

THE HIGH COURT

Record Number: 2001 No. 5295P

BETWEEN

DONAL GREEGAN

PLAINTIFF

AND
TREVOR DUNICAN

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 9th day of November 2005

1. The plaintiff is a young man now aged 22 years who, some nine years ago on the 11th July 1996 when he was 13 years of age, suffered a very serious injury to his right leg when, riding aboard a home-made go cart down the driveway of his home, he came into contact with a motor car travelling along the roadway outside his open front gate.
2. The gate itself is set back from the road by about 13feet (3.9 meters) and beyond the gate there is an area of driveway which widens out between the gate itself and the commencement of the actual road. A small wall about one meter in height runs from the each gate post outwards at about a 45 degree angle towards the road, and on the left hand side as one exits the gateway, this low wall reaches a narrow grass verge which is first of all a couple of feet wide, but narrows gradually as it meets the road surface. It is necessary to view a drawing of this location to properly appreciate these features.
3. The detail of exactly what occurred is in dispute. There is a conflict of evidence between what the defendant says happened, and the evidence given by the plaintiff, his younger brother, a friend of theirs, as well as the plaintiff's father. This dispute centres on the question as to whether the plaintiff collided with the defendant's car on the roadway itself as contended by the defendant, or whether the defendant in order to avoid potholes on the road outside the plaintiff's house, in fact came over to his incorrect side of the road and into the mouth of the gateway of the plaintiff's home, colliding with the plaintiff in that area and causing the plaintiff to end up on the small grass verge at the roadside.
4. I will leave aside the detail of the plaintiff's injury for the moment because it has been suggested that I should make findings on liability at this point of the hearing, and the evidence which I have heard to date has been confined to that issue.
5. An important feature of this case is that the accident happened in July 1996 when the plaintiff was only thirteen years of age. His younger brother, Darragh, who has also given evidence, was only eleven years of age at the time and is now aged twenty years, and their friend, Conor Hannon, who was playing with the plaintiff and Darragh at the time was about ten years old at the time, and is now about nineteen. They are doing their best at this remove in time to recollect what happened that day, and to relate it to the Court and be cross-examined on that evidence.
6. Another feature of this case is that for some extraordinary reason, given the seriousness of the injury to the plaintiff, the Gardai were not called to the scene. One consequence of that omission is that neither the Court nor the parties have had the benefit of a contemporaneous sketch of the scene as a Garda may have found it, including the position of the defendant's car, any marks and debris on the roadway, or on the grass verge, and any other objective indicator as to where the point of impact actually was. That may certainly have been helpful.
7. Another feature of the case is that it was not for another five years that any communication was sent to the defendant by any solicitor acting for the plaintiff, alleging that he was at fault and claiming damages for negligence. By the time this first communication was sent, the plaintiff had just turned eighteen years of age. Proceedings were not issued until the 10th April 2001, almost five years after the accident, and at the present time it is over nine years since the accident.
8. It is a reasonable presumption that the recollection of all witnesses, including both the plaintiff and the defendant, must be impaired to some extent, if not indeed significantly, at this remove in time. It is also inevitable that even if the evidence of these three boys was being given within a year or two of the incident, the Court would have been cautious about accepting their evidence at face value. That is not for one moment to suggest that they might be less than truthful. Far from it. But the Courts must always be careful when considering the evidence of persons of that age. It must be even more careful in the interests of doing justice to the defendant (who is entitled to a reasonably expeditious hearing of any claim being made against him) when relying on the recollection of these boys after such a very lengthy period, when that evidence is offered for the purpose of satisfying that Court, on the balance of probabilities, as to what happened on that unfortunate evening in July 1996. The driver was seventeen years of age at that date, so there is not the same need to exercise the same caution about his evidence, although his evidence must be scrutinised in the normal way given the lapse of time and the lack of independent witnesses to what happened.
9. That is not to say that no weight should be given to that evidence of the plaintiff and his two young companions, but the Court must be very cautious about it given the consequences to the defendant of a finding of negligence on the basis of a probability based on that evidence. For that reason the Court must look very closely at whatever independent evidence there might be which can tend to support or tend to refute the evidence of the plaintiff and his witnesses, and the evidence of the defendant. The problem in the present case as far as that category of evidence is concerned is that there were no independent witnesses who saw what happened, and as I have stated there was no Garda investigation of the scene in the immediate aftermath of the accident.
10. The plaintiff's father has stated that when he went down to the end of the driveway after he heard the impact with the plaintiff, he found the plaintiff lying on what has been referred to as the grass verge, whereas the defendant driver of the car says that after the accident he got out of his car, which had halted a short distance down the road just past the gateway, and he says that he saw the plaintiff lying on the road itself and not on the grass verge, or even in the mouth of the gateway.
11. The principal independent evidence is that of an engineer called on behalf of the plaintiff who has taken certain measurements and photographs, as well as similar evidence given by a different expert on behalf of the defendant. These experts have tried to form a view as to the likely point of impact between the plaintiff and the defendant's vehicle. There is some disagreement in their opinions in that regard. There has also been some doubt expressed as to what the plaintiff's brother and friend could have actually seen from where they say they were positioned at the front of the house, because these witnesses both say that they saw the car hit the plaintiff. Where they were situated is a distance of about forty meters from the gate and almost forty four meters from the road itself.
12. There is some evidence which has been given by Mr Andrew Macey, Orthopaedic Surgeon, as to the type of impact involved

based on the nature of the fractures to the plaintiff's right leg. He opines that the particular injury would indicate that it was the result of a direct impact to the side of the right leg, rather than the leg having been run over by a wheel of the car. That is of some assistance, given that the plaintiff says that his right leg was hit by the front corner of the car bumper, whereas the defendant's recollection is of being aware of his right rear wheel running over something. In fact as his evidence will show, the defendant believed that it was a dog which he had run over rather than a boy on a go-cart. Mr Macy does not believe that the nature of the fractures to the plaintiff's leg is consistent with having been rolled over or crushed by the wheel of the car.

13. I will come to the evidence itself, but I mention these more general comments so as to demonstrate the difficulty facing the Court – especially after such a long period of time – in its task of examining whether the plaintiff has discharged the onus of proof upon him to establish on the balance of probability that the accident happened as a result of negligent driving by the defendant – in other words the way he says it happened rather than the way the defendant says it happened. The Court must be satisfied only on the balance of probabilities, but (even though it is stating the obvious) the plaintiff must do more than show to the Court that it is possible that it happened the way he says it happened. Mere possibility is insufficient. The Court must decide whether the plaintiff has demonstrated that it is more probable that it happened one way or the other.

The evidence

The plaintiff

14. On the date of this accident he was about thirteen and a half. He recalls that it was a fine sunny day during which he, his younger brother Darragh, and a friend Conor Hannon were playing at the front of their house in the driveway. He said that they had been taking it in turns to "have a go" on a home-made go-cart down the length of the driveway and as far as the grass verge outside the gate itself but just short of the road surface. The driveway slopes gradually down to the road, and the plaintiff described how they would each go down this sloped driveway, and by taking a route resembling a reverse "S" shape they would emerge through the gate itself at an angle which would bring them round naturally to the left in the direction of the grass verge and that the go-cart would come to a halt at the grass.

15. This go-cart had two wheels front and back attached to a four foot length of timber on which the rider sat with his two feet forward. The two front wheels were attached with a pivot arrangement so that these wheels could be controlled or steered down by means of a rope held in each hand. There was of course no braking mechanism attached to such a basic contraption. The plaintiff described how he had made this machine about two weeks previously during the summer holidays.

16. He stated that at about 5.30pm that evening his father arrived home from work, and that his brother went over to their father to see if he had brought home sweets after his day's work – something which very often happened. While Darragh did this, the plaintiff set off on the go-cart down the driveway in the way described, namely by going initially over to the left side of the driveway and then on the descent steering the machine over to the right in order to be suitably aligned on the driveway to exit through the gate at an angle, so as to safely reach the grass verge at the end of the low wall at the roadside, and come to a halt. They had been doing this for most of the day it would seem. He indicated that the slope of the driveway was not too steep and that the speed which might be achieved was not so great that one could not stop at the grass verge in this fashion. He described how when he reached the gate and beyond he saw a car immediately before him and he said there was very little he could do to avoid colliding with it. He stated that at the point when he came to the gate pillars themselves he could not see the car, but that he saw it when he reached the widened area between the gate and the road surface. According to his account of the looping nature of the descent down the driveway, he would at that point be turning towards the left hand side aiming for the grass verge. If that is so his right leg would be naturally presented to the road and any car on it.

17. He says that the defendant's car, a small Austin Mini (old model) which he recalls being brown in colour with a chrome bumper at the front, was coming from his left but on its wrong side of the road and that it was coming in at him at an angle, rather than travelling past him on the road. The plaintiff stated that there were many potholes on this road in the area immediately outside the gateway, and that the defendant was swerving over in his direction to avoid these potholes and ran into the plaintiff aboard the go-cart.

18. The plaintiff was asked to indicate by marking a map drawn by the plaintiff's engineer exactly where he states the point of impact was. He placed his mark at a point off the road surface itself and in the widened section of the driveway outside the gate, and which the defendant's expert indicated was about 1.4 meters (4 feet 8 inches) from the grass verge, and the same distance from the corner of the low wall.

19. The plaintiff stated that in his view the defendant's car came onto the widened section of driveway by a couple of feet, struck him and continued in a natural arc back out onto the road ending up back on the road just past the gateway and angled into the ditch on the left hand side.

20. The plaintiff in his evidence stated that after the impact he hit the ground, and sat up. He could see the serious injury to his right leg and he described how his foot was in against his inner thigh and his ankle was twisted and facing the ground. He realised that it was very bad and he says that he then put his hands on the ground and lifted himself up a bit off the ground and "shimmied back". He says that he tried to straighten his leg about three times but eventually just lay back, by which time his father had arrived down the driveway to where he was lying, and helped him lie back down on the ground. He lay there until an ambulance arrived and took him to hospital.

21. He could not recall if the car left any marks on the road after the impact.

22. When cross-examined the plaintiff was adamant that the go-cart had not gone as far as the road surface itself or the grass verge when the impact occurred. He stated that the reason why he ended up at the grass verge was on account of the angle he was travelling at coming out of the gate and going towards that grass verge, and the angle that the defendant was travelling towards the gateway to avoid the potholes.

23. I should perhaps state at this point that the road along which the defendant was travelling is about ten feet and ten inches wide as he approached the plaintiff's gateway, and for some reason just at the gateway itself the road is slightly wider, namely 11 feet and ten inches. It is also relevant to state that the evidence has been that the defendant would not get sight of the gateway until he is about 20 yards from its commencement, although at 40 yards he would be able to see the wooden fencing along the road beyond the gate which might indicate the presence of a gateway.

24. The plaintiff could not recall if the go-cart had been broken up by the impact, but seemed to recall that the go-cart was attached to him as went into the air. He has a recollection of that. He says that the nature of the impact was such as to spin him

around, and that he had not hit the front of the car head-on. He said the car continued on as if he had not hit him.

25. In cross-examination it was put to him that what happened was that he had shot out of the gateway onto the road, swerved to the left, and in doing so the right rear wheel of the defendant's car went over his leg. But the plaintiff denied that this was what happened, and said that if that was what happened he would have been hit on his left side and not his right. He was sure that he was hit by the driver's side front bumper which he recalled (and correctly as it happens) was a chrome bumper. He said that the Mini car is low to the ground and that the bumper hit his right leg.

26. In relation to where he ended up lying, it was put to him that he was lying on the road itself after impact, he was certain that he was not on the road itself. He said that he was 100% sure that he was lying on the grass verge, which, as I have tried to explain, is just a couple of feet further to the plaintiff's left as he exited the gateway. It is just at the edge of the road itself. If he ended up on the grass verge, it means that he continued moving or was thrown a couple of feet from the point of impact as shown by the plaintiff. The plaintiff feels that he was spun around by the impact, as I have already recounted.

27. He said under cross-examination that it was difficult to say what speed the defendant was travelling, because it all happened so fast, but he speculated that the defendant was doing between 20 and 30 miles per hour.

Darragh Creegan

28. As I have said, Darragh was eleven at the date of this accident. He said that he had been using this go-cart during the day. He also confirmed the trajectory of the route by which the boys travelled down the driveway and then exiting the gate by taking the angle to the left and ending up at the grass verge. He said that in the evening his father came home from work and while he could not remember them going over to their father to see if he had brought home sweets, he said that it was usual for them to do that. He said that at that stage he and their friend Conor were seated on a ledge just outside a window at the front of the house between two flowerpots. That position is shown in some of the photographs which have been produced to the Court. He remembers seeing his brother, the plaintiff, going down the driveway on the go-cart as normal and veering to the left past the gate and he said that this was when the car hit him. He also said that the car went on about five to ten yards past the gate and stopped on the other side of the road. He says that he and Conor stayed at the house and that his father ran down to the gate. He appears to have gone down to the gate as well at that stage, because he stated that when he got there he saw his brother on the grass margin I have referred to.

29. Under cross-examination, Darragh was asked whether he had actually seen the impact occur from where he was sitting at the front of the house, and he said that he had. He was shown some photographs which have been produced to the court and it was put to him that he would not have been possible for him to see his brother being struck if it happened at the point where the plaintiff says he was hit by the car. But he was sure that he had seen the impact. It was put to him also that if it was true that he saw his brother being hit, it had to be because the impact occurred on the road nearer the centre of the mouth of the gateway, as opposed to nearer the grass verge. He was shown a couple of photographs with a view to showing him that his angle of sight from the house would preclude him seeing the impact if it happened out to the left of the gateway, whereas he would be able to see it if the point of impact was more to the right. But he was quite adamant that it happened where the plaintiff said it was. Darragh made the point that some bushes at the left of the gateway would not have been as high as they now are because many years have passed since the date, and that he could see the plaintiff in spite of the bushes. It was also put to him that from where he was sitting, which is about 44 meters from the gate, that he could not be sure from that distance where the plaintiff was lying. But Darragh was quite sure that he could see that far. He also said that it had all happened in a couple of seconds.

30. Darragh also stated that he could see the defendant's car coming from the left just before the impact, and he again made the point that the trees at the gate area were not as high in those days. But again it was put to him that it would have been impossible to see a car coming from the left. Even though the roadway was eleven to twelve feet wide and that it would mean that the defendant's car was over double its own width on its wrong side of the road in avoiding these potholes if it had gone into the gateway area, Darragh was adamant that he saw the defendant's car doing that, and that the impact was not on the road.

Conor Hannon

31. Conor was only ten at the time, He remembers getting to the plaintiff's house between about ten and ten thirty in the morning to play with the plaintiff and his brother. He remembers they were playing with the go-cart and said that it was possible to travel down the driveway in the way the plaintiff described and stop at the grass verge without going out onto the road. He says also that when the plaintiff took his turn to go down the driveway after their father came home in the evening, he and Darragh were sitting at the wall at the front of the house. He said that he saw the defendant's car coming at what he said was about 35 mph, swerve to avoid the potholes, and that he saw the plaintiff being spun around and landing at the grass verge and that the string of the go-cart was tied around his leg. When he was cross-examined he said that even though there was a slope to the road it was not too steep, so you could not get up too much speed, and that the end of the driveway would slow him down. He said that in order to stop it was not necessary to put your foot down to act as a brake. The grass verge would cause the cart to stop. He was asked why if that was correct it was necessary to go as far as the verge if it was not going that fast. But he said that that was simply how they did it.

32. He said also that it was not their practice to have one of their number down at the road in order to keep a look-out for traffic. He said that it was not dangerous because they never went out onto the road, and that they were always able to stop at the grass verge. It was put to him also that from the position he was sitting at in front of the house he could not possibly see the grass verge, but he was adamant that he could in spite of the low wall and the bushes shown in the photographs.

33. He was also asked how long after this accident he had first been asked to recall where exactly the impact occurred. He said that it would have been when he made his statement to the Gardai, and that was about five years after the date of the accident.

34. It was put to him that when he said that he saw the defendant swerving to avoid the pot-holes he was simply guessing as to what had happened. But he denied that.

Padraig Creegan

35. He is the plaintiff's father. He confirmed that he had got home from his job as a postal clerk with An Post at about 5.30pm that evening. He remembers parking his car just in front of a window in front of the house. He could not recall actually having sweets for the boys on that particular occasion but that it was something which he often had for them. When he got home the go-cart was being played with. He recalled hearing an impact at the gate, but had not actually seen it happen. He went down to the road immediately and said that when he got there he saw the plaintiff on the ground "just around to the left and on the grass margin". He said that he was sitting with his legs parallel to the road. He was very distressed and tried to console him. He thought that the leg was broken and kept the plaintiff immobile and waited for the ambulance to arrive. Because he was concerned only with looking after the plaintiff, Mr Creegan cannot say exactly where the defendant's car ended up after the impact, but that it was just past the gateway, and he

added that it appeared to him that it was pointed into the ditch on the left at an angle, as if it had gone over there from the right.

36. He also described how the road outside the gate was always pot-holed badly due to water lodging on the road after heavy rain. It was a constant problem, and County Council road repair records in fact confirm this to be the case.

37. When he was cross-examined, it was put to him that when he came down to the plaintiff he had actually removed the plaintiff from the road itself rather than from the verge, but he denied this. He was sure that he had seen the plaintiff go down the driveway in what he called "a laboured fashion" and then going to the left at the bottom towards the grass verge.

38. It was also put to him that if he had thought that the defendant was at fault he would have made sure to call the Gardai, but Mr Creegan responded that his only concern at that time was for the injury to his son's leg, and he agreed that it was some years before any allegation of negligence was made against the defendant.

Mrs Marie Creegan

39. She is the plaintiff's mother. She was in the house at the time and was told about what had happened by her daughter. She recalled running to the front window, and while she said she was unable to see the plaintiff she could see her husband down at the end of the driveway. She ran down the driveway and said that the plaintiff was on the grass verge. She also gave some evidence as to the effect this accident had had on the family in the years following it. It appears that the family find it very hard to talk about it and they did not discuss it very much. In relation to the delay in the commencement of these proceedings, she stated that in the years that followed this accident their concern was for the plaintiff's recovery and well-being and they were not thinking in terms of whose fault it had been. She added that when the plaintiff turned eighteen he indicated a wish to do something about it and they suggested that he see their solicitor.

The defendant's evidence

40. He was seventeen at the time of this accident and he had been driving a car for only a few weeks on a provisional licence. It appears that his father had bought him the car so that he could drive to work.

41. His evidence was that on this evening he was travelling down this road on his way to a friend's house. He described the road as being narrow and full of pot-holes that you could not avoid. When he was cross-examined he stated that there were so many pot-holes that you could not avoid them and had to simply drive over and through them as best you could. He denied also that he was swerving to try and avoid them.

42. He recalled that when he got to the gate of the plaintiff's house something shot out into his path and he thought it was a dog rather than a boy on a go-cart. He says that he swerved to try and avoid it and came to a halt at the hedge a bit further up the road on the left. He is certain that he never drove into the gateway area itself, and is also certain that he was opposite the middle part of the gateway when the impact was felt and in the middle of the road. In cross-examination he stated that the plaintiff had come out towards the middle of the road as he drove to the entrance, but he could not say at exactly what angle the plaintiff came out, but that it was at an angle of some sort.

43. In cross-examination that as he came down this road he was certainly trying to negotiate his way through the potholes but was on his correct side of the road, and was not even aware that there was a gateway further down on the right. He says that he was concentrating on the potholes.

44. He was also asked in cross-examination to mark on one of the photographs the position in which his car stopped on the road after the impact. He marked a position on the left hand side and at a point where the rear end of his car was just opposite the first of the wooden posts of a fence which begins after the gateway to the plaintiff's house. In other words, it is just beyond the entrance to the plaintiff's house on the opposite side of the road.

45. After the incident he got out of his car and he saw the plaintiff lying just off the centre of the road on the house side of the road. He says that he saw the plaintiff sitting up and that his father came down and lifted the plaintiff off the road and back to the middle of the driveway. It was put to him that he was wrong to say he was in the middle of the road and that in fact he was lying at the grass verge. But the defendant was sure he was on the road and not the grass verge.

46. When asked what speed he thought he was doing at the time of the incident he stated that he thought it may have been between twenty and thirty miles per hour. He also believes that he swerved to his left first before applying the brakes.

47. He states that his recollection of the event is that something came out of the gateway very fast and collided with the middle of his car and he believes that his rear wheel ran over it.

Christopher O'Dowd

48. He gave evidence of having taken various photographs at the locus. He made some comments to which I have already referred about the possibility of the young boys still sitting up at the wall of the house being able to see the impact happening if it happened where the plaintiff says it happened. He said that the boys could not have seen the impact happening from where they were sitting unless the point of impact was about two meters back from the grass verge in the direction of the centre of the gateway, rather than at the point 1.5 metres from the grass as pointed out by the plaintiff on the map. It was put to him however that if the point of impact was somewhere on the widened part of the gateway there would be no difficulty seeing it from where the boys were sitting up at the house. He stated however that the point of impact as demonstrated by the plaintiff could not be seen from the boys' vantage point.

Conclusions

49. The first task facing me is to make findings of fact. Some facts are easily found. Firstly, there is no doubt that the plaintiff, aged thirteen at the time, travelled down the driveway and collided with the vehicle driven by the plaintiff. I am prepared to accept the plaintiff's recollection that he was in contact with the front right side bumper of the Mini car, because first of all he has recollected correctly that the bumper was chrome and the car was brown in colour. This seems to be an accurate recollection. But the second reason why I accept that he was hit by the bumper rather than that the rear wheel of the car went over his leg, is that the Orthopaedic Surgeon, Mr Macey who has looked at the x-rays of the fractures to the right leg above and below the right knee has expressed the clear opinion that this injury was a direct impact type of injury rather than a crush type injury which might be caused by a wheel rolling over the leg. He was also satisfied about this because of the nature of the flesh injuries to that part of the leg. I have no doubt that the car bumper came into direct impact with the right leg in the area of the knee, thereby shattering it in the way shown in the x-rays.

50. That conclusion does not however assist in determining from an objective viewpoint at what angle the car was in relation to the plaintiff's leg at impact, or vice versa. But it seems clear that there was some angle involved, as a head-on type impact would have resulted in a different type of fracture injury than what was obviously a side-on impact. These conclusions help to the extent that I am satisfied that the plaintiff and the defendant's vehicle came into contact when they were at some angle to each other. But I cannot say on the basis of any probability whether it was the defendant's car which was at an angle as the plaintiff would say, due to its swerving into the gateway area, or whether it was the plaintiff who presented himself at an angle to the front bumper- perhaps the corner of the front bumper- due to coming out onto the road at an angle having overshoot his normal or expected route to the grass verge. The defendant's evidence was that he saw something shoot out suddenly onto the road which he thought was a dog – presumably because the plaintiff would have been very low to the ground when riding aboard the go-cart.

51. The next matter on which I can be satisfied on the basis of probability is that the defendant's car pulled up within a very short distance from the impact and on its correct side of the road – albeit probably at an angle into the left ditch. One way or another I am satisfied that there was no excessive speed on the defendant's part, and I am satisfied to infer from the clear evidence about the extent of the pot-holing on this road in the vicinity of the gateway that the defendant could not have been driving at any speed which could be considered excessive.

52. The next matter on which I am satisfied is that the evidence of Darragh Creegan and Conor Hannon should be disregarded by me firstly because they were aged eleven and ten respectively at the time. But secondly because it is nine years since this accident and it is inconceivable that their recollections would not be blurred by that passage of time – a passage of time, by the way, for which the defendant bears no responsibility whatsoever. Since it was the plaintiff who delayed in the commencement of these proceedings, any disadvantage occasioned by that delay should be borne by him rather than by the defendant. I would not be happy to rely on their evidence in order to assist me in reaching conclusions as to liability on the basis of the balance of probabilities. I am also satisfied from the evidence of Christopher O'Dowd and the photographs which he has taken that the boys could not be correct that they could see the impact and the plaintiff lying on the grass verge from where they were seated at the front of the house. If they could see the plaintiff as they say, that must mean that the plaintiff is wrong about the point of impact and where he lay thereafter. If they are wrong then it confirms the unreliability of their recollections. One way or another it means that in the interests of justice their evidence should not be relied on.

53. There has been a complete conflict of evidence as to where the plaintiff was lying in the immediate aftermath of the accident. The plaintiff says that he ended up on the grass verge. His father is also certain that that was where he was when he went down to the end of the driveway immediately the accident happened. The plaintiff's mother is also saying the same thing. The defendant on the other hand says that when he got out of the car he saw the plaintiff lying near the middle of the road just on the house side of the centre at the mouth of the gateway. It is not possible to resolve that conflict beyond doubt. To do so would be to disbelieve the defendant, or alternatively to disbelieve both the plaintiff, but more significantly the plaintiff's mother and father. Again I feel that it appropriate to make some allowance in favour of the defendant in view of the length of time which has been allowed to pass since the accident happened, but on the whole I am prepared to prefer and rely on the evidence of the plaintiff's father and mother, both of whom strike me as very honest and genuine people who would have no wish to mislead the Court. It is also not likely that they would forget the immediate aftermath of such a traumatic event. I am therefore prepared to be satisfied that the plaintiff was lying at or on the grass verge rather than in the middle of the road.

54. An important question which remains is whether the final position in which the plaintiff was after the accident, combined with the finding that the plaintiff and the car collided at some angle, is sufficient to conclude on the basis of a probability that the impact occurred as a result of the negligent driving of the defendant. In one possible scenario the impact could have occurred at some angle if the defendant had swerved towards the gateway and onto the widened surface and collided with the plaintiff, causing him to spin around and end up at the grass verge. That is what the plaintiff says happened. But I have heard no expert evidence or other evidence which enables me to conclude as a probability that such an impact would have to effect of landing the plaintiff in the area of the grass verge. I have simply the plaintiff's evidence that this is what happened and his father and mother's evidence that this is the location where he ended up.

55. Another possible scenario is that the plaintiff came out further than the normal route by which he would otherwise end up at the grass verge, and out a bit onto the road veering to his left, as the defendant says, hit the front bumper of the car at some angle, while the car was travelling along the road, and was sent back into the area of the grass verge by the effect of the impact. I have no expert evidence from which to conclude one way or another as a matter of probability that such an impact would or would not also result in the plaintiff ending up on the grass verge.

56. In these circumstances we are all left in a position where speculation is the only option and that is insufficient for the purposes of concluding on the basis of a probability.

57. There is as I have said no information as to marks and debris on the road which may have been available had the Gardai been called to examine the scene in the immediate aftermath of the accident. That might have provided some objective independent evidence which would have assisted the Court in the task of preferring one party's version of events rather than another.

58. In my view there is a possibility only that the accident happened the way the plaintiff describes. I am not satisfied that the conclusion which I have reached that the plaintiff was located after the accident on the grass verge, means as a matter of probability, that the impact occurred in the mouth of the gateway as opposed to on the road. I appreciate that if the point of impact was in fact on the road, it means that at least the right hand side of the defendant's car was on the right hand side of this road, albeit a narrow road. But it means also that the plaintiff would have to have come out onto the road at least to some extent.

59. In the circumstances of this accident, given the dimensions of the road, the terrain of the locus generally, particularly the extent of the pot-holing and the lack of any excessive speed on the part of the defendant, I would not even be prepared to automatically conclude that the driving by the defendant was negligent.

60. In all cases in which a plaintiff alleges that a defendant has been negligent, it is the plaintiff who has the onus of satisfying the Court that on the balance of probability, the defendant was conducting himself in breach of his duty of care to others, and that the breach of that duty of care resulted in the plaintiff's injuries. The balance of probability test requires more than to present the Court with a possible explanation for how the accident happened. In the present case the plaintiff has certainly presented enough evidence to suggest a possibility that the accident happened the way he says it happened. However, in my view the defendant has done exactly the same. The way he recalls events presents just as plausible an explanation, and his version is not fatally flawed by my being satisfied on the basis of probability that his recollection is incorrect about the position of the plaintiff's body after the accident.

61. The crucial difficulty in the case from the plaintiff's point of view is the absence of firm evidence. I appreciate that the plaintiff is

fully convinced that the car came over to his side and onto the mouth of the gateway. But the difficulty for him is not that I do not believe him. That is not the issue. It is important for him to appreciate that I believe firmly that how he says this accident happened is his very true and honest and genuine recollection. I imagine that hardly a day goes by that he does not have cause to think back to that awful day in July 1996 and contemplate what went wrong with a profound sense of sadness. That is only natural and to be expected. But I cannot avoid recognising the great length of the passage of time since the accident. Nine years is a very long time indeed for somebody to look back to – particularly when he was only thirteen at the time. I am entitled to infer that his recollection would be affected by that passage of time. In many cases that loss of accurate recollection can be compensated for by the existence of other evidence which does not deteriorate over time, such as evidence of a physical nature found at the scene afterwards, whether by a Garda examining the scene or another person present at that time. In the present case there is simply one party's honestly spoken word as to recollection against another persons. That is insufficient for me to resolve the conflict as a matter of probability as opposed to a possibility.

62. With great regret I have no alternative but to dismiss the plaintiff's claim on the basis that negligence has not been made out to the required standard of proof. At the same time I want to express the sincere hope that in spite of the disappointing result for this young man, he will derive benefit from the fact that these proceedings have concluded, so that he can resume as normal a life as possible and achieve his full potential. I wish him well.