out otherwise he would not have gone out if there were A riders there. The plaintiff maintained in race and practice sessions he stayed within his own group and would not mix with A or B riders as interacting with the faster ones would be more difficult due to speed and that they threw up dirt and could be ignorant on the track.

23. The plaintiff was questioned about the signing on sheet. It was suggested that lap time decided the category and it was the committee who runs the track that decided grading. Grading was for determining races and based on times for practice.

#### **Mr. Tony O'Keeffe, Engineer**

24. Mr. O'Keeffe attended at the racing track in April 2015. He produced extremely helpful, informative charts whose enumeration I have utilised for the purpose of this judgment and these were compiled from his own inspection and a computerised survey of the track. He numbered the marshal boxes and I have followed this system for this judgment. He also carried out an examination of the discovery documentation.

25. He agreed with Mr. Tennyson, engineer retained on behalf of the defendants that eight marshals were appropriate in number for a practice session. Thirteen were required for racing. He had understood that MB11 was utilised for the purpose of practice for the day in question but was surprised to learn that it was the plaintiff's case that this box was only occupied when junior competitors were utilising the "cut off" area which is to be found below MB11. It did not make sense to him that a flag marshal was absent from MB11, given the length of the straight and the dimensions of the jumps including the two double jumps and the double jump that was located in the vicinity of MB11. In his view, the rules governing the meeting, as he read them, mandated the presence of a marshal at MB11. Someone standing in that box was located about ten feet above and thirty feet away from the area where the plaintiff fell. As Mr. O'Keeffe put it, "the accident happened and was right under his nose". He was then in a position to flag following motorcycyles.

26. It was pressed upon him by Mr. Gerard Clarke S.C. for the second to fourth named defendants that the main focus of a flag marshal's attention was on vehicles going away from him, something which was later to be stressed by Mr. Stephen Parrish. Although Mr. O'Keeffe professed no specific expertise in motocross, he fairly "stuck to his guns" and maintained, firstly, that a flag marshal was required in MB11, that such flag marshal ought to have been able to observe the plaintiff falling and would have had an opportunity to warn following motorcyclists, in this case Mr. Mullally to such an extent as to prevent or at least mitigate what happened. Given that the case as was put to Mr. O'Keeffe seemed to indicate a rigid practice of observing only motorcyclists as and after they pass a flag marshal, the common sense of what Mr. O'Keeffe said was, in my view, difficult to dispute. It is fair to say that the vigorous rigidity of the flag marshal's duties as put to Mr. O'Keeffe was modified somewhat by Mr. Parrish's evidence.

27. Mr. Clarke put to Mr. O'Keeffe that the two ambulance drivers, Messrs. Fogarty and Farrell, would say that the plaintiff and Mr. Mullally came around the final bend into the straight and were travelling close together, so much so that, even if there were a flag marshal present in MB11, this would have made no difference because, by the time the plaintiff fell from his bike Mr. Mullally would have been so close behind as to render a flag marshal powerless to do anything as far as Mr. Mullally was concerned. Mr. O'Keeffe laid much stress on the potential frailty of evidence of the lay eyewitnesses and matters pertaining to time and distance. He said that had a marshal been positioned in MB11 and had given evidence to the effect that Mr. Mullally was "up on the tail" of the plaintiff coming

to those jumps then he would accept, in that situation, there was nothing the flag marshal could do and no negligence would, in his view, arise on anyone's part in those circumstances.

28. Mr. O'Keeffe said that as the plaintiff rounded the bend, again to the straight he would have had a good view to his left, a fact disputed by Mr. Tennyson who said there was a berm which would have obstructed his view to the extent of his being then unable to see if anyone was coming behind him on the track prior to the straight.

29. Mr. O'Keeffe's fundamental point was that there ought to have been a flag marshal at MB11 because of the dimensions of the double jump at J4/J5 on a point approximately half way up the longest straight stretch in the course albeit with marshals supposedly located at either end of this straight. A marshal in that position, having observed the plaintiff falling, would have been able to flag the following riders. Somebody in MB11 who observed two riders, one following the other in close proximity would be unable to give any effective warning to the second rider where the first to get into difficulties.

#### **Stephen Parrish**

30. Mr. Parrish, a qualified engineer, experienced motor sportsman and broadcast media commentator inspected the race track on 20th April, 2015, and observed an event taking place there. He confirmed that the track is of an appropriate standard and that proceedings appeared to be well run when he was present.

31. He described the flagging system. A stationary yellow flag indicates a hazard ahead and warns a rider to take care and continue with caution. A waved yellow flag means that a rider ahead is blocking or stopped on the track and extreme care must be taken. This means that the rider must be prepared to stop and that no overtaking is allowed. You may still proceed but with care. A red flag is an alert for danger due to a serious incident and the race will halt with all riders to stop and turn off their engines. An orange flag with a white stripe indicates the last lap be it practice or race. A chequered flag indicates the race is over.

32. Competitors are split into three groups, A, B and C with A being the vastly experienced competitors, B intermediate and C novice and less experienced or slower. The machines employed range from 125cc up to 450cc. Between 250cc and 450cc the machines vary little in real terms in size and often accomplished riders will use the less powerful machine for enhanced agility and manoeuvrability for racing. On the day in question, the plaintiff was riding a Honda 250cc, weighing 105 kilograms with a power output of 28 kilowatts. Mr. Mullally, who was a more experience rider, was riding a Honda 450cc which is slightly heavier (111 kg) with a power output of 38 kilowatts. This difference would be of little significance in racing terms and the less powerful machine might well beat the more powerful one in a race. In a practice session there would no appreciable difference.

33. Youngsters and beginners at the sport would negotiate jumps remaining adherent to the ground. As one progressed, one of the more exciting, satisfying and yet dangerous aspects of the sport was clearing the jumps airborne and Mr. Parrish described what this involved. Deciding to take a jump in this way is a matter for each individual rider to determine if he is capable to do it. When approaching a jump one would have to prepare, commit and jump. Once committed there was, in reality, no going back and attempting to abort at the last minute is dangerous and could result in an accident. Once you had decided that you had the competence and ability and skill to accomplish the jump you couldn't do it half heartedly. You had to commit to doing it. Doing two jumps is even more challenging because you might find yourself landing halfway up the second jump. This is not a pleasant experience. One has to be determined, accelerate appropriately and maintain balance and co-ordination in order safely to accomplish the manoeuvre.

34. Mr. Parrish accepted that the double jump at which the accident occurred was one of the more demanding parts of the course. From that one can deduce that it was also one of the more spectacular and satisfying to spectator and competitor alike.

35. Mr. Parrish confirmed that motocross is an inherently dangerous sport. This is well known to participants. It is common case that the participants prior to practice sign a document acknowledging, *inter alia*, the dangers attended to this sport.

36. Mr. Parrish was satisfied with the manner in which the practise session was run as was related to him by Mr. McGinn. Allowing 20 participants out on the track at each session and letting them off at two second intervals was appropriate and the track was well able to accommodate numbers at this level. It was common practice to allow out riders of mixed ability at practice sessions. Faster riders could take their time passing slower ones. No one would be under any pressure particularly on the first laps. More experienced riders would know where safely to pass slower ones. Practice days were also used setting-up the bikes, preparing and honing them. Also, these sessions were important in improving fitness levels and gaining experience. In practice as in racing faster riders would overtake slower riders. In racing one could have up to four competitors cycling abreast at various points attempting to manoeuvre into the lead. Letting riders out at two second intervals was, "common practice". Once out, unless you were the fastest man on the track, you were going to be overtaken. Machines are going to collide and accidents are part and parcel of the sport. Mr. Parrish observed collisions happen perhaps twenty times a year, including collisions which can occur in mid air. It was his evidence that it is rare not to pick up an injury at some point in the season.

37. Mr. Parrish was of the view that if Mr. Mullally had committed himself to taking the jump and proceeded with it there was nothing that he could have done to avoid striking Mr. Burke. If he was at or around the bottom of the ramp prior to the jump he could not have seen Mr. Burke on the other side. There is an onus on the following driver to take evasive steps if they were in a position to observe the rider ahead.

38. In his view a flag marshal was not necessary at MB11. The flag marshals at MB10 and MB12 were sufficient in the circumstances. The function of a flag marshal was to focus on what was happening to riders who had passed him or her by so that, if any mishap occurred, the flag marshal would be in a position to warn following riders. The marshal boxes are positioned to enable flag marshals to observe what is occurring on the track. They would have a clear view of the progress of the cyclists.

39. The bends are more important from the point of view of alerting drivers of hazards ahead rather than jumps. The main criterion is being aware of what has happened to riders who have gone past you so you can inform riders coming towards you. You would, however, stand facing the course.

40. Mr. Parrish saw no difficulty in allowing riders of mixed ability on practice sessions. This was not at all uncommon and particularly when there are few riders. He had been informed that there only around twelve riders left for this final session. When pressed under cross examination he held to his view that it was appropriate for novice and more experienced riders to be out on the track at the same time. Novice riders would learn from their more experienced colleagues.

#### **Mr. Anthony Tennyson, Consultant Engineer**

43. Mr. Tennyson observed *inter alia*, that he saw jumps on the course that were producing much higher airborne riders than J4/J5.

He noted that there was a jump after J4/J5 which was significantly higher.

44. He spent a long time studying various videos of the jump where the accident occurred at J4/J5 and found that airborne time varied from 0.89 to 0.97 seconds. He said that the best athlete's reaction time is around 0.75 seconds giving a total reaction time plus airborne time of between 1.64 and 1.72 seconds. His research indicates that take-off speed at these jumps was between 20 and 40 miles per hour. Using a median 45 miles per hour or 75 kilometres per hour this netted to speed to 20.8 metres per second including "committal time" to the jump. This would give a travelling distance of 40 metres approximately during which period there would be no possibility of a rider being able to evasive action.

45. The inter-crest distance between J3 and J4, the first jump of the double jump where the accident occurred, measured at 40 metres. The flat level track between the two jumps that is between the down ramp of J3 and the up ramp of J4 he measured at seventeen metres. Thus he measured the point of no return as being 40 metres which is over twice the flat distance between J3 and J4.

46. A significant part of the cross examination of Mr. Tennyson and of Mr. Parrish was taken up with identifying the sources (apart from Mr. McGinn) of the information upon which they formed their opinions. I have already alluded to absent witnesses.

#### **Mr. Michael McGinn**

47. Mr. McGinn is the chairman of North Dublin Motocross Club Limited. He was the only officeholder to give evidence on behalf of the defendants. He is a lifelong enthusiast of the sport, something he passed on to his own son. His engagement in the sport is entirely voluntary. The running of the racetrack is financed by membership subscriptions, entry fees and event sponsorship. Participants in the sport finance their own activities and outlay includes subscription to the ambulance services who attend at the sessions and some small amounts paid to officials at the various events.

48. He referred to the first jump in the straight (J1) as the ambulance jump and the final jump (J5) as being the sea-sided jump. MB10 and 12 were located in the vicinity of the foregoing jumps respectively. MB11 is never manned except for junior events where automatic bikes use the cut-off for the curtailed course. Riders can be seen all the way from the ambulance station at MB 10 up to the sea-sided jump. This along with the clear view from MB12 (which on the day in question was marshalled by Mr. Constantin Ivanov) is the reason why MB11 would remain unmanned except for junior events.

49. Mr. McGinn outlined the general organisation involved in a practice day. He referred to the jumps on the straight as being a "more technical part of the track" meaning that these were more difficult technically rather than dangerous as such. However, one had to train up to do the jumps and steel oneself to that end. He referred to it as a steep learning curve.

50. He was the clerk of the course on the day. In addition to the various marshals there was also one ambulance stationed at the commencement of the straight beside MB10 and manned by Mr. Fogarty and Mr. Foley. He explained how riders are graded as A, B and C, with these gradings based on lap times over the previous year. The top 23 % are graded A, the second 23% graded B, and the rest C. On race days they would be broken up into groups with the top 30 riders in one group. This group would be made up of perhaps 20 A's, 5 B's and 5 C's.

51. Around 57 people turned up on the day in question to practice. He says that only 20 were allowed out for each practice session. This contrasts with up to 40 participants on a race day. The reduced numbers on a practice session allows riders more space and room to focus on experience, fitness and any technical adjustments which need to be made to their bike.

52. The accident happened at the end of the day. It was the very last round. Mr. McGinn was positioned in or around the starting area where there is a prefabricated hut used for administrative purposes and also the other ambulance station. He would usually base himself at a marshal box in this area and this was a vantage point from where he could see most of the course. He moved around to carry out his duties as clerk of the course. Riders were let out at intervals of 2 to 3 seconds to practice. Sometimes this interval could be longer if people were slow getting up to the starting gate. Around the time of the accident there were about a dozen people of mixed abilities out on the track. He became alerted to the fact that people were running towards the scene. He would have noticed it before the ambulance crew got to it. He ran down the hill and went straight across to the scene of the accident. He observed Mr. Burke on his hands and knees on the ground. He remembered the two bikes being together with Mr. Burke being about a couple of metres to the right hand side of the bikes on his hands and knees.

53. Among other things, he gave evidence of the signing in procedures for competitors, briefings and how he might detect somebody who was not a competent rider. There was, however, no suggestion that either the plaintiff or Mr. Mullally were in any way incompetent.

54. At all times Mr. McGinn maintained that there was no marshal in MB11 because there never was one there apart from the automatic cycle races conducted by the younger members. Mr. McGinn was cross examined extensively on his investigation of the incident. He was pressed by Mr. Gleeson, S.C., with regard to the deployment of flag marshals on the day, the manner in which he conducted his enquiries, the statements he took and from whom. Absent witnesses were alluded to. At all times however, Mr. McGinn maintained his stance with regard to the non-deployment of a flag marshal in MB11. He was unable to produce a list of flag marshals compiled on the day. He did produce a list which, he said, he compiled subsequently from memory and which he said he produced from his pocket at a consultation, a fact confirmed by Mr. Anthony Tennyson on affidavit. During the course of the hearing it is worth noting that when the prospect of possibly deficient discovery by the discovery became potentially an important issue in this matter and, presumably, in response to observations that I had made regarding the pristine state of the list of marshals and how it did not appear to have spent any time in a pocket, Mr. McGinn sought subsequently to explain this by saying that he really meant a file or folder. This struck me as a wholly preposterous and self serving explanation and is demonstrative of a difficulty I had with Mr. McGinn's evidence. I feel it not unfair to observe that I found his evidence at times to be somewhat defensive and perhaps not as helpful as otherwise might have been the case. His evidence on the deployment of flag marshals on the day I found confusing. As a primary source of information on a range of issues to expert witnesses which I do not propose to set out in detail, this could have significant implications for the weight of the defence case.

#### **Mr. Constantin Ivanov**

55. This witness was the first of three witnesses of the bystander variety or, at least, as close as we could get to this in the trial. Mr. Ivanov was a flag marshal on the day in question and he was located, he tells us, in MB12 beside the final jump on the straight. It is known as the "seaside jump". He said he was there all day and disputed the plaintiff's allegation that he wasn't there. He might have absented himself to take a toilet break but otherwise he was there for the whole practice session.

56. He had a panoramic view down the straight as far as MB10. He was focused on the track ahead of him rather than the straight to

his left. He says he saw the plaintiff and Mr. Mullally coming towards him after they rounded the corner. Thus he observed them at a point when they were on the straight before they had made it as far as J4/J5. Maintaining his focus on the track ahead of him he says he didn't exactly see the accident until they were already on the ground. He stated that he had a full panoramic view of the J4/J5 jump.

### **Evidence of Frank Fogarty**

57. This witness was one of two emergency medical technicians attending the practice session. Both were members of the Red Cross organisation and attended on a voluntary basis. His function and that of Mr. Farrell was that of paramedic and ambulance driver. He was involved in motorcycle sport himself and had acted as a marshal although his interest and involvement was in road racing rather than motocross.

58. He noticed the plaintiff and Mr. Mullally riding by him. He saw them going over the jump but not preceding beyond that up to the seaside jump. He then observed people running towards J4/5 and observed to Mr. Farrell that it seemed an accident had occurred. They made their way up the gravel path up the side and found Mr. Burke on his knees and in pain and Mr. Mullally hopping around. He then got the ambulance dealt with the situation and transported Mr. Burke to Our Lady of Lourdes Hospital in Drogheda.

59. Mr. Fogarty said that he saw the two riders coming around the hairpin and preceding the straight over jumps 1, then 2 and 3 and then 4 and 5 together. When they passed the ambulance point there was only some two or three seconds gap between them and that this gap was maintained the whole way. He observed them on the stretch between J3 and J4 at the beginning of the relevant double jump at the same time. Although pressed he stoutly maintained that he saw one bike take off and then the second taking off. He was very firm stating that this is what he had seen notwithstanding being confronted by Mr. Gleeson S.C. with the frailties attendant on eyewitnesses with regards to time and distance. He pointed out the extensive scope of the view which he had of the racetrack from his particular vantage point.

### **Mr. Sean Farrell**

60. Mr. Farrell was the second emergency medical technician on duty that day. At the material time, he was standing in front of the ambulance. As he described it, the riders passed a couple of feet underneath him. He accepted that he was at distance of some 90 to 100 metres from J4. He observed one bike going over J4 and more or less when the first bike was in the air the second bike was at that bottom of the ramp. Then the two bikes disappeared following which he observed people running towards the jump and knew something was wrong. He agreed that when the first bike had taken the jump the second bike was starting on the ramp at J4.

61. When pressed under cross-examination by Mr. Gleeson S.C. he held to what he described, namely the first bike being more or less in the air and the second bike just taking off at J4. He stressed that a big part of his job was to observe and to respond if they saw someone fall. He didn't see Mr. Mullally's bike hitting the plaintiff. He might have mentioned what he saw to Mr. McGinn.

### **Conclusions**

62. Insofar as there may have been some differences between witnesses as to the time of the occurrences these were of no significance in the overall context of the case. It is clear that the accident occurred late in the evening. I am satisfied that the last practice session was in progress and the plaintiff was engaged in the last lap of that session.

63. I am satisfied that riders of differing levels of experience and of different gradings, namely A, B and C were using the track for practice purposes at the same time as one another. This was in accordance with the general and approved practice of the defendants and seems to me to be a sensible approach. One would expect that the more experienced riders would be better able to take care of themselves and others and to give an inexperienced fellow competitor a wide berth. At the same time, I do note that the plaintiff expressed misgivings about the conduct of higher graded riders. However, I was not persuaded that the presence of more experienced riders on the track during the session would have dissuaded him from embarking on this final practice session.

64. It is, in my view, probable that, having completed the series of hairpin bends and starting into the straight, the plaintiff was "in full flight" and was committed to and determined to clear all the obstacles in his path including taking the double jumps, namely J2 and J3 and after that J4 and J5 in one go. After he rounded the hairpin bend and proceeded up the straight he may have glimpsed to his left but any such view would have been obscured partly at least by a berm. At that point, having already entered upon the straight and set upon his determined course to clear the up-coming jumps the plaintiff did not have sufficient opportunity to observe the presence and location of the first named defendant, Mr. Mullally.

65. I am satisfied on the balance of probabilities that Mr. Mullally was travelling in close proximity behind the plaintiff. The plaintiff was unaware of or oblivious to his position when he resolved to attempt the double jump.

66. In my view, the impact between the plaintiff and Mr. Mullally's motorcycle occurred within at most a period of two or three seconds after the plaintiff's fall. I believe that immediately upon falling he picked himself up with a view to getting himself off the track quickly and that, while he was in the course of rising to his feet to make good his escape from the racing surface the front wheel of Mr. Mullally's motorcycle collided with the plaintiff's shoulder area. The fact that this accident happened so suddenly and in such a minute timescale is supported, inter alia, by the reporting of same by the plaintiff to Dr. McCarthy, Dr. Hearty and Dr. Cryan, all of whom were informed by the plaintiff during the course of their medical examinations of him that the accident happened very quickly.

67. I was impressed by the evidence of Mr. Fogarty and Mr. Farrell, the ambulance men. Firstly, they were in an ideal position to observe the behaviour of riders up to a point where the jump over J4/J5 was almost concluded. Secondly, both of these gentlemen observed the plaintiff and Mr. Mullally passing them at close quarters. From their evidence, in my view it is probable that the plaintiff and the first named defendant in that sequence rounded the final hairpin and turned left into the straight proceeding towards the seaside jump close to each other with the plaintiff ahead. It is probable that Mr. Mullally was in the order of at most two to three seconds behind the plaintiff.

68. I am satisfied that firstly, Mr. Mullally, who had probably caught up slightly on the plaintiff in the straight due to his more powerful machine, had entered upon the level area between J3 and J4 at a time when the plaintiff was in the process of or about to "take off" from J4. I am of the view that at the time the plaintiff fell Mr. Mullally had already arrived at the base of J4 and was in the process of "taking off" to accomplish the double jump.

69. This accords with the evidence of Mr. Constantin Ivanov who was in MB12. Albeit at a far greater distance than Mr. Fogarty and Mr. Farrell, he did observe both bikes together at some point on the straight leading up to J4/J5.

70. I fully accept Mr. O'Keeffe's caution about the unreliability of the evidence of lay witnesses as to time and distance. However,

there is no doubt here as to the distances involved. Mr. O'Keefe and Mr. Tennyson seem to be agreed on this. The eyewitnesses gave evidence of the events as they occurred from perspectives that varied as the actors moved around the track. Thus, all three observed the plaintiff and Mr. Mullally on the straight together. Mr. Fogarty and Mr. Farrell observed the plaintiff and Mr. Mullally close together from the point they each turned into the straight. Their view of what was occurring was, at that point, clear and proximate. Shortly thereafter, they were observed on the stretch between J3 and J4 at the same time. Further, Mr. Mullally was observed at the base of J4 while the plaintiff was still in the air. Barring the moment of impact between Mr. Mullally's bike and the plaintiff, Messrs. Farrell and Fogarty had a clear and unimpeded view of what occurred in those few, vital seconds. Even allowing for the frailties of lay evidence properly identified by Mr. O'Keefe, I found their evidence to be credible and convincing

71. Bearing in mind the views which I have already expressed I now turn briefly to the questions concerning liability posed in paragraph 3(m);

(i) Ought the plaintiff and Mr. Mullally to have been on the race track at the same time?

I expressly accept the views offered on behalf of the defendants, in particular by Mr. Parrish. The placement of a rider in category A, B or C is more pertinent in terms of racing as opposed to a practice session. A practice session is focused on gaining experience, improving fitness and making technical adjustments to bikes rather than the fast pace of a race. Mixed sessions offer the novice the benefit of observing more skilled and technically proficient riders whom they can learn from and aspire to. The presence of more experienced riders on the course has an additional safety bonus as they have the awareness to give inexperienced riders a wide berth. Though the Court notes the experience of the plaintiff in his own encounters with discourteous riders there can be no fault with the policy of the defendants in allowing riders of mixed ability to participate together in a practice session.

(ii) Was it the practice of the defendants to provide a flag marshal in the marshal box at MB11 at practice sessions and race meetings? Was a flag marshal present earlier in the day in MB11?

It is clear no marshal was present when the accident occurred. The defence evidence was to the effect that, junior biker sessions apart, no marshal was ever located in MB11. I am in some doubt about the deployment of marshals at this track both generally and as to MB11 on the day in question. As already indicated, I found Mr. McGinn's evidence somewhat confusing. It seems that eight flag marshals should have been provided although Mr. McGinn was unable to account for that number or to produce (rather surprisingly) a simple signing on lists of persons who were allocated this important function. I am, however, persuaded that junior competitors using automatic bikes were not involved in the practice on that date and that the cut off beneath MB11 was not being utilised on that date. This may well have been otherwise on previous days when the plaintiff was riding at the Gormanstown track.

Beyond that, I have some difficulty in assessing the evidence and coming to a conclusion as to what the marshalling arrangements were on the day and what deployment would ordinarily occur as a matter of policy. My views hereunder would render such an exercise somewhat academic.

(iii) Should a flag marshal have been deployed at MB11 in the circumstances?

There was a straight conflict between Mr. O'Keefe's evidence and that of Mr. Tennyson and Mr. Parrish on behalf of the defence with regard to the necessity of a flag marshal at MB11, other than just for supervising automatic bikes using the cut off. I must observe that given the fact that J4/J5 was one of the more spectacular jumps on the course (a fact confirmed by Mr. Parrish) because of its challenging nature, given the presence of a marshal's box beside it and with a clear view of it, commonsense would seem to indicate that locating a flag marshal was a good idea. Mr. Tennyson and Mr. Parrish were both of the view that flag marshals at MB10 and MB12, were sufficient to "police" the straight. The evidence in this case, however, points out a possible flaw in that argument in that the ambulance men who were located with a bird's eye view of the straight looking up towards the seaside jump still were unable to observe the plaintiff falling from his bike or the subsequent accident. From their evidence, it is also clear that people on the ground at unspecified locations, obviously, different to that of the ambulance drivers were able to see what happened because their movement towards the locus in quo confirmed the ambulance drivers' suspicion that a mishap had occurred. In the meantime, Mr. Ivanov, at the opposite end of the straight, although having observed the two motorcyclists together on the straight, nevertheless turned his attention (as was, apparently, his duty) to the track in front of him and, even though it appears he had a clear view, he did not observe the accident although he would never have been in a position to do anything to prevent it.

Therefore, it would seem that the plaintiff's accident has identified a possible "blind spot" on the course. It may be the case that were a mishap to take place along the lines of what occurred to the plaintiff that a flag marshal in MB11, having observed this, would have been in a position to warn other cyclists who were engaged in the hairpin bends or had just entered into the straight and were at a point prior to committing themselves to jump J4/J5.

(iv) Even if the defendants had provided the services of a flag marshal at MB11 would the presence of any such official have had any material effect on the outcome as regards the injuries suffered by the plaintiff?

I am satisfied that even if a flag marshal were to have been present in the given circumstances of this case in MB11, given the close proximity of Mr. Mullally to the plaintiff at the time the plaintiff fell, no reasonable opportunity would have arisen for a flag marshal to offer anything by way of warning to Mr. Mullally of what had occurred. No action could have been taken which would have prevented the accident. I am satisfied that what occurred was an unfortunate but unavoidable occurrence and one of the unintended but unhappy consequences of involvement in this unquestionably dangerous sport. Accordingly, on the facts of this case as presented, even if one were to find fault with the defendants for not stationing a flag marshal at MB 11, no nexus exists between this failing, if such it might be, and the injuries suffered by Mr. Burke.

72. Whereas I have every sympathy for the plaintiff, I regret that I must find that his undoubtedly serious injuries did not arise as a consequence of any negligent act on the part of the defendants or any of them, and I must dismiss his claim.