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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

AOIFE CORR

Plaintiff:

and

PAUL QUINN

Defendant:

_____

ROONEY J

Introduction

[1] On 14 December 2013 the Plaintiff, who was born on 4 August 1995, was driving her Peugeot 206 vehicle on the Brackaville Road towards Newmills when it was involved in a collision with the Defendant's VW Touareg vehicle. Ms Natasha Kerr, a friend of the Plaintiff, was a front seat passenger in the Plaintiff's Peugeot vehicle. The Defendant, Mr Paul Quinn, was travelling alone in his VW Touareg in the direction of Coalisland.

[2] The accident occurred during the hours of daylight at approximately 15:00 hours. The Police report, which was admitted into evidence with the agreement of the parties, described the road conditions as dry.

[3] The collision occurred adjacent to a property situated at 180 Brackaville Road, Coalisland. At the locus of the accident, Brackaville Road consisted of a single carriageway with one lane travelling in the direction of Newmills and the other in the direction of Coalisland.

[4] As the Plaintiff travelled in the direction of Newmills, there was a right bend on a decline which led to a short, straight section of carriageway. The road then inclined, continued through a slight left bend onto a predominantly straight section of carriageway where the impact between the two vehicles occurred.

[5] Travelling in the opposite direction towards Coalisland, the Defendant's vehicle entered a left bend which led to a slight right bend and then further to the predominantly level and straight section of carriageway.

[6] There were no central road markings on the date of the collision. When the locus of the accident was inspected by the respective Consulting Engineers some years later, central road markings were evident and consisted of a hazard warning line on the approaches to and at the collision area between both vehicles.

[7] The national speed limit for unrestricted car drivers, namely, 60 mph, applied to this section of road. It is noted that the Plaintiff was a restricted driver.

[8] The lane in which the Plaintiff was travelling ["*the Newmills bound lane*"] was bordered by a narrow, grass covered verge which measured approximately 1.5 m in width. The lane in which the Defendant was travelling ["*the Coalisland bound lane*"] was adjacent to a narrow, grass covered verge measuring approximately 0.95 m wide with an associated hedge width of approximately 1.1 m. The field to the inside of the hedge was approximately 2.5 m below road surface level.

[9] As will be considered in further detail below, the precise point of impact between both vehicles is disputed. In short, it is alleged on behalf of the Plaintiff that the accident occurred on the Newmills bound lane. On the other hand, the Defendant alleges that the accident occurred on his side of the road, namely, the Coalisland bound lane.

[10] The Plaintiff sustained serious personal injuries as a result of the collision. In the statement of claim dated 30 March 2017, it is alleged that:

> *"The Plaintiff suffered multiple and serious injuries rendering her unconscious and required an extensive period of hospital treatment. The Plaintiff received brain injury treatment and she has permanent brain damage. … She suffered nerve damage in the neck which has caused her to have very restricted function in the right arm."*

[11] The Plaintiff was not called to give evidence. She has no recollection of the accident. In a statement to the Police, the Plaintiff stated:

> *"I do not remember anything about the accident. I have travelled the road and still have no memory of what happened."*

[12] Ms Natasha Kerr was a front seat passenger in the plaintiff's Peugeot vehicle. She was not called to give evidence. In a statement to police dated 15 December 2013, Ms Natasha Kerr stated as follows:

> *"On Saturday 14 December 2013, at about 3.00 p.m., I was travelling along Brackaville Road with my friend, Aoife Corr,*

in her car, a blue 206. I was the front seat passenger. She was driving. I didn't see any other traffic on the road at that time but I do remember the road was wet and weather wasn't good. I was talking to Aoife as we travelled along the road. She was driving at normal speed. I took my attention from looking at the road to looking into the foot-well for my cigarettes. I spent 10 to 20 seconds looking into the foot-well. I heard a bang and looked up. All I remember is looking at Aoife and her not moving. The car I was in was next to the fence. There was smoke in the car from the air bags. I got out of the car and saw a man standing on the grass verge. He shouted, 'It was her fault. She was on the wrong side of the road.' I felt faint and sat back into the car. There was people starting to gather round the car. I didn't see Aoife use her phone at any stage while in the car. Aoife has a Blackberry, purple in colour. The last time I received a text from Aoife was at about 14.20 hours."

[13] Constable Donnelly attended at the scene of the road traffic accident accompanied by Sgt. Carlisle. In a statement dated 15 December 2013, Constable Donnelly stated that at approximately 17.45 hours, he attended the home address of the Defendant, Mr Paul Quinn, together with Sgt. Carlisle. The following is an excerpt from Constable Donnelly's statement,

"I gave Mr Quinn the following caution, as per Article 3 of the Criminal Evidence (Northern Ireland) Order 1988. 'You do not have to say anything, but I must caution you that if you do not mention when questioned something which you later rely on in court, it may harm your defence. If you do say anything it may be given in evidence.' I informed Mr Quinn that he was not under arrest, he did not have to remain to speak with me and that if he chose to, he was entitled to legal advice. I then asked Mr Quinn the following questions and noted his replies:

Q: 'Were you the driver of a VW Touareg, RLZ2798, when this collision occurred?'

A: 'Yes.'

Q: 'Did the vehicle suffer any mechanical defect that could have contributed to this collision?'

A: 'No.'

Q: 'Did you, or do you, suffer from any illness that could have contributed to this collision?'

A: 'No.'

Q: *'Tell me what happened.'*

A: *'I was coming down the road from Newmills heading towards Coalisland from a school event in Donaghmore. When I came down the road where the collision was an oncoming car coming from Coalisland was on my side of the road. It just came gradually over but quickly without swerving. I hugged the left side of the road hoping she would fix it and the next thing, bang. I had a hazy moment and then I'm lying in a ditch.'"*

[14] Constable Donnelly conducted a breath test on Mr Quinn which gave a zero reading. Constable Donnelly returned to the scene of the accident at approximately 19.20 hours and took over the scene log from Constable Campbell. At approximately 19.35 hours Constable Donnelly seized Exhibit 'ED1', namely a purple Blackberry phone from the ground beside the driver's door of the Peugeot 206, Registration CHZ 9313, on the Brackaville Road. He noted that the back cover was off and damaged. At approximately 20.50 hours, Constable Donnelly seized Exhibit 'ED2', namely, a red Samsung phone from the rear offside foot-well of the Volkswagen Touareg, RLZ 2798. At approximately 21.50 hours he closed the scene log and passed it to Sgt. Carlisle. At approximately 22.30 hours Constable Donnelly placed Exhibits 'ED1' and 'ED2' in a secure locker in Dungannon PSNI Station.

Split Trial

[15] The Defendant made an application for a split trial. I was informed that at a hearing before the Master on 10 August 2018, the application was struck out. A further application for a split trial was lodged on 28 September 2020. The Plaintiff and the Defendant agreed that a hearing to determine liability only would take place on 8 March 2021.

Issue for Determination

[16] As highlighted above, the central issue for my determination is whether the collision occurred on the Plaintiff's side of the road [*Newmills bound lane*] or the Defendant's side of the road [*Coalisland bound lane*].

[17] Mr Damian Coll, Civil Engineer, gave evidence that, in his expert opinion, the accident occurred on the Newmills bound lane. On the other hand, Mr Michael McLoughlin, Consulting Engineer, prepared reports and gave evidence that the accident occurred on the Coalisland bound lane.

[18] The evidence of the said engineers, based on their expert reports, is considered in detail below. However, before doing so, I consider it necessary to give some consideration to the Police investigation of the accident, to include an analysis of the Police sketch map and Police photographs which were prepared and taken within a short period of the accident.

Police Investigation

[19] The sketch was prepared by Constable Campbell. The rough sketch depicts the stretch of carriageway where the collision occurred. The rest positions of both the Peugeot and the Volkswagen Touareg are illustrated. The Peugeot is shown to be partially on the grass verge adjacent to 180 Brackaville Road with the front of the vehicle up against a wooden fence. The Volkswagen Touareg is shown to be in a ditch facing Coalisland. The engine block from the Peugeot is depicted on the Coalisland side of the carriageway, apparently close to the centre of the road. However, when one looks at photograph 28 of the PSNI photographs, the engine block is actually positioned on the left side of the Coalisland bound lane, close to the nearside verge. It is significant that the point of impact is marked with an 'X' at the location of the engine block. In the Police report, Constable Campbell states as follows:

> *"Driver of the [VW Touareg] states point of impact is where the engine block was on the road. This was marked with an 'X' on the sketch."*

[20] Surrounding the estimated point of impact, there is an area of dirt and debris extending from the engine block towards the nearside verge on the Coalisland bound lane.

[21] No scrape marks or gouge marks were depicted on either the Newmills side of the road or the Coalisland side of the road. In addition, damage to the verges adjacent to the Newmills bound lane and the Coalisland bound lane was not illustrated on the sketch.

[22] Police Photography attended at the scene. Thirty six photographs were taken on the evening of the accident. A further seven Photographs were taken some time later in daylight hours. The images of the scene of the accident, the position of the vehicles after the accident and the debris from the vehicles on the road was a matter of considerable debate by the Consulting Engineers. The images are considered in detail below.

[23] Following the accident, it would appear that the PSNI failed to instruct an Authorised Officer to examine the vehicles involved in the collision to establish whether there were any pre-collision defects which may have caused or contributed to the accident. For example, no wheel assembly inflation pressures were noted or instrument cluster readings obtained which may have indicated the speed of one or both of the vehicles in the event that electrical continuity had been disrupted on impact.

[24] Due to the serious injuries suffered by the Plaintiff, it is regrettable that, at the very least, inspections of the respective vehicles were not carried out by an appropriate authorised expert after the collision.

[25] I would like to express my gratitude to counsel and solicitors for their professionalism in the presentation of this case. Unanticipated but relevant issues arose during the course of the hearing, particularly by Plaintiff's counsel and solicitor, which were robustly pursued and analysed. In effect, no stone was left unturned.

The Engineering Evidence

[26] Mr Damian Coll, Civil Engineer, initially prepared two reports on behalf of the Plaintiff dated 3 March 2021 and 6 March 2021 following site visits and examinations of the accident locus on 15 October 2020, 15 February 2021 and 5 March 2021. He gave evidence to the court on 10 March 2021. After an adjournment of the hearing, Mr Coll prepared a further report dated 26 June 2021. He was called to give evidence in respect of the issues raised in the latter report on 30 September 2021.

[27] Mr Michael McLoughlin, Consulting Engineer, prepared a report on behalf of the Defendant dated 23 June 2017 and a further report dated 29 November 2017. Mr McLoughlin gave evidence on 11 March 2021. Following an adjournment of the hearing, Mr McLoughlin prepared two further reports dated 14 June 2021 and 8 September 2021 in respect of the discrete issues considered below. Mr McLoughlin gave his evidence on these issues 30 September 2021.

[28] It is proposed to consider the engineering evidence under the following headings:

(a) The significance (if any) of marks and possibly gouges on both sides of the road.

(b) The significance (if any) of disruption to the verge adjacent to the Coalisland side of the road.

(c) The significance (if any) of the position of the debris on the road.

(a) The significance (if any) of marks and possibly gouges on both sides of the road

[29] Mr Coll noted that there were no central road markings on the date of the collision. The absence of central road markings was clearly evident from the PSNI photographs taken shortly after the accident. Documentation provided by the Department for Infrastructure indicated that the relevant section of the carriageway was surface dressed in 2012 and during an inspection dated 18 September 2013, it

was noted that the central lines were missing. At some time subsequent to the accident in December 2013, central markings were painted on the road and these are depicted in the images of the accident locus taken by Mr Coll and Mr McLoughlin.

[30] During his inspections, Mr Coll noted, "*a series of two gouges*" in the Newmills bound lane (i.e. the Plaintiff's side of the road). The centre of the gouges was approximately 1.15 metres from the central road marking. The gouges measured approximately 40 cm in length, 3-4 cm wide, 0.5 cm deep and were angled across the lane at approximately 45 degrees. The gouges were depicted in Photographs 17 and 18 taken by Mr Coll.

[31] Mr Coll also noted an area of smaller gouges in the Coalisland bound lane (i.e. Defendant's side of the road). The centre of one of the gouges was approximately 1.45 metres from the central road marking and this gouge measured 21cm in length, 4cm wide and 0.5cm deep. The centre of the second, smaller gouge, was approximately 1.57 m from the central road marking and measured 10cm in length, 1cm wide and 0.8cm deep. These gouges were depicted in Photographs 19 and 20 taken by Mr Coll.

[32] None of the gouges visible in the said photographs taken by Mr Coll at the time of his inspections were marked in the PSNI rough sketch of the collision scene prepared by Constable Campbell. A major bone of contention in the evidence of the consulting engineers was whether the gouges observed by Mr Coll (almost seven years post-accident) were evident in the PSNI photographs taken in the immediate aftermath of the accident. Particular reference was made to PSNI photographs Nos. 26 and 27 which showed the Newmills side of the road close to the rear of the Plaintiff's Peugeot vehicle.

[33] Mr Coll's evidence was that, having carefully considered PSNI photograph No. 26, he was able to see two relatively large diagonal gouges on the Newmills side of the road similar to the two gouges he noted at his inspection on 15 October 2020. Conversely, Mr McLoughlin's evidence was that the said gouges were not visible in photograph No. 26. Both Engineers were able to identify on PSNI photograph No. 26 lighter scrape marks on the carriageway surface behind the resting position of the Peugeot vehicle. According to Mr Coll, these lighter scrape marks were produced as the Peugeot car rotated rapidly clockwise after separation from the Volkswagen Touareg and as the Peugeot moved from the area of initial impact to its rest position.

[34] According to Mr Coll, the significance of the gouges is that they are typical of gouges he has observed at collision scenes and are indicative of the position of vehicles on impact. In his opinion, based on his analysis considered below, the gouges in the Newmills bound lane indicated the initial area of impact and were produced when the Peugeot car was forced down and contacted with the carriageway during the collision with the Volkswagen Touareg. Put simply, Mr Coll

concluded that the gouge marks are strong indicators that the initial impact had occurred on the Plaintiff's side of the road.

[35] On the basis of his analysis of the PSNI sketch, PSNI photographs, the damage sustained by both vehicles and his scene examination in 2020, Mr Coll came to the following conclusions:

(a) The Peugeot car was travelling in the general direction of Newmills and the VW Touareg in the general direction of Coalisland when the collision sequence commenced. This observation is not in dispute.

(b) The PSNI photographs captured at the collision scene indicate that the VW Touareg sustained impact damage which commenced at the front offside corner and extended rearwards, terminating on the rear offside door. The offside of the bonnet of the VW Touareg did not sustain rearward impact damage and, coupled with the damage to the Peugeot vehicle, in Mr Coll's opinion, the cars were not directly aligned when the impact sequence commenced. Rather, it was Mr Coll's view that both vehicles were angled at approximately 160 degrees to each other so that the offside of the VW Touareg was exposed to the front of the Peugeot vehicle when the impact phase of the collision sequence commenced.

(c) The mass of the VW Touareg was approximately 2220 kg and the mass of the Peugeot vehicle approximately 970 kg. In Mr Coll's opinion, due to the height and weight differences between both vehicles, with the VW Touareg significantly higher and heavier than the Peugeot car, the front offside of the Peugeot car has underrun the front offside of the VW Touareg and the impact would have forced the front offside of the Peugeot downwards with a very high probability that the underside of the Peugeot car forcibly contacted with the carriageway, producing gouges in the road surface.

(d) Following the impact with the VW Touareg, the forward movement of the Peugeot car was arrested and it rotated rapidly in a clockwise direction as it moved from the Newmills bound lane to its eventual rest position partially on the Newmills bound lane and partially on the grass covered verge adjacent to the lane. Mr Coll's evidence was that the Peugeot car rotated approximately 280 degrees as a result of the impact and travelled a few meters forward from its position at maximum engagement to rest.

(e) As a result of the impact the engine/gear box of the Peugeot car had been forcibly ejected from the engine bay after the VW Touareg separated from the Peugeot and as the front of the Peugeot car was facing in the general direction of Coalisland while it was rotating in a clockwise direction.

(f) After separation from the Peugeot the VW Touareg continued in the general direction of Coalisland, moving to its nearside and in a relatively gentle

clockwise rotation and subsequently traversed across the adjoining verge and came to rest on its offside in the adjacent field with the front of the car facing in the general direction of Coalisland.

(g) The rough sketch prepared by the PSNI did not depict the position of any gouges or scrapes. It was Mr Coll's opinion that the gouges and scrapes were visible in a number of photographs taken by the PSNI at the collision scene.

(h) As regards the gouges in the Coalisland bound lane, according to Mr Coll, these were produced by the engine/gear box after it had been ejected from the Peugeot vehicle and moved to its rest position on the Coalisland bound lane.

(i) Mr Coll considered the proposition that the impact of both vehicles occurred on the Coalisland bound lane and at the position where the engine/gear box was depicted on the PSNI sketch and visible in the PSNI photographs. In Mr Coll's opinion, if this was the correct scenario, he would have expected the nearside of the VW Touareg to be positioned on the verge adjacent to the Coalisland bound lane and the Peugeot to be positioned fully on the Coalisland bound lane. Mr Coll states that no marks were depicted on the PSNI rough sketch or, according to him, in the PSNI photographs which would suggest that the nearside of the VW Touareg was driven along the verge. In addition, due to the severity of the impact, Mr Coll would have expected gouge marks to have been produced. No marks were depicted in the rough sketch or were visible in the PSNI photographs to show this occurred. Also, for this scenario to be correct, there would have been no kinetic energy from the ejected engine/gear box despite the fact that the Peugeot continued to rotate after impact.

[36] Mr McLoughlin's initial report dated 23 June 2017 followed a survey of the accident locus on 15 June 2017. The Defendant, Mr Paul Quinn, was also present at this inspection.

[37] At paragraph 2:3 of Mr McLoughlin's report, he provided a summary of the Defendant's recollection of the events immediately prior to and at the time of the accident. This summary will be considered in more detail below.

[38] During his survey on 15 June 2017, Mr McLoughlin did not have access to the said PSNI photographs taken in the immediately aftermath of the accident. However, he did have a copy of the PSNI sketch map. Photographs were taken by Mr McLoughlin of the respective views of both drivers towards the impact scene.

[39] During his inspection, Mr McLoughlin identified the position of gouge marks in the middle of the Coalisland bound lane. He took two photographs of the gouge marks. One of the photographs shows, according to Mr McLoughlin, a deep, dark and straight gouge mark with another shallower curving mark just beyond it and to

the right of the deep gouge mark. The second photograph shows a close up view of the deep straight gouge mark and the curving gouge mark on its right. The deep straight gouge is 1.6 m from the centre line of the road. The shallower curving gouge is 1.4 m from the road centre line. In his report, Mr McLoughlin does not provide any details as to the measurements of both gouge marks, to include width, depth and length.

[40] During the course of his survey, Mr McLoughlin was informed by the Defendant that, on the day after the collision, that he recalled seeing gouge marks on the road at or about the position where the engine block had come to rest. Following the survey, Mr McLoughlin came to the following preliminary conclusions:

(a) Gouges are features of severe frontal impacts. They are caused when engine parts are forced violently downwards into the road surface. They are normally a very good indicator of the point of impact.

(b) As the collision phase proceeds, the compression between the vehicles relax, lifting the relevant part out of the road surface and thereby taking an "*imprint*" of the vehicle position at the time of the impact.

(c) With reference to the circumstances of this accident, Mr McLoughlin noted a deep gouge and a shallower gouge on the Coalisland side of the road which were characteristic of an impact mark.

(d) Mr McLoughlin acknowledged that it is possible that two gouges on the Coalisland bound lane were not caused by the same incident and also, that neither gouge resulted from the subject incident.

(e) With regard to this accident, Mr McLoughlin stated that he would have expected gouges in the road surface at the point when the engine block was forced out of the car. The fact that the gouges appear to be approximately 2m from the position of the engine block as marked in the Police sketch map may simply mean that the engine block travelled a short distance after becoming detached from the car. According to Mr McLoughlin, this was consistent with the Peugeot 206 rotating in the expected clockwise direction after impact.

[41] On the date of his inspection, Mr McLoughlin did not look for and identify gouge marks on the Newmills lane. This is not a criticism of Mr McLoughlin. As observed above, prior to his inspection, Mr McLoughlin did not have access to the PSNI photographs. Additionally, the PSNI sketch map did not identify any marks or scrapes on the Newmills side of the road. During his inspection, Mr McLoughlin would have been unaware of any allegation that the accident occurred on the Newmills bound lane.

[42] Having considered the evidence of both Mr Coll and Mr McLoughlin, it was clear that they agreed on a number of matters. Firstly, the front offside corner of the

VW Touareg collided with the front offside of the Peugeot. At the point of impact, the orientation of both vehicles was at angle of approximately 160 degrees. Secondly, the force of the impact could have caused the engine compartment of the Peugeot vehicle to strike forcibly the road surface and to leave a gouge mark or marks on the road. Thirdly, the collision caused the Peugeot vehicle to rotate in a clockwise direction thereby resulting in the engine block becoming detached from the vehicle. Fourthly, it is not likely that the engine block would have simply dropped onto the ground at the point of collision. Rather, following the maximum point of impact, it was ejected and travelled some distance along the road either by sliding or by rolling to its rest position. For this reason, the point of impact as indicated by the Defendant on the sketch map is unlikely to be correct. Fifthly, the impact must have been significant so as to generate sufficient forces to eject the engine block from the Peugeot vehicle.

[43] Despite the large measure of agreement between both Engineers, they were diametrically opposed in relation to the precise location of the initial point of impact.

[44] Based on the gouge marks he identified on the Newmills lane (i.e. the Plaintiff's side of the road) in 2020, Mr Coll concluded that the initial impact occurred at this location. He stated that the severe nature of the impact and the orientation of the vehicles at the point of impact, created such rotational forces sufficient to eject the engine block from the Peugeot and other pieces of debris onto the Coalisland bound side of the road and extending into the grass verge. If this version of events is to be accepted, it would be necessary to convince this court that prior to the collision, the Defendant's vehicle was driving towards Coalisland completely or partially on the wrong side of the road and struck the Plaintiff's car at an angle of 160 degrees as it moved to the correct side of the road.

[45] Mr McLoughlin's evidence was that the impact occurred in the Coalisland lane, (i.e. the Defendant's side of the road). He stated that it was possible that the gouge marks he identified in the Coalisland lane were indicative of the point of maximum impact and that, due to the severe nature of the collision, the engine block was ejected from the Peugeot vehicle and travelled at least 2 m to its resting position as identified in the PSNI sketch map.

[46] Mr McLoughlin stated in his evidence on 11 March 2021 that, having scrutinised the PSNI photographs, particularly Photograph 26, he was able to see two parallel scratches angled diagonally in the Newmills lane close to the nearside rear wheel of the Peugeot. He was also able to see another scratch slightly further away from the two parallel scratch marks. He said that the scratches were made when the Peugeot was rotating after impact as it moved across the road. With regard to the other marks identified by Mr Coll as gouges, according to Mr McLoughlin, these visually resembled the parallel scrape marks close to the rear side wheel of the Peugeot. Essentially, Mr McLoughlin took issue with Mr Coll's description of the said marks as "gouges." However, Mr McLoughlin did accept

that Mr Coll's photographs of marks on both the Newmills and Coalisland sides of the road taken in October 2020 could be described as "gouges."

[47] The major thrust of Mr McLoughlin's evidence was that the debris on the road following the collision was predominantly in the Coalisland lane and the grass verge adjacent to this lane. There is no evidence of any debris from the VW Touareg or Peugeot at the alleged point of impact in the Newmills lane. If the point of impact had occurred on the Plaintiff's side of the road, Mr McLoughlin stated that he would have expected some debris at this location. Accordingly, it was Mr McLoughlin's opinion that the engine block and the spread of the debris on the Defendant's side of the road were more consistent with the point of impact on the Coalisland lane.

[48] Mr McLoughlin dismissed as unlikely Mr Coll's evidence that, after the impact in the Newmills lane, due to rotational forces, the engine block and the other pieces of debris as noted in the photographs would have been forcibly ejected to the Coalisland side of the road.

[49] During the course of their evidence on 30 September 2021, both Mr Coll and Mr McLoughlin drew the court's attention to the fact that the PSNI had an electronic data file from the Total Station operated by the PSNI at the scene of the accident. Essentially, the electronic data file contained information which the PSNI Mapper considered relevant when he surveyed the collision scene on the evening of the 14 December 2013. The survey file was received by Mr Coll on 24 March 2021. Mr Coll loaded the survey data onto a software system and used the data to prepare a map which was submitted into evidence. Mr Coll and Mr McLoughlin were also provided with "Jpeg" images of the photographs taken by the PSNI in the aftermath of the accident. Essentially, the Jpeg files of the PSNI photographs allowed the images to be enlarged without significant loss of resolution.

[50] When Mr Coll examined the Jpeg images of Photographs 25, 26 and 27 he claimed he could see a total of 6 marks on the Newmills side of the road. Three of the marks were in close proximity to the nearside rear of the Peugeot. In his evidence, Mr Coll described these marks as "*scrape marks*" on the road surface. A short distance further back and closer to the centre of the road, Mr Coll stated that he saw an additional three marks. He stated that the additional three marks appeared to be the same gouges he detected during his previous inspection on 15 October 2020.

[51] Mr Coll reproduced the said marks which he claimed were visible in the survey data from the Total Station onto a map. The three marks, which Mr Coll claimed were gouges, were depicted on the map as running in a parallel direction and equally distant from each other. This court notes that in his initial report dated 3 March 2021, Mr Coll claims that he saw a series of two (as opposed to three) gouges in the Newmills bound lane. In Photographs 16, 17 and 18 produced by Mr Coll, he identified the 2 gouges.

[52] Despite the fact that Mr Coll initially identified only 2 gouges, when one looks closely at the said Photographs 16, 17 and 18, it is possible to make out three distinct marks on the road. The court notes that, following questioning by Mr Ringland QC, Mr Coll accepted that the marks/gouges shown in the said Photographs 16, 17 and 18 were not equally distant as depicted by Mr Coll on the map purporting to produce the data from the Total Station.

[53] Mr McLoughlin was also provided with the Jpeg files of the PSNI photographs and asked to comment on photographs 25-29. In an addendum report dated 14 June 2021, Mr McLoughlin observed that the Jpeg files allowed the images on the photographs to be enlarged to a certain extent without too much loss of resolution. He stated that the Jpeg files enabled the marks on the Newmills bound lane to be seen "a little more clearly than…the paper photographic prints." Mr McLoughlin was able to identify two almost parallel marks close to the rear nearside wheel of the Peugeot, which both Engineers had described as scrapes. He was also able to see, in the area that Mr Coll described seeing gouges, other marks less distinctive than the parallel scrapes noted above. Mr McLoughlin repeated his previous evidence that he did not accept that these marks were gouges. Rather, it was his opinion that the marks visually resembled the parallel scrape marks to the rear of the Peugeot, although less prominent. Specifically, Mr McLoughlin states that he would have expected "gouges" to be more visually prominent than scrape marks.

Assessment of Engineering Evidence

[54] As discussed in paragraph [42] above, I acknowledge that there has been a large measure of agreement between the respective engineers with regard to several material factors, to include the alignment of the vehicles on impact, the violent nature of the impact and the significant forces generated by the impact so as to cause the Peugeot to rotate and the engine block to be ejected onto the road.

[55] The critical question is whether the engineering evidence assists me in my determination as to whether the impact occurred on the Newmills bound lane or the Coalisland bound lane. In support of their respective theories, the engineers have focused their attention on gouge marks on both the Newmills bound lane and the Coalisland bound lane.

[56] I have carefully considered the evidence and the reports from Mr Coll and Mr McLoughlin with regard to the alleged presence of and the purported significance of the gouge marks on both the Newmills and Coalisland bound lanes. In essence, I am urged to accept that the case can be decided primarily on the location of the gouge marks. For the reasons given below, I have come to the conclusion that the engineering evidence relating to the location of the alleged gouge marks is not sufficiently definitive and persuasive to allow me to make a determination as to the precise locus of the collision between the vehicles.

[57] With reference to the photographs taken by Mr Coll, and in particular images 16 - 20, I do accept that the images identify "gouges" in the road surface of both the Newmills and Coalisland bound lanes. I also accept that gouges can be indicative of the point of impact between vehicles. However, Mr Coll's photographs were taken almost seven years after the accident. Mr McLoughlin's photographs of the gouge marks in the Coalisland lane were taken approximately three and half years after the accident. I cannot be satisfied to the requisite standard that, with regard to the circumstances of this accident, the gouges depicted in the said photographs were caused by the initial impact between the vehicles or consequent to the initial impact.

[58] I am urged to accept that the gouges identified in the images taken by Mr Coll in Newmills bound lane are apparent from the Police photographs and Jpeg images taken in the immediate aftermath of the accident. I am unable to accept this assertion. Firstly, Mr McLoughlin remained adamant that, having reviewed the Jpeg images, he did not see any gouges but rather scratches similar to marks on the road closer to the rear wheel of the Peugeot. Secondly, whilst I acknowledge my lack of expertise, having viewed PSNI Photograph 26 and the corresponding Jpeg image, I was also unable to make out any gouges. Thirdly, in his initial report, Mr Coll described a "*serious of two relatively deep and wide gouges in the Newmills bound lane*" as depicted in images 16 - 18. However, following access to the Jpeg images, Mr Coll in his addendum report (22 June 2021) and in his evidence described three gouges. I accept that it is possible to make out three gouges from images 16 and 18 taken by Mr Coll in October 2020. However, I remain unconvinced that the marks on the said images equate to the marks in the Jpeg images.

[59] With regard to the two gouges in the Coalisland bound lane identified by both Mr Coll and Mr McLoughlin, I am equally not satisfied to the requisite standard that the said gouges represent either where the impact took place or the landing position of the engine when it was ejected from the Peugeot following the collision. I accept that both scenarios are possible. However, it is also possible that the gouges resulted from an impact to the road surface prior or subsequent to the accident. Accordingly, I am not prepared to accept that the gouges per se allow me to reach a conclusion as to the point of impact in this case.

(b) The significance (if any) of disruption of the verge adjacent to the Coalisland side of the road

[60] It is clear from PSNI Photographs 28 and 29 that there is an area of heavy disruption to the verge adjacent to the Coalisland bound lane in close proximity to the rest position of the engine block from the Peugeot.

[61] According to Mr Coll, after the VW Touareg separated from the Peugeot, it travelled in a clockwise direction across the road and onto the grass verge adjacent to the Coalisland bound lane. It was during this clockwise movement that the disturbance to the verge occurred and that it was, in fact, the rear of the VW Touareg which travelled through the hedge before impacting with the field below the level of

the carriageway. Mr Coll states that the damage to the rear of the VW Touareg is obvious from the photographs which also confirm that the vehicle subsequently came to rest on its offside.

[62] Mr Coll is of the opinion that, if the VW Touareg was travelling partially on the verge in the Coalisland bound lane when the impact with the Peugeot occurred, it is highly unlikely there would have been sufficient transverse distance to allow the Volkswagen vehicle to rotate to the degree that it did before the rear of the vehicle went through the hedge and impacted with the field below.

[63] Essentially, the Plaintiff advances two arguments. Firstly, there is no evidence from the photographs that the grass verge adjacent to the Coalisland side of the road was disrupted to support a conclusion that the nearside of the VW Touareg was driven along the said verge prior to impact. Secondly, if it is accepted that the disruption to the verge as shown in the PSNI photographs was caused after the impact and during the clockwise rotation of the VW Touareg, this scenario is more consistent with the impact occurring on the Newmills bound lane as opposed to the Coalisland bound lane.

[64] Mr McLoughlin's interpretation of the PSNI photographs and Jpeg images differs from that of Mr Coll in the following respects. According to Mr McLoughlin, the photographs and images depicting the Coalisland bound lane and verge show the *"heavy"* disruption to the verge as referred to by Mr Coll. However, Mr McLoughlin also identifies *"lighter but still marked"* disruption of the verge which appears to commence around the position of a car spring (close to the engine block) and continues at a shallow angle in the grass verge to the hedge line. Mr McLoughlin states that the obvious explanation for the lighter disruption to the grass verge is that it was caused by the nearside tyre or tyres of the VW Touareg.

[65] Mr McLoughlin does not take issue with the suggestion that there was some post-impact rotation of the VW Touareg. He accepts that the heavy disruption could have been caused by the VW Touareg during rotational movement. However, he makes the distinction between post-impact rotational movement and post-impact translational movement, the latter being the general direction of movement of the car regardless of rotation and indicated by the line taken by the centre of gravity of the vehicle.

[66] Mr McLoughlin agrees with Mr Coll that the Volkswagen is more likely to have entered the field travelling backwards rather than forwards. However, he states that the closeness of the rest position of the Volkswagen to the hedge suggests that the general translational direction of the post-impact travel of the Volkswagen was at a shallow angle to the road; otherwise, he would have expected the VW Touareg to have come to rest in a position in the field further away from the road. Consequently, Mr McLoughlin rejects Mr Coll's thesis that the heavily disrupted area of the verge is more consistent with the VW Touareg entering the verge in a clockwise direction following an impact on the Newmills side of the road.

[67] Having considered the evidence and the Police photographs, it is clear that the heavy disruption in the verge was caused by the VW Touareg prior to the vehicle proceeding through the hedge and falling rearwards into the field below. I accept the evidence that the rear of the VW Touareg impacted the field below before coming to rest on its offside very close to the hedge. Having looked carefully at the photographs and Jpeg images, I accept the evidence of Mr McLoughlin that there is lighter disruption of the verge which appeared alongside the rest position of the engine block.

[68] It is the view of this court that, subject to the evidence of the Defendant, the light disruption to the verge is likely to have been caused by the nearside tyres of the VW Touareg. I also accept that the heavy disruption to the verge was caused post impact and that the VW Touareg was rotating at this point. The precise degree of the VW Touareg's rotation cannot be determined.

[69] It is the view of this court that it is simply not possible to reach a determination as to the location of the point of impact in this accident by reference solely to the nature of the heavy disruption of the verge on the Coalisland side of the road.

(c) The significance (if any) of the position of the debris on the road

[70] PSNI Photographs 12 - 32 show the devastation caused by the collision, to include the extensive damage to the Peugeot, the debris on the road and on the adjoining verges, the damage to the fence on the Newmills side of the road and the marks on the carriageway.

[71] Photographs 12, 15, 20, 21 and 25 - 30 depict the debris. It is clear from the said photographs that there is a significant spread of debris on the nearside of the Coalisland bound lane and the adjoining verge. The engine and gear box of the Peugeot are positioned on the Coalisland side of the carriageway, closer to the verge as shown in the PSNI sketch map. Around the engine and gear box the road surface is littered with engine and body parts. The windscreen from the Peugeot is also located on the Coalisland side of the road. A plastic bumper (possibly from the Peugeot) and other body parts from the VW Touareg are visible in the grass verge, to include a metal coiled spring.

[72] Photographs 18 - 20 depict relatively minor damage to a wooden fence at 180 Blackball Road adjacent to the Newmills side of the carriageway. It is likely that this damage was caused by the Peugeot. Some debris, to include the rear section of the Peugeot's exhaust is positioned close to the fencing. The photographs also appear to show a mat, plastic bags and possibly blankets. One cannot rule out the possibility that at least some of the debris shown in these photographs was moved to their position on the grass verge by personnel attending at the scene.

[73] Having considered the photographs and the fact that the debris is predominantly on the Coalisland bound lane, it is readily understandable how the PSNI came to the conclusion that the collision was on the Defendant's side of the road.

[74] With regard to the location of the debris as depicted in the photographs, Mr McLoughlin gave the following evidence. Firstly, the concentration of debris is indicative of the approximate point of impact. Even if the vehicles rotated on impact, he would still expect a considerable spread of debris at the point of impact. Secondly, it is his opinion that based on the concentration of the debris, the accident occurred on the Coalisland side of the road. Thirdly, according to Mr McLoughlin, there is no evidence of debris from both the VW Touareg and the Peugeot which would confirm an impact on the Newmills side of the road. In other words, if as alleged by Mr Coll, the impact did occur on the Newmills bound lane, Mr McLoughlin would have expected a concentration of debris at the suggested point of impact. Reference to Photographs 25, 26 and 27 does not reveal any debris from either vehicle on the road surface confirmatory of a point of impact at this location. Fourthly, although some debris would be ejected from a vehicle after impact and during rotational movement, Mr McLoughlin took issue with Mr Coll's hypothesis that the engine and gear box and other components were ejected from the Peugeot onto the Coalisland side of the road as the Peugeot was facing in the general direction of Coalisland while rotating in a clockwise direction.

[75] The location of the debris is a highly significant factor in this case. The court accepts Mr McLoughlin's evidence that, following a collision of this nature, there would be a concentration of debris at or about the place of contact. The photographs clearly demonstrate debris from both vehicles on the Coalisland side of the road. Subject to my assessment of the Defendant's evidence, I have come to the conclusion that, based on the concentration of the debris, it is more likely that the collision occurred on the Defendant's side of the road. In addition, it is a relevant factor in reaching this conclusion that there was no debris from either the Peugeot or the VW Touareg at the point of impact on the Newmills bound lane as suggested by Mr Coll. No convincing explanation was provided for the absence of debris at this location.

The Defendant's Evidence

[76] Approximately three hours after the accident, Con. Donnelly and Sgt. Carlisle attended at Mr Quinn's home. The Defendant was cautioned pursuant to Article 3 of the Criminal Evidence (NI) Order 1988 and gave the following account as to the circumstances of the accident:

> *"I was coming down the road from Newmills heading towards Coalisland from a school event in Donaghmore. When I came down the road where the collision was, an oncoming car coming from Coalisland was on my side of the road. It just came gradually over but quickly without swerving. I hugged the left*

side of the road hoping she would fix it and the next thing bang, I had a hazy moment and then I am lying in a ditch."

[77] The details of the interview were recorded in Con. Donnelly's notebook which was signed by the Defendant.

[78] Some days after the accident, the Defendant spoke to Sgt. Carlisle. The meeting was not pre-arranged and was informal. In a handwritten note of the discussion, Sgt. Carlisle recorded the following from the Defendant:

> *"Going to Coalisland from Newmills. Oncoming vehicle gradually comes across to my side of road. Began to brake (sic) but didn't get fully stopped. Doing 50 mph approx. at start but didn't get stopped due to closing speed. No chance. Thought - she's still coming at me - I went further left towards the hedge. Hoping she would pull away to my right. She kept coming and struck my front driver's side. My vehicle went over the hedge landing on its side, passenger side. Didn't see any other vehicle which might have caused her to swerve. Couldn't see her face. All happened too fast."*

[79] Part A of the Police Report ('Brief summary of how collision occurred') records the following:

> *"Speaking to driver of W02 (Defendant). Stated he was travelling towards Coalisland and W01 (Plaintiff) travelling towards him. No other cars on the road. He stated she swerved into his path colliding with him. He ended (sic) up in the ditch. Car on its side. W01's engine block came out and car badly damaged. Driver to be cut out. … Driver of W02 (Defendant) states point of impact is where the engine block was on the road. This was marked with an 'X' on the sketch."*

[80] The Defendant's Engineer, Mr McLoughlin, attended at the scene on 15 June 2017 (three and a half years approximately post-accident). Mr McLoughlin recorded the following history from the Defendant with regard to the circumstances of the accident:

> *"**Information from Paul Quinn***
>
> *He is not sure of his exact speed before the emergency arose, but believes it was about 40-50 mph. He first noticed the oncoming car as it was some distance on his side of the low point on the road. He realised that it was slightly over the white line but travelling at a shallow angle which was bringing it further over the white line. He braked and moved his car to the left so that the nearside wheels were up on the grass verge. The oncoming*

car continued to move further onto his side of the road. While he did not have any appreciation of the speed at which it was travelling, he got the impression that there was no effort made by the driver to brake or take evasive action. A collision occurred in or around the middle of his lane, with the contact being between the front nearside of his car and the centre front, or perhaps a bit on the driver's side of the centre front of the other car. His car was knocked over the hedge and came to rest on its driver's side, with the front pointing towards Coalisland. He had to climb out of the passenger side of the car."

[81] The Defendant told Mr McLoughlin that he gave a statement to Police at the scene and then another statement a couple of hours later at his home. According to the Police, no statement was taken from the Defendant at the scene.

[82] The Defendant, Mr Quinn, gave his evidence to this court on 10 March 2021, seven years and three months post-accident. Despite understandable nervousness when giving his evidence, it was the impression of this court that Mr Quinn presented as an honest witness who did his best to recollect the circumstances of the accident, despite the lapse of time.

[83] Mr Quinn informed the court that he was a school teacher in Donaghmore. On Saturday, 14 December 2013, he was driving from a school event in Donaghmore to collect his children at a dancing class. He stated that he was very familiar with the road from Newmills to Coalisland. He stated that he had a reasonably clear recollection of the circumstances of the accident. As he approached the locus of the collision, he estimated his speed at between 40-50 mph.

[84] The Defendant stated that when he first noticed the Plaintiff's vehicle, it was approximately 100 m in the distance. He stated that he could not recall if the road was divided by white lines. Mr Quinn stated that, when he first noticed the Plaintiff's vehicle, it was moving gradually to his side of the road. His reaction was to brake gently in the hope that the other car would turn back onto its side of the road. Mr Quinn stated that he moved his car as far left as was possible, although he could not say whether the nearside wheels were on the grass verge. In his evidence he said that he suspected that the nearside wheels were on the edge of the grass verge but could not say with absolute certainty.

[85] In examination in chief, Mr Quinn stated that he reduced his speed as effectively as he could anticipating that the other vehicle would *"fix its position on the road"* and return to its correct side.

[86] The Plaintiff was adamant that the collision occurred on his side of the road. He stated that there was *"absolutely no truth in the hypothesis that the collision occurred on the other side of the road."* He stated that everything happened very quickly.

[87] After the collision, the Defendant stated that he was very disorientated and confused. He was aware of white dust which he now knows emanated from the airbag. He became aware that his vehicle was on its side. The Defendant exited the vehicle from the passenger door. Some people helped him across the hedge onto the road and he became aware of squealing from the other car. He has no recollection of the Police attending at the scene. He was taken to a neighbour's house where he believes the Police asked him some questions.

[88] The Defendant was subjected to robust, yet measured, cross examination by Mr Lyttle QC. The following paragraphs summarise the salient features of Mr Quinn's evidence arising out of cross examination.

[89] The Defendant repeated that he first became aware of the Plaintiff's vehicle when it was crossing onto his side of the road, approximately 100m away. The Defendant agreed that his range of vision would not have been obstructed. He stated that apart from a gentle curvature of the road, he could not see anything to explain why the Plaintiff's vehicle crossed onto his side of the road.

[90] The Defendant repeated his evidence in chief that the Plaintiff's car gradually crossed onto his side of the road. He stated that he had no recollection of a central white line, despite reference to a white line in the account given to Mr McLoughlin. When pressed by Mr Lyttle QC, the Defendant said that it was very clear to him that the Plaintiff's vehicle was crossing onto his side of the road.

[91] It was asserted on behalf of the Plaintiff that the Defendant's reference to central white lines, which in fact did not exist at the time of the accident, called into question his reliability and credibility. I place little weight on this discrepancy. As stated above, when Mr McLoughlin carried out his survey in 2017, centre white lines had been marked on the road. Consequently, Mr McLoughlin may have assumed that white lines were present at the time of the accident. When he carried out his initial survey in 2017, Mr McLoughlin did not have the PSNI photographs taken shortly after the accident, which depicted no white lines. I am satisfied that the Defendant would have been in a position to observe, irrespective as to no centre white lines, that the Plaintiff's car was moving towards his side of the road.

[92] Mr Lyttle QC referred the Defendant to a written entry in the Police Report purporting to emanate from the Defendant that the Plaintiff's car *"swerved into his path colliding with [his vehicle]."* Mr Lyttle suggested this was a relevant inconsistency. The Defendant denied that the Plaintiff's vehicle swerved into his lane and reaffirmed his evidence that the Plaintiff's vehicle gradually drove into his lane.

[93] The said account given in the Police Report is difficult to explain. Mr Ringland, QC submits that the account is not contemporaneous. However, a close reading of the Police Report leads to the conclusion that it must have been completed within a reasonably short period after the accident. Nonetheless, I am not

persuaded that the account in the Police Report is correct. Within three hours of the accident, Con. Donnelly interviewed the Defendant under caution. The Defendant told Con. Donnelly that the Plaintiff's car *"came gradually over, but quickly without swerving"* onto his side of the road.

[94] Mr Lyttle QC asked the Defendant whether at any time prior to the collision he sounded his horn. The thrust of his questioning was that, if the Defendant was able to observe the Plaintiff's vehicle gradually move onto the Coalisland bound lane and into his path, why did he not sound his horn thereby alerting the Plaintiff as to the danger? The Defendant initially stated that he could not recall whether he sounded his horn. However, following further probing by Mr Lyttle QC, the Defendant admitted that he probably did not sound his horn, stating that *"these things happened so fast. My two hands were firmly gripped to the steering wheel."*

[95] It is my view that the Defendant did not sound his horn. The question as to whether sounding the horn would have prevented the accident or rendered the Defendant partially culpable for the accident will be considered in more detail below.

[96] The Defendant was cross-examined at length with regard to his speed and the manner of his braking prior to the accident. The Defendant stated that when he initially saw the Plaintiff's vehicle, he estimated his vehicle was travelling between 40 - 50 mph. As noted above, Mr Lyttle QC reminded the Defendant that he had told Sgt. Carlisle he was travelling at approximately 50 mph. The Defendant stated that he braked *"gently but firmly enough to reduce his speed."* On numerous occasions, the Defendant repeated his evidence in chief, namely that he hoped the Plaintiff's vehicle would *"fix her position on the road."* The Defendant did not allege that the Plaintiff's car was speeding. However, his impression was that the Plaintiff's vehicle did not slow down. When asked by Mr Lyttle QC whether he had slammed on his brakes, the Defendant stated that he had no recollection but may have braked heavily at the last minute. When asked why did he hold off slamming on his brakes, the Defendant stated that he hoped the Plaintiff's vehicle would correct its position on the road and return to the Newmills bound lane. He repeated his evidence that, *"everything happened so fast."*

[97] The Defendant was asked to identify where the collision occurred. Mr Quinn stated that the point of impact was in the middle of the Coalisland bound lane, in close proximity to the engine block as shown in the Police sketch. Significantly, the Defendant denied that the collision took place in the Newmills bound lane, i.e. the Plaintiff's side of the road. The Defendant was reminded of Mr Coll's evidence and referred to the "gouge" marks in the Newmills bound lane. When it was suggested again that he had been driving on the wrong side of the road and that the collision had occurred in the Newmills bound lane, the Defendant stated that he was *"very certain as to what happened."* As regards the point of impact, the Defendant stated that he always believed it was at the position of the engine block. During re-examination by Mr Ringland QC the Defendant accepted that the position of the

engine block may not have been the precise point of impact. At no stage did the Defendant vary his evidence that the collision occurred on his side of the road.

[98] Mr Lyttle QC focused particularly on the Police photographs and, as he claimed, the lack of any tyre marks on the grass verge adjacent to the Coalisland bound lane. In essence, Mr Lyttle QC argued that, if the collision occurred at or about the position of the engine block on the road, then the marks from the nearside tyres of the Defendant's Volkswagen Touareg would have been imprinted in the grass verge. In this regard, Mr Lyttle QC referred the Defendant to the account he had given to Mr McLoughlin in 2017 which provided that the Defendant *"braked and moved his car to the left so that the nearside wheels were up on the grass verge."* The Defendant's response was that he recalls that the two nearside wheels of the VW Touareg were close, if not actually on the grass verge.

[99] On the basis of photographs 28, 29 and 30, it cannot be categorically asserted that there is no evidence of tyre imprints or disruption of the verge caused by the nearside wheels of the VW Touareg. In this regard, see my analysis at [63]-[67] above. According to Mr McLoughlin, having viewed the Jpeg images, he was able to see disruption of the grass verge, particularly after the location of the coil spring in Photograph 29. Mr McLoughlin said that it was likely that this track of disturbed grass was caused by the nearside tyres of the VW Touareg. The court agrees with this observation.

Analysis of the Defendant's evidence and Decision

[100] Having assessed the demeanour of the Defendant in the witness box and the coherent nature in which he gave his evidence, the court considers Mr Quinn to be an honest and reliable witness. Despite robust cross examination, he gave his evidence in a calm and credible manner. Mr Quinn remained adamant that the collision had occurred on his side of the road. When interviewed by the Police under caution within a short time after the accident, he stated that the Plaintiff's car drove "*gradually but quickly*" onto his side of the road. He confirmed this assertion in his evidence to the court. Further, in his statement to the Police he stated that he *"hugged the left side of the road hoping she would fix it and the next thing, 'bang.'"* During the course of his evidence, Mr Quinn repeatedly reaffirmed this version, adding that *"everything happened so fast."* Mr Quinn categorically and steadfastly denied that he drove his vehicle on the wrong side of the road and that the point of impact was on the Newmills bound lane. At no stage did Mr Quinn demur from his contemporaneous assertion that the Plaintiff's drove her vehicle onto his side of the road and that the collision occurred on the Coalisland bound lane.

[101] On the basis of my assessment of the Defendant's evidence considered above, it is my decision that the collision occurred on the Coalisland bound lane. As considered in paragraphs [69]-[74] above, support for my decision is found in the concentration of debris (to include the engine block and other chassis/body parts)

on the Coalisland bound lane. The absence of any debris from the Peugeot and VW Touareg on the Newmills side of the road serves to confirm my decision.

[102] In reaching my decision, based upon the analysis at [28]-[58] above, I have come to the conclusion that the engineering evidence with regard to the presence of alleged gouge marks is not sufficiently definitive to allow me to make a determination as to the precise locus of the collision between the vehicles. I am not convinced to the requisite standard that the marks identified as gouges by Mr Coll on the Newmills side of the road are indicative of the point of impact. Similarly, I am not persuaded that the gouge marks on the Coalisland bound lane signify the precise point of impact.

[103] Also, it is simply not possible to reach a determination as to the location of the point of impact in this accident by reference solely to the nature of the heavy disruption of the verge on the Coalisland side of the road. Although both the consulting engineers accepted that the heavy disruption of the verge was caused by the Defendant's vehicle, they advanced separate theories as to the position of the VW Toureag as it entered the verge and the degree of its rotation resulting in the said heavy disruption. Having looked carefully at the photographs and Jpeg images, I accept the evidence of Mr McLoughlin that there is *"lighter but still marked"* disruption of the verge which appears to commence adjacent to the position of the engine block and continues at a shallow angle in the grass verge to the hedge line. According to Mr McLoughlin, the obvious explanation for the lighter disruption to the grass verge is that it was caused by the nearside tyre or tyres of the VW Touareg. Having previously stated that the nearside wheels of his vehicle were on the grass verge, the Defendant stated in his evidence that he could not be sure. It is the view of this court, having considered the evidence, that the nearside wheels of the Defendant's vehicle were on the grass verge prior to and post impact.

[104] The court is aware that the Plaintiff has suffered severe life threatening injuries. In this regard, I extend my sympathy to the Plaintiff. Unfortunately, it cannot be ascertained why the Plaintiff's car crossed onto the wrong side of the road. A momentary lapse of concentration is a possibility. A defect to the Peugeot vehicle is also possible. As stated previously, it is regrettable that an examination of the Plaintiff's car was not carried out by an authorised expert in the aftermath to the accident. It is axiomatic that a forensic examination of the Plaintiff's vehicle would have greatly assisted the court and the parties.

Secundum Allegata et Probata

[105] It was submitted on behalf of the Plaintiff that if the court accepts on the balance of probabilities that the accident occurred on the Defendant's side of the road, it is still open to the court to make a finding of negligence against the Defendant. In essence it is alleged, that based on the Defendant's evidence, he contributed to the accident by failing to sound his horn and failing to apply his

brakes earlier than he did. Both precautions, it is alleged, would have avoided the accident.

[106] The Defendant seeks to rely upon established legal principle, *secundum allegata et probata* (according to allegations and proofs). Essentially, the principle means that the legal burden is on the party to prove his pleaded case in order to succeed. Mr Ringland QC on behalf of the Defendant asserts that the Plaintiff's case was opened solely on the basis that the Defendant was negligent in driving his vehicle on the wrong side of the road and that the collision occurred on the Plaintiff's side of the road, namely the Newmills bound lane. Mr Ringland stated that it was only during the course of the hearing that Mr Lyttle QC advanced the possibility of an alternative argument, depending on the court's finding of the facts. Mr Ringland QC further submitted that the statement of claim did not contain allegations sufficient to make a finding against the Defendant and no application was made to amend the allegations of negligence in the statement of claim.

[107] At my request, counsel provided succinct oral and written submissions on the principle of *secundum allegata et probata.* The leading case is the decision of the Court of Appeal in *Graham v E and A Dunlop Limited* [1977] 1NIJB 1. The facts of this case are relevant. The plaintiff was working on a building site as a plasterer's helper. He was not employed by the defendant, but the site and a hoist on the site were under the control of the defendant. The purpose of the outside hoist was to lift materials from ground level to workmen engaged in the construction at a higher level. The hoist was not to be used for the carriage of persons. The plaintiff alleged that he placed a full barrow of plaster on the hoist platform and pulled the vertical rope from the ground level so as to raise the platform to the third storey of the building under construction. The plaintiff then ascended the stairs to the platform. When he stepped onto the platform to remove the barrow, the platform either gave way or moved and the plaintiff fell to the ground sustaining significant injuries. The defendant alleged that the accident occurred when the plaintiff wrongfully and contrary to instructions travelled on the hoist. It was put to the plaintiff that he did not step onto the hoist for the purpose of taking the wheel barrow off, but rather he was bringing the hoist down to ground level by standing on it and *"jogging it down in short slips or jerks."* It is significant that the evidence of the plaintiff's engineer and the defendant's engineer, taken in conjunction with the evidence of other witnesses, strongly suggested that the accident could not have happened in the manner suggested by the plaintiff.

[108] Counsel for the plaintiff argued that even if the jury rejected the plaintiff's account of the accident, it was still open for the jury to consider whether the plaintiff could succeed in negligence and breach of statutory duty on the case put forward by the defendant.

[109] On the facts of the case, Jones, LJ rejected the plaintiff's allegations as to the circumstances of the accident. At no stage did the plaintiff seek to argue that his version of events may have been factually wrong. For example, possibly due to pre

accident or retrograde amnesia, he did not leave open the possibility that he had been riding on the hoist. Rather, the plaintiff initially alleged and throughout his evidence maintained that the hoist collapsed and that he was not travelling on it. No question as to any amendment of the pleadings arose.

[110] Referring to the principle that the plaintiff must recover *secundum allegata et probata,* Jones LJ cited the dicta of Black, LJ in *Walsh v Curry* [1955] NIR112 at p. 134*:*

> *"Under our system of pleading in the High Court cases have to be decided secundum allegata as well as secundum probata. In my opinion the plaintiff was not entitled without an amendment of the pleadings … to judgment against Wallace on a totally different issue from the one raised in the statement of claim and on an issue, indeed, which deliberately and significantly … her advisors never sought to raise or rely upon at the trial."*

[111] The decision of the Court of Appeal in *Graham* and the principle of *secundum allegata et probata* was considered by Gillen J in *Savage v McCourt* [2014] NIJB 38. The learned Judge stated as follows:

> *"[22] In my view the thrust of Graham's case is that where a plaintiff seeks to justify a verdict on a ground which is not just a variation, modification or development of what is averred but is something which is new, separate and distinct, the principle of secundum allegata et secundum probata applies. In short the duty of a trial judge is to consider matters which are in issue on the pleadings and which were supported by evidence and only those matters.*
>
> *[23] However it may be of significance that in Graham's case, the alternative theory put forward by the defendant was advanced only as a theory and, as Gibson LJ stated, "Indignantly rejected by the plaintiff." What would the situation have been if there had been positive evidence to support the defendant's case? If for example the defendants had called a witness to say that was what the plaintiff had done, "other considerations would then apply and there would be evidence for the jury to consider if the suggestion was left to them by the trial judge" (per McGonigal LJ at p. 7)."*

[112] The facts in *Savage* are relevant and interesting. The plaintiff claimed that the defendant had crossed the road and collided with the plaintiff who was stationary on his quad bike on the opposite road verge. It was argued that this version of events was irreconcilable with the defendant's case, namely that the plaintiff, without warning, turned his quad bike across the path of the defendant when she was attempting to overtake him. In essence, counsel for the defendant submitted

that the plaintiff cannot at the end of the case argue that if the court rejects his claim as alleged under his own factual matrix, then he is entitled to have the defendant's case adjudicated upon and thereafter succeed if there is a finding in negligence.

[113] Counsel for the plaintiff in *Savage* argued that the judge, in his role as a jury, is entitled to form his own theory of his accident provided that the theory is reasonably consistent with the evidence as a whole. This argument was based upon the unreported judgment of the Court of Appeal (10 February 1987) in *Irvine v O'Hare* where Lord Lowry, CJ cited with approval the following dicta:

> *"A jury or other tribunal trying a case of negligence arising out of a collision between two vehicles, has to try and reconstruct the collision. In doing this, they are entitled to form what I may call a theory of the collision. I use the word theory in this sense, that it is not, necessarily, confined to a combination of the reasons given by all the witnesses; but may be a version which is the result of three elements:*
>
> *(i) a portion of the evidence given by one witness;*
>
> *(ii) a portion of the evidence given by another witness;*
>
> *(iii) inferences drawn from the portions of the evidence accepted by them.*
>
> *And a theory so framed will be sustained if, fairly looked at, it is reasonably consistent with the evidence as a whole."*

[114] It is my view that the statement of claim was sufficiently drafted in this case to cover the version of events alleged on behalf of the Plaintiff but also allegations of negligence against the Defendant if the accident is determined to have occurred on the Defendant's side of the road. The particulars of negligence are generally drafted and include the following:

> *"(d) Failing to steer, brake, use gears or otherwise control a motor vehicle in order to avoid a collision.*
>
> *(g) Failing to warn the Plaintiff adequately or at all by use of lights, horn or other signal.*
>
> *(j) Failing to take any or adequate evasive action in all the circumstances.*
>
> *And the Plaintiff will further rely upon the legal doctrine of res ipsa loquitur and upon such facts as are known to the Defendant, but not to the Plaintiff, and as may be given in*

> *evidence by the Defendant or his witnesses at the trial of this Action."*

[115] As stated by Gillen J in *Savage*:

> *"[26] Road traffic accidents are notoriously susceptible to variations in accounts. … This is meat and drink of road traffic cases where in instance after instance not only plaintiffs and defendants but wholly independent witnesses can at times give conflicting and varying accounts of what has happened. Whether one approaches this on the basis of Graham and asks if such aspects of evidence are in terms merely a variation or modification of the plaintiff's case or whether one adopts the Irvine approach of forming "a theory of the collision" based on different portions of evidence, in road traffic accidents of this kind, the courts should be slow to invoke the purist approach of finding two wholly separate and unconnected versions. I am satisfied that the general pleading of the plaintiff allows him in this instance to ask the court to form a theory of how this accident happened by combining aspects of all the evidence before the court recognising that human frailty makes for difficulties in accurate recall of rapidly unfolding incidents in a road traffic accident."*

[116] In this case, I also take into consideration that due to the injuries sustained by the Plaintiff in the accident, she has no recollection or memory of the events immediately prior to and subsequent to the collision. It is significant that in *Graham,* Jones LJ purported to imply pre-accident or retrograde amnesia as a possible example as to when the court would not rigidly apply the principle of *secundum allegata et probata*. The exemption to the principle is demonstrated in *Cowan v J Graham Dromore & Ors.* [2014] NIJB 47. In that case, the plaintiff sustained catastrophic injuries. He was found on the floor of the well of a storm tank. The plaintiff has no recollection of the accident and there were no witnesses. The defence raised the issue of *secundum allegata et secundum probata.* The court held that the plaintiff had proved, on the balance of probabilities, that he had fallen from a height into the storm tank as a result of the defendant's negligence and breach of statutory duty in failing to adequately cover access holes in the storm tank and permitting an inadequate means of access. The learned Judge, Gillen J, said that he was satisfied that the pleadings adequately covered the factual matrix and that the plaintiff had not fallen foul of the principle of *secundum allegata et probata.*

[117] Turning to the facts of this case, the primary case as pleaded by the Plaintiff is that the accident occurred on her side of the road. This theory was based on engineering evidence from Mr Coll. For the reasons given, that theory is rejected, and I have concluded that the accident occurred on the Defendant's side of the road. Nevertheless, I am satisfied that it is open to the Plaintiff to advance arguments in negligence against the Defendant arising out of the version of the factual matrix of

the accident as claimed by the Defendant. As stated above, my rationale is based upon the fact that due to nature of the injuries sustained, the Plaintiff has no recollection as to the circumstances of the accident. The pleadings adequately cover the factual matrix in this case as alleged by the Defendant and principle of *secundum allegata et probata* does not prevent the Plaintiff from advancing an alternative argument.

[118] Having considered in detail all the evidence in this case, I have come to the conclusion that, even on the Defendant's version of the events, the Plaintiff has failed to satisfy me on the balance of probabilities the Defendant was guilty of any negligence and at least partially to blame for the accident. I accept that the Defendant failed to sound his horn. However, I do not accept that this failure would have prevented the accident. Similarly, I have not heard any evidence that if the Defendant had braked earlier or had slammed on his brakes, such acts would have prevented the accident. The Defendant stated that he initially became aware of the Plaintiff's vehicle moving gradually to his side of the road. His reaction was to brake gently in the anticipation that the Plaintiff's vehicle would turn back onto its side of the road. The Defendant estimated his speed as between 40 - 50 mph. As he braked, his speed reduced. However, the Plaintiff's vehicle continued to travel towards the Defendant's vehicle and did not slow down. It is the view of this court that the Defendant was confronted with a swiftly developing emergency situation. As the Defendant repeated in his evidence, "*Everything happened so fast … My hands were firmly gripped to the steering wheel.*"

[119] The burden is on the Plaintiff to prove that the Defendant was negligent to the requisite standard. I am not persuaded on the basis of the evidence that this burden has been satisfied. Accordingly, the Plaintiff's claim will be dismissed.