Neutral Citation No: [2024] NIKB 41	*Ref:* **HUM12525**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **24/05/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between:

JOHN MICHAEL McAULEY

Plaintiff

and

(1) SAMUEL JAMES RUSSELL
(2) LIVERPOOL VICTORIA FRIENDLY SOCIETY LIMITED T/A LV

Defendants

Colm Keenan KC and Jonathan Collins (instructed by Donnelly & Wall Solicitors) for the Plaintiff
David Dunlop KC and Michael Maxwell (instructed by Keoghs Solicitors) for the Second Defendant

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HUMPHREYS J

Introduction

[1] The plaintiff in this action seeks damages as a result of personal injuries, loss and damage sustained by him in a road traffic collision which occurred on 11 August 2014 on the Slaughterford Road in Whitehead, Co Antrim.

[2] The plaintiff was aged 17 at the time and was driving his Renault Clio with three passengers in the vehicle away from Whitehead at around 9pm. As he travelled over a humpback bridge, it is his case that he was met by a Vauxhall Corsa vehicle, driven by the first defendant, on the plaintiff's side of the road. He took evasive action and, in doing so, collided with a Hyundai Santa Fe vehicle driven by Julie Magowan, on the other side of the road.

[3] One of the passengers in the plaintiff's vehicle sustained serious life changing injuries as a result of the collision.

[4] Both the plaintiff and the first defendant were prosecuted. The plaintiff pleaded guilty to a charge of causing grievous bodily injury by careless driving whilst the first defendant pleaded guilty to careless driving and to using a motor vehicle on a road without a valid policy of insurance.

[5] The first defendant was not insured to drive his vehicle at the relevant time by reason of having carried out modifications to his car and failing to disclose these to his insurers. As a result, the second defendant declined to indemnify him. It was joined to these proceedings on its own application as insurer concerned pursuant to article 98 of the Road Traffic (Northern Ireland) Order 1981 and was given liberty to exercise the rights of the first defendant.

[6] The first defendant engaged a solicitor and served a defence denying liability but took no active part in the proceedings. He did not give evidence at the trial.

The Evidence

(i) Witness testimony

[7] The plaintiff gave evidence that he was driving his car over the bridge when he was met by the first defendant's vehicle coming directly towards him. He stated that he had to manoeuvre in order to avoid a head-on collision with the first defendant's car. When asked what distance the first defendant was from him when he became aware of his presence in his lane the plaintiff stated that he could not be sure of the exact position but that the first defendant was approaching the Hyundai Santa Fe vehicle driven by Ms Magowan. As a result of the evasive action which the plaintiff was obliged to take due to the presence of the first defendant's vehicle he collided with Santa Fe on the wrong side of the road.

[8] The plaintiff was shown a number of photographs of the locus of the accident. He stated that although he had only passed his driving test some two months prior to the accident he was nonetheless familiar with the area as he had played a nearby golf course a number of times. He gave evidence that he approached the bend before the humpback bridge at a speed of around about 30 mph and that he was aware of the word 'slow' on the road and the warning signs of the presence of the humpback bridge.

[9] The plaintiff stated that the aftermath of the accident was a blur to him. He had suffered serious injuries. Various people came to help but at the time he was falling in and out of consciousness.

[10] Under cross examination the plaintiff accepted that this was the first time he had driven over the humpback bridge in that particular direction. He had driven over it in the other direction on a previous occasion. He accepted that as you approach the bridge one cannot see what lies beyond the bend and that therefore particular care is required in negotiating this part of the road. One of the photographs shown to the

plaintiff established the presence of a tyre mark on the left-hand aspect of the lane in which the plaintiff was travelling. He was asked if the mark was caused by his vehicle, but he said that he could not answer that. He believed that he did at some point brake instinctively but was unable to precisely recall whether this did in fact occur. The plaintiff was also asked why he swerved in circumstances where this would cause a head-on collision with a vehicle travelling in the other lane. His answer to this question was that it was a natural instinct based on the presence of the Corsa vehicle in his own lane.

[11] The plaintiff was asked why in circumstances where he claimed to have done nothing wrong, he pleaded guilty to the charge of causing grievous bodily injury by careless driving. He replied that he had originally faced a more serious charge of dangerous driving causing injury and entered a plea to a lesser charge on legal advice.

[12] Counsel for the second defendant put it to the plaintiff that his vehicle was airborne prior to the collision with the Santa Fe and that he had been driving much too fast for the corner. The plaintiff denied having lost control of his vehicle or driving at a high speed but admitted that he had been unable to bring his car to a halt.

[13] Orla Kelly gave evidence that she lives around half a mile from the scene of the accident and is very familiar with the Slaughterford Road. She had finished a shift as a care worker and was visiting a friend in the Riverford estate. She left there to travel home in her Renault Megane and turned right from the housing development onto the main road. As she drove out, she was aware of a vehicle some distance away travelling in the same direction. A few seconds later she observed that vehicle coming up beside her and overtaking both her and the car in front of her. This was around the bottom of the hill on the approach to the bridge. Ms Kelly described the overtaking car as travelling at a very high speed. She considered that this was a very dangerous manoeuvre which the driver was making. Her evidence was that she saw this vehicle overtaking the vehicle in front of her and as a result she put her hands over her eyes. The next thing she heard a crash as the plaintiff's vehicle came over the brow of the hill and struck the car in front of her. She stopped her vehicle and ran to help. Ms Kelly remained at the scene until emergency services arrived but stated that the vehicle which had overtaken her just disappeared. She gave a description of the vehicle to the police and believed that he was identified from cameras located on the road nearby.

[14] Ms Kelly testified that in the aftermath of the accident another silver car came on the scene, and she had a conversation with the driver who indicated that he came to help and had earlier been at his girlfriend's house. She was adamant that this was a different car than the one which she saw carrying out the overtaking manoeuvre in front of her.

[15] Julie Magowan gave evidence that she was working as a nurse and had just completed a fitness class and was heading home to Whitehead. She was driving at around 30 miles an hour in an area which is well known to her. As she came up the

hill towards the bridge, she could hear a loud vehicle noise although she was unsure where it was coming from. As she slowed down, she could hear the noise get louder and then in front of her appeared the vehicle driven by the plaintiff. She could see that this vehicle was off the ground, and it was travelling straight towards her car. She braced and carried out an emergency stop. Ms Magowan said that she was not overtaken by any silver car and that she was not aware of the presence of any other car in the vicinity of her when this accident occurred. She stated that she saw a man and his dog walking on the right-hand side of the road and in the aftermath of the accident she recalled a small silver car approaching and stopping briefly beside her car. Her evidence was that this occurred some minutes after the accident and there was just one young man in this silver car.

[16] Noel McKee worked as a firefighter and lived in Whitehead. On the day in question he was walking with his 13-year-old son and their dog along the footpath towards the bridge. His recollection was of a loud noise as if a vehicle was travelling too fast. He could see the black Santa Fe driving slowly and then became aware of a Renault Clio coming over the brow of the hill launching into the air, bouncing once on the ground before striking the front of the Santa Fe. He asked his son to dial 999 for the emergency services and then he stepped over the crash barrier and walked towards the accident site. His evidence was that about this time a grey coloured Corsa pulled alongside and rolled down the passenger window. There was a single occupant in this vehicle who asked Mr McKee if it was okay to drive through past the accident scene. It was his recollection that there was no other car in the vicinity of the accident. In his opinion the Renault Clio was out of control and the grey car played no part in the accident. He accepted that there was a time gap between the accident occurring and the arrival of the Corsa on the scene.

(ii) Expert evidence

[17] The plaintiff called Dr David Marrs, consulting engineer, who gave evidence that he had inspected the locus of the accident on 11 July 2016 as he was involved originally in the criminal proceedings. He noted the topography of the area and the warning signs which are in place for drivers approaching from each direction which indicate that there is a narrowing of the road and the presence of a humpback bridge. The word 'slow' had been painted on the carriageway. There is a housing development known as Riverford around 115 metres from the crown of the bridge and in the vicinity of that development there are chevrons which create a right-hand turning lane. The distance from the point of impact to the bridge he measured at approximately 35 metres. In the direction of the plaintiff's travel, a driver enjoys no view at all around the bend from a distance of around ten metres from the bridge. At around five metres from the crown of the bridge, the road begins to open up and the driver has a view of the road ahead for about 70 metres.

[18] Dr Marrs accepted that the front tyres of the plaintiff's vehicle were of a herringbone type tread and would not leave the type of tyre mark that had been shown in the photographs. However, the rear tyres were of more conventional tread

and would be consistent with the tyre mark shown. In cross examination Dr Marrs accepted that a vehicle with an anti-lock braking system is less likely to leave a skid mark on the road surface but it is nonetheless still possible. He accepted that front tyres take most of the force under such braking but that rear tyres can go over where the front ones had left a mark and therefore could overwrite a mark left by the front tyres.

[19] Dr Elwood, consulting engineer, gave evidence on behalf of the second defendant. He attended the scene in 2018 but had the benefit of the photographs and statements associated with the police investigation. From those had formed the opinion that this was a high energy significant impact. The relative weights of the vehicles were 1200 kg for the Clio and 2020 kg for the Santa Fe. The position of the vehicles as demonstrated by the photographs indicated that the Clio was going faster than the Santa Fe since the latter appeared to have been shoved back into the crash barrier at the time of the collision. Dr Elwood had examined some of the data from NCAP tests and from those was able to derive an estimate that the plaintiff's vehicle was travelling at around 40 mph. This was based on an assumption that the Santa Fe was stopped prior to the collision occurring. He accepted that the damage to the vehicles was caused by the cumulative energy of both and therefore if the Santa Fe was not stationary then his estimate of the speed of the Clio would necessarily reduce.

(iii) Evidence adduced under the Civil Evidence (Northern Ireland) Order 1997

[20] The plaintiff relied on two statements of witnesses which were produced under the provisions of the Civil Evidence (Northern Ireland) Order 1997 ('the 1997 Order'). By virtue of the 1997 Order hearsay evidence is admissible in civil proceedings subject to the weight to be attached to same by the court. By article 4 of the 1997 Order, where a party adduces such evidence and does not call the maker of the statement, then the other party may call the witness and cross-examine him on his statement. Under the provisions of Order 38 rule 19 of the Rules of the Court of Judicature (NI) 1980, I offered the second defendant the opportunity to secure the attendance of these witnesses and to cross-examine them, but senior counsel declined that invitation.

[21] Article 5 of the 1997 Order sets out a non-exhaustive list of factors which the court must take into account in ascertaining what weight, if any, to attach to hearsay evidence which has been adduced under the provisions of the Order. These factors are as follows:

> "(a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;
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> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[22] The evidence of Darryl Cardwell was that he was driving his blue Vauxhall Astra on the evening in question and was travelling behind a silver Corsa which he had observed driving at considerable speed. Whilst proceeding along the Slaughterford Road, Mr Cardwell observed a navy car pulling out from the Riverford development and turning towards the direction of Whitehead. In his opinion, the Corsa had plenty of time to slow down and follow this navy car. To his surprise, the Corsa did not even attempt to brake but proceeded to overtake the navy car just after the junction driving up the hatch markings in the middle of the road. He immediately thought that this was a dangerous manoeuvre given that there was a bend and a humpback bridge in front of that vehicle. As he looked up at the bridge, he saw a blue Clio coming around the bend on the wrong side of the road and heading towards what he described as a large black jeep. At this time the Corsa was still behind the black Santa Fe but on the wrong side of the road. The Clio then collided with the Santa Fe and the Corsa continued driving round the bend and proceeded on. The navy car in front of Mr Cardwell stopped and put its hazard lights on and he proceeded to pass the collision and parked with his hazard lights on beyond the collision in an attempt to warn drivers coming from Whitehead. He returned to the scene and attempted to help the female passenger who was badly injured in the Clio. He expressed his belief that the Clio was going to collide with the Santa Fe whether the Corsa was there or not.

[23] The evidence of Gareth McQuitty was that he was both a friend of the first defendant and the passenger in the vehicle driven by him that evening. He had been picked up at his house between 8.30 and 9pm. He described the vehicle driven by Samuel Russell as a silver Vauxhall Corsa with lowered suspension and a loud custom exhaust. Whilst proceeding on the Slaughterford Road, Mr McQuitty was aware of the blue Astra travelling behind them. He also observed a Hyundai Santa Fe travelling in the same direction in front of their vehicle. He described Mr Russell as driving at a speed which was too fast for the road. As they approached the entrance to Riverford, a Renault Megane pulled out into their lane. Mr Russell decided to overtake the Megane. Mr McQuitty described feeling anxious as a result of this decision. During the overtake he noticed a Renault Clio coming towards them around the corner and

travelling across the white line into the other lane. He stated that somehow, they avoided the collision as they saw the Clio impact with the Santa Fe. Beyond the scene of the accident Samuel Russell stopped at the junction with Islandmagee Road and said, "what will I do?" Mr McQuitty replied that he did not know as he felt shocked and sick. Mr Russell said that he was driving off as he did not want to get 'done' for speeding. Mr McQuitty described how he did not sleep that night and decided to contact the police after he had confided in a colleague at work what had happened.

[24] These statements were both made in August 2014, contemporaneously with the events which are the subject matter of this litigation. They do not involve multiple hearsay. There is nothing in the statements or in any other source to indicate that these individuals had any motive to misrepresent or conceal matters. There is also no suggestion that the statements were made in collaboration with others. The court was informed that both these individuals were written to and requested to attend court to give evidence and that counsel had assumed that they would appear. There is no evidence that they were made the subject of subpoenae to compel their attendance at trial. The circumstances of the accident and the proximate views enjoyed by these individuals mean that their evidence is of value and weight in these proceedings, and I will take it into account accordingly.

Liability

[25] The burden is on the plaintiff to establish that the first defendant drove his vehicle in such a fashion as to breach the duty of care which he owed to other road users and also that that breach caused the plaintiff to suffer his injuries, loss and damage. Counsel for the second defendant accepted that the first defendant was guilty of a piece of poor driving by engaging in a dangerous overtaking manoeuvre but said that this breach of duty did not cause the collision or any of the harm sustained by the plaintiff. It is the second defendant's case that the plaintiff's own poor driving by travelling at an excess speed and losing control of his vehicle led to the collision between his car and the Santa Fe. Reliance is placed on the evidence of Mr McKee and Ms Magowan insofar as they make no reference to the Vauxhall Corsa playing any role in the accident.

[26] The plaintiff relies on his own direct evidence of what he could see as the approaching Corsa in his lane as he rounded the corner on the bridge and also the evidence of Ms Kelly who witnessed the course of performing the overtaking manoeuvre and the evidence of both Mr McQuitty and Mr Caldwell in relation to the driving of Mr Russell on the evening in question.

[27] I have listened carefully to the evidence of all the witnesses who were doing their best to give evidence in relation to traumatic events which occurred almost ten years ago. It is not unusual or surprising that the accounts given to the court of the events of that evening do not tally. It is common for people's recollection of events of this nature to differ and I have not concluded that any of the witnesses gave evidence which was misleading or inherently unreliable. I have weighed up the versions of

events and considered the hearsay evidence adduced in the form of the statements and taken into account the fact that the first defendant did not give evidence to the court at all.

[28] I make the following findings of fact on the balance of probabilities:

(i) The plaintiff was driving too fast on the approach to the humpback bridge, and he lost control of his vehicle;

(ii) As he rounded the corner, he was faced with a Vauxhall Corsa driven by the first defendant carrying out an overtaking manoeuvre and in the plaintiff's lane;

(iii) This manoeuvre was carried out by the first defendant despite the presence of warning signs on the road and the chevrons around the junction with the Riverford development and it was highly dangerous;

(iv) Had the plaintiff been travelling at a speed commensurate with the road conditions and layout he ought to have been able to get stopped before the collision with the Santa Fe;

(v) The plaintiff swerved out of his own lane due to the presence of the Vauxhall Corsa;

(vi) The tyre mark observed at the scene was not made by the plaintiff's vehicle;

(vii) After the collision occurred the Vauxhall Corsa driven by the first defendant left the scene. The other vehicle which arrived on the scene was a different small silver car with only one occupant and was not the one driven by the first defendant;

(viii) The first defendant was overtaking the vehicle driven by Ms Kelly and was approaching the Hyundai Santa Fe at the time the plaintiff's vehicle came over the brow of the hill;

(ix) The loud noise heard by some of the witnesses emanated from the first defendant's vehicle which had a customised exhaust;

(x) As such I reject the evidence of Ms Kelly that the Vauxhall Corsa had overtaken the Santa Fe prior to the collision, and I also reject the evidence of Mr McKee that the Corsa was not present at the scene. I note that Ms Magowan was not aware of any vehicle behind her and that is where I find the Vauxhall Corsa was at the time the Clio swerved and collided with the Santa Fe.

[29] On the basis of these findings of fact I am satisfied that the first defendant in carrying out the overtaking manoeuvre caused the plaintiff to swerve to his right and

thereby collide with the vehicle driven by Ms Magowan and thereby sustain injuries. The plaintiff's case against the first defendant succeeds.

[30] However, I have also determined that the plaintiff must bear significant responsibility for the collision. Rule 126 of the Highway Code states:

> "Drive at a speed which will allow you to stop well within the distance you can see to be clear."

[31] The plaintiff, as an inexperienced driver, approached the blind corner of a humpback bridge at an excessive speed, and was unable to stop within his field of vision. As a result, he was compelled to swerve into and collide with Ms Magowan's vehicle. I find that it is just and equitable to reduce the plaintiff's damages by 50% in respect of this contributory negligence.

Quantum

(i) General Damages

[32] The plaintiff suffered the following injuries:

(i) A fracture to his left femur and tibial plateau. He underwent emergency surgery and later surgery to remove screws. He has persistent pain in the left thigh and knee and developed a valgus deformity which has led to some knee instability. There is an increased risk of degenerative change. A referral for realignment surgery has been recommended;

(ii) Left distal radius fracture. This required surgery and he was in plaster for eight weeks. He has been left with some numbness and decreased strength in the left arm;

(iii) Degloving injury to the right knee which healed without complication;

(iv) Facial fractures to the right orbital floor, left maxillary sinus and nasal bones which required open reduction and internal fixation. He had pain in this region for several months. His nose remains deformed. Vents were inserted to address a blockage to the ears caused by damage to the mechanism opening the eustachian tubes. There is ongoing discomfort and low grade tinnitus;

(v) Laceration to the face which has left some scarring to the right upper lip and an area of abnormal sensation;

(vi) Fracture to right first rib and pulmonary contusion from which he made a full recovery;

(vii) A concussive injury from which there were no significant sequelae;

(viii) Damage to a right upper incisor necessitating three dental repairs; and

(ix) A prolonged adjustment disorder, characterised by anxiety, sleep disturbance, lowered mood and loss of motivation.

[33] The plaintiff has also sustained a substantial loss of amenity in his reduced ability to play golf. I have taken that into account in the assessment of the appropriate overall level of damages in this case.

[34] Having considered all of the medical evidence, the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (6th Edition), and the submissions of the parties, I assess damages for these injuries as follows:

(i)	Left leg injury	£100,000
(ii)	Left arm injury	£40,000
(iii)	Right knee	£10,000
(iv)	Facial & ENT injuries	£40,000
(v)	Scarring	£20,000
(vi)	Rib/chest injury	£10,000
(vii)	Concussion	£5,000
(viii)	Tooth	£10,000
(ix)	Adjustment disorder	£15,000

[35] The arithmetic total of these figures is £250,000. However, in *Wilson v Gilroy* [2008] NICA 23, Kerr LCJ advised:

> "In cases involving a multiplicity of injuries each of which calls for individual evaluation it is well-established that one should check the correctness of the aggregate sum (which is produced when one adds together the amounts for all of them) by considering the figure on a global or general basis. Essentially, this involves an intuitive assessment of the suitability of the sum produced to compensate the overall condition of the plaintiff."

[36] Having carried out this exercise, I assess the appropriate figure for general damages in this case to be £225,000.

(ii) Special Loss

[37] The plaintiff was studying for BTEC qualifications at the time of the accident. In April 2015 he dropped out of school, his education having been significantly disrupted by his injuries. He trained as a car mechanic and has been employed by Agnew Volkswagen since 2017.

[38] At the time of the accident the plaintiff's golf handicap was 5.6 and he harboured hopes of becoming a golf professional. He aspired to get this down to 4 and then apply to do his PGA exams with a view to taking up a professional teaching role in the future. The plaintiff's special loss claim was based on his potential loss of earnings in this capacity.

[39] The plaintiff did return to playing golf within a year of the accident. He played for his club in the Boys' Fred Daly Trophy in June 2015. However, he gave evidence that playing 18 holes was difficult due to his left leg injury and 2016 was his last 'proper' season of playing.

[40] The plaintiff's claim in this regard suffers from many imponderables. Whether he would have achieved the necessary lowering of his handicap, whether he would have been admitted to the PGA degree course, whether he would have succeeded in it and whether he would ultimately have attained gainful employment as a golf professional, but for the injuries sustained in this accident, are all questions which demand a considerable degree of speculation.

[41] There are three possible approaches to the calculation of a claim in respect of future loss of earnings:

(i) The traditional multiplier/multiplicand method using the Ogden tables;

(ii) A broad brush lump sum award in line with the approach in *Blamire v South Cumbria Health Authority* [1993] PIQR; and/or

(iii) An award of damages for handicap in the labour market, often described as *Smith v Manchester* damages.

[42] In *Khuzan Irani v Oscar Duchon* [2019] EWCA Civ 1846 Hamblen LJ held the Ogden tables method is to be preferred to the *Blamire* approach unless there are too many imponderables to be able to make the findings necessary to support the multiplier/multiplicand method. This is likely in a case where the plaintiff is unable to establish, on the balance of probabilities, (i) the but for earnings and/or (ii) the residual earnings.

[43] The award of damages under the *Smith v Manchester* head is a separate award, intended to compensate a plaintiff in respect of the handicap he may face in the labour market by reason of his injuries. In *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 156 (QB) Chamberlain J held:

> "In order to make a *Smith v Manchester* award, a court must be satisfied there was a real risk that the claimant would lose his current job before the end of his working life; and
>
> If a court were satisfied of the above, it would go on to assess the level of such an award by considering a number of factors, including the level of risk and the general employment situation."

[44] In *Billett v MOD* [2015] EWCA Civ 773, the Court of Appeal overturned an award for future loss of earnings, in a case where the claimant had continued to work in steady employment at his pre-accident rate of pay. It substituted a *Smith v Manchester* award of two years' earnings, describing this as a "classic example of such a case."

[45] In this case, the plaintiff had no pre-accident earnings and has, since 2017, been in stable employment. The claim in respect of loss of a chance of employment as a golf professional is simply too speculative to provide a coherent basis for a damages award. I do, however, find that the persistent nature of the plaintiff's injury to his left leg will place him at a disadvantage in the labour market. Given his youth, I assess the level of such damages as £50,000, being approximately two years' net earnings.

Conclusion

[46] Accordingly, I assess damages in this case at £275,000, allowing for the 50% reduction for contributory negligence, there will be judgment for the plaintiff against the defendants in the sum of £137,500.

[47] I award interest on the damages at 2% from the date of issue of the writ to the date of this judgment and order that the defendants pay the plaintiff's costs to be taxed in default of agreement.