THE HIGH COURT

[2022] IEHC 450

[Record No. 2019/1003P]

BETWEEN

MICHAEL O'DWYER

PLAINTIFF

AND

MAREKS SILARAUPS

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered electronically on the 12th day of July, 2022.

Introduction

1. The plaintiff is 54 years of age, having been born on 21st January, 1968. This action arises out of injuries suffered by the plaintiff as a result of a road traffic accident on 27th October, 2018. Liability for causation of the accident is not in dispute; nor is there any allegation of contributory negligence on the part of the plaintiff.

2. However, there is a major dispute between the parties in relation to aspects of the plaintiff's claim for damages. Firstly, the defendant argues that having regard to the plaintiff's pre-accident medical history, and in particular in relation to the mental health difficulties suffered by him, his claim to general damages, insofar as it relates

to damages for psychiatric injury, should be modest, having regard to the fact that he had considerable pre-existing mental health difficulties.

3. This is denied by the plaintiff. He accepts that he had significant mental health difficulties in the past, for a variety of reasons, but states that since in or about 2013, he had recovered from these difficulties and was not on any ongoing medication, or under psychiatric care at the time of the accident.

4. The second main area of dispute between the parties relates to an injury to the plaintiff's left ureter, which became obstructed, leading eventually to the necessity to carry out a nephrectomy on the left side. It is the plaintiff's case that the injury to his ureter and to his left kidney, which ultimately resulted in the loss of the kidney, was due to injury to the ureter, sustained in the road traffic accident.

5. In response to that assertion, the defendant has led expert medical opinion to the effect that, given the level of impact between the vehicles in the RTA, it was highly unlikely that the forces generated therein, would have been capable of producing injury to the ureter of the type that occurred and that ultimately led to the loss of the kidney. The defendant's expert is of the view that the more likely cause of the injury to the plaintiff's left ureter, was inflammation of tissues in that area due to sepsis in the area, which had been due to a pre-accident event which had occurred in 2017 and which had necessitated two surgical operations.

6. Thirdly, there is a conflict as to whether the plaintiff's hernia was adversely affected by the accident.

7. In order to properly understand all the issues that arise for determination in relation to both the injuries suffered by the plaintiff and the causation of those injuries, it is necessary to set out his pre-accident medical history in some detail.

Background.

8. On 28th November, 1999, the plaintiff was involved in an RTA, when he was travelling as a back seat passenger in a car that was involved in a head on collision with another vehicle. In that accident he suffered fractures to the left arm, extensive bruising and abrasions to his forehead. In evidence, the plaintiff stated that that accident had been particularly frightening, due to the fact that he had been trapped inside the vehicle for approximately two hours, before being set free. During that time, he feared that the car might go on fire.

9. Since in or about the age of 16 years, the plaintiff had been addicted to gambling. This ultimately led to the breakup of his first marriage. The breakup of the marriage was acrimonious and there was a bitter dispute in relation to the custody of his daughter. In June 2011, the plaintiff attempted to take his own life by taking an overdose of medication. However, he changed his mind and voluntarily went to the hospital. He came under the care of the psychiatric services in 2011. The plaintiff stated that thereafter, he managed to overcome his gambling addiction. He stated that he has gone on to become a mentor with the organisation Gambling Anonymous, which operates from a premises owned by the charity Aiseiri. The plaintiff states that he attends there voluntarily on a Saturday morning to give talks and to provide advice to people who are struggling with a gambling addiction.

10. The plaintiff stated that while he had had mental health difficulties at the time of the breakup of his marriage and due to his gambling addiction and had been on medication for such difficulties, he had not been on any psychotropic medication, nor did he receive any psychiatric treatment between 2013 and the date of the road traffic

accident on 27th October, 2018. There is some support for this statement in the history of the plaintiff's psychiatric difficulties as set out in the medical report furnished by Dr. Akpubi, Consultant Psychiatrist on 15th February, 2021.

11. On 30th December, 2017, the plaintiff was admitted to South Tipperary General Hospital complaining of acute abdominal pain. This transpired to be a perforation in the large bowel. This meant that he was leaking faeces into the peritoneal cavity, giving rise to what is called faecal peritonitis. That was a serious and life-threatening condition. Emergency surgery in the form of a Hartmann's procedure was carried out. That involved removal of the damaged portion of the bowel, while bringing out the end of the remaining functioning bowel as an external stoma, with an external stoma bag into which the bowel contents could drain thereafter. After this operation the plaintiff suffered serious infection in the area of the bowel leading to sepsis. He was detained in hospital until 24th January, 2018; during which time he received extensive treatment in the intensive care unit, with a requirement for ventilation support, as well as cardiac supportive medication, nutritional support and intensive physiotherapy.

12. A CT scan of the abdomen and pelvis was performed on 8th January, 2018. The report thereon stated that the kidneys, both left and right, were within normal limits. There was no evidence of hydronephrosis or hydroureter (dilation of the kidney or ureter) on the left side.

13. On 12th July, 2018, the plaintiff underwent a colostomy reversal procedure. Dissections of the rectal stump and the transverse and proximal left colon appeared to have been done laparoscopically. According to the records, the operation appeared to have been carried out satisfactorily. The plaintiff was discharged from hospital thereafter.

14. A CT scan of the abdomen and pelvis was performed on 17th August, 2018. This showed no evidence of left hydronephrosis or hydroureter. The plaintiff was reviewed at the surgical outpatients on 20th August, 2018. He was doing well, apart from some residual areas of wound infection. He was noted to be developing an incisional hernia at the top end of his laparotomy scar. He was subsequently seen at the outpatients department on 1st October, 2018. It was noted that the wound was now healing well, but again that there was an incisional hernia at the upper end of the laparotomy scar. At review at the OPD on 22nd October, 2018, the incisional hernia was found to be approximately 18 x 10cm in diameter.

15. By letter dated 1st October, 2018, Mr. Sheikh, Consultant General and Colorectal Surgeon at South Tipperary General Hospital, wrote to the plaintiff's GP in relation to the hernia. He noted that the plaintiff had an incisional hernia in the proximal end of his laparotomy scar, which would require further assessment with a CT scan and possible incisional hernia repair in the future. He stated that he would arrange to see the plaintiff in his clinic in approximately six weeks from that date.

16. In a follow up letter dated 22nd October, 2018, Mr. Sheikh, noted that the plaintiff had had an elective reversal of the Hartmann's procedure in July of that year, from which he had recovered well, apart from some wound infections. He stated that the plaintiff had recovered fully from both surgeries. However, he had an incisional hernia in the top part of the laparotomy wound, measuring approximately 8x10cm in diameter. He was managing that by using an abdominal binder. He stated that the plaintiff was an active person, who was involved in gym training and it was clearly interfering with his lifestyle and activities. He had discussed the option of open mesh repair of the hernia. The plaintiff was happy for that to be performed. The doctor stated that he was arranging for that to be performed early in the following year.

The accident

17. The only evidence led in relation to the accident, was that given by the plaintiff. He stated that as he turned into the road leading to his house, the defendant's car approached at some speed. There was a collision between the vehicles, which was almost head on, but was not a complete head on impact. The accident occurred because the defendant was driving partially on the wrong side of the road. The plaintiff stated that at the time of the impact he was travelling at approximately 15/20kmh. He estimated that the defendant was travelling three to four times faster than that.

18. The plaintiff stated that as a result of the impact, his car was driven backwards a number of feet. The bonnet flew open and there was smoke coming from the engine. The plaintiff stated that in the impact itself, he suffered a considerable impact with the seatbelt, as his body continued to move forward, when the vehicle was shunted backwards. As a result of the impact, the plaintiff's vehicle, which was a 2009 model, was rendered a write-off.

19. In cross-examination, the plaintiff accepted that the airbags on his vehicle had not inflated as a result of the impact. However, he denied that that indicated that the impact was not severe. He stated that he had a vivid recollection of being thrown forward and then stopping as a result of the seatbelt engaging. At that point, he felt a popping or bursting in his left lower chest area, in the area of the hernia. He stated that a considerable amount of material was pushed out through the hernia. The plaintiff stated that prior to the accident, only a small amount of material would protrude out through the hernia from time to time. He estimated that that was approximately the size of the top of his thumb. He stated that he was able to easily push that material back in through the opening, or if he lay on his back, it would recede spontaneously.

After the accident, the amount of material was considerably larger. The plaintiff was not able to push it back in through the hole and it would not recede spontaneously. This evidence is supported by the plaintiff's GP records, which noted that prior to the accident, the material protruding through the hernia was "prominent" whereas, subsequent to the accident, it was recorded as being "very prominent".

20. It was put to the plaintiff in cross-examination that the accident had not been a high impact collision, due to the fact that the plaintiff had been able to get out of his vehicle and walk over to the defendant's car; he had not been taken to hospital in the ambulance that had been summoned and he had not sought medical attention until three days later, being the Tuesday after the Bank Holiday weekend; the accident having occurred on the Bank Holiday Saturday. In response, the plaintiff stated that prior to the accident he had spent a considerable period in hospital. He was looking forward to spending the Bank Holiday weekend with his wife and their children. He stated that he did not go to the hospital, because a nurse from the care team was due to visit him later that day to change his dressings. When she arrived, she advised that he did not have to seek medical attention for the hernia until after the weekend; however, if the hernia should get bigger, he was advised to immediately call the Care Doc team.

21. The plaintiff stated that as a result of the impact between the vehicles, he experienced severe pain in his neck, right shoulder and lower back. This came on in the hours and days following the accident. He was prescribed painkilling medication by his GP, whom he had consulted on 30th October, 2018. He had also received a number of painkilling injections from his GP. The plaintiff stated that the accident had also caused him to suffer very considerable psychiatric difficulty. It brought back memories of the previous accident that he had been involved in, in 1999. After the accident, the subject matter of these proceedings, he had required psychotropic

medication and psychiatric treatment. This aspect will be dealt with in greater detail later in the judgment. The plaintiff stated that after the accident he became extremely nervous of driving in general, and in particular of driving near the locus of the accident. He stated that he had had to move house, due to the fact that he was unable to drive down the road to his old house as a result of the anxiety caused by the accident.

22. The plaintiff stated that his hernia had become considerably worse after the accident. The plaintiff's GP had referred the plaintiff back to Mr. Sheikh in November 2018 to review the hernia.

23. By letter dated 21st January, 2019, Mr. Sheikh wrote to the GP informing him that the plaintiff had already been booked in for a hernia repair operation on 5th February, 2019. He noted that while waiting for the surgery, the plaintiff had been involved in a car accident. He stated that according to the plaintiff, his hernia was more symptomatic since the accident. Mr. Sheikh stated that on examination, he did not find anything sinister and the plaintiff was asymptomatic from a chest and abdominal trauma point of view.

24. The hernia repair operation was carried out on 26th February, 2019. While that appears to have been largely successful, the plaintiff went on to develop a large subcutaneous seroma of the abdominal wall, following surgery. The seroma was aspirated at the outpatient's clinic on 10th June, 2019. That eased the plaintiff's discomfort considerably. It was noted that he had a nephrostomy tube in place in his left kidney. He was awaiting a procedure under the care of the urologist at University Hospital Waterford in this regard. When reviewed on 1st July, 2019, the seroma was noted to be draining well. It was noted that 60ml had been drained on the previous day

and 25ml was drained on the day of the review in the outpatient's clinic. A decision was made to remove the drain at that time.

25. The plaintiff was reviewed again by Mr. Sheikh on 30th September, 2019, at which time he appeared to be doing reasonably well. The seroma appeared to be resolving. He did not have any major symptoms associated with it. A discharging sinus over his laparotomy wound was also healing, with some small area of over-granulation, which was treated in the clinic. The plaintiff was discharged back to the care of his GP in relation to ongoing monitoring of the repaired hernia.

26. The plaintiff had been referred by his GP to Professor Michael Molloy in relation to the soft tissue injuries to his neck, shoulder and lower back. In the course of treating those injuries, Professor Molloy had arranged for MRI scans to be taken of the lumbar and cervical spine. As noted in the plaintiff's GP report, the MRI scan taken on 23rd January, 2019, was reported as showing broad based bulging at C6/7, but no nerve root or cord compression and degenerative changes at L5/S1, with mild disc bulging and encroachment bilaterally towards the S1 nerve roots. Facet joint degenerative changes were noted at a number of levels. The MRI scan of the lumbar area also revealed an indication of a dilated left ureter, which was of some concern. The plaintiff went on to have an ultrasound of his kidneys and a CT scan of his abdomen and pelvis on 12th February, 2019. These were reported as showing a relatively small and slightly scarred left kidney, with moderate left-sided hydronephrosis and distended left renal pelvis, which concurred with the findings on the MRI scan.

27. These scans were reviewed by Professor Padraic Daly, Consultant Urologist in UHW. He performed a ureteroscopy and insertion of a nephrostomy tube. Subsequent tests revealed that the functioning of the left kidney was less than 15%. This had been

due to an obstruction in the lower third of the left ureter. As a result of this, a decision was made that the plaintiff would require a left nephrectomy, which was carried out on 29th January, 2020. His post-operative recovery was complicated by severe infection, which required a prolonged stay in hospital until 17th February, 2020.

28. The aetiology of the kidney complaint is a matter of considerable debate between the medical experts. This aspect will be considered in detail in the next section of the judgment.

29. In relation to his present condition, the plaintiff stated that he continues to require medication for anxiety and to help him sleep. He stated that he was conscious that his abdomen was enlarged due to mesh bulging following the hernia repair operations. He stated that the skin over the mesh had become saggy. He thought that it could only be improved by cosmetic surgery. The plaintiff stated that he had got back to activity in the form of walking eight/ten miles per day. He was also able to do some stretching exercises in the gym. He was not able to do any significant weight training. He stated that he continued to experience pain in his lower back and shoulder. However, his neck had made considerable improvement.

30. In terms of his mental health, the plaintiff stated that he continued to experience symptoms of PTSD. He had had to move house. He was managing reasonably well with the support of his wife and family.

31. In cross-examination, it was put to the plaintiff that it was not correct to state that he had been free from mental health difficulties in the period 2014, to the date of the accident. It was put to him that the medical records from the time that he was in hospital in 2018, following surgery for the perforated bowel, revealed that he was having considerable mental health difficulties at that time. The plaintiff accepted that he had experienced what he termed “hospital fever” in the form of a psychiatric

reaction to being in hospital and on that account, he had been allowed to go home to continue his recovery there. However, he stated that prior to 2018, he had been doing well mentally. He had got over his gambling addiction and had gone on to provide assistance to others suffering from that condition. While he had not been working, he had been back in college in 2017, training to be a fitness instructor and personal trainer. He was permitted to undertake that course, while still receiving social welfare benefits. However, he accepted that he was on antidepressant medication at the time of the road traffic accident. He stated that his depression had got worse after the accident and his medication had had to be increased at that time.

The medical evidence.

32. As already noted there was a considerable degree of conflict between the medical experts in relation to the cause of the obstruction to the left ureter, which ultimately led to the need to remove the left kidney. In this regard, the court had the benefit of hearing evidence from two consultant urologists, one on behalf of the plaintiff and one on behalf of the defendant.

33. The plaintiff's treating urologist was Professor Daly. However, he was not in a position to give evidence at the hearing of the action. Evidence was given by Mr. Peter Ryan FRCSI, a Consultant Urologist attached to the Bons Secours Hospital in Cork. He also furnished a comprehensive medical report dated 4th April, 2022. He stated that the injury to the plaintiff's left ureter and kidney, had to be seen in the context of his premorbid medical condition. In this regard, the episode involving the perforated bowel and the surgical procedures that were required to treat that, being the Hartmann's procedure carried out in December 2017 and the reversal of that procedure in July 2018, were very serious medical conditions. The perforated bowel,

which allowed faecal material to enter the peritoneal cavity, giving rise to sepsis in the general area, was a very serious life-threatening condition. The surgery that was required to correct that, was complicated.

34. Mr. Ryan stated that it was a well-recognised risk that the ureter could become damaged in the process of carrying out such surgical procedure. However, in the plaintiff's case, it was reassuring that the surgeon had noted "ureter preserved" in his surgical notes. This indicated that the surgeon had been able to identify the location of the ureter and had been careful not to interfere with it. It was also reassuring to note that in a subsequent CT and ultrasound scans, there was no evidence of either hydronephrosis or hydroureter. The ultrasound report had specifically stated "spleen and kidney normal". On this basis, it was possible to rule out any significant uretic injury as a result of the operative procedure carried out in relation to the perforation of the bowel.

35. However, Mr. Ryan stated that it was also noteworthy that the plaintiff had gone on to suffer considerable infection as a result of the perforated bowel and the operative procedure. That had required extensive treatment in hospital post-operatively.

36. The next significant matter recorded in the medical records was the CT scan that was carried out following the reverse colostomy operation in July 2018. It was reported as stating "both kidneys normal". Mr. Ryan was of opinion that that was significant, as it confirmed two things: firstly, that the first operation in December 2017, had not caused damage to the ureter; secondly, it led to the inference that the reversal operation of July 2018, had not caused any acute injury to the ureter either. If there had been any acute injury to the ureter as a result of that operation, Mr. Ryan

stated that there would have been hydronephrosis visible within approximately forty-eight hours.

37. Mr. Ryan stated that in the area of anastamosis, being the area where the tube leading from the bowel was reconnected to the rectal stump, there would be post-operative healing, which would involve some swelling. However, he noted that in the CT report it was recorded "findings are non-specific", which meant that any findings of swelling thereon, were consistent with post-operative healing. He noted that the report also stated "no evidence of leak or breakdown", which meant that there were only the non-specific findings of swelling. He stated that the important thing was that both kidneys were normal according to these scans. This meant that the events relating to the perforated bowel in 2017, or the operative procedures for that condition, could be ruled out as being responsible for the uretic obstruction, which was disclosed in the MRI, CT and ultrasound scans taken in 2019.

38. Mr. Ryan noted that it was only as a result of the incidental finding on the MRI scan taken on 23rd January, 2019, that the problem with the ureter was first detected. That was subsequently confirmed on CT and ultrasound scans. While treatments had been tried to alleviate the problem in the form of an nephrostomy procedure, that had proved unsuccessful; resulting in the requirement to remove the kidney in January 2020. Mr. Ryan stated that there were two possible causes of the obstruction in the ureter. The first was swelling of the tissues surrounding the kidney due to inflammation as a result of the healing process in that area following the sepsis infection in the area, as a result of the perforated bowel in December 2017. The other possible cause was that there had been some form of acute injury, possibly stretching or tearing of the ureter, as a result of the deceleration forces exerted during the RTA

in October 2018, which had led to swelling during the recovery process, leading ultimately to obstruction of the ureter.

39. On balance, Mr. Ryan was of the view that the more likely cause was the injury sustained in the RTA in 2018. He did not think that it was caused by post-operative healing after the reverse Hartmann's procedure carried out in July 2018, because that operation was a much cleaner operation than the Hartmann's procedure itself. The scans had made it clear that there had been no injury to the ureter or the kidney as a result of the original operation in December 2017.

40. Ms Ryan stated that in the July 2018 operation, the surgeon was operating in a clean area. The only "dirty" part of the operation was the removal of the stoma and the reattaching of the tube leading from the bowel to the rectal stump. It was unlikely that that had caused the injury, as the scans following that operation, had recorded that both kidneys were normal. There was no indication of any hydronephrosis or hydroureter following that operation.

41. Mr. Ryan stated that he was of the view that relatively large forces would have been generated on the plaintiff's internal organs as a result of the impact between the vehicles in the RTA. His view was that the impact was relatively high speed, given that it had been almost head on; the plaintiff's car had been rendered a write-off; and of particular significance, the plaintiff had reported that as a result of pressing forcefully against the seatbelt, he had felt his hernia burst and the prominence protruding through the hernia had increased significantly.

42. Mr. Ryan also stated that one also had to have regard to the fact that the deceleration forces were being exerted on the internal organs in areas that had already been considerably weakened due to the perforated bowel, the subsequent infection, and the surgical procedures carried out in that area. In these circumstances, he was of

the view that on the balance of probabilities, it was the RTA that had caused the injury to the ureter, rather than the natural healing process following the second operation.

43. In the course of cross-examination, it was put to him that the defendant's expert, Mr. Creagh, was of the view that the damage to the ureter had not been caused by the RTA, but had been caused by inflammation in the course of the healing process following the peritonitis, which occurred as a result of the perforated bowel and the carrying out of the Hartmann's procedure. Mr. Ryan stated that while Mr. Creagh was entitled to his opinion, that was not supported by the evidence. Mr. Creagh's opinion was that the damage to the ureter had been caused as a result of the healing process following the surgery in December 2017; but the scans taken following the reversal procedure in July 2018, had refuted that theory, because they had shown that the kidneys were entirely normal at that time. There was no evidence of any fibrous tissue at any stage on those scans. It was put to the witness that Mr. Creagh would say that the obstruction of the ureter was due to a slow fibrosis development. Mr. Ryan stated that there was no evidence to support that opinion. He could not confirm or refute that statement. However, he was satisfied that the process did not happen after the first operation, which was a much more serious operation, than the second operation. Accordingly, he was of the view that any fibrous development was unlikely as a result of the second operation.

44. The expert evidence on behalf of the defendant was given by Mr. Tom Creagh, Consultant Urologist, practising in private practice in Beaumont Hospital, Dublin. He stated that the scans taken in 2019, revealed that the obstruction to the ureter was probably in the lower third of the ureter. This was significant, as it meant that the obstruction had occurred in the pelvic area. That area of the ureter was generally well protected by the pelvic bones. Mr. Creagh stated that it was clear that the obstruction

had occurred in that area, causing urine to become lodged in the mid and upper ureter and to go back into the kidney, causing serious damage and loss of function to the kidney, which had resulted in the need to carry out the nephrectomy in January 2020.

45. In relation to the cause of the obstruction to the left ureter, he was of the view that that was not likely to have been caused by the RTA in October 2018. He had reached that opinion due to the fact that the impact between the vehicles did not appear to be a high speed collision. He noted that the airbag in the plaintiff's vehicle had not inflated; the plaintiff had been able to walk from the vehicle and he had not suffered serious acute injury in the accident, which had resulted in the need for hospitalisation. Indeed, he had not sought any medical advice until three days post-accident, on 30th October, 2018.

46. Mr. Creagh stated that in order for there to be internal injuries as a result of an RTA and in particular as a result of the deceleration forces caused by a driver's impact with the seatbelt, one would need an impact of very high velocity, which would normally be accompanied by significant bony injury in the affected area. Normally if there were significant internal injuries, one would expect to see fractured ribs, or a fracture to the bones in the pelvic area. There was no bony injury as a result of this accident.

47. Mr. Creagh stated that where there was obstruction or damage to the lower third of the ureter, that was normally caused by cancer, or by surgical misadventure. He stated that there was no evidence of surgical misadventure in this case. His view was that the most likely cause of the injury to the ureter, was that it arose as a result of peritonitis, which had caused scarring in the area. He stated that such scarring would cause inflammation, which would lead to constriction and ultimately obstruction of the ureter. That probably arose as a result of the perforated bowel, the subsequent

infection in the area and the surgical procedures carried out to the area. The scarring and inflammation in the area would have taken a number of months to become evident. That would explain why it was not visible on the scans taken after the operations carried out in relation to the perforated bowel.

48. Mr. Creagh stated that the fact that the scans taken post-operatively had been clear and had not shown any problem with the ureter or kidney, meant that the issue of any surgical injury to the ureter or kidney could be out ruled; however, he stated that the sepsis which had set in after the perforation of the bowel and the first operative procedure, had led to fibrosis, ultimately leading to obstruction of the ureter and damage to the kidney. He stated that it was important to note that fibrosis can develop very slowly. It can occur over months or even years. It would only become evident a considerable time after surgery or injury. For these reasons, he was of the view that the cause of the damage to the ureter and the kidney, was not related to the RTA in October 2018, but was referable to the earlier events relating to the perforated bowel.

Other medical evidence.

49. Evidence was given by Dr. Declan Murphy, the plaintiff's GP. He had treated the plaintiff since in or about 2008. He stated that prior to 2017, the plaintiff's main symptom was anxiety, which was managed by anxyliotic medication and sleeping tablets. The plaintiff had suffered a perforation of his bowel in December 2017, which had required surgical treatment. There had been post-operative infection. Dr. Murphy stated that prior to the RTA in October 2018, the plaintiff was on standard medication for stoma care, as well as medication for anxiety and sleeping medication. He had had some engagement with the psychiatric services while an inpatient in hospital in the early part of 2018. They had put him on extra medication for a short period. He was

only seen by them up to April 2018. Dr. Murphy's recollection was that the plaintiff was doing reasonably well on the normal amount of medication that one would have following such surgery. In the period September/October 2018, he did not report any urinary or renal problems.

50. Dr. Murphy stated that he first saw the plaintiff on the Tuesday following the accident, which was three days post-accident. The plaintiff was considerably more anxious and was in quite a lot of pain in his neck, shoulder and back. He also noted the prominence in the area of the hernia. He prescribed painkillers. He also referred him back to Mr. Sheikh for reassessment of the hernia. However, there was no evidence of strangulation of the hernia at that time. He increased the plaintiff's medication.

51. When subsequently reviewed on 2nd November, 2018 the plaintiff continued to complain of being stressed and of soft tissue injury to the neck, shoulder and back. The GP changed the medication to stronger medication and also added in some further medication for anxiety and sleep.

52. When seen again on 9th November, 2018, the plaintiff's main issues were of pain in the neck, shoulder and back. The GP administered Difene and Tramadol injections. The plaintiff had similar complaints when seen on 21st November, 2018 and further injections were administered. X-rays had revealed degenerative changes in the neck, but no evidence of any fracture. There were also degenerative changes in the lower back. There was also evidence of slippage of the vertebrae in the back, but the cause of that was not clear.

53. When reviewed on 3rd December 2018, the plaintiff continued to complain of difficulties sleeping, he complained of pain in the affected areas and anxiety. The hernia was noted to be gradually getting bigger. The plaintiff found that embarrassing.

There was also mention of urinary leakage; however, urinalysis carried out at that time was reported as NAD. The plaintiff continued to take Diazepam and sleeping tablets.

54. When reviewed on 19th December 2018, the plaintiff complained of pain in his back, which had flared up recently. There was evidence of spasm in the area. A further injection of Tramadol was administered. He was also prescribed Tradol medication.

55. When reviewed on 7th January, 2019, the plaintiff was concerned about his hernia. It was noted to be "very prominent" the whole length of the scar. The GP noted that hernias tended to fluctuate. It had gone from "prominent" to "very prominent". When reviewed on 13th February, 2019, the plaintiff was concerned about the prominence of the hernia. The GP reassured him. The mesh repair operation to the hernia was carried out on 26th February, 2019.

56. In relation to the damage to the ureter, while Dr. Murphy accepted that he would defer to the opinion of the urologists in this regard, his view was that the accident may have caused damage to scar tissue from the surgery, as that was an area that was already weakened. That could have become torn or stretched due to the deceleration forces in the accident.

57. In relation to the plaintiff's soft tissue injuries, Dr. Murphy noted that while he had referred the plaintiff to Professor Molloy for treatment of the soft tissue injuries, there had been little improvement in the neck and back since the accident. His shoulder had improved. The plaintiff was restricted in the exercises that he could undertake in terms of rehabilitation, due to the hernia repair operation. However, he was hopeful that with a moderate exercise programme and medication, that the soft tissue injuries would settle within a further six/twelve months. In terms of his

psychiatric injury, the plaintiff remained on Diazepam and sleeping tablets. He stated that he would expect the plaintiff to return to his premorbid status within a further six/twelve months. In relation to the hernia, that had been treated by means of the mesh repair operation carried out by Mr. Sheikh.

58. In cross-examination, Dr. Murphy accepted that the plaintiff had had significant mental health difficulties prior to the accident. However, in the period 2013 to 2018, his mental health had been reasonably stable. Dr. Murphy accepted that he had put in a letter in support of the plaintiff's application for a change of housing, which was stated to be necessary due to difficulty with physical access to a bath.

59. Evidence was given on behalf of the defendant by Mr. Michael O'Riordan, Consultant Orthopaedic Surgeon in WUH. He saw the plaintiff in July 2019, at which stage he was complaining of pain in his shoulder, neck and back. He was not able to do rehabilitation exercises, due to his other medical conditions. He was taking painkillers at that time. Examination revealed that his neck was stiff, with some limitation of movement. Movement of the lower back was good. Shoulder movements were reasonably good, but were reported as being uncomfortable.

60. In terms of a prognosis, Mr. O'Riordan felt that the plaintiff would make a full recovery, although that was hampered by his inability to engage in exercise as much as he wanted. The MRI scans showed minor degenerative changes in the neck and lower back, which would be consistent with a person of his age. Mr. O'Riordan stated that these findings were not significant.

61. In cross-examination, Mr. O'Riordan stated that he was retired and only did medico-legal work at this time. The plaintiff was attending physiotherapy and was getting massage treatment when he saw him. He accepted that the plaintiff was doing his best to get better. He accepted that he still had some limitation of movement of the

spine when he examined him. He stated that the slippage of the vertebrae was usually a degenerative finding.

62. Finally, the court had the benefit of reports in relation to the plaintiff's psychiatric condition from Dr. M. Nadeem, Consultant Psychiatrist, from a report dated 29th August, 2019 (although p.2 of that report appears to be missing). The plaintiff was referred back to the mental health service in the South Tipperary area by his GP on 3rd December 2018. In the report he set out the plaintiff's presentation and complaints from the time that he was reviewed by the psychiatric services. Dr. Nadeem was of the opinion that the plaintiff had suffered PTSD as a result of the accident. He stated that it was expected that the plaintiff could recover from the symptoms of PTSD with appropriate treatments in a period of approximately one year.

63. The court also had the benefit of a comprehensive report from Dr. Akpubi, Consultant Psychiatrist, who dealt with the plaintiff's psychiatric condition from 2011 until February 2021. He too, was of opinion that the plaintiff had suffered PTSD as a result of the RTA in October 2018. He noted that treatment had included therapy in the form of antidepressant medication, anxiolytics and hypnotics. He had also received psychological intervention and therapy. This therapy was ongoing. He noted that the plaintiff had shown improvement with regard to his mood, which had gradually become euthymic. There had also been a marked amelioration of anxiety since the treatment had begun. However, the plaintiff continued to suffer from reliving the events of the accident in the form of dreams and nightmares. He remained hypervigilant; he demonstrated features of persisting hyperarousal and he continued to be irritable, with subtle personality change.

64. Dr. Akpubi stated that the prognosis for recovery was good. The positive prognostic factors included good recovery from depressive episodes in the past and a history of positive response to psychological intervention. He also had good support from his second wife, whom he married in 2013. He recommended that psychiatric treatment and intervention should continue, together with medication and other therapies and in particular EMDR, which was a therapy specifically designed to deal with PTSD.

Conclusions.

65. The court has considered all of the evidence in this case, including the evidence of the plaintiff himself, the medical witnesses and the medical reports and records that were handed into the court.

66. Having watched and listened to the plaintiff giving his evidence and recount the entirety of his medical history, from prior to the breakdown of his first marriage, down to the present time, the court is satisfied that the plaintiff is a truthful witness. He has done his best to give a fair and accurate portrayal of how he has got through the various medical and other difficulties that have confronted him in the course of his life. The court is satisfied that the plaintiff has done his best to tell the truth and has not tried to exaggerate his symptoms.

67. The court accepts the evidence of the plaintiff as to the circumstances of the accident. The court accepts that the plaintiff was travelling slowly around a bend at approximately 15/20kmh, when he was confronted with the defendant's vehicle travelling on the wrong side of the road coming against him. The court is satisfied that there was a significant impact between the vehicles, which was generally head on in nature. The court accepts as truthful, the plaintiff's account that after the impact his

car was driven backwards and that the bonnet flew open and that there was some smoke emerging from the engine area. The plaintiff very fairly conceded that the airbag on his vehicle did not inflate. He also accepted that after the impact, he was able to walk from the vehicle.

68. The court accepts the plaintiff's evidence that he was thrown forcefully in a forward direction against the seatbelt. The court accepts his evidence that he felt the hernia bursting and that after the accident there was a greater amount of material protruding through the hernia, than had been the case prior to the accident. This evidence is supported by the evidence of the plaintiff's GP and by the matters recorded in the GP's notes.

69. In the circumstances, the court is satisfied that this was a relatively high impact collision. It has to be remembered that both vehicles were travelling in the opposite direction at the time of the impact. The court accepts the plaintiff's evidence that the defendant's vehicle was travelling considerably faster than the speed at which he was travelling. There is no evidence that either vehicle braked, or attempted to brake prior to the impact. Thus, it would appear that this was an impact between a vehicle that was travelling at 15/20kmh coming into contact with a vehicle that was travelling considerably faster. The plaintiff stated that the defendant's vehicle was probably travelling at four times the plaintiff's speed. The court does not feel that that is an accurate perception of the speed that the defendant would have been travelling at in a suburban street on a Saturday afternoon. Furthermore, given the fact that the plaintiff's airbag did not inflate, the court cannot accept that the defendant was travelling at approximately four times the speed that the plaintiff was travelling. The court is of the view that it was more likely that the defendant was travelling in or

about 30/40kmh. Even at that speed, that would mean that there were substantial deceleration forces when the two vehicles came into contact.

70. While it was put to the plaintiff that he was not seriously injured in the accident, as he did not seek medical treatment from his GP until three days later, the court accepts the evidence of the plaintiff that he did not return to hospital, as he was tired of being in hospital for prolonged periods, both as an inpatient and as an outpatient, and that he was looking forward to a weekend with his wife and children. The court also notes that he was seen by the community nurse later that day for change of his dressings. In these circumstances the court accepts that the fact that he did not attend for medical treatment immediately, or go to hospital, is not indicative of the accident being minor in nature.

71. In relation to the injuries suffered as a result of the accident, the court is satisfied that, having regard to the evidence of the plaintiff, and the evidence given by his GP, Dr. Murphy, and the evidence as set out in the medical reports from Dr. Nadeem and Dr. Akpubi, that the plaintiff suffered a significant deterioration in his mental health following the RTA. This was mainly in the form of the onset of PTSD. In assessing the severity of this condition, one has to have regard to the fact that the plaintiff was a bad candidate for psychiatric injury. He had been involved in a very frightening RTA in 1999; he had experienced psychiatric difficulties following the breakup of his marriage due to his gambling addiction and the acrimonious custody dispute that ensued thereafter; and he had been involved in a life-threatening medical event involving the perforation of his bowel in December 2017. While the court accepts the evidence of the plaintiff, which was supported by the evidence of his GP, that he had got over his gambling addiction and was doing reasonably well in the period 2013-2018, the court has to note that he had mental health difficulties while in

hospital in early 2018 and he was on antidepressant medication at the time of the accident. Thus, the court cannot agree that he was completely free of psychiatric difficulties at the time of the accident; but the court accepts the evidence of Dr. Murphy that he was doing reasonably well from a mental health perspective in the weeks and months prior to the accident.

72. The court is satisfied that the accident caused a significant deterioration in his mental health condition, in particular in the onset of PTSD, for which he has required an increase in medication and other therapies. The court does not accept that the plaintiff had to move house as a result of his symptoms of PTSD following the accident. That assertion is not supported by the documentary evidence, which records that the plaintiff's GP supported that application due to difficulties the plaintiff had accessing the bath in his old house. However, the court is satisfied that the plaintiff's mental health difficulties were exacerbated as a result of the accident.

73. In relation to the hernia, the court accepts the evidence of the plaintiff's GP that the material protruding through the hernia became more prominent after the accident. However, the plaintiff had been scheduled for a mesh repair operation to the hernia in February 2019. That operation went ahead. There is no evidence from Dr. Sheikh that either the operation itself, or the post-operative position, was rendered either more difficult, or more protracted, as a result of the accident. There is no evidence that the onset of the seroma after the surgical procedure can be ascribed to the RTA. In relation to the hernia, the court finds that there was an increase in the material protruding through the opening of the hernia after the RTA, but that this did not materially affect the repair operation that was carried out in February 2019.

74. In relation to the plaintiff's soft tissue injuries, the court accepts the evidence given by the plaintiff's GP, Dr. Murphy, that after the accident the plaintiff made

extensive complaint of pain in his neck, shoulder and lower back. This required treatment in the form of the administration of analgesics and pain-relieving injections by the GP. When those issues did not resolve, the plaintiff was referred to Professor Michael Molloy for further treatment. Unfortunately, Professor Molloy was not in a position to give evidence on behalf of the plaintiff and his medical reports were not admitted in evidence. Accordingly, in relation to treatment of the soft tissue injuries, the court must proceed on the basis of the evidence given by Dr. Murphy.

75. The court is satisfied that the evidence given by Dr. Murphy was fair and accurate in all respects. He stated that while there had been little improvement in the plaintiff's neck and back symptoms since the accident, he was hopeful that if the plaintiff could maintain an exercise regime and with medication, that a full recovery would be made within a further six to twelve months. It would appear that the findings on the MRI scans of degenerative changes in the cervical and lumbar spine, are not greatly significant and are probably consistent with the plaintiff's age. In considering this aspect, the court has also had regard to the evidence of Mr. O'Riordan, from his examination of the plaintiff in July 2019.

76. The court is satisfied that the plaintiff has suffered soft tissue injuries to his neck, shoulder and lower back, which have made gradual improvement since the time of the accident in October 2018. It is hoped that a full recovery will be made from these injuries within a further six to twelve months, which would give an overall recovery period of in or about 4/4.5 years from the date of the accident.

77. The main area of conflict between the medical experts in this case was in relation to the injury to the ureter and the kidney. Having considered the evidence of Mr. Ryan on behalf of the plaintiff and Mr. Creagh on behalf of the defendant, the court prefers the evidence of Mr. Ryan in this regard. As already noted, the court is

satisfied that the impact between the vehicles was a reasonably high speed impact, which would probably have generated significant forces on the plaintiff's body when it came in contact with the seatbelt. While there was no engineering evidence led in relation to the forces that are generated in such impacts, the court has already accepted the plaintiff's evidence in relation to the effect of the impacts between the vehicles, that his car was shunted backwards and that the effect of his body moving forwards against the seatbelt, caused the hernia to enlarge and additional material to protrude out. This is indicative of a significant impact between the vehicles and of significant forces being generated as a result of that impact.

78. While Mr. Creagh's hypothesis that the obstruction of the ureter could be due to fibrosis as a result of healing following the peritonitis suffered by the plaintiff in the aftermath of the perforation of his bowel in December 2017, could possibly explain the injury to the ureter; the court prefers the evidence of Mr. Ryan, that the more likely cause is that the ureter was torn or stretched during the RTA, leading to swelling following the natural healing thereof. The court accepts his evidence that this is the more likely cause, rather than the gradual onset of fibrosis following the peritonitis in December 2017/2018, due to the fact that the CT scans taken post-operatively in both January 2018 and July 2018, were clear for any damage to the ureter and kidney. Both doctors were agreed that surgical misadventure could be ruled out as a possible cause of the damage to the ureter. This left only the gradual onset of fibrosis as a result of the perforation of the bowel and the surgical procedures for that condition, or injury as a result of the RTA which occurred in October 2018. The court is satisfied that the more likely explanation is, that the ureter was damaged as a result of the RTA being superimposed on an already weakened internal area due to the medical events that had occurred in the months prior to the accident.

79. The court is satisfied that, having regard to the plaintiff's presentation prior to the time of the accident and the clear scans that were taken post-operatively in January and July 2018 and to the fact that the obstruction of the ureter only became known as a result of a coincidental finding on the MRI scan taken in January 2019, the more likely cause of the injury to the ureter was that postulated by Mr. Ryan, that there was an injury to the ureter caused by the deceleration forces exerted in the RTA, which went on to cause fibrosis in the area leading to constriction and ultimately obstruction of the ureter, which in turn led to damage and loss of function in the kidney. Accordingly, the court finds that the damage to the ureter and the resulting damage to the kidney, leading ultimately to the need to carry out the nephrectomy operation, was caused by the RTA in October 2018.

80. In these circumstances, the plaintiff is entitled to damages in respect of the prolonged treatment that was carried out in an effort to save the kidney in the form of the nephrostomy procedures, which were ultimately unsuccessful, and for the ultimate loss of his left kidney.

81. In assessing general damages in this case, the court has had regard to the Book of Quantum. However, as there are multiple injuries crossing a number of different areas and the Book of Quantum does not deal with psychiatric injuries, the Book of Quantum has not been of great assistance to the court in this case. The court has had regard to the principles laid down by the Court of Appeal in relation to the assessment of general damages in the following cases: *Nolan v. Wirenski* [2016] IR 461**;** *Shannon v. O'Sullivan* [2016] IECA 93 and *McKeown v. Crosbie* [2020] IECA 242.

82. Having regard to the matters set out above and to the findings thereon, the court awards the plaintiff the sum of €65,000 for pain and suffering to date; the sum of €25,000 for pain and suffering into the future; together with the sum of €5,000 as

agreed special damages. There was no claim for loss of earnings. Accordingly, the plaintiff is entitled to judgment against the defendant in the sum of €95,000.