

## THE HIGH COURT

[2015 No. 2161 P.]

BETWEEN

DEIRDRE O'DONNELL

PLAINTIFF

AND

DECLAN MORRISSEY

AND

DAMIEN MORRISSEY

AND

MOTOR INSURERS BUREAU OF IRELAND

DEFENDANTS

**JUDGMENT of Ms. Justice O'Hanlon delivered on the 17th day of May, 2019****Background**

1. This case concerns a road traffic collision (RTC) which occurred on the Cloneen - Killusty Road, Co. Tipperary at about midday on 11th August, 2013. The plaintiff was in her own motor vehicle, had a front seat passenger and her four-year-old son strapped into the back of the vehicle. Declan Morrissey, son of the named owner of the second vehicle Damien Morrissey, was driving alone and uninsured in the vehicle when the accident occurred. A full defence is pleaded asserting that the plaintiff was on the wrong side of the public highway at the time the accident occurred and also an allegation of speed is made.

**The Collision**

2. The plaintiff observed the defendant's vehicle coming towards her down the middle of the road driving at between 30km/ph and then later 10 to 15 km/ph. He did not slow down and she pulled her own vehicle into the left hand side and went very slowly. The defendant vehicle glanced along the side of her vehicle and the rear right wheel of her car bore the brunt of the impact. The force of the impact shunted the plaintiff's car further into the ditch whereupon it rebounded off a stone pillar.

3. The plaintiff got out of her motor vehicle and retrieved her son, through the driver's door. The defendant apologised to her for what had happened. The defendant (who had previously lost an arm explained that his prosthetic arm had become stuck in the steering wheel, which was an adjusted steering wheel for a disabled driver. He asked the plaintiff not to call the gardaí that he would buy her a new car and he admitted at the scene that he didn't have a valid policy of insurance.

4. The plaintiff telephoned her partner who took both herself and her son home and later to hospital in Clonmel. The plaintiff underwent an x-ray and had limited recollection of going to hospital. She also began to experience significant discomfort in her neck.

5. The plaintiff freely admits to having had prior back pain and to having had a prior MRI scan which showed degeneration of the spine and bulging discs.

6. The plaintiff had neck difficulties and attended her GP, Dr Rochford, in Clonmel and was referred to a Mr. Molloy, Rheumatologist. She was later referred to Mr. Kaar, Neurologist, in Cork. She underwent further MRI scans and was found to have oedema at the C2, C3 level. She was treated with physical therapy rather than with physiotherapy.

**Impact on Work**

7. Prior to this accident, the plaintiff farmed 150 animals and she also used to have dog kennels. She said that she doesn't do the dog kennelling as much now and that she uses grass feed for the cattle at this point and she said she has a new man working for her now who brought in an environmental approach for hedging. She said she has 165 acres, all of which she farms and she has contractors when she needs them. She said that she worked with sucklers and dry stock. The invoice figures for Mr. Spratt included €4,269.87 for the invoice dated 23rd December, 2013, €3,064.50 for the invoice dated 16th June, 2014 and €749.10 for the invoice dated 22nd December, 2014. She also claims a further €700 to Mr. Desmond for the same type of work and she said she doesn't get the VAT back. The items of special damage amount to €12,069.

8. She said she can once again do the calving herself having adapted to a different system. She said that she has followed the medical advice to maintain neck exercises, that the pain is not constant but that there is some pain and that physiotherapy helps.

**Collision Evidence**

9. The plaintiff's partner returned to the scene the following day and took some photographs. There were black curved skid marks on the road left by the defendant as he impacted with the plaintiff's vehicle.

10. The Defendant's vehicle ended up behind her vehicle on her side of the road and he ended up on the ditch on her side of the road.

11. In her evidence she described the weather at 1pm on that August day. She was then referred to photographs taken by her engineer, photographs one to five which are taken from the angle of the plaintiff driving away from the photograph. The plaintiff agreed under cross-examination that the road was narrow and twisty but she said that two cars can easily pass on it. She reiterated that she saw the defendant's vehicle coming and that she gave him a chance to go back to his own side of the road. She said he took her wing mirror off and that she was almost stopped while tight to the ditch but that he hit her car. The plaintiff said that the defendant's motor vehicle was nosed into the ditch after this accident. The plaintiff said that the defendant told her that he could have killed her child and he had admitted this at the scene. He also said he did not want the gardaí involved because he had a problem with his insurance. The plaintiff's impression was that as the defendant's vehicle approached her he picked up speed and accelerated the closer he came. She said she saw him coming around the bridge. Her passengers were out on the road but she said she didn't actually see them get out of the car.

12. With reference to the assertion that a third vehicle, a jeep, passed on the inside of this, the plaintiff argued that she said there was no way any vehicle could get inside her car.

13. The plaintiff said that she felt anxious, that the defendant came from nowhere and was out of control. The plaintiff was recalled later and said she had no recollection of a jeep approaching. She said that her car was a write-off and a jeep would easily have been able to pass her car on the outside as she was already in the ditch. Her car couldn't have been out on the road and the only reason that it could be on the road would be the severity of the impact, because the defendant's vehicle may have pushed it. She completely denies the defence claim that her vehicle was out on the wrong side of the road.

14. The plaintiff said that while pregnant she put on a lot of weight and that when she had her baby her lower back was giving her such trouble that she could not lift her baby. She agreed that her back had been a bit sore before that point in time. The plaintiff was treated with muscle relaxants then physiotherapy after treatment with tablet medication.

15. It was put to her that her own passenger sued her in the Circuit Court and she said her passenger took the case against her as she had an insurance policy and as the defendant was uninsured.

16. It was put to this witness that under cross-examination in the Circuit Court her passenger said that she was able to open her passenger door wide and get out of the car. This witness said that the passenger was handed a set of photographs in the Circuit Court showing two cars which were not their cars and that the questions were designed to confuse her. She said she was asked several times, told that she got out the door of the car but the plaintiff said that she was already on her side of the road and she went further into the ditch and she couldn't have gone in any further. In answer to the contention put to her that her own passenger said she swerved to the left when she saw the other car. She said she was on the edge of the left hand side of the road and she was not on the verge before she moved in further in an attempt to avoid the defendant.

17. The plaintiff said that she works with dogs and has nine kennels but she now does this work on a much smaller scale. She said bending down to put leads on the dogs was a problem and that power hosing the kennels is a problem.

18. The plaintiff gave birth to her child in 2009 and said she had a long history of back pain and suffered fluid retention and weight gain during the pregnancy. Her GP found her to be stiff and referred her to Dr. Murray for an MRI as well as referring her to physiotherapy and a pain specialist. She said she was breast feeding her baby, she had difficulties at that time and that the first six months of the baby's life she found it very hard to hold the baby.

19. The Plaintiff went on to say that she had had problems before the birth but that they were minimal. It was pointed out to this witness that in her replies to particulars it was indicated on her behalf that since 2001 she had had a problem with back pain and had significant problems after the birth of her child. The plaintiff said that the back pain post the birth lasted for nine months.

#### **The Evidence of the Plaintiff's Engineer**

20. Mr. Fogarty inspected the site on 17th December, 2013 when he took photographs; he said that there was a bend in photograph seven showing the locus of the accident. He referred to photograph eleven which showed a pier in the ditch 1ft 5 inches tall and he said that the defendant's car was 1.74 metres wide, the roadway was 4.7 metres wide and he said that the plaintiff's car brings that up to 1.3 metres.

21. This witness said that the damage commenced on the plaintiff's side of the road and there was significant damage to her back axle and to the back wheel on the driver's side as well as to the back left door.

22. Mr. Fogarty was shown "a loose" set of photographs which were taken by Mr Ger Kennedy. Mr. Fogarty said he did see some of the photographs before but, not those of the car. He went on to say that he did report seeing them, and that the first time he saw those loose photographs was the previous day. He had done his inspection the previous December. This witness agreed that the locus was described roughly similarly by both engineers. Mr. Fogarty referred to his photograph 5 and he said the bridge was clear at twenty metres but he said the bridge was not in view in photograph four at 35 metres. He said half way would be 27.5 metres with the bridge coming into view. This witness said that his own photograph 7 shows 90 metres from the end of the bridge on his side and his estimate of the average differences at 20km per hour for the plaintiff and at 65km per hour for the defendant. In terms of the speed, the average distances would be 27.5 for the plaintiff and 90 for the defendant. Alternatively, if the plaintiff was going at 25km per hour as an average to cover the 27 metres; the defendant, to cover the 90 metres, would have to be going at a speed of 82km per hour.

23. It is taken that there was a 45 metre sight line available to both vehicles and a minimum sight distance on the bend. This witness, when asked what he thought of the suggestion that both of them were going slower than suggested, said it was not a minor impact and there was significant impact to the plaintiff's vehicle, he also agreed that the defendant was coming into another series of bends.

24. With reference to images four and five of the axle photographs, this witness agreed that the main impact was to the rear wheel and to the bumper of the plaintiff's car, but he also stated that it started at the start of the driver's door and that there was glancing effect on the door.

25. In answer to the suggestion that it was an oblique impact he agreed that it was at an angle to each other in terms of the two vehicles and that the plaintiff had just completed the bend at the point of impact. In terms of three possible scenarios on liability, this witness said that the first was that the defendant was on his correct side and therefore not liable for this accident at all. The second scenario was that the plaintiff was on her incorrect side but was angling back onto her correct side. The third scenario was that the plaintiff was on her correct side but that the defendant came towards her and she angled to the left because of the danger.

26. This witness said that the plaintiff turned left into the ditch and he doesn't accept that she was well off the road. This witness disagreed that if the plaintiff swerved to the left that meant that she was too far out on the rear. With reference to the semi-circular skid mark, he said it indicated a vehicle was travelling in the direction the defendant was travelling. He also thought that even though the skid mark was on the plaintiff's side, it was more likely from a vehicle going in the defendant's direction, and the skid marks starts just opposite the pier. This witness thought that the first scenario was unlikely to have been the reality. With regard to options two and three, he wasn't sure which was the correct scenario. He agreed that if a wheel was damaged it would cause the steering to spin and a loss of control. His vehicle should be forced to the left, or if the wheel was already turned to the left it was a possibility that this was the case. He said that the wheel was broken or deflated and noted that the impact would cause the tyre to deflate anyhow.

#### **Evidence of the Plaintiff's Passenger, Ms Barbara Daish**

27. Ms Daish was called to give evidence on behalf of the plaintiff and she confirmed that she was a front seat passenger in the

plaintiff's vehicle. She said that a white car appeared in the middle of the road and he appeared to accelerate behind them after the impact. She said they were on the left in the ditch on the verge. This witness said that the plaintiff checked how she was and how her child was and then went to check on the man from the other vehicle to see if he was alright. She took the child out of the driver's door of the car. This witness noted that the defendant said that he was so sorry that he could have killed her son and that he needed to telephone his father, that his father would know what to do.

28. This witness was asked about her evidence in the Circuit Court and she said she remembered the white car swerving to her side of the road and she said "swerve" in her language means to pull in as far as you could to the left and that the plaintiff pulled further into the ditch to give him room. It was put to her that there was nowhere to pull in and she said they came around the bend on their correct side of the road and her driver tried to go even more to the left, even though there was no room. She said she was on her correct side and she tried to move as far in as she could. She said the driver, the plaintiff in this case, was the only person with insurance so she had been advised to bring her to court. She agreed that her case was now under appeal having been dismissed by the Circuit Court.

29. This witness said that the plaintiff's child had blood on his face which was maybe gone by the time the gardaí got there. She said she had not thought about this accident as to whether the bushes would have been in full bloom in August for example. She further said she didn't remember getting out of the car, that she assumed she got out the passenger door but she actually hadn't thought about it in the Circuit Court. She said if their car hadn't been in the ditch she would have gotten the plaintiff's son out his own door which would have been on the passenger side. She said it would have been easier technically but that she had never been in court before and had no idea about issues such as liability.

#### **Evidence of the Plaintiff's Partner, Mr Ger Kennedy**

30. He confirmed that he was the plaintiff's partner and that the child involved in this accident was his son. He indicated that when had been called to come to the accident that he was worried about his son. He arrived from the direction of Cloneen. He said that he found a white car on the road behind the plaintiff's car, nosed in at a slight angle, and that the car was facing him at a slight angle. He said her car was very close to the ditch and that the defendant said to him that his father was going to kill him. He said that he told the defendant not to worry, that there was nobody killed or badly injured. He also said the defendant had told him that his arm had become stuck in the steering and he said everyone was very upset.

31. He said he was twenty minutes away from the collision locus when called and that he couldn't swear to what time the gardaí arrived. He confirmed that he took some of what were referred to as the "loose" photographs the following day. He confirmed his belief that they showed the position of where the black car was and he said he thought there were some bits of debris on the road and that he noted the fresh mark on the stone pier and the defendant's car had hit the pier, or their other car was bounced against the ditch and hopped back out. He said he was 100% sure that he took the photographs the following day and he said there is debris on the road on the photograph, a piece of plastic.

32. He said that the defendant said that his arm got stuck and apologised and he confirmed that there was absolutely no problem for oncoming traffic going past the site of this accident. He said his car was very much in the ditch and hers was at a slight angle.

#### **Evidence of Mr. Spratt**

33. Mr. Spratt confirmed that he became self-employed in October, 2014 and did machine work for the plaintiff after she had the accident in August, 2013. He did extra feeding of the cattle for one and half to two years after that. He did eight hours one week and five hours the next week and he charged €12.50 per hour which was the rate at the time. The three invoices totalled €8,083 and he said he was paid €8,000 for the entire work.

#### **Evidence of the Defendant**

34. Mr. Morrissey, the driver of the car on the occasion of this collision, gave evidence that he resides at Tubber which is two miles from Cloneen and that he is 26 years of age. Cloneen is two miles from the locus of the accident. He is a single farm labourer and had lost his arm two inches above the elbow at the age of fourteen years in a farm machinery accident. He confirmed that he had purchased the motor car he was driving at the time, which was registered in his father's name, and that there was no insurance on it. He noted that his former partner had insurance on it a year before that. He works 39 hours a week, working with calves on another farm and he does not get disability allowance. He said that he was going to Cloneen and left his own home at 12:15pm and he was travelling at 35km per hour when turning the bend, he could not see the car coming and he was just into the bend as in photograph eight.

35. He described the other vehicle as coming wide around the bend and he said the front of his car connected with the driver's door. He said he started to come into the bend and he said there was a knob on the wheel of the steering wheel of his car which got whipped out in the impact of the accident and this had been a steering wheel adapted in accordance with the requirements of the Irish Wheelchair Association. He said he caught his hand and it brought it around. He said the front wheel was touching. That his car was pulled towards the right ditch but not into the ditch. He said he jumped out and that the plaintiff met him and they were in an awful panic and he was in an awful panic because the car was in his father's name. He told her that he had spotted the child and that he wanted to ring his father, that he was panicking and kneeling against the wall, that his hand was painful, that his knuckles were sore between his fingers and that it hurts in cold weather and the muscles are sore. He described the spokes of the car coming off at the rim and braking and he said he blamed the plaintiff's motor vehicle for being too far to his side, so he ended up hitting her car and was touching the stone verge on one side. He said that he was off the road for two years for driving without insurance and got three penalty points and had another conviction for not having tax.

36. He said he remembered a piece of the rim being on the road and that his car was removed from the scene, but that he paid the removers, O'Sullivan's, to drop his car to his own house. He said that it was a good day on the day of the accident. He had not mentioned there being a blind dip in the road before this, and he said when he went past the cottage into the gateway, one could only see that when coming around the bend. He said that he did strike her but she was on her own, out on her own side of the road and he agreed he ploughed into her side but that it all happened on his side of the road and that his front corner hit her back door.

37. He agreed that you would expect debris and he said he was upset that he saw blood and he did say sorry and that he was afraid for the child. He said that did not mean that it was his fault in his view. He said it all happened in a split second, that he was on the bend and she came around and there was no way they could see each other and he agrees that the plaintiff could see as far as the bridge. He believed that his tyre popped and that there were two spokes, a chunk came out of the rim of his tyre and that could have made marks on the road. He said he was breathalysed and he passed the test. When asked about the dip in the road, he said it was not a dip but a bend that goes in so far just past the cottage, he said he could not see the person at all and on her side, it would be a blind side. He said the house in picture ten is not visible in picture nine.

### **The Evidence of the Defendant's Engineer**

38. Mr. Vincent O'Hara, Engineer of Tony O'Keeffe & Co. Engineers, gave evidence for the defendants and he said that the combined sight distance was 45m i.e. 22.5m each. He said he attended the locus on his own and identified it as best he could and said pictures five and eleven of his photograph will show where each would first see the other, each having 22.5m. He said that there was a traffic cone under a beech tree and his description of a blind spot and he did not believe it was a head on impact with reference to the assessor's photographs, he said the two vehicles had to have been at an angle to each other. With reference to the three possible scenarios raised by the plaintiff's engineer, he was asked whether it was possible to say that the plaintiff was on her incorrect side and moved back or swerved at the last minute or whether the defendant moved his vehicle as it travelled past. He said that it would have been a left bend for the plaintiff and a right bend for the defendant and that there would be a tendency to move to the centre.

39. The witness said that once there was an impact to the right hand wheel, it acts as an anchor and causes it to curve to the right. The witness does not believe speed was a significant factor. There was no debris, no glass. He argued that the tyre marks seemed to be of a different locus in the "loose" photographs taken by the plaintiff's partner the following day with the one showing some plastic. In the photographs, the one marked four, according to this engineer has no date on the picture. He said there is debris in three but not in four and there is a tyre mark in four but not in three and that this suggests a different locus.

40. In summary, with regard to the three possible explanations of the plaintiff's engineer, regarding the first one, he said that a vehicle damaged on the front right would cause the vehicle to move to the right but he said the second and third scenario would show the plaintiff's vehicle exposed to the right hand side and he said in any of the three of the scenarios might have applied. He said that the defendant's wheel would move to the left side on impact and that two or three was more likely but you cannot say one was not the cause of the accident.

41. The witness was asked by the court what if one adopted a 50/50 position. What would move one or other back from that 50% liability. He said you would need debris to tell you that after impact the plaintiff would move to the right hand side and the debris could be from either vehicle. He felt that if the defendant had been on the incorrect side, the plaintiff would be facing forward, there would be more damage to her front. He said that the "loose" photographs three and four do not tally and seem to refer to different locations.

### **Potential Liability of Plaintiff**

42. In the first scenario considered, the contention is that it is the fault of the plaintiff. In the second, the damage is to her right side and the contention is that it is the first named defendant's fault. The third contention is that the Plaintiff was on the wrong side of the road, that the plaintiff corrected and evaded by pulling to the left and that she was, therefore, entirely to blame.

43. Mr. O'Hara said that the first possibility could not be discounted entirely and that in relation to the second, one would have to be objective and to look at the evidence and the credibility of the plaintiff and her passenger and her partner in relation to the photographs and he said that it was helpful that the gauge mark was curving to where the defendant's car ended up. The submission was made that the lack of a garda investigation was unhelpful, that the absence of a sketch mark was unhelpful and that there must have been debris.

### **Defence Submissions**

44. The defence submissions was made for an apportionment or that the court adopts the second proposition. It is pointed out in resubmissions that it is common case that both engineers found that the two vehicles were one at an angle to the other. This suggests that the plaintiff's car was straight on the road. She suggested that she was square with the road or almost stopped and the credibility of the plaintiff is very much in issue.

45. It is noted that Garda Carty is on the plaintiff's schedule but he was not called as a witness. If one is not calling a witness under the s. 391, one ought to serve a notice of discontinuance of that witness and the submission was made that the court may infer that if you are not going to give supporting evidence, it is a significant factor and one can infer that that witness did not support the plaintiff's case.

46. Section 34(1) of the Civil Liability Act is referred to and if the court divides up liability, it is mandatory if one cannot decide then on the issue of contributory negligence or proportions regarding same then if it is not possible to establish the different degrees of fault, the liability ought to be divided 50/50.

47. The "loose" photographs taken by the plaintiff's partner were not produced pre-trial but late in the day and it was also submitted that some are dated and some are not and thus we are relying on his recollection. However, we cannot ignore these photographs but it is noted that there was a car rally the same day.

### **The Medical Evidence**

48. The plaintiff's general practitioner, Dr. Bernadine Rochford, G.P. noted in her first report dated 10th of September, 2018 that the plaintiff attended the surgery on the 7th of September that year having been involved in a road traffic accident on the 11th of August, 2013. It was noted that the plaintiff was brought to South Tipperary General Hospital by her partner as she was concerned about her young son in case he had either a head injury or concussion as he had a nose bleed at the scene of the accident and had been frightened. No x-rays were taken and there was no sign of a concussion and the plaintiff herself was referred to Fran Mulcahy, Physiotherapist.

49. This report notes that on the 20th of August, 2013 Ms. O'Donnell attended the surgery and saw Dr. Deirdre Dunne, Registrar to the G.P. She complained at that time of mild neck pain and had been to see a physiotherapist that week. She had no arm symptoms and her neck was not tender with no midline tenderness but she was tender on the right C7 vertebrae and was tender over the upper trapezius muscle on the right side. Her neck movements were good and Dr. Dunne diagnosed a muscular problem and prescribed anti-inflammatories, difene tablets and Valium for muscle spasm, and gave her a tetanus vaccine.

50. The plaintiff was seen again by Dr. Rochford on the 4th of November, 2013 and was treated for a sinus infection and complained at that time of having a sore neck. She attended physiotherapy and had pain in her right arm on that occasion and reduced movement to the right side of the neck with tenderness. More anti-inflammatory medication was prescribed. At that stage the plaintiff had had six sessions of physiotherapy for both neck pain and arm pain.

51. Her MRI scan of the 1st of May, 2014 showed mild broad based posterior bulging of the C5/C6 and the C6/C7 intervertebral discs, each of which is distorting the thecal sac and causing mild encroachment on the emerging bilateral C6 and C7 nerve roots

respectively. That was in relation to the cervical spine. On the same date an MRI scan of the lumbar spine showed disc space narrowing with disc degeneration and mild broad based posterior bulging of the L4/5 and the L5/S1 intervertebral discs each of which is slightly distorting the thecal sac and is causing mild encroachment on the emerging bi-lateral L5 and bi-lateral S1 nerve roots respectively.

52. The MRI scan of the cervical spine of the 4th of January, 2018 showed slight loss of the usual cervical lordosis giving rise to a relatively straight cervical spine with disc space narrowing and disc degeneration and moderate broad based posterior bulging at the C6/C7 intervertebral disc which is slightly distorting the thecal sac and is causing mild degeneration and minimal broad based posterior bulging of the C5/C6 intervertebral disc which is causing minimal encroachment on the emerging bi-lateral C6 nerve root. There is a suggestion that changes in the vertebral bodies and in the posterior aspect of the cervical spinal cord are possibly due to previous trauma. The changes noted were present in the previous MRI carried out on the 1st of May, 2014 and there has not been a significant change during the interval. This clinical report confirms her social status as a full time farmer with a suckler herd and kennels and that she is a full time carer for her 90-year-old mother. There are home helps and HSC carers visiting the house daily to aid with the care of her mother. She also has the care of a nine-year-old son who attends local national school. This report verifies her oral evidence to the effect that the plaintiff can do tractor work but is unable to do any physical lifting including lifting buckets of foods and meal as a result of this accident and she has changed her work practices in terms of how she fattens her herd to avoid the necessity for heavy physical work. She had to have help with her dogs and keeping the kennels clean post-accident, as she was no longer able to do that work.

53. This report sets out that she was a very nervous driver and passenger post-accident but that this has settled down and she is now fine when driving.

54. As of the date of that report the plaintiff has neck and back pain but no pain radiating into the leg, the pain in her low back comes and goes and the neck pain, on the right side of her neck, is some days worse than others and she cannot turn her neck at all on some occasions. She had pain in the right lower ribcage over the summer but no arm pains.

55. The general practitioner found the plaintiff to have reduced rotation to the right side of the neck with normal flexion and extension, her shoulders were found to have a normal range of movement and her back was agile with normal range of movement and normal straight leg raising. In summary this 49-year-old woman who was involved in this accident five years ago in August 2013, has been found by her general practitioner to suffer from chronic neck and back pain ever since. An overall improvement in her symptoms is not expected.

56. The report of Mr. Kaar of the 15th January, 2018, Consultant Neuro Surgeon says that the plaintiff had very severe symptoms for four months and needed constant help on the farm and with kennel work until December, 2013. Dr. Kaar said the plaintiff had severe stiffness in the neck and low back, with pain in the shoulders more on the right side and she had to turn her whole body due to muscle spasms. Mr. Kaar traced through views on 4th December, 2013 by Dr. McCarthy, on the 13th May, 2014, October 4th, 2014, April, 2015 and October, 2016 which show a pattern of difficulty since the accident.

57. In his review on the 18th of December, 2017 the plaintiff still complained of ongoing pain on the right side of the neck radiating into the right shoulder and arm. He noted that she undertook physical tasks more with the left hand and that she carried buckets with the left hand rather than with the right, although she is right-handed. She still required extra help with the farm and kennel work. This witness found tenderness in the mid-trapezius muscle in the lower cervical area on the right. He found reduced rotation of the head to the right by 15° compared to the left. This doctor diagnosed degenerative change in the cervical spine at C5/6 and C6/7 bi-laterally where there were disc/osteophyte protrusions and foraminal stenosis and soft tissue strain of the cervical spine as a result of this accident on the 11th of August, 2013. In addition, this doctor found degenerative changes in the lumbar spine particularly at L5/S1 where there is a disc/osteophyte protrusion. A soft tissue strain to the low back is as a result of this accident. This doctor found persistent restricting mechanical/referred lower neck and right arm pains and lower back symptoms since this accident. He also found in the follow-up MRI of the cervical spine an indication of degenerative changes at C5/6 and C6/7 and persistent narrow edema of the C2 and C3 vertebrae with an adjacent area of spinal cord signal change possibly of post-traumatic origin. This doctor indicates that the disc degeneration will require by way of repair process a number of years. The acute spinal pain is a mechanical strain of the soft tissues such as ligaments, tendons, muscles and discs in the spine. He said that where severe muscle spasm is induced by pain there may be a reversal of the spinal lordosis and restricted movement. In the opinion of this doctor there were underlying degenerative changes in the lower cervical spine prior to the accident. He also confirms that it is likely that the changes in C5/6 and C6/7 were present prior to the accident. He noted that a twisting injury may give rise to severe and persistent symptoms and that a mechanical strain of a disc may give rise to referred symptoms to the upper limbs and the right shoulder and arm symptoms could have been referred from the lower cervical spine. In the view of this doctor he believes that it is likely that there was a twisting strain to the cervical spine as a result of this accident. He notes that the plaintiff was stationary, restrained in a seatbelt and that there was a severe head-on collision. There was extensive damage to her car. Following the accident, she experienced early and ongoing symptoms in the neck and shoulders more in the right arm with paraesthesia to the right hand. He said that the medical intervention showed severe symptoms in an early stage with a reduction in movement of the neck and tenderness in the right side muscles to the extent of 70° but that symptoms reduced to the point so that by August, 2016 neck movements were 30% of normal with no paraesthesia in the right hand and the severe initial symptoms and gradual reducing symptoms and clinical signs were consistent with post-traumatic pain.

58. He found ongoing pain in the neck radiating to the right shoulder and arm.

59. This doctor felt that it was likely that there was a compression and a twisting strain to the lower lumbar spine as a result of this accident. He notes pre-existing degenerative change in this area and that she had experienced mechanical symptoms of the low back from 2007 and that it was likely that they arose from the L5/S1 level. He noted that prior to the accident she was mildly symptomatic but that following the accident Dr. McCarty noted that she was experiencing severe low back symptoms.

60. In terms of prognosis Dr. Kaar says that this patient is now four and a half years' post-accident and pain remains significant and ongoing particularly in the cervical area and that on the positive side clinical examination does not show any evidence of progressive neurological change or nerve root compression and MRI appearances are overall stable. This report specifies that symptoms are likely to persist for at least a further one to two years but should gradually reduce. In the meantime, the plaintiff will be restricted for exercise and physical work for at least that period of time and that there may be some restriction for exercise and physical work longer term. Simple aerobic exercises, anti-inflammatories and other medications are likely to be necessary for a one to two-year period. He found that the risk of further neurological change was 5% in the longer term.

61. Professor Eamon Breathnach, Consultant Radiologist gave his report dated the 29th of June, 2018 and he had reviewed the MRI scan of the 25/11/09 which pre-dated the accident and he said that there was moderate associated degenerative change in both

facet joints at L5/S1 and he said that the MRI of the cervical spine of the 4/1/2018 showed evidence of degenerative change at both the C5/6 and C6/7 disc spaces. He amended his opinion dated the 22nd of March, 2009 and he said that in the absence of back pain prior to the accident and the development of neck pain subsequent to the accident, in particular with neck and right arm pain, it is a matter of probability that the underlying change was altered from a clinically insignificant pre-existing condition to one which is now clinically troublesome in terms of neck stiffness and some neck pain and right arm pain.

62. As of the 24th of December, 2014 this doctor was now in receipt of the MRI scan dated the 1/5/2014. He noted mild degenerative change at L5/S1 with sub-chondral reactive bone change in the adjacent support end plate vertebral bodies with mild facet joint degenerative change in the lower lumbar sacral spine but the spinal canal diameters remained normal.

63. Mr. Michael O'Riordan a Consultant Orthopaedic Surgeon in his report of the 30/5/2018 examined this patient and found that she exhibited an excellent range of movement in both the cervical and lumbar spine with no tenderness and that she was able to heel walk and toe walk and that straight leg raising was 90° bi-laterally and that neurology in upper and lower limbs is normal. This doctor found that her prognosis was good, that there were strains in her neck and back gradually recovering and he did not doubt that she would make a full recovery with no long term sequelae.

### **Findings of Fact**

64. Having reviewed the evidence I find that the plaintiff is a credible witness. Beginning with the photographic evidence, it can be seen that on the driver's side of the plaintiff's car, the impact begins at the forward end of the car at the wing and driver's door continuing on to the rear. This is in direct contradiction with the defendant's testimony who stated that he crashed into the plaintiff's back door as she swerved back onto her side of the road.

65. The force of the collision shunted the plaintiff's car further into the ditch against a stone pier in the hedge which is displaying fresh impact damage in all photos in which it appears, "loose" or otherwise. I do not accept that the rally had any connection to the tyre marks in the photographs. As the plaintiff's car was wedged against the pier, the right rear wheel took the majority of the force of the collision and was wrenched sideways. This would appear to be the source of the tyre mark as it begins almost parallel to the stone pier and would be the point that the wheel would stop turning as it was dragged backwards in a sideways position. This is consistent with the evidence of the plaintiff and her passenger that she pulled into the left as far as was reasonably practicable.

66. I find on the balance of probabilities that the third option as outlined by the plaintiff's engineer is most likely. The defendant either cut the corner or crossed over to her side due to the unfortunate catching of his arm in either the seatbelt or the steering wheel. The lack of a "head on" collision also coincides with the evidence that the plaintiff attempted an emergency avoidance further to the left when she realised that the defendant was committed to his course of travel but the plaintiff had no more room on her left. The plaintiff was not responsible for this accident. Her passenger and partner were credible witnesses. On the balance of probabilities, the plaintiff moved as far in as she could to her left, to avoid this accident and it was reasonably foreseeable given her description of the defendant's approach as described by her.

67. The first named defendant made wild promises in his panic, at the scene. He acted in a wholly irresponsible manner, in not taking sufficient care in terms of driving without insurance, driving carelessly given his disability in not allowing himself adequate time to stop in the emergency which arose, and in his not paying due care and attention to the presence of the plaintiff's vehicle on the roadway. The defendant's evidence was self-serving in all the circumstances. The plaintiff's engineer gave clear and complete evidence to show the court that her version of events was, on the balance of probabilities, the correct one and it is clear that in all the circumstances as found by this Court, this accident was reasonably foreseeable. The owner was negligent in allowing his son to drive without insurance. I find in favour of the plaintiff as against the defendants and reject all claims for contributory negligence. The plaintiff did her best to avoid this accident and was not negligent.

### **Conclusion**

68. In assessing the appropriate amount of damages for this injury this Court takes the view that the plaintiff clearly had, and makes the finding that, the plaintiff clearly had pre-existing back difficulties. I find that she suffered a moderately severe wrenching type injury which led to serious limitation of movement with recurring pain stiffness and discomfort. These injuries had exacerbated a pre-existing condition, certainly in the back, although she suffered further neck difficulties as a result of this accident. Now, almost five years post-accident, she has ongoing pain and stiffness and the medical view of Dr. Kaar is that she will continue to have these symptoms for at least another one to two year period. In all the circumstances, given that this has impacted on the plaintiff's manner of doing her farming enterprise work, has restricted her in earning her livelihood, in terms of her having to pay hired help on occasions, and having had to adjust the type of farming she does and having had to get assistance cleaning out kennels for the dog kennelling work which she does, this has severely impacted on the plaintiff in terms of her earning her livelihood. While she did not require surgery, nonetheless, she definitely has had consistent and persistent pain for what is exceptionally a lengthy period of time and if Dr. Kaar is correct it will have taken her seven years to get over this accident. The impact on her life has been significant on her working life and normal day to day living. In all the circumstances the court is mindful of being proportionate not only in relation to the injuries sustained by the plaintiff but also proportionate when assessed against the level of damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. In all the circumstances it seems to this Court that the appropriate level of damages, pain and suffering to date €80,000 with a figure for pain and suffering in the future in the sum of €25,000 giving a total of €105,000 in terms of general damages with items of special damage in the sum of €12,069. This Court has taken note of the revised Book of Quantum.