

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH  
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] EDIN 32

PIC-PN2220-18

JUDGMENT OF SHERIFF KENNETH J MCGOWAN

in the cause

KEITH FITZSIMMONS

Pursuer

against

MOTOR INSURERS BUREAU

Defender

**Pursuer: Wilson, advocate; Digby Brown**  
**Defender: Murray, advocate; Weightmans**

Edinburgh, 13 May 2020

**NOTE**

**Introduction**

[1] This is an action of damages, following a road accident in Greece when the pursuer was seriously injured.

[2] I heard evidence from:

- a. the pursuer;
- b. his wife, Mrs Michelle Fitzsimons<sup>1</sup>;

---

<sup>1</sup> The pursuer said in evidence that notwithstanding the spelling of his name in his birth certificate and other official documents ('Fitzsimons'), he used the spelling 'Fitzsimmons' as it appears in the instance. Out of courtesy to him, I shall use that spelling when referring to him. I understood that in contrast, his wife Michelle used the spelling Fitzsimons, though, it turned out that matters were not so clear cut. I deal with this more fully below.

- c. his daughter Rebecca;
- d. his daughter's boyfriend, Dylan Dalziel;
- e. Rebecca's aunt (her mother's sister), Louise Riddell (or McGurgan);
- f. Rebecca's grandmother, Mrs Mary Riddell;
- g. Rebecca's uncle, William Riddell;
- h. Dr Colin Mumford, Consultant Neurologist;
- i. Mr Angus Maclean, Consultant Surgeon;
- j. Mr George Moschos, Greek lawyer;
- k. Ms Aspasia Merkouri, translator;
- l. Ms Catriona McDonald, handwriting expert;
- m. Mr Athanasios Katsaros, Greek lawyer;
- n. Mr Ioannis Papadopoulos, Greek lawyer; and
- o. Mr Mattheos Repapis, translator.

[3] A number of evidential and factual matters were agreed in joint minutes. I was referred to a variety of authorities and sources, which are detailed below.

[4] In arriving at my decision, I have taken account of the written and oral submissions made by counsel for both parties.

[5] Having heard the evidence and submissions, I made the following findings in fact.

### **Findings in fact**

[6] On 14 July 2016, the pursuer, Mrs Fitzsimons, his daughter Rebecca and his daughter's boyfriend, Dylan Dalziel, arrived on the Greek island of Zakynthos (also known as Zante) for a two week holiday.

[7] On the morning of 17 July, the pursuer and Dylan hired two quad bikes. The pursuer was offered but declined the use of a crash helmet.

[8] The pursuer and Dylan then returned to the accommodation in which they were staying and collected Mrs Fitzsimons and Rebecca.

[9] The party of four then set off on an excursion round the island. They were not familiar with the geography of it and were just touring about. The party visited various locations. At their last stop before the subsequent accident, to buy some water, the couples swapped quad bikes. They then set off again, this time with Dylan in the lead driving the larger of the two quad bikes with Rebecca as his passenger followed by the second quad bike being driven by the pursuer with his wife as his passenger.

[10] At about 13:30 hours, both quad bikes were travelling along a country road. The road was untarred but was wide enough to accommodate two cars passing each other in opposite directions. On the approach to a right hand bend, the quad bikes were going down an incline. The quad bike which the pursuer and his wife were on was a short distance, 10 metres or so, behind the one in front.

[11] At that point, the road was bounded by a ditch and a cliff or rock face (to the right of the quad bikes) and a steep slope (on the left).

[12] As the quad bike which Dylan and Rebecca were on began to exit the bend, a larger vehicle like a tanker ("the tanker") of some sort passed them going in the opposite direction. It was going uphill and not going fast. It caused no difficulty to Dylan or Rebecca.

[13] Either shortly before or when the tanker was adjacent to the pursuer's quad bike, the pursuer allowed the front offside wheel of the quad bike to leave the road surface and go into the ditch. The quad bike went out of control, collided with the rock face and rolled over. The tanker and the quad bike did not collide.

[14] The pursuer and his wife were both thrown from the quad bike which they were on. They were both rendered unconscious.

[15] Dylan stopped his quad bike and he and Rebecca ran back to the scene of the accident. Mrs Fitzsimons recovered consciousness quite quickly. The pursuer remained unconscious for longer.

[16] Neither Dylan nor Rebecca were able to obtain mobile phone reception at the locus. They spoke to a passing taxi driver who agreed to summon help. A family from Scotland stopped to provide assistance.

[17] Within a relatively short time, an ambulance arrived and the pursuer and his wife were taken to the local hospital, arriving there about 14:00 hours.

[18] Dylan and Rebecca were driven to the hospital by the family from Scotland.

[19] While the pursuer and his wife were receiving treatment, police officers arrived at the hospital along with the interpreter, Mr Repapis.

[20] A police officer took a statement from Rebecca. This was done by the police officer asking a question in Greek; Mr Repapis translating the question from Greek to English; Mr Repapis then translating the answer from English to Greek; and the police officer writing the answer down. Once that process had been completed, the statement was signed by the police officer, then read back to Rebecca and then signed by her and Mr Repapis. The same process was then followed with Dylan, the pursuer and Mrs Fitzsimons.

[21] This process was carried out or completed with Rebecca at 15:00 hours; Dylan at 15:20 hours; the pursuer at 15:45 hours; and Mrs Fitzsimons at 16:00 hours. In the course of giving their statements, none of the four members of the party mentioned the presence or involvement of another vehicle to the police.

[22] Rebecca told the police that:

"Whilst [the pursuer] was going downhill, to the right of him, in his lane, he hit a piece of stone that had broken off from a larger stone, with his front right wheel which resulted in his losing control of the quad bike and initially to swerve to the right of the road and then in his effort to reinstate the quad bike to the road he collided to the left side".

[23] Dylan told the police that:

"... whilst we were going downhill towards Lithakia I saw my girlfriend's parents lose control of the quad bike and veer off to the right side of the road hitting a rock and carrying on after being diverted by the rock to the left side of the road where they came to a standstill".

[24] Mrs Fitzsimons told the police:

"After a bend the wheel of the quad bike that my husband was driving went over a large stone and this made him lose control of the quad bike, initially veering to the right of the road and then in his effort to reinstate the bike on the road he moved into the contraflow lane and colliding with the left side of the road."

[25] The pursuer had been badly injured in the accident. As a result of his condition, he was unable to engage properly with the process of taking a statement from him. He was able to sign the statement but had little awareness of the interview process, what questions he had been asked and what he was being asked to sign.

[26] At 16:15 hours, the pursuer underwent a breathalyser test and gave a breath sample which was negative for alcohol. He was able to follow the instructions given to him through Mr Repapis but had difficulty in providing a breath sample. He had difficulty signing the printout.

[27] Thereafter, Rebecca and Dylan accompanied the police to their accommodation where the passports of all four members of the party were obtained.

[28] Mrs Fitzsimons contacted a representative of the UK government who visited her in hospital within a day or two of the accident. Mrs Fitzsimons gave an account to that person of the accident which did not mention any other vehicle.

[29] The pursuer was seriously injured in the accident sustaining

- a. head injuries comprising a fracture to the front of his skull, a fracture of the sphenoidal sinus walls to the left and a soft tissue laceration to his scalp;
- b. spinal injuries comprising fracture at the C6/C7; fracture at the T3/T4;
- c. right upper limb injuries comprising complex fracture dislocation of the elbow, a comminuted intra-articular fracture of the right thumb with de-gloving of tissue and a fracture of the wrist; and
- d. left upper limb injuries comprising impacted distal radius fracture with minimally displaced fracture of the ulnar styloid and minimally displaced fracture of the volar aspect base of the distal phalanx of the left thumb.

[30] Although the severity of the pursuer's head injury may have been reduced had he been wearing a helmet, it is not possible to quantify this, given the number of variables involved.

[31] The pursuer was rendered unconscious at the scene and had (and continues to have) amnesia about the circumstances of the accident or of events at the hospital.

[32] He was hospitalised initially on Zakynthos and then transferred to Patras on the Greek mainland for further treatment. The remainder of the party had to move from Zakynthos to Patras. In due course, arrangements were made for the party to fly home.

[33] Before leaving Greece, a neck collar for the pursuer had to be purchased at a cost of approximately €500. A medical certificate vouching the pursuer's fitness to travel cost €500. Certain other expenses were incurred before leaving Greece on return home to Scotland.

[34] During his convalescence, Mrs Fitzsimons provided services to the pursuer for approximately 4-5 hours per day while the pursuer was in hospital (4 weeks). After the pursuer was discharged, she provided approximately 5 hours of services for approximately a further 6-8 months. Rebecca assisted in providing services to her father.

[35] The pursuer has made a good recovery from many of his injuries. He continues to have a stiff right elbow and some restriction of movement. He is at significant risk of developing post-traumatic arthritis in his right elbow. The long-term risk of requiring further surgery for arthritis is about 30%. He has some persisting stiffness and discomfort in his right wrist. It is unlikely that he will develop post-traumatic arthritis in his right wrist. He has some functional restriction in the right thumb but little pain. No further treatment is indicated.

[36] The pursuer's current employment is of a sedentary and light manual nature. The sequelae of his injuries do not have a material effect on his ability to carry out his current role. He would be disadvantaged on the labour market if he were to lose his current job.

[37] After the Greek police file was recovered by the pursuer's Greek legal representatives, steps were taken to try and trace the tanker. A lawyer on Zakynthos was instructed to carry out investigations. He made enquiries of the newspapers and local news media. He was unable to uncover any information and the enquiries proved fruitless.

### **Findings in fact and law**

[38] The pursuer having failed to prove that his loss, injury and damage was caused to any extent by an untraced vehicle, he has no right to be compensated by the defender.

### **Submissions for pursuer**

#### ***Summary***

[39] The pursuer avers that the quad bike which he was driving and on which his wife was a passenger, was hit by a petrol tanker proceeding in the opposite direction. The pursuer's position is that he was proceeding in the correct (right-hand) lane but that as the

tanker passed him, it did not leave enough room for the quad bike to pass and did not slow down resulting in the tanker colliding with the rear of the quad-bike causing the pursuer and his wife to be propelled from the quad bike causing them injury. The petrol tanker and the driver of the petrol tanker have not been traced. As a result, the pursuer sues the Motor Insurers' Bureau as the compensation body for the United Kingdom for the purposes of and pursuant to Regulation 10 of The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 ("the 2003 Regulations"). The MIB has been approved as the compensation body for the United Kingdom for the purposes of the Fourth Directive (Directive 2000/26/EC of 16.05.00 on motor insurance) and/or the Codified Directive (Directive 2009/103/EC of 16.09.09 on motor insurance).

[40] It is admitted that pursuant to Article 4(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("Rome II"), Greek Law is the applicable law for purposes of (i) determining the issue of liability for the accident (ii) the assessment of damages.

[41] Applying Greek law, the pursuer having been injured in the circumstances condended upon, the driver of the untraced vehicle was at fault in terms of Articles 12(1), 16(1), 16(4), 18(1), 19(1), 19(2) and 19(3) of the Greek Civil Code ("GCC"). The pursuer is accordingly entitled to damages from the defender for loss, injury and damage as a result of the negligence of the driver of the untraced vehicle.

[42] Applying Greek Law, the pursuer submits that damages should be assessed under the following heads of claim and on the following basis:

a. Pecuniary Damages [Art. 929 of the Greek Civil Code]

|                                     |            |
|-------------------------------------|------------|
| i. Past Loss of Earnings            | £17,929.00 |
| ii. Miscellaneous Expenses/Outlays: | €5,000.00  |

£5,000.00

iii. Services

£11,425.00

b. Non-Pecuniary Damages [Moral Damages] [Art 932 of the Greek Civil Code]

€30,000.00

c. Disfigurement or Invalidity/Compensation for Future Negative Impact [Art 931 of the Greek Civil Code]

€20,000.00

[43] All sums are exclusive of interest which should be applied at the rate of 9.25% from the date of service of these proceedings on the defender to the date of judgment and thereafter at the rate of 10.25%.

[44] There should be no finding of contributory negligence.

### *Preliminary Issue*

[45] The defender pleads (on an *esto* basis) what can properly be considered as a preliminary issue, namely:

*“Esto the pursuer’s accident was caused by an untraced vehicle (which is denied), the pursuer was under an obligation to avoid or mitigate any losses sustained under Article 300 of the Greek Civil Code. He was under an obligation to take all reasonable steps to assist in the identification of the said untraced vehicle, including but not limited to notifying the Greek Police and the authorities to the accident, seeking the identity of witnesses, to provide a description of the vehicle to the Greek Police, such as the make, model, registration plate, and colour, and to assist with identifying witnesses to the accident.”* [Answer 4].

[46] It is averred *inter alia* that the pursuer failed to take all reasonable steps to assist in the identification of the petrol tanker involved and that as such his claim ought to be dismissed. [Answer 6].

[47] The primary position of the pursuer is that this argument is irrelevant as this is a matter of procedure and as such it is a matter for the *lex fori*. It deals with the liability of the

Greek Auxiliary Fund (“GAF”) in circumstances where a claim is being brought in the Greek courts, not the liability of an untraced vehicle for causing an accident. It is in effect a matter of procedure which for purposes of the present proceedings is not a matter of Greek Law given that Article 1(3) of Rome II provides that Rome II does not apply to evidence and procedure (without prejudice to Articles 21 and 22 which it is submitted are not relevant to the issues in the present case). It is necessary to give a strict interpretation to Article 1(3) given that (a) Article 15 confers a very wide function on the law designated; (b) it is desirable to have certainty and consistency in litigation; and (iii) to meet the principle of equivalence: *Wall v Mutuelle de Poitiers Assurances* [2014] 1 WLR 4263.

[48] Furthermore, all the pursuer requires to do is to intimate a claim to the defender. That entitles him to proceed with a claim against the defender. The issue of how the domestic Greek courts might deal with claims against their Auxiliary Fund in Greece, is irrelevant for present purposes. To require a claimant to do what the defender asserts a claimant such as the pursuer requires to do, is to impose an unnecessary burden on a claimant. It would also be against EU law, the purpose of which is to ensure that a claimant can deal with such matters effectively in terms of his domestic legal system, subject to the specific applicable law issues as set out in Rome II.

[49] The placing of an obligation on an injured party in a foreign country such as is desiderated by the defender, is inconsistent with the applicable EU Directives.

[50] Article 18 of the Directive 2009/103 of the European Parliament and of the Council of 16 September 2009 relating to insurance against liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (also known as “the consolidated Motor Insurance Directive”) provides:

“therefore, it should be provided that that body cannot require the victim, if he is to be compensated, to establish that the party liable is unable or refuses to pay”.

[51] In addition, Article 10(1) of the Directive 2009/103 provides:

“however, member states may not allow the body to make the payment of compensation conditional on the victim establishing in any way that the person liable is unable or refuses to pay”.

[52] This approach is consistent with the general guidance that the aim of the Directives was to create a uniform approach to dealing with accidents abroad, whereby claimants could raise claims in their own country in their own language and would not suffer prejudice simply by being a foreign visitor. The obligations the defender seek to impose on the pursuer are inconsistent with the directives and contrary to their purpose.

[53] Thus, this preliminary issue is irrelevant.

#### *Submissions on the Evidence about Accident Circumstances*

[54] The pursuer had no recollection of the accident.

[55] Mrs Fitzsimons had no recollection of how the accident happened. She found out subsequently from her daughter. Rebecca’s evidence was that that conversation was not one that took place in the hospital on the day of the accident but on a different day, one or two days after.

[56] Rebecca Fitzsimmons and Dylan Dalziel spoke to seeing the accident in the mirror of the quad bike in which they were travelling. On the critical issue of the existence of the oil-tanker and the fact of the lorry colliding with it their evidence was essentially the same. Dylan’s evidence was that the quad bike being driven by the pursuer was on the same side of the road as the one he was driving. That evidence was not challenged.

[57] Mrs Fitzsimons gave evidence that she had informed William Riddell (her brother) of the circumstances of the accident as per text message 22/07/16 [between 11:25 and 12:08]:  
5/13. Her position is that she was given this information by her daughter Rebecca.

[58] Rebecca spoke to her gran, Mary Riddell and to her aunt, Louise Riddell or Louise McGurgan. Her evidence was that she spoke to them by telephone on the day of the accident and mentioned the "truck". Louise Riddell, who was in Hong Kong, spoke to receiving a text from Rebecca around 5pm Hong Kong time when Rebecca mentioned the accident and that "a truck had pushed her mum". The accident had just happened. The role of the truck – pushing her mum and dad's quad bike into a mountain - was confirmed in subsequent discussions with Rebecca. Mary Riddell spoke to Louise recounting to her that Rebecca had said to her that "a lorry had veered towards them", that she saw "it in the wing mirror, that the lorry had pushed them out of the way and hit them." The following day she herself spoke to Rebecca and she recounted what Louise had relayed to her the day before, mentioning the lorry.

[59] The defender led no witnesses who had attended at the scene of the accident. They relied upon an alternative version of events set out in a purported Greek Police Report: 6/1. The terms of that report are not agreed. In terms of paragraph 8 of the first Joint Minute (23 of process) it was simply agreed that 6/2 of process was "a translation of the document forming 6/1 of process and [was] agreed as a translation of 6/1 of process." That production has not been spoken to by any witness and as such is not an adminicle of evidence before the Court and is of no evidential value. While evidence was led from Mr Repapis in relation to certain pages of 6/1 of process, he did not confirm that 6/1 was a police report. Indeed, in evidence he expressly confirmed that it would be necessary to ask the relevant Greek policemen who allegedly compiled 6/1 of process to speak to it. No Greek policemen were

called as witnesses, notwithstanding that the court had been given notice that the defender intended to call Second Police Lieutenant Koukouvitis Athanasios<sup>2</sup> as a witness.

[60] In addition, the pursuer invites the Court to draw an adverse inference from the fact that on such a critical issue as the alleged police report, the key issue in the defenders' case, no police witnesses were led.

[61] Mr Repapis was led as a witness for the defender. He was a very unsatisfactory witness. He had a significant personal interest in the issues on which he was questioned.

His evidence was wholly unreliable and should not be relied upon on. For example:

- a. He accepted that there had always been the same 2 police officers present and attending when the 4 individuals spoke to the police at the hospital. The statements in fact named 3 police officers. He could not explain that satisfactorily.
- b. He gave evidence in examination in chief that the first statement had been taken from the pursuer. That was contrary to the terms of the statements themselves.
- c. His evidence was that the statements as per 6/1 of process were in effect finalised, signed and approved by the 4 individuals on the occasion of the attendance at the hospital on 17 July 2016. He could give no explanation as to how the details of the individual's passports were on the statements. The evidence of the witnesses led on behalf of the pursuer in relation to their knowledge (or rather lack of it) of the details of their passports and when the police were provided with the passports was not only consistent but was unchallenged.

---

<sup>2</sup> In fact, I think that the police officer's name is Athanasios Koukoubiti: see no. 6/2/27, for example

d. His evidence in relation to the pursuer having difficulty breathing when undergoing the breathalyser test simply did not accord with his description of the pursuer when allegedly giving the statement.

[62] On the basis of the evidence led, it is submitted that the defender has wholly failed to prove his averments as to how the accident occurred.

[63] In any event, the Court should hold that the accident to the pursuer occurred as averred by the pursuer given the evidence led for the pursuer as summarised above.

[64] If the Court considers it appropriate to have regard to 6/1 of process, the pursuer submits the following.

*Mr Fitzsimmons*

[65] In relation to Mr Fitzsimmons' alleged statement, the Court should find that it was not provided or signed by him for the following reasons: -

- a. The issues already outlined above about the inconsistencies relating to the statements.
- b. In relation to the pursuer, the evidence of Mrs Fitzsimmons was that only one police officer attended him: that evidence was unchallenged. No interpreter was present.
- c. The fact that the pursuer has no memory of the accident and has never claimed to have any memory of it.
- d. His head injury – as per Dr Mumford's evidence.
- e. His orthopaedic injuries – as per Mr Angus MacLean's evidence – in particular the significant injuries to his dominant right hand and upper limb as well as the fractures to his left wrist and hand.

f. The evidence in relation to his signature from Catriona MacDonald and the Forensic Report: 5/7.

g. The evidence from Rebecca Fitzsimmons, Dylan Dalziel and Michelle Fitzsimons regarding his condition after the accident. For instance his repetition of the same three statements/questions.

*Mrs Michelle Fitzsimons*

[66] In relation to Mrs Fitzsimons' alleged statement, the Court should find that it was not provided or signed by her for the following reasons: -

- a. She had no memory of the accident – the timing of the “statement” does not fit in with her evidence (again unchallenged) as to when she heard about the lorry from her daughter.
- b. The evidence of Mrs Fitzsimons that she was only asked 3 questions.
- c. The issues already noted regarding the inconsistencies relating to the statements – see above.

[67] Mrs Fitzsimons spoke to only one police officer attending her. No interpreter was present.

[68] She disputes that she gave the statement or that it was her signature.

*Ms Rebecca Fitzsimmons*

[69] In relation to Ms Fitzsimmons' alleged statement, the Court should find that it was not provided or signed by her for the following reasons:

- a. Her position about the circumstances of the accident has not changed in any material way and has been as per her evidence to this court. She has consistently mentioned the collision with the lorry: see above.
- b. The issues noted above about the inconsistencies relating to the statements – see above.
- c. Rebecca Fitzsimmons spoke to only one police officer attending her. No interpreter was present.
- d. Although she spoke to signing something at the hospital, she disputes that she gave the version of the events set out in the statement or that it was her signature.

*Dylan Dalziel*

[70] His description of the accident was, to a very large extent, similar to that of Rebecca. He confirmed the collision of the lorry with the quad bike being driven by the pursuer.

[71] The issues noted above about the inconsistencies relating to the statement.

[72] Dylan spoke to himself and Rebecca speaking to one police officer each, separately. No interpreter was present. That evidence was again unchallenged.

[73] He disputes that he gave the version of the events set out in the statement. He recalled signing something and accepted one of the two signatures was his but not the other one.

*Legal Submissions – Liability*

[74] There was ultimately relatively little difference between parties' experts as to the applicable Greek law in relation to liability.

[75] Parties have agreed a summary of certain key matters on applicable provisions of Greek law on liability: 5/30 of process and paragraph 1 of the third Joint Minute for the Parties, 23 of process.

[76] On the basis of the evidence led for the pursuer, liability has been established in terms of Articles 12(1), 16(1), 16(4), 18(1), 19(1), 19(2) and 19(3) of the GCC.

[77] It is accepted by the pursuer that the court may make a finding of contributory negligence as a result of the pursuer's failure to wear a helmet provided that a causal link is proven between that failure and the damage/loss sustained. It is submitted that no such causal link has been established – per the evidence of Dr Colin Mumford. In any event, any allowance for contributory negligence has already been made in parties' experts' assessment of damages (see below).

[78] The defender has led evidence (to which the pursuer objected but which was allowed to be led subject to competency and relevancy) on the status of a police report in Greek law. That is wholly irrelevant given that that is a matter of evidence. See the discussion of this issue *supra*.

[79] One issue in dispute was how the Greek court might address the issue of the liability of the GAF. While the pursuer's primary position is that this is irrelevant (*supra*), even if, contrary to that submission, the Court accepted the defender's argument on that issue, on an *esto* basis, the pursuer contends that the pursuer met any obligations incumbent on him to enable him to rely upon Article 19 of the Presidential Decree 237/1986.

[80] Mr Papadopoulos' and the defender's initial position appeared to be that "every reasonable step" had to be taken, but it is submitted that in evidence Mr Papadopoulos moved away from that. He accepted that the test is non-prescriptive and that each case depended on its own circumstances. The test as enunciated by Mr Moschos was that in

Greek law what a claimant was required to do was in effect to take “average reasonable care”. The Court heard evidence as to what was undertaken on behalf of the pursuer, once the police file had been obtained. Other relevant factors include the pursuer’s injuries; the pursuer returning back to Scotland; the prior involvement of the police; the terms of the “police report” – what more ought the pursuer reasonably to have done as a non-Greek national? Mr Moschos was firmly of the opinion that he had acted reasonably and this court is invited to find likewise.

[81] Finally, it was accepted that the pursuer had two options when he had recovered the police file – one to raise a criminal complaint against the police; the other to challenge the police position in civil proceedings. The latter is what he has done. To require him to go to the time and expense of raising preliminary proceedings in Greece, never mind undertaking the suggested extensive social media enquiries (particularly given the language barrier and that no evidence was led or obtained from Mr Fitzsimmons that he uses social media), is wholly unreasonable and unrealistic.

### *Legal Submissions – Quantum*

[82] Applying Greek Law, the pursuer submits that damages should be assessed under the following heads of claim and on the following basis.

#### *Pecuniary Damages [Art. 929 of the GCC]*

##### Past Loss of Earnings

[83] It was ultimately accepted by the defender that the pursuer is entitled to receive, in full, compensation equivalent to the earnings he was entitled to receive in the year he was

absent from work post-accident, ignoring any sums actually received from his employers in that period. His net annual earnings were £17,929.00

#### Misc. Costs/Expenses

[84] Mrs Fitzsimons spoke to having paid approximately €500 for a collar; €500 for a necessary medical certificate and approximately €3,000 - €4,000 on other expenses. Her evidence on this was unchallenged. Allow €5,000 in total.

[85] In addition she spoke to increased expense/costs once at home – maybe up to £5,000.

#### Relative's Services

[86] Mrs Fitzsimons spoke to providing services for approximately 4 - 5 hours per day while the pursuer was in hospital (4 weeks), giving a total of 140 hours @ £7.50 per hour = £1,050.

[87] Thereafter, she continued to provide approximately 5 hours of services for approximately a further 6 - 8 months. Allow 1050 hours @ £7.50 per hour = £7,875.

[88] In addition, Rebecca spoke to providing services to her father – allow an estimated sum of £2,500.

[89] This gives a total of £11,425.

#### *Non-Pecuniary Damages [Moral Damages] [Art 932 of the GCC]*

[90] This head of claim is akin but not identical to solatium under Scots Law as it does not take into account future issues (see Article 931 *infra*). Loss of enjoyment of a holiday would also be a factor taken into account when assessing this head of claim.

[91] There was ultimately no difference in the guidance provided to the Court by parties' Greek Law experts on this head of claim. For the pursuer, Mr Moschos noted the severity of the pursuer's injuries and considered €30,000 to be an appropriate award under this head. For the defender, in examination in chief, Mr Papadopoulos also indicated €30,000. He confirmed this figure in cross-examination.

[92] It is accordingly submitted that an appropriate award under this head would be €30,000.

#### Disfigurement or Invalidity/Compensation for Future Negative Impact [Art 931 of the GCC]

[93] This head of claim takes into account future issues for a claimant, including future consequences as a result of his injuries and what in Scots Law would be a claim for loss of employability/disadvantage on the labour market.

[94] For the pursuer, Mr Moschos' range was €15,000 - €20,000. For the defender, in examination in chief, Mr Papadopoulos indicated €20,000 - €30,000. In cross-examination, his position was that it should be "no more than" €30,000.

[95] It is accordingly submitted that an appropriate award under this head would be €20,000.

#### Interest

[96] All sums are exclusive of interest. It is submitted that interest should be applied at the rate of 9.25% from the date of service of these proceedings on the defender to the date of judgment and thereafter at the rate of 10.25%.

### *Contributory Negligence*

[97] While it is accepted that contributory negligence is a concept known to Greek Law, the pursuer's primary position is that in the circumstances of the present case, and given the nature of the injuries sustained by the pursuer, there should be no finding of contributory negligence for three primary reasons:

- a. causation: as per the medical evidence in particular that of Dr Mumford - the defenders led no contrary evidence on this aspect of contributory negligence;
- b. in assessing damages under Article 932, Mr Papadopoulos appeared to specifically indicate that in quantifying those damages, he was taking into account the degree of both liability and contributory negligence;
- c. in any event, if, contrary to the pursuer's primary position, the Court determines that there was any contributory negligence with a causative effect this should be restricted to the head injury only and it is suggested that a maximum finding of 5% would be appropriate.

### *The absence of evidence from Greek police officers*

#### *Relevant Timeline*

[98] The timeline was as follows:

- a. 30/10/2018 – Motion for judicial co-operation in relation to the three police officers via video-link intimated (unopposed);
- b. 11/04/2019 – Procedural Hearing - parties ask for time to consider the taking of evidence under the Hague Convention;

- c. 31/05/2019 – the defender’s agents advise the Court that one of the police officers is willing to travel to Scotland to give evidence; ask Court for more time to clarify whether he would be willing to give evidence by video-link;
- d. 27/06/2019 – the defender ‘s agents advise that they are endeavouring to take steps to have at least one of the Greek police officers give evidence without the need to proceed with Form A procedure;
- e. 30/08/2019 – the defender’s agents advise that they were unable to secure the voluntary co-operation of the officers and have received correspondence from the Hellenic Police to the effect that any request must proceed through judicial co-operation means and they intend to proceed with Form A procedure;
- f. 06/12/2019 – Procedural Hearing - the defender advises the Court that the Second Police Lieutenant will be attending personally in Scotland to give evidence.

### *Submissions*

[99] The defender’s additional submission is that Police Lieutenant Athanasios was unavailable to give evidence. In their submission, this leads to the conclusion that his failure to give evidence is credibly explained and, therefore, the potentially detrimental inference of the silence of the witness or the failure to lead his evidence can in effect be reduced or nullified. The defender submits that (i) there is no basis to draw any adverse inference from the defender’s failure to call Lt Athanasios and (ii) it would be manifestly unfair for any adverse inference to be drawn given the circumstances disclosed in the Letter from the Hellenic Police dated 29 January 2020 (“the Letter”). It is observed of course that the Letter is not an adminicle of evidence before the court, nor has it been spoken to by any witness nor is it agreed.

[100] The defender states that the pursuer makes no suggestion that the defender failed to take available steps to secure the evidence of Lt Athanasios. That submission has to be seen in the context of, and under reference to, the timeline set out above. Contrary to the defender's submission, steps were available to compel Lt Athanasios - and indeed the other police officers involved - to give evidence. The refusal of the Greek Court to assist refers only to the defender's application under Regulation (EC) No. 1206/2001. As the defender was well aware, other steps could have been taken (and indeed were considered) under the Hague Convention. That those steps were not proceeded with or taken was because apparently Lt Athanasios had volunteered to give evidence.

[101] The defender's e-mail to the Court of 30 August 2018 advised that the defender had been unable to secure the voluntary co-operation of the three Greek police officers. This is in spite of the assistance of Greek lawyers in Athens and Zakynthos. One must also bear in mind that the defender liaises with the Greek Guarantee Fund which is an emanation of the Greek State. In any event, at that stage, it would still have been possible to proceed under The Hague Convention procedure. What can be ascertained is that the three Greek police officers were asked to give evidence voluntarily and, at least initially, they refused.

[102] The court was subsequently advised by the defender's agents that one of the police officers was willing to give evidence voluntarily and was prepared to travel to Scotland to do so. They advised the Court that they wished to consider taking his evidence via videolink due to cost. At some point the defender, via either their Scottish or Greek agents, has had direct contact with a Greek police officer who is presumed to be Lt Athanasios. He has volunteered to give evidence. It is submitted that he must have later changed his mind and refused to co-operate. As late as 6 December 2019 the defender was advising the Court that Lt Athanasios would be attending personally.

[103] The defender relies on the Letter to explain why Lt Athanasios was apparently not available to give evidence, but no explanation is given as to the context of the Letter or the nature of the “relevant request” made (as referred to in the letter). What was the “relevant request”? The Letter does not provide an explanation.

[104] The heading of the letter from the Hellenic Police is important. It is entitled “Your Application of 21-01-2020”. It appears from the translation provided that a formal request for a special permit was submitted on the day that the proof began. It was responded to on 29 January 2020 which is not an unreasonable time within which to expect a police force to respond to correspondence. Neither a special nor a regular permit was to be granted. The reasons for the refusal of the request are not provided. Time may have been a factor.

[105] It is also submitted that the translation of the letter of 29 January 2020 is not a certified translation. Furthermore, it is questionable and arguably potentially misleading for the reasons set out in the e-mail dated 4 March 2020 from the pursuer’s Greek law expert witness, Mr Moschos. The subject of the letter of 29 January 2020 is not an application for a regular or special permit. The letter simply clarifies the rules on a police officer applying for leave following a request to do so by the defender’s legal expert. It can be reasonably inferred that Lt Athanasios did not wish to take time off to attend the proof. Legally he would not have been entitled to special leave to attend the proof. No explanation for why he would require to take time off to provide evidence via videolink has been provided. Arrangements could have been made, but were not, to take his evidence when he was not on duty.

[106] In the circumstances, no adequate explanation has been given as to why Lt Athanasios or indeed any of the other police officers involved did not give evidence.

[107] The defender relies on Mr Repapis' evidence concerning the statements allegedly given by the pursuer and three other witnesses. As previously submitted, however, Mr Repapis was unable to explain key questions put to him about those statements (such as how and why details from individuals' passports were on the statements), indicating that only the police officers could explain those matters.

[108] In Scots law, the applicable law is as set out in *O'Donnell v Murdoch McKenzie & Co Ltd* 1967 SC (HL) 63. In that case the defenders led no evidence. At page 71, Lord Upjohn observed that in such cases "only the most favourable inferences should be drawn from the pursuer's evidence." Similarly, at page 73, Lord Wilberforce observed:

"No evidence was called by the respondents ... in such circumstances, if inferences are to be drawn from the pursuer's evidence, they should be those favourable to him."

[109] Similarly, see also the observations of Lord President Hope (with whom Lords Allanbridge and Cowie concurred) in *Binnie v Rederu Theodoro BV* 1993 SC 71 at page 87D:

"In the present case the inferences to be drawn from the evidence are those which are most favourable to the pursuer since the defenders did not give evidence."

[110] Furthermore, in the Second Division decision in the case of *Davidson v Duncan* 1981 S.C.8. Lord Justice Clerk (Wheatley) in delivering the Opinion of the Court, followed those *dicta* in circumstances where evidence had not been led on a particular matter, namely the value of the goodwill, that the court should follow those *dicta*.

[111] The case of *Regina v Inland Revenue Commissioners* 1991 2 A.C. 283 confirms the following proposition in relation to English law:

"In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima

facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."

[112] In that case the rule did not apply because

"by reason of the principle of confidentiality (which the applicants concede), the general rule for taking account of a party's silence does not fully apply and, for the same reason, the court cannot assess the extent to which in each case it does not apply."

[113] It is submitted that in the present case, for the reasons set out above, no explanation, let alone any "credible explanation" has been given to explain why key evidence, namely that of the police officers, was not led. Quite simply, no explanation has been given in the present case as to the three police officers' refusal to give evidence.

[114] In *Wisniewski v Central Manchester Health Authority* [1998] P.I.Q.R. P324 it was held that:

"in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. If a court is willing to draw such inferences, they may go to strengthen the evidence adduced by the other party on that issue or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. There must, however, be some evidence, adduced by the opposite party on the matter in question which raises a case to answer, before the court is entitled to draw the desired inference. If the reason for the witness' absence or silence satisfies the court, no such adverse inference may be drawn. If there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect may be reduced or nullified."

[115] In *Wisniewski*, a Dr Renninson refused to return from Australia to give evidence. An affidavit of Dr Renninson had been provided. Dr Renninson had advised that he would be happy to give evidence in any way possible from where he was. Videolink was not explored. The judge at first instance said:

"Dr Renninson's evidence was only given by way of a statement. There was no justifiable reason which explained his non-attendance at the trial to give evidence and be cross-examined on his statement, and no reason why some other

arrangements could not have been made had the defendants so chosen. For this reason and because his statement was equivocal on whether he attended or not, I attach little weight to his evidence on this issue. However, his statement, the circumstances of his non-attendance and the failure to submit his evidence to cross examination give rise to further consequences to which I refer at p. 21.” and “In my judgment this is an inference that I can and should draw; there was no legitimate reason put forward by Dr Renninson for not returning to this country for the trial; furthermore there was no explanation from the defendants for not taking his evidence in Australia on commission or otherwise so he could have been cross examined and given evidence as to what he might have done. I conclude that a decision not to call him or to take his evidence in Australia was made for tactical reasons; the defendants cannot therefore complain if I draw this adverse inference against them.”

[116] Brooke L.J. following *Regina v Inland Revenue Commissioners* 1991 2 A.C. 283 derived the following four principles:

“(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.” He further stated “In those circumstances it may be easier for the plaintiff to set up an affirmative case on that issue which is liable to be strengthened if, for no good reason, the doctor is unwilling to submit him/herself to questioning before the judge as to what he/she would probably have done. And in these days of video link technology, it may no longer be sufficient for defendants to rely on a doctor's absence abroad to avoid calling him/her to give evidence.”

### *Conclusion*

[117] Applying all of the above *dicta* to the present case, this is not a case where an explanation has been provided or a credible explanation given for the failure to lead the evidence of Lt Athanasios or any of the police officers has been given. The three Greek

police officers refused to give evidence voluntarily. One of those officers, Lt. Athanasios, has at some point advised that he would give evidence voluntarily but has later changed his mind necessitating some form of (unexplained) late formal request to his employer, the Hellenic Police Force. The defender's submission is effectively that they have been unable to compel reluctant witnesses. If the witnesses were willing their evidence could have been taken by video-link or on commission. It was not. The pursuer had confirmed to the defender that they would consent to the evidence of the police officers being taken under and in terms of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, which would be by commission. No such motion was made by the defender.

[118] In the absence of any form of explanation for why the reluctant witnesses gave evidence, it is submitted that the Court should draw inferences as previously submitted on behalf of the pursuer in the course of submissions at the close of evidence. The defender could and should have taken steps to secure the evidence of the three Greek police officers.

### **Submissions for defender**

[119] Decree of *absolutor* should be granted on the following grounds:

- a. that the pursuer has failed to prove, on the balance of probabilities, that an untraced vehicle caused the road traffic accident in Zakynthos on 17 July 2016 which resulted in his injuries and consequent losses;
- b. that the statements given by the pursuer, Michelle Fitzsimons, Rebecca Fitzsimmons and Dylan Dalziel to police officers on 17 July 2016 contain an accurate record of their accounts of the accident on that date: the accounts of the accident are

contemporaneous, consistent with one another and consistent with Michelle Fitzsimons recollection of the accident at the time;

c. that the explanations given by those four witnesses as to how the statements were created are inconsistent with one another and with the surrounding factual circumstances;

d. that the accounts of the involvement of a lorry, truck or oil tanker in the accident originated with Rebecca in the days following the accident: those accounts are marked by inconsistency and vagueness as to the description of the vehicle involved, the precise mechanism of the accident and the purported actions of the driver after the collision, are unreliable and weight ought not to be attached to them;

e. there being no involvement of an untraced vehicle in the accident, there is no basis for a claim under Articles 24 and 25 of Directive 2009/103/EC (6<sup>th</sup> Motor Insurance Directive).

[120] *Esto* there was an unidentified vehicle, there is an insufficient basis upon which to find that there was any breach of the GTC or GCC by the driver of that vehicle. There was scant evidence of the position of the vehicle, the position of the quad bike or the speed of the two vehicles.

[121] Further, *esto* there was an unidentified vehicle, the pursuer failed to discharge the requirement in Greek law to take average reasonable care to identify the untraced vehicle to authorities in Greece. *Separatim*, it has not been impossible to identify the vehicle and a claim cannot be made against the GAF in terms of Article 25 of the 6<sup>th</sup> MID (and regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003.

*The circumstances of the accident*

[122] The police statements in 6/1 of process are crucial to the case. The four persons to whom the statements are attributed each take a different position.

[123] The pursuer had no recollection of speaking to the police. His position in relation to the statement was that he did not sign any documents in hospital at all (modified later in cross-examination to perhaps one medical document).

[124] Mrs Fitzsimons said that she had spoken to the police but they did not ask a single question about the circumstances of the accident. She denied that the signature on police statement was hers.

[125] Rebecca said that there were two police officers at the hospital and that she spoke to one of them. The officer had been writing something down and she signed a piece of paper but she denied that the signature on the statement was hers.

[126] Dylan said that he had spoken to the police. In examination in chief, he said that he did not give a statement as far as he remembered; but in cross-examination he said that the officer wrote something down on paper which he then signed. He accepted that he might have signed something and that the signature on page 2 of the statement was his.

*Accounts of the accident*

[127] Evidence was given that the following accounts of the accident were conveyed by the four persons (in chronological order):

| Date, time                | From, to                                     | Content   | Reference  |
|---------------------------|--|---|--|
| 17.7.16, 13:30 –<br>15:00 | Mrs<br>Fitzsimons<br>to consular<br>official | “[MF] thought that she had hit something. She thought they had lost control.”   | Evidence of<br>Rebecca                           |
| 17.7.16, 15:00            | Rebecca to<br>police                         | Q <sup>3</sup> hit a stone and lost control   | 6/1, p. 9  |
| 15:20                     | Dylan to<br>police                           | Q hit a stone and lost control  | 6/1, p. 5  |
| 15:45                     | Pursuer to<br>police                         | Q hit a stone and lost control  | 6/1, p. 11                                       |
| 16:00                     | Mrs<br>Fitzsimons<br>to police               | Q hit a stone and lost control  | 6/1, p. 7  |
| Unknown                   | Rebecca to<br>pursuer                        | “Collision with an oil tanker, which stopped for a few minutes then the driver got back in and went on his way”. Description was “I think it was cylindrical in shape.” | Evidence of<br>pursuer P<br>(Sheriff’s question) |
| Unknown, but              | Rebecca to                                   | “Truck pushed pursuer and Mrs   | Evidence of Louise                               |

---

<sup>3</sup> Quadbike

|                                  |                                       |  |   |
|----------------------------------|---------------------------------------|--|---|
| on 17.7.16                       | Louise Riddell                        | Fitzsimons's quad into side of a mountain."  | Riddell   |
| Unknown (but later than 17.7.16) | Rebecca to Mrs Fitzsimons             | Conversation with Rebecca "at some point in hospital". "The truck hit us when it came around the bend and hit again. The quad bike had no control."  | Evidence of Mrs Fitzsimons                        |
| 22.7.16, 11:25                   | Mrs Fitzsimons to William Riddell     | Facebook message: "the lorry and us and small roads ... we were pushed into a cliff". <i>Collision? Not an oil tanker.</i>   | 5/13/112  |
| 29.7.16                          | Pursuer at Glasgow Royal Infirmary    | "Driving quadbike, swerved to avoid lorry tipped quadbike into ditch, not wearing helmet". <i>No mention of collision. Not an oil tanker. Omissions contrary to evidence of earlier statement by Rebecca. Rebecca present but did not correct account.</i> | 5/2/ 77<br><br>Evidence of P (Sheriff's question) |
| 1.8.16                           | Pursuer at Queen Elizabeth University | No recollection of events but daughter reports swerved to avoid oil tanker and went into ditch. <i>No mention of collision. First mention of</i>   | 5/2/251   |

|                 |                                       |   |                        |
|-----------------|---------------------------------------|---|------------------------|
|                 | Hospital                              | <i>oil tanker.</i>  |                        |
| 23.8.16         | Pursuer to<br>his GP                  | Tried to avoid oil tanker, went into ditch. <i>No evidence of collision.</i>  | 5/4/429                |
| June/ July 2017 |                                       | Moschos recovers police report  | Evidence of<br>Moschos |
| 20.2.18         | Pursuer to<br>Dr<br>Mumford           | "He was pushed off the road initially into a small ditch and then onto rocks. The oil tanker stopped briefly and then continued on its journey."  | 5/5/441                |
| Before 5.3.18   | Unknown<br>source to<br>Mr<br>Moschos | "F was driving his quad bike on the right hand of the road, with a hill to his right; as he approached a corner, an oil truck came around the corner ... the truck clipped the rear part of the quad bike propelling the claimants into the hillside... the truck only stopped briefly to remove the quad bike from under it before carrying on." | 5/17/ 8                |
| 9.3.18          | Pursuer to<br>MacLean                 | "Believes ... he was involved in a collision with an oil truck coming from the opposite direction."   | 5/4/423                |

|         |                          |  |         |
|---------|--------------------------|--|---------|
| 18.7.18 | Pursuer to<br><br>McLean | “... later told by his daughter that<br><br>he swerved to avoid collision with<br><br>an oil tanker” | 5/3/414 |
|---------|--------------------------|--|---------|

*Summary and analysis of witness' evidence on the accident and surrounding circumstances*

*Pursuer*

[128] The pursuer had no recollection of the accident at all. His first memory is waking up in hospital with Rebecca at his side and asking a nurse for painkillers. His memory of the hospital thereafter appears to be patchy. He must have been conscious when he gave a breathalyser sample, but cannot remember giving it. He cannot remember speaking to a police officer, but on any view must have done so to have provided a breathalyser sample. His provision of a sample for the breathalyser is inconsistent with the statement he attributes to Rebecca that he was “in no fit state” to speak to police officers.

[129] The first record of the pursuer describing the circumstances of the accident was at the GRI on his return to Glasgow. His account then made no mention of a collision nor of an oil tanker despite what RF says she told him, and her being present at the time: 5/2/77. An account two days later is the first documented reference to an oil tanker.

*Mrs Fitzsimons*

[130] In chief, Mrs Fitzsimons said that her only recollection of the accident was coming down the slope and the wheel of the quad being in the ditch. She thought she'd have to put her hands up before a crash, thinking “we're going to crash”. It transpired from the

evidence of Rebecca that Mrs Fitzsimons had given that account to a UK consular official who visited her in hospital on 17 July 2016.

[131] Mrs Fitzsimons' account of thinking that she would have to put her hands up is a natural and instinctive response to a collision. It was the response to the right wheel going into the ditch, not the response to a collision with another, much larger vehicle. That adminicle of evidence tends to undermine the proposition that there was any other vehicle.

[132] When she came to, Mrs Fitzsimons was standing in the road. She described the pursuer's appearance, her instructions to Dylan and the arrival of the ambulance. She made no mention of any other vehicle. She thought that the ambulance might have been called by a taxi driver.

[133] Mrs Fitzsimons' account of the accident comes from a description given by Rebecca "at some point":

"It hit us when it came round the corner and hit again. The quad bike had no control. We both came off the quad bike and hit the cliff face. [Rebecca] informed our family at the time that there was another large vehicle of some form that caused us to come off the bike".

[134] The account given by Rebecca to Mrs Fitzsimons was of a 'truck' or 'another large vehicle of some kind' that collided with the quad bike twice. There was no reference in Mrs Fitzsimons' evidence to an oil tanker.

[135] In cross-examination, Mrs Fitzsimons did not see any other vehicle when she came to after the accident.

[136] Mrs Fitzsimons made no mention of having given a statement to a consular official. Her direct evidence of what she told the consular official was not tested in chief or cross-examination. There is no reference to that statement in any production or the

pleadings. On the evidence, there has been no attempt to 'correct' the account of the accident recorded by the consular official.

[137] Mrs Fitzsimons denied that the signature on the police statement was hers, although she accepted there were some similarities. The account given to the police is entirely consistent with the account she gave to the consular official.

*Rebecca*

[138] Rebecca's account of the collision differed from that related by Mrs Fitzsimons.

Rebecca said the truck hit the quad bike front-on and pushed it into the cliff. It then clipped the back of the quad bike and spun it into the side. It was only on the second collision that the pursuer and Mrs Fitzsimons were thrown up into the air. That sequence of events seems objectively unlikely. It is also entirely different from the account of the collision given by Dylan.

[139] Rebecca had no concerns when the truck passed her, but "by chance" was looking in the wing mirror to see the first collision. She turned around and saw the rest of the collision unfold, even though those events must have taken place in a fraction of a second.

[140] She said that she was too busy to notice what the truck was doing, but that it had stopped and the driver got out, looked around and got in and drove off. No-one was with her at the time. She explained that Dylan had gone back to the quad to get towels. That sequence of events suggests that Mrs Fitzsimons had regained consciousness by this point, since one of the few memories she has of the accident locus is telling Dylan to get towels from the quad bike.

[141] Rebecca could provide no satisfactory description of the other vehicle. She said it was large with a cylinder at the back. She appears to be the witness who got the best view of the vehicle prior to the collision, yet her description is so lacking as to be incredible.

[142] Her account of where the lorry was after the collision was also lacking in any detail. She could not describe the driver, aside from saying he had dark hair. She said she wasn't paying much attention. She made no attempt to communicate with him, to ask for help. It is incredible that Rebecca did not notice any more about the lorry when it drove off from a hit and run in which her parents were injured. Rebecca said Dylan was with her at this point, although in his evidence, he observed even less detail about the lorry. Neither Rebecca nor Dylan contended that they could remember a better description of the vehicle later on the day of the accident.

[143] Rebecca clearly stated that she had no service on her phone. A passing taxi driver agreed to call for an ambulance once he had signal. That account is credible, but it undermines the evidence of Louise Riddell who said Rebecca phoned her from the accident locus.

[144] Rebecca said in her evidence in chief that it was 1½ to 2 hours before she spoke to the pursuer and Mrs Fitzsimons on the ward. That was after the police officers left the hospital. If the pursuer and Mrs Fitzsimons did not arrive at hospital until 40 minutes or so after the accident, any conversation between Rebecca and either or both of them could have taken place after the police statements were obtained and the breathalyser sample taken. Rebecca said that she did not see the breathalyser.

[145] Rebecca said in evidence that she had signed a document when speaking to the police at the hospital in Zakynthos. She denied signing any document at any other time.

[146] Rebecca said that after retrieving the passports from the hotel, only her mother and her father's were photocopied. She did not write on the copies. That evidence must be incorrect since Rebecca wrote the names of her maternal grandparents on the copy of Mrs Fitzsimons' passport. Rebecca's recollection of these events is unreliable. Moreover, this evidence strongly suggests that the passports were retrieved from the hotel prior to the statements being taken. If the statements were taken before going to the hotel, there is less reason for Rebecca to have written the names of her maternal grandparents on the copy of Mrs Fitzsimons' passport.

[147] It is not clear on the evidence precisely when Rebecca told her mother and father of her version of the accident. On Rebecca's account of the visit of the consular official to Mrs Fitzsimons (which was after the date of the accident), it could not have been until later than the date of the statements.

*Dylan Dalziel*

[148] Dylan gave a number of slightly different accounts of the collision:

- a. he passed the truck and heard a bang and looked in his mirror to see the quad bike flipping and crashing;
- b. he saw the front of the quad bike crashing with the oil truck;
- c. he looked in the mirror at the same time as hearing the noise;
- d. he heard the noise, looked in the mirror and saw the quad bike hit the front of the lorry;
- e. he was not looking in the mirror, but then saw and heard a noise at the same time (in cross).

[149] He went onto describe two collisions: one at the front of the quad bike, and one at the rear of the tanker; but only one noise.

[150] Dylan described using the left-hand mirror, but previously said that it was a sharp bend. It might be doubted whether that mirror would show what was happening to the right. His description of the movement of the quad bike seemed confused. He saw it flip, then roll to the side. He said the pursuer and Mrs Fitzsimons were on the quad bike as it was rolling. That does not fit with the evidence of Rebecca, nor the nature of the injuries to the pursuer and Mrs Fitzsimons.

[151] Dylan could provide no meaningful description of the other vehicle involved in the collision. His description of the road surface did not match that of any other witness. It was his first time on a quad bike.

[152] He could not say where the vehicle was after the collision or what it did. He said he 'believed' that it stopped for a couple of minutes and after that he didn't see it again. He did not recall seeing the driver, although on Rebecca's account he got out of the truck nearby and was the only other person present.

[153] When his statement was put to him, Dylan said he probably tried to mention the tanker, a far weaker statement than in his evidence in chief. He had concluded chief by saying of the police statement: "That's probably one of the best ways I could describe it. I probably did mention a truck, but I may not have done." It is extraordinary that he cannot be sure that he mentioned a hit and run vehicle which was responsible for the serious injuries to the pursuer and Mrs Fitzsimons, and the distress of his girlfriend, Rebecca. His evidence that he saw a truck does not ring true in those circumstances.

*Louise Riddell*

[154] Louise Riddell gave evidence of three calls from Rebecca on 17 July 2016. Rebecca was initially distraught at the condition of her parents. There was a second conversation a few minutes later and a third conversation in her apartment at a later time.

[155] Louise Riddell said that she had a number of telephone conversations with Rebecca. They spoke at least every day after the accident. It is entirely plausible that Ms Riddell is confused as to precisely when Rebecca first mentioned a truck.

[156] The evidence of Louise Riddell that she had a conversation with Rebecca at the accident locus is inconsistent with the accounts that there was no phone reception at the locus and a passing taxi driver was asked to call an ambulance.

*Mary Riddell*

[157] Mary Riddell's evidence was a confused and unclear version of the evidence of Louise Riddell. She appeared to conflate different telephone conversations her daughter, Louise, had with Rebecca. Mrs Riddell's evidence was not of particular assistance.

*Orthopaedic evidence*

[158] Mr MacLean opined that the pursuer would have had difficulty holding a pen after the accident in a usual pinch grip, but could have made a mark. He had not looked at signatures in the medical records for the purpose of forming an opinion on if or when the pursuer could have made a mark which was an attempt at a signature.

[159] It would be consistent with the pursuer's injuries that he was not able to produce something like his normal signature.

*Neurology evidence*

[160] It is submitted that Dr Mumford went too far in his second report, 5/9 of process and evidence when he opined that the pursuer's account of the accident was unreliable, for the following reasons.

[161] Dr Mumford's factual basis for that assertion was weak or non-existent. He did not know how long the pursuer was unconscious for. He had no assessment of the Glasgow Coma Scale ("GCS") at the locus or on admission to hospital. The only GCS reading available was 15/15, supported by the very clear statement that the pursuer had a "good level of consciousness".

[162] Dr Mumford exaggerated the assumed period of unconsciousness with no basis for doing so - "several minutes probably longer": 5/5/448. His conclusions were muddled. He said that the statement given by the pursuer was unreliable (para 3.4) then states that the pursuer was not capable of providing a statement (para 3.5).

[163] Dr Mumford was not aware of the consistency of the account attributed to pursuer with the other three statements obtained by the police and the original recollection of Mrs Fitzsimons as to the accident circumstances.

*Handwriting evidence*

[164] Ms MacDonald's opinion that the signatures on the pursuer's police statement were not his was based on her view that pressure had been applied to the page. She drew that conclusion from the colour of the ink, but had accepted that she did not know how many times the document she saw had been reproduced. She could not tell if the person had been holding a pen in the left or right hand (an analysis only available on the original document).

[165] Ms MacDonald had not been given other signatures attributable to the pursuer after the accident from the medical records. She was not aware of the extent of his injuries in preparing her report. She appeared to be applying some generalisations to analysis, but later said in evidence that this is the only case of this kind she has dealt with.

[166] There are a number of factors which might explain the variation in the pursuer's signature, including the size of the paper, what position he was in, which hand he used and his medical circumstances at the time. It is submitted that the evidence of Ms MacDonald was not sufficiently cogent for reliance to be placed on it in the particular circumstances of this case.

*Mr Repapis*

[167] Mr Repapis is a court appointed interpreter who provides interpretation services to prosecutors and courts of all levels in Greece, to the UK FCO, the EU and UN bodies. He was energetic in his demeanour, but candid and truthful. There was no guile in his responses.

[168] Mr Repapis explained the procedure which he followed when interpreting in a police investigation. He candidly said that he had little recollection of meeting the four witnesses, but explained why he could rely on his countersignature on the witness statements.

[169] There was no challenge to Mr Repapis' evidence that his signature appears on the witness statements, nor that he had failed to follow his usual procedure. The gravamen of the allegation against him is that he conspired with the police officers to fabricate the statements. He was, quite naturally, shocked and offended by the suggestion.

[170] It is submitted that Mr Repapis was credible and reliable. Substantial weight should be accorded to his evidence.

*Analysis of the evidence*

[171] The most contemporaneous recorded accounts of the accident in the statements contained in the police report 6/1 of process should be accepted as the most reliable accounts of the accident. They are consistent with each other and with the first recollection of Mrs Fitzsimons.

[172] The accounts given by the pursuer and Mrs Fitzsimons that the accident involved or was caused by another vehicle originated with Rebecca. There is no record of precisely when she told the pursuer and Mrs Fitzsimons of the involvement of another vehicle. The earliest documentary record of the involvement of another vehicle is a Facebook message, dated 22 July 2016.

[173] Neither Rebecca nor Dylan could offer any satisfactory description of the other vehicle they allege was involved in the accident. Nor, on their own accounts, could they offer a satisfactory description in the hours following the accident. That is implausible. A more implausible factual hypothesis is that the vehicle stopped and the driver got out, an assertion made by both Rebecca and Dylan. No witness has accepted that they made a statement at any time that the driver of the unidentified vehicle got out and retrieved the pursuer's quad bike from under the vehicle. That latter account is extravagant and could only have originated with Rebecca or Dylan.

[174] The denials by all four witnesses that they provided a statement to the police should be rejected. Dylan accepted that the signature at the end of his statement was his. Rebecca accepted that she had spoken to the police and signed a document.

[175] The denials by Mrs Fitzsimons and Rebecca that the signatures on the statements are not theirs do not ring true. Although they dispute that the signatures are theirs, they have

produced no examples of their signatures (the copies of their passports at 6/1/21 and 6/1/22 respectively are too poor for comparison).

[176] It is not part of the pursuer's pleadings that Mrs Fitzsimons, Rebecca or Dylan did not sign statements, nor has any evidence been adduced from any other person or document to support their contentions that signatures attributed to them are not theirs.

[177] Guidance on how the assessment of evidence might be approached is contained in a judgment of Tugendhat J in *Ali v. Basri*, 18.11.04, unreported at [127].

[178] The position of the pursuer and his witnesses, if true would require an extraordinary set of events:

- a. even on a favourable reading of the evidence, the hit and run vehicle was barely identified by Rebecca or Dylan. It is particularly surprising that it was not better identified by Dylan if it existed, and that he was unsure whether he told the police of its existence;
- b. that a police officer took a statement from Rebecca about a truck, had her sign a Greek language record of the statement, then discarded that statement and fabricated a new statement with her signature;
- c. that Mrs Fitzsimons' statement is entirely in accordance with the her understanding of the mechanism of the accident at the time she gave it;
- d. that Mrs Fitzsimons having been told by Rebecca of her account of the accident, no attempt was made to 'correct' the account given to the Consular official;
- e. that not a word of complaint has been made in the 3½ years since the accident to the police or prosecutor in Zakynthos that either: (i) the police report was inaccurate; or (ii) the statements were fabricated by police officers;

f. that a criminal complaint was not made to the prosecutor, for the relatively modest sum of €100 (in the context of the undoubtedly considerable expense of instructing two sets of Greek lawyers, one based in Zakynthos);

g. that somehow inaccurately or mistakenly, a statement was attributed to one of them that the lorry driver was seen pulling the quad bike out from the lorry before making off.

[179] There is a logical and clear chronology of events:

13:30 hrs: RTA

c. 14:00 hrs: the pursuer and Mrs Fitzsimons arrived at hospital

c. 14:10 hrs: Rebecca and Dylan arrived at hospital

14:10 – 1450: Rebecca, Dylan and two 2 police officers retrieve passports from hotel

15:00 – 16:15: statements are taken from Rebecca, Dylan, the pursuer and

Mrs Fitzsimons, using the passports for spelling and identification.

16:15 hrs: the pursuer gives breathalyser sample.

[180] If it is accepted there was an untraced vehicle involved in the accident, there is very little evidence on the respective road positions of the quad bike and that vehicle.

### *Applicable law on liability*

[181] The applicable law on liability is accurately summarised in the Notice to Admit (Appendix 3).

[182] Mr Moschos and Mr Papadopoulos agreed that if the GAF did not have to respond to the pursuer's claim, there would be no claim against the MIB. Both also agreed that there is a requirement in Greek domestic law that a person injured by an untraced vehicle exercise "average reasonable care" in identifying the vehicle. How this requirement might be met in

practice was not particularly controversial. Examples were given at paragraph 19 of the Notice to Admit. The pursuer instructed a local solicitor to contact the press in Zakynthos to see if there were any reports of the accident.

[183] It is submitted that the pursuer failed to exercise average reasonable care for the following reasons:

- a. there was no evidence that any attempt had been made by the pursuer's representative to contact fuel supply firms in Zakynthos to try to identify the unidentified vehicle;
- b. Mrs Fitzsimons said that at the time of the accident, she didn't know who had called the taxi, but she thought it was a taxi driver. She made reference to the taxi driver who took her to the port (to travel to Patras). There has been no evidence that the pursuer's representative in Zakynthos made any attempt to contact taxi companies;
- c. no attempt has been made to contact the police or the public prosecutor in Zakynthos to provide a description of the untraced vehicle since the police report was recovered (June or July 2017);
- d. no attempt has been made to 'correct' the account of the accident given to the British consular official on around 18 July 2016, or to seek their help; and
- e. no adverts or publicity have been given to finding the untraced vehicle.

[184] The opinion of Mr Moschos on whether the pursuer had fulfilled this requirement should be treated with caution. Much of his opinion evidence is uncontroversial and can be accepted as he concurs with Mr Papadopoulos. His opinion evidence in this area is challenged on the basis that he is not sufficiently independent to act as a skilled witness on this matter, as demonstrated by the chronology:

- a. 13 June 2017, instructed to act as a legal representative to the pursuer in Greece: 5/7/12 of process;
- b. June/ July 2017 instructs a local lawyer to carry out investigations and recover police report;
- c. March 2018, prepares his expert report: 5/17 of process;
- d. October 2018, prepare his second expert report 5/19 of process;
- e. March 2019, recovers pursuer's medical records: 5/11/56 of process.

[185] Reference is made to: *Kennedy v Cordia* 2016 SC (UKSC) 59 at [51]; *The Ikarian Reefer* [1993] FSR 563 at 565; and *Toth v Jarman* [2006] EWCA Civ 1028 at [100].

### *Injuries and prognosis*

[186] The pursuer's injuries and prognosis, as set out in the reports by Mr McLean, Mr MacLean and Dr Mumford are not in dispute.

### *Quantum*

[187] There are three applicable heads of claim under Greek applicable law.

#### *Non-pecuniary losses in respect of injury are awarded under Article 932 GCC*

[188] Mr Moschos and Mr Papadopoulos agreed that damages in terms of Article 932 of the GCC could be valued in the region of €30,000 (£25,201.79 at today's rate). This head of claim corresponds to general damages, or *solatium*.

*Article 931 GCC for future pecuniary losses which are uncertain to arise*

[189] Whether to make an award under Article 931 is a matter for the pure discretion of the court. Mr Papadopoulos opined that a Greek court might award between €20,000 and €30,000 (£16,801.14 to £25,201.79) under Article 931, corresponding to loss of employability.

*Past and future certain pecuniary losses under Article 929 GCC*

[190] In this case, these are:

- a. Past loss of earnings: the pursuer remained absent from work for a period of 1 year from the date of the accident. His pre-accident gross earnings were £17,389 per year (£15,362 net of IT and NI).
- b. Gratuitous care by relatives: this corresponds to section 8 of the Administration of Justice Act 1982. It is submitted that this can be valued in the ordinary way a claim for services might be. It is submitted that the sum of £4,000 would be appropriate.
- c. Miscellaneous expenses: the evidence of MF as to out-of-pocket expenses was not vouched by any productions. She asserted that she had spent “quite a few thousand” Euros (E3,000 to E4,000). That estimated sum is excessive. Most of this had been paid with her credit card. It would have been relatively straightforward to produce vouching. In general, hearsay evidence as proof of a document which can be produced is inadmissible: *Scottish Universal Newspapers v Gherson* 1987 SC 27. It is accepted that some out of pocket expenses will have been incurred, but it is submitted that the amount is more modest than that asserted by MF. They should be valued at £500.

*Contributory negligence*

[191] It is uncontroversial that neither the pursuer nor Mrs Fitzsimons were not wearing helmets at the time of the collision.

[192] Mrs Fitzsimons asserted that they had only been given three helmets. That was not consistent with the copy of the hire contract which appears to state that two helmets were declined. Dylan said in cross examination that they were given two helmets. There was no evidence that the pursuer or Dylan requested additional helmets.

[193] In terms of Article 300 of the GCC, a deduction for contributory negligence can be made to reduce the liability in damages according to the degree to which the claimant has contributed to the loss (including injury) suffered as a result of the event. On the basis of the evidence of Dr Mumford, it is submitted that the pursuer's contribution to the extent of his injuries by failing to wear a helmet is 10%.

*Absence of evidence from Greek police officers*

[194] The defender tenders a certified translated letter from the Hellenic Police ('the Letter'), dated 29 January 2020, in obtempering the request by the Court on 31 January 2020 to explain why Second Police Lieutenant Koukoubiti Athanasios, a police officer, was not called to give evidence at proof.

[195] Whereas the pursuer submitted at the diet of proof that the Court should draw an adverse inference from the defender's failure to call Lt Athanasios to give evidence, it is submitted that:

- a. there is no basis upon which such an inference could be drawn; and
- b. in the particular circumstances as disclosed in the letter, it would be manifestly unjust for any adverse inference to be drawn.

[196] The defender acknowledges that there are circumstances in which the decision of a party not to give evidence, or the decision of a party not to call witnesses who are under citation and available to give evidence, is a basis on which certain inferences may be drawn by a trial judge. The inference to be drawn is generally that where there are disputed facts on which no evidence is given by the defender, the Court is entitled to accept the evidence of the pursuer's witnesses, and where appropriate, draw such inferences from the evidence of the pursuer's witnesses as may be favourable to the pursuer's case: *O'Donnell v McKenzie* 1967 SC (HL) 63 at 71, 73; and *Davidson v Duncan* 1981 SC 83.

[197] Lt Athanasios was not under citation as a witness and, as the Letter makes clear, was not available to give evidence.

[198] Where an explanation is given by the party who declines to call evidence, even if the explanation does not entirely justify the decision, the basis for drawing an inference may be reduced or nullified:

“In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified.”: Lord Lowry with the support of the rest of the committee in *R v Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283 at p. 300 (approved by Lord Sumption in *Prest v. Petrodel Resources Ltd* [2013] 2 AC 415).

[199] In *Wiszniewski v Central Manchester Health Authority* [1998] PIQR P324, the Court of Appeal held that the silence or absence of a witness might justify drawing an inference adverse to a party, but there must be some evidence which raised a case to answer before an inference could be drawn, and if an explanation for the absence was given, even if it was not wholly satisfactory, the potentially detrimental inference may be reduced or nullified.

[200] The defender submits that the line of authorities on drawing inferences in such circumstances are not apposite to the circumstances of this case, for the following brief reasons:

- a. the witness Lt Athanasios is not an employee of the defender, nor is there any other contractual or similar basis on which he might be compelled to give a statement, let alone give evidence to this Court;
- b. the witness Lt Athanasios was not under citation and for the reasons explained in the Letter, was not available to give evidence;
- c. he was not a compellable witness;
- d. the defender did not elect not to call the witness;
- e. as is apparent from the documents lodged in process, the defender made proper attempts to secure the evidence of the witness Lt Athanasios;
- f. the application was referred to on numerous occasions at procedural hearings prior to proof;
- g. the pursuer and the court were aware of the efforts being made to secure his evidence;
- h. the defender's application was refused by the Greek court for reasons which are not entirely clear;
- i. evidence in relation to the disputed matters of fact (concerning statements given by the pursuer and three other witnesses) was given by Mr Repapis;
- j. the defender did not fail to lead evidence on the matters in dispute.

[201] The pursuer quite correctly makes no suggestion that the defender failed to take available steps to secure the evidence of Lt Athanasios. It would plainly have been of assistance to the defender and the court for his evidence to be led. It would be manifestly

unfair for any adverse inference to be drawn from the decision of the Hellenic Police not to permit Lt Athanasios to give evidence.

[202] In the circumstances, it is submitted that the only proper course is for the Court to treat the absence of evidence of Lt Athanasios as neutral and to make findings in fact on the available evidence in the usual way.

### **Grounds of decision**

#### *The main matters in issue*

[203] Leaving aside any complications created by this case arising from events which occurred in Greece, the pursuer's claim is a straightforward one. Having set out the circumstances leading up to the accident the pursuer avers:

“Dylan and Rebecca were on a quad bike in front of the pursuer who was sharing a quad bike with his wife. The pursuer was driving. He came to a curve in the road. As Dylan and Rebecca arrived at the bend, a petrol tanker came from the opposite direction. The pursuer was approximately 10 metres behind Dylan and Rebecca's quad bike. He was on the right hand side of the road. To his right hand side was a cliff face. To his left hand side was a drop. The petrol tanker did not leave room for the quad bike. The petrol tanker did not slow down. As it passed the pursuer, it collided with the rear of the quad bike. The pursuer and his wife were propelled from the quad bike and into the cliff face on their right-hand side. As a result of the accident, the pursuer has sustained loss, injury and damage.”

[204] In response, the defender denies that the accident happened as the pursuer avers and makes positive averments to the effect that instead, the pursuer's quad bike hit a stone in the road, causing him to lose control of it and collide with the side of the road.

[205] It is made clear that the source of these averments is statements (said to have been) made by the pursuer and the other members of the party when interviewed by Greek police officers, undertaken with the assistance of an English interpreter.

[206] In response to that, the pursuer avers that the alleged report of any interview of the pursuer by Greek police officers was not provided or signed by the pursuer. It is said that the pursuer was in hospital and heavily sedated after the accident and that he did not give or sign any statement. The pursuer goes on to aver that *if* any statements were provided by the pursuer's 'family' (*sic*) to the Greek police, no interpreters were present when any such statements were taken.

[207] In relation to liability, the issue between the parties is - as it is in all cases of this type - the circumstances of and reason for the pursuer's accident.

[208] But in this case, there is a second important issue between the parties, namely the evidential weight to be attached to the statements said to have been given by the pursuer, Mrs Fitzsimons, Rebecca and Dylan to the Greek police.

[209] At the risk of over simplifying, if the content of these statements is to be taken at face value and as accurate, then that evidence at the very least seriously undermines the factual basis of the pursuer's case, namely that there was another vehicle present at the locus and involved in the accident.

[210] In summary, in order for the court to accept a piece of oral testimony, it has to be satisfied that the evidence is both credible and reliable. In other words, the person who has given that piece of evidence is (i) honest (credible) and that (ii) the recollection of events is accurate - or at least sufficiently accurate in material particulars - (reliable), thereby allowing the court to attach weight to the account of what is said to have happened sufficient to allow it to be used to establish a fact (or set of facts) on the balance of probabilities (i.e. that it is more likely than not that it happened).

[211] The evidential picture in this case is rendered more complex by a significant body of evidence which was led about what the pursuer, Mrs Fitzsimons and Rebecca are said to

have said to each other and to third parties on a variety of occasions around and after the time of the accident. Evidence about these “prior statements” was led by both parties. That evidence was admissible and may be used both as evidence of the facts contained within the statement and as a basis for comparison of evidence given in court, thereby potentially undermining or enhancing a witness’s evidence: sections 2 & 3, Civil Evidence (Scotland) Act 1988.

[212] Ordinarily, I would not set out in any significant detail the evidence of the various witnesses nor would I make findings in fact about what are, strictly speaking, evidential matters. Nevertheless, in this case, given the two potential uses to which the evidence of prior statements might be put and the significance in the case of the secondary dispute concerning the provenance of the police statements, I have considered it necessary to examine not only the direct testimony as to what happened, but also the relevant parts of the evidence about and related to the making of the various prior statements (including the content, the circumstances in which they were made and the evidence as to the timing of them) before coming to a view on what weight (if any) should be afforded to them as supporting or undermining, as the case may be, the evidence given in court. I have also found it appropriate to make findings in fact about the most significant of these, namely the police statements.

[213] In undertaking this exercise, I have sought to set these out in broadly chronological order, although it must be borne in mind that (i) it has not always been possible to be precise about the chronology and (ii) in some cases, I concluded that evidence about when certain things were said to have been said is not accurate.

*Report to Louise Riddell (or McGurgan)*

[214] Ms McGurgan said that she had been living in Hong Kong on 17 July 2016 and that she had received a text from Rebecca at about 5pm Hong Kong time while she was on the bus home. She was not sure of the date.

[215] There had then been a phone call with Rebecca who had said that they had been on quad bikes; a truck had “pushed her Mum”; and that most of the conversation was about the pursuer and Michelle. On the basis of what she was told, the accident had “literally just happened”.

[216] This had been reported by Ms McGurgan to her own mother Mary Riddell who was with her. Ms McGurgan had then had to hang up because her phone battery was flat. On arriving home a few minutes later, she put her phone on charge and called Rebecca back, by which time there were other people at the accident scene. Thereafter, she had spoken to Rebecca every day. Most of the conversation had been about the pursuer’s injuries. They did not discuss the accident in detail. Rebecca had told her that a truck had turned the corner and pushed her mum and dad into a mountain. She had seen this through her mirror.

[217] Under cross-examination, Ms McGurgan gave some more detail about the telephone calls with Rebecca, saying that the latter had been screaming; panicking; and that she had had to get her to check that the pursuer was still breathing.

[218] Ms McGurgan accepted that it was possible that the truck was not mentioned until the second phone call; and that the mention by Rebecca of seeing the accident in her mirror was mentioned subsequent to that.

*Report to Mrs Mary Riddell*

[219] Mrs Riddell spoke of being told of the exchange of texts while on the bus with Louise and of Louise then phoning Rebecca and of the following being relayed to her: "That they were on quad bikes. They were out for the day. They were in front. They saw a bus coming towards them. It veered off to the side. They went into a cliff."

[220] She then corrected herself by saying that it was a lorry not a bus. That the lorry had come up by them; Rebecca had said she saw it in her wing mirror. The lorry seemed to be veering off the road. Keith had tried to pull the quad bike out of the road (i.e. out of the way). The lorry hit them and they went down a cliff.

[221] Mrs Riddell said she could hear Rebecca screaming.

[222] She had spoken to Rebecca the next day and asked her what had happened. Rebecca said that a lorry came round and hit them and moved them into a cliff.

*Report to Pursuer by Rebecca*Pursuer's evidence

[223] In his evidence in chief, the pursuer said that he had remembered nothing after stopping to buy water and that the next thing he had remembered was sitting in the hospital next to his daughter asking what had happened; where his wife was; and saying "look at my thumb".

[224] Later, he was asked if he now knew what had happened. He said that he did from what Rebecca had told him and that she had said that we had been driving and that she was ahead of them. They were coming up to a bend. An oil tanker came round and didn't leave enough room and collided with the bike.

[225] It was an oil tanker. She saw it didn't leave enough room and hit the quad bike.

[226] She had told him this in hospital when he had said “what happened, look at my thumb.” This was in the local hospital in Laganas. The first hospital.

[227] In cross examination, it was suggested to the pursuer that (in the context of his medical condition and possible interaction with police officers) his memory was poor. He agreed. It was then put to him that it was possible that events took place when he was conscious that he could not remember. He disagreed with that, saying that the first thing he remembered was sitting next to his daughter.

#### Rebecca's evidence

[228] Rebecca said that she eventually got to see her dad when he was put into the ward - about 1½ to 2 hours after they had arrived at hospital. Her evidence was that she and Dylan had taken it in turns to sit with him. There had not been much conversation as he was not good. She agreed that he was very disorientated and kept repeating the same three things being “Where is mum?”, “What happened?”, and “My thumb is sore”. She had not discussed the accident with him then nor at any time soon after the accident.

[229] Under cross examination, Rebecca was asked if the account she gave to her mother about a lorry striking the quad bike (see below) was the same one which she had given later to the pursuer. She said that she had done so once they had left hospital. It was only during the last two days after leaving hospital she gave him her description of the accident. She agreed that while he was in hospital she did not tell him the details and that she had said “You’ve had a serious accident and we’ll talk about it later”.

*Police statements*Rebecca Fitzsimmons

[230] The next description of the accident circumstances was ostensibly given by Rebecca to the police at about 15:00 on the day of the accident.

[231] In her evidence in chief, Rebecca said that two male police officers had arrived while she and Dylan were sitting in Accident and Emergency reception. They had spoken to her and Dylan while Dylan was with her. She accepted that she had tried to give a statement but said that there was a severe language barrier. It had been very hard to give a statement accurately. They spoke very little English.

[232] Nobody else had been present. She said that she had told the police what she had said (in evidence). That there had been an accident. It was a very brief conversation. A lorry had hit her mum and dad.

[233] She did not know if the police had spoken to her mum. They had not spoken to her dad but had breathalysed him. She accepted that she could not be 100% sure.

[234] Asked to describe the accident locus, she said that the road had been very narrow. The lorry had been able to pass the quad bike she was on because they were "very tucked in".

[235] After she and Dylan had spoken to the police, the latter took them to the apartment to obtain the four passports. These were handed to the police.

[236] Back at the hospital, the police took them to the administration room where her mum and dad's passport were scanned. The police then left, taking all four passports with them.

[237] The only other interaction with the police was when she and Dylan went to the police station which was just down the road to get the passports back. They went in and asked for them. They were given them but there was no further conversation.

[238] Rebecca said she had only signed one document. During her interactions with the police there was no interpreter present.

[239] Rebecca said that she had spoken by telephone to her Gran, Mary Riddell, her aunt Louise and her uncle William. She had just told them the same thing – that there had been a serious accident. Her mum and dad had been hit by a truck and they were acutely unwell with severe injuries.

[240] Rebecca was then taken to the statement itself and the translation thereof. She reiterated that no interpreter had been present when she spoke to the police. She denied giving the description of the accident recorded in the statement. She accepted that the police “had tried” obtain from her a description of how the accident happened but said that “they didn’t have much English”.

[241] Asked if they had asked her how the accident happened she said “Yes. Kind of.”

[242] She remembered what she had told them, which was exactly what she had said all morning (in evidence).

[243] She denied that the signatures on the copy of what was said to be the original statement in Greek was hers. She agreed that she had signed a document, but not that one.

[244] Under cross examination, she denied that the information in the instructions to Mr Moschos came from her: 5/17/8.

[245] At the hospital, two police officers had arrived. One had spoken to her and one had spoken to Dylan. They were writing on a piece of paper in Greek.

[246] It was put to her that her position was that she had told the police a truck was involved; that she had signed the same piece of paper police had been writing on; and asked if it had been read back to her and she said “Only briefly – due to the language barrier (the police officer) couldn’t really say what he’d written.” The policeman’s understanding was

that there had been a crash and a truck had been involved; there was pretty much no other discussion. It had not been a long conversation – 10 or 15 minutes.

[247] She had not been asked for a description of the truck or driver? “Not at all”.

[248] She didn’t know what she had been signing? “No”.

[249] She agreed that she did not know anything about what Dylan was saying to the police nor did he know what she had been saying to them.

[250] She had not told the police “much” about the lorry.

[251] She had not said what the vehicle or driver looked like? No. She was frightened and concentrated on her mum and dad.

[252] The police had told her that they had to breathalyse her dad.

*Dylan Dalziel*

[253] Dylan’s statement is timed at 15:20.

[254] In relation to his interaction with the Greek police, Dylan said that two policemen had turned up at the hospital and that he had “spoken to them as best I could” and that it was “pretty tough”. One policeman had spoken to Rebecca and one policeman had spoken to him. They had been split up and this had been done separately.

[255] Dylan had tried to describe what happened. The description given had been “kind of brief”. He was trying to describe the crash using basic words.

[256] He could not remember what he told them about how the accident happened. He was asked if he had told the police what he said in evidence and replied “most likely”. He said that no interpreter had been present at the hospital.

[257] He was then asked if he had told the policeman about the truck and said that he “tried to mention it”.

[258] He said that he “might have” signed something.

[259] He was asked if the police had spoken to Michelle or Keith and said “No”. He was asked if that was his understanding and said “Yes”.

[260] His evidence about how and when the passports were obtained from the hotel in the company of the police was similar to that given by Rebecca.

[261] He was asked if he had been “asked questions” and said “I don’t think so”. He did not remember seeing the police for the rest of that day and could not recall if they were given back the passports then.

[262] Dylan did not sign the statement “that I remember”. He did not remember signing other documents.

[263] The only other meeting with the police was when he and Rebecca “both saw the police – just picking up the passports, I believe”. There was no discussion then about the accident circumstances.

[264] It was then put to Dylan that there had “never been an interpreter present?” To which he responded “There was actually but he wasn’t saying anything”. He was asked if he had discussed the accident circumstances with the interpreter and said “No”.

[265] He was then taken to the terms of the statement and asked if he had been questioned through the interpreter to which he replied “I don’t recall that”. He could not remember the policeman’s names and said that the interpreter only been present when they were given back their passports.

[266] He was asked if he had given the account of the accident recorded in the statement to the police.

[267] He said “I probably did mention a truck at some point – but it’s not come across”.

[268] He denied that the signature on the first page of the statement was his: 6/1/5. He was asked Q. "You didn't sign this document?" A. "It doesn't ring any bells".

[269] In relation to the signature on the second page of the statement, Dylan said "That looks a bit like mine."

[270] Towards the end of his evidence in chief, Dylan was taken to the terms of the description of the accident in the translation of his statement in his police statement: 6/1/27. Dylan said words to the effect of "I couldn't have described it better if I tried".

[271] Under cross examination, Dylan agreed that he had given his personal information to the police. He did not recall what questioning was like.

[272] It was put to him that the signature on the second page of the statement was his and he said "Yes, I believe so".

[273] He agreed that the narrative had been written down in his presence and that the police officer was writing things down on this bit of paper. He was asked if it had been read back to him and said "Not that I can remember".

[274] It was put to him that he had signed it and said "I believe so. There were no other signatures on it when I signed it."

[275] He accepted that there were similarities between the signature on the first page of the statement and the second page of the statement. He did not accept the suggestion that it was possible that if it had been done in a rush or in a cramped space the signature on the first page could be his because "My Y's always join my L's".

[276] Dylan accepted that when he had been asked in examination in chief if he had ever told the police what was recorded in his statement he had said something like "It's probably the way I worded it" and that he had "tried to mention the truck".

[277] Asked why the truck was not mentioned in the statement, he said that the “language barrier was tough”. He insisted that there had been truck.

[278] Under re-examination, Dylan maintained his position that the signature on the second page of his statement could be his and his denial that the signature on the first page of the statement was his. In relation to his acceptance under cross examination about what he’d been saying to the police officer being written down on a piece of paper and him signing a piece of paper it was suggested to him that the reality was that he did not actually know. He agreed with that proposition.

[279] He also accepted that when the description of the accident in the translation of his statement had been put to him, he had said “I couldn't have described it better if I tried”. It was then suggested to him that the statement did not contain a complete account of what had happened, in that no lorry was mentioned and that the statement was limited to a description of what had happened afterwards. He agreed with that.

[280] In response to a question from me about what the interpreter had been doing, he said that the interpreter was simply telling them that they could have their passports back. He did not go over the crash or injuries. He spoke good English.

*Michelle Fitzsimons*

[281] Mrs Fitzsimons statement is timed at 16:00. She recollected a “small and stocky” Greek policeman whose name she did not know speaking to her. She could remember what he said. He had asked if she knew where the driving licence was and if her husband had been drinking. These were the only two questions she was asked.

[282] It was put to her that she had not been asked about the accident and said “possibly who was driving”.

[283] She did not know where the driving licence was and her husband had not been drinking.

[284] She was asked Q "Did you give a statement some stage?" A. "I don't remember that."

[285] She was asked if she remembered meeting the police officers named in her statement or the interpreter and said "No". She denied that the signature on the statement was hers: 6/1/7 and 8.

[286] Under cross examination, Mrs Fitzsimons agreed that description of the accident contained in Mr Moschos' report was quite different to her account: 5/17/8.

[287] She said that she had still been in the treatment room at the hospital in Zakynthos. She was asked if this was about 15:00 hours and said that she thought it was earlier than that because she was in the treatment room and had been taken straight there and could hear her husband. She had quite a bad head injury and needed stitches.

[288] The police officer had been in uniform and had asked her two questions only. She had not been asked about what happened. She was asked if these questions had been in English and said "Yes, in English". She had not asked any questions of the police officer.

[289] Mrs Fitzsimons was taken to the Greek version of her statement: 6/2/7. She was asked if her position was that that was not her signature to which she replied "It is similar to my signature. I don't recall signing this. There is only one M there. I sign with two M's – not one which is on my passport." She was unable to say how somebody would know if she signed with one M or two M's. She did not know the significance of the underlined section on the second page of her statement: 6/1/8.

[290] Under re-examination, Mrs Fitzsimons said that she always signed with two M's, not with one. The signature on the police statement looked like it had been one M: 6/1/7 and 8. It was similar to her signature but it was not hers.

*The pursuer*

[291] The pursuer's statement is timed at 15:45. His position was that (as well as having no recollection of the accident itself) he was not aware of the police being present whilst he was in hospital. He did not see any at any point. He accepted it was possible that they had attended before he recovered his memory. He did not remember speaking to any police officers. He did not remember signing a statement or any other documents. The signature at the foot of the first and second pages was "absolutely not" his: 6/1/11 and 12.

[292] He said that the signature on what appears to be the breathalyser printout was not his: 6/1/17.

[293] Under cross examination, the pursuer accepted that his memory was poor as to what happened. He was then asked if it was possible that events took place when he was conscious that he did not remember which he replied "No. The first thing I remember is sitting next to my daughter."

[294] He had no recollection of giving a breath sample. He was asked if what appeared on the printout could be an attempt to sign and said "I wouldn't think so". He agreed that the first letter like a K. He said that it was not possible that he had signed it, given the injury to his arm.

[295] He did not recognise the signature on his statement. It did not resemble his signature. He had no recollection of meeting the police or interpreter. He agreed that the possibilities were either he did not recall the police and interpreter being present or that the

police and interpreter were lying; the signature was a forgery; and that the police were conspiring with the interpreter.

*Mattheo Repapis*

[296] Mr Repapis gave evidence as to his qualifications, experience and credentials. He had been born in Athens. Although not a native English speaker, he had undertaken and completed school and university studies in England, including a university degree. His accreditations included being on the U.K.'s Foreign & Commonwealth Office List and acting as a translator in the Supreme Court in Athens.

[297] He said that he had been contacted by Laganas Police station. He had been asked to come to the police office and drive with them to the location. He thought the police officer was called Stanassios or Athanasios.

[298] Mr Repapis was being paid by the court – the state prosecutor. He was appointed to provide language assistance to the police. He was paid a retainer exclusively for police investigations.

[299] He had gone to the hospital as the people had been transferred there. He had been interpreting for people in beds. He could not give complete detail but he recalled two people in beds and two outside.

[300] The first person he saw was a man in bed. He was the most critical and time was of the essence. He also did interpreting for some youths and a woman. They also had to establish an alcohol test.

[301] He was unable to recall word for word what the man had said. What he had said was repeated and written. The police had always been present. He agreed that he had been interpreting between the police and the citizens. He could not be certain who he had seen

next. Two people had to go for tests. The police questions were translated word by word and answers written down. He had seen the police officer writing down what was said. That applied to all four meetings.

[302] The document was signed first by the police. He then read the whole document back to the person. They then signed and he signed in the middle.

[303] Some people did not want to sign or where not able to – for example, if they were dying.

[304] This was a description of the general procedure.

[305] Mr Repapis was asked if he recalled the nature of the incident and he said “A rock caused it or a piece of stone.” He understood that it was a road traffic accident.

[306] Nobody had ever mentioned another vehicle.

[307] The personal information about Rebecca recorded on the first page of her police statement had been taken down in his presence: 6/1/9. The mark made on the second page was his stamp and his signature: 6/1/10.

[308] Asked whether the description of the accident recorded there was accurate he said “We have no right to alter what they say. They say what they want.”

[309] The procedure which he had described for taking statements was the one used. He was asked if the translation of Rebecca’s police statement reflected what was recorded in the police statement: 6/1/9 and 10; 6/2/31 and 32. He said “We can only repeat what we hear. I don’t recall word for word that day. There is no reason to alter any word.”

[310] Dylan’s police statement was recorded in his presence and signed by Mr Repapis on both pages: 6/1/5 – 6. He was surprised that his stamp was not on it. It was his signature.

[311] The pursuer’s police statement was signed by Mr Repapis on both pages: 6/1/11 and 12.

[312] He was told that there was a challenge to the pursuer's signature on this document and asked if he personally remembered him (the pursuer) signing to which he replied "I cannot recall the moment. But I'd write 'refusal' or 'non-capable' in the case of a deceased". He emphatically denied the possibility that somebody else signed it.

[313] He agreed that the words at line 3 of page 2 of the statement attributed the accident to a collision with a stone. It said "I hit a big rock. As a result of hitting the rock on the right side I tried to regain control of the ATV<sup>4</sup> and finished up on the left side". That was an accurate record of what the pursuer had said.

[314] Mrs Fitzsimons' police statement was signed by him on both pages: 6/1/7 and 8. Asked about the underlined part on the fifth last line of page 2, he said that this would have been him emphasising that there would be no court or penal proceedings.

[315] It was put to him that as per the translation, there were to be no proceedings and that it was a "random event" and he said "Correct".

[316] He had signed on top of the signature to the left. He then qualified this by saying that on the first page the person had signed before him but on the second page, perhaps the person had signed after him: 6/1/7 and 8.

[317] He agreed that the process was for him to interpret what the person said from English to Greek; for that to be recorded in Greek; signed by the police; read back; and then signed by him and by the person who had given the statement.

[318] He was told that it might be suggested that he was not present when the police spoke to these people. He said that he needed to be present when the statements were signed. It took time to write up the details and there was a procedure to go through.

---

<sup>4</sup> The meaning of this acronym was not clarified but I believe it to mean "all-terrain vehicle" which I take to be a reference to the quad bike.

[319] He then gave evidence about the significant negative consequences for him professionally if these documents were forgeries.

[320] Under cross-examination it was put to him that because of what was at stake for him personally and professionally, he had an interest in justifying what had been done in Zakynthos in 2016. He said that his job was to provide services and that's what he did.

[321] It was put to him that there were issues about when and where the police statements were signed and he agreed that his position was that he was involved in that process and that he had explained his role in it.

[322] It was then put to him that there was an issue about the pursuer's signature and he agreed that he had an interest in explaining that he had a proper role.

[323] He was challenged as to evidence that had been contacted a maximum of 10 minutes after the accident and replied "plus or minus".

[324] It was put to him that he did not know when the accident took place and he replied that he was informed by "999" line which was used when there was trouble concerning tourists. He did not know the exact time but had relied on what he was told by sworn police officers.

[325] He had not gone to the location of the accident but to the hospital where there were two police officers with him. He agreed that only these two officers were involved in taking the four statements.

[326] He had not met any of the family who were at the hospital on any other occasion.

[327] In cases like this they would speak to the most seriously injured person first if they are capable. He thought that they had spoken to the man in the bed first. That was the procedure normally used.

[328] He had then spoken to some youths and a woman and done an alcohol test.

[329] The sequence of statements being taken was then put to him by reference to the police statements and he agreed that this showed that they had spoken to the pursuer third and not first.

[330] He agreed that he had explained the procedure which was that he had attended with two police officers, and they had asked questions to establish the identity of the person they were speaking to. He was asked if they had filled out the statements and said that it was not his writing and that interpreters "don't touch the paper".

[331] He agreed that the two police officers then signed and that he then read the entire statement to the witness and checks that these are the answers they wish to provide.

[332] It could be him or the witness who signs first. If a witness refuses to sign, that was usually noted.

[333] He agreed that he then stamped the statements but said that he had not stamped on every page.

[334] He was taken to Dylan's statement and said that when he had signed it, that's what was before the witness at the time: 6/1/5 and 6.

[335] He was taken to Rebecca's statement and agreed that the questions in the middle of the first page began with "what is your name?" and that the answer was contained in the next two lines and that it then moved on to the passport number: 6/1/9.

[336] Rebecca's evidence to the effect that she did not have her passport with her; did not know the number or other details of it; and that the police had obtained the passports later was put to him and it was suggested that if that evidence was accepted, then at the time the document signed passport number was not present. Mr Repapis said that the person giving a statement was not required to give the passport number and it was not a question that was

asked. He agreed that it was possible that something was added to the statement after it was signed.

[337] In respect of Dylan's statement it was put to him that if Dylan did not have his passport with him at the time, the document details would not have been there: 6/1/5 and 6. He agreed that they would not be there said he was unable to say anything about this because it was a matter for the police and he could not ask for a person's identity card.

[338] Mr Repapis accepted that on looking at the statements there had been three officers involved rather than two and said that he thought that "close to that hour there was a change of guard". His recollection was that there were two police officers present.

[339] It was put to him that he had said that the same officers were present on each occasion. He said that he did not look at the "top part" of the statement and that his memory could be wrong. His recollection was that when he had met the pursuer, he was with two police officers. He was sure that the pursuer had been talking and things had been written down. He did not recall how the pursuer was or the injuries he had. He did not think it could have been difficult for the pursuer to give an explanation if one was written down, but he accepted he could not remember it.

[340] He remembered that the pursuer had difficulty with the breathalyser test. It was a vague image but he had to tell him to breathe as well as he could.

[341] He was asked if the pursuer had difficulty giving a statement but said that they had been able to write a report.

[342] A summary of the pursuer's position (that the pursuer had sustained severe injuries, did not give a statement, did not sign it and did not give this explanation) was not accepted by Mr Repapis. He said his signature was on it.

[343] In relation to Mrs Fitzsimons' statement Mr Repapis knew that she was the pursuer's wife.

[344] He was asked about the next question which is "Do you know or are you related to the charged or the victim?" Mr Repapis drew attention to the small line or stroke at the beginning of the answer on the pre-printed form and said that that meant "not filled out".

[345] He was asked if he meant that it had been marked out and agreed. It was put to him that that meant "No" but he said "I'd say 'not applicable'". Mr Repapis volunteered that it should be filled out, because if it was not, it gave a wrong understanding.

[346] Mr Repapis said that the contents of the statement from the foot of the first page to mid-way down the second page was Mrs Fitzsimons' answer to a question by the police officer. He said he thought he had underlined the part about not seeking criminal or civil liability. He said that she was asked that in hospital and that was her answer – that's what she had said.

[347] Mrs Fitzsimons' position (she did not give this statement to the police; she did not sign it; and his evidence was not an accurate description of what took place at the hospital) was put to Mr Repapis. He did not accept that, saying that if his signature was on the statements, he spoke to them.

[348] He did not accept that only one police officer was speaking to Mrs Fitzsimons and that only three questions were asked and these were not the ones recorded in statement, but said it was way too long ago for him to remember.

[349] It was put to him that the statements produced were not statements given by Rebecca on the day in question. He did not agree.

[350] He said that the pursuer had been able to provide breath for the breathalyser test but agreed that he had had difficulties. The pursuer had not had difficulties signing his statement.

[351] It was suggested to him that the pursuer had had difficulty answering questions, Mr Repapis said as long as a person can breathe, what they say can be written down.

[352] He said that the pursuer was able to answer and was able to sign his statement at the bottom left of the page. He could not say 100% what the pursuer's difficulties were but he had not been asked a lot.

[353] He agreed that the time shown on the breathalyser printout was 16:15 hours.

*Other evidence relevant to police interviews*

Medical

[354] Dr Mumford spoke to his report: 5/5/453 *et seq.*

[355] He said that the pursuer had sustained a significant (but not severe) head injury. The pursuer's own account to him was that he had "snapshots of memory" during his time in hospital in Laganas.

[356] He also spoke to his supplemental report: 5/9. He described in some detail the nature of the head injury suffered by the pursuer.

[357] His opinion was that he thought it very unlikely that the pursuer was able to give a statement, although he had some hesitation because of the detail.

[358] Under cross examination, Dr Mumford was taken to the breathalyser printout and accepted that the pursuer must have been conscious when he gave the sample.

[359] Dr Mumford agreed that it appeared that 30 minutes after giving his statement, the pursuer was able to follow instructions to do a breathalyser test and that this appeared to

have been signed by him. Dr Mumford explained that people who are very drunk can do breathalyser tests but that did not mean that they were orientated as to date, time and place.

[360] He was puzzled by the Glasgow Coma Scale (“GCS”) reading of 15 recorded and doubted if the pursuer was fully orientated as to date, time and place. He accepted that this was speculation.

[361] In relation to the statement, Dr Mumford said that he was slightly taken aback by the detail of it and that there was a mismatch between this and his interpretation of the pursuer’s likely condition at the time. He could not explain this mismatch and it was difficult to know what interpretation to place on it. He thought it was very unlikely that the pursuer would have been capable of giving the statement in this way but he was hesitating as it was very detailed.

[362] He found it surprising that the statement had been given by the pursuer himself as the pursuer had told him that he had had amnesia.

[363] Dr Mumford accepted that in respect of the pursuer’s amnesia, he was relying on what he was told about it. It was not a medical judgment as such and was subjective.

[364] He had a bit of disquiet at the GCS score of 15. It was suggested to him that it was going too far to say that the pursuer did not give this statement. He disagreed. His opinion was as expressed in his supplementary opinion. The issue was reliability.

[365] He was asked if the pursuer had been given an account of the accident by somebody else, whether he could have repeated it. Dr Mumford agreed that that was a possibility.

#### Angus MacLean

[366] The terms of Mr MacLean’s two reports were agreed by joint minute: 5/4 *et seq* and 5/129 *et seq*. Mr MacLean was called to give some additional evidence pertinent to the

pursuer's ability to write. He said that the pursuer had suffered severe injuries to his right elbow and right wrist and a crushing injury to his right thumb. There had been a fracture to his left wrist and a dislocation to his left thumb. The fracture to the left wrist was a more simple injury.

[367] He was asked whether, given the nature of the injuries which the pursuer had suffered, he would have been likely to be able to sign the police statement: 6/1/11 – 12.

Mr MacLean expressed the view that the pursuer would not have been able to hold a pen in a normal fashion. A prehensile grip was required to hold a pen normally.

[368] Under cross examination, he was asked whether the pursuer would have been able to hold a pen in his right hand. Mr MacLean said that he would not have been able to do a "pen grip" but he could do a "power grip" at best with three fingers. Given the fractures to the wrist and elbow he would need to make movements from the shoulder. It would be very difficult to make anything other than a mark.

[369] He was then taken to the breathalyser printout and asked if the pursuer could have provided that mark at that time: 6/1/17. Mr MacLean agreed that he could, saying that it was an illegible squiggle and that the pursuer could have used his left hand. He thought it was unlikely that he would be able to make a deliberate mark like that but added that he was not a handwriting expert.

#### Handwriting - Catriona MacDonald

[370] Ms MacDonald spoke to the report which she had jointly prepared with a Ms Thorndycraft, another forensic document examiner: 5/7.

[371] In her examination in chief, she explained what material had been made available to her and what her instructions were which, in summary, were to compare "known"

examples of the pursuer's signature with three "questioned" signatures, the latter being those at the foot of the two pages of the pursuer's police statement and that on the breathalyser printout: 6/1/11 – 12; 6/1/17.

[372] She explained the methodology adopted and that on examination the two signatures on the statement were probably of common authorship while the differences between those signatures and the one on the breathalyser printout meant that there was no evidence that they were written by the same author.

[373] In relation to the breathalyser printout signature, she observed in her report that "It does not appear to be natural writing although we cannot determine what the circumstances were."

[374] She explained that a comparison of each of the three questioned signatures with the "known signatures" was then carried out.

[375] Differences were identified between the known signatures and the signature on 6/1/9 and the conclusion expressed was that:

"Comparison has found that this is not the genuine signature of (the pursuer) and was not written by him. It is likely a simulation by an unknown author intended to be taken as genuine as the block 'K' and the undulating line show similarities."

[376] A similar conclusion was reached in relation to the second "questioned" signature on the second page of the police statement: 6/1/10.

[377] In relation to the third questioned signature on the breathalyser printout the conclusion was that there were "... insufficient features to rule out or connect (the pursuer) as the author...".

[378] Under cross examination, Ms MacDonald accepted that there were certain pieces of technical equipment which could be used in handwriting analysis but that these had not

been used here because what was being analysed were photocopies rather than originals.

Accordingly, the process was a simple comparison of marks.

[379] She was asked about the signature on the patient consent form from the hospital in Patras: 5/10/17. She said that that did not appear to be the genuine signature of the pursuer. It looked "tremulous" and she thought it was unlikely that it was his genuine signature. It did not look natural and she could not say if it was or was not.

[380] She expressed the view that the signature in the second consent form was not genuine: 5/10/48. The shapes could broadly be made out. It did not resemble the samples she had been provided with in any way. The scope and flow was very different and the lines were very upright.

[381] In relation to the signature on the Queen Elizabeth Hospital records, Ms MacDonald said that this was not a genuine signature and it was not how the pursuer would normally sign: 5/2/286. It did not resemble the examples given for analysis.

[382] She did not accept that her conclusion in relation to the signatures on the police statement was speculation. These signatures had been done "with pace". There were no pen lifts and it was very fluent. There was a slight tremor at the beginning.

[383] It was probable that the author of the signatures had something to simulate.

[384] These two signatures had been done with "fluency and pace". It was not a natural move to stop and go back.

[385] It did not make sense for some factors to be affected and some not.

[386] Under re-examination, Ms MacDonald agreed signature on the breathalyser printout lacked fluency. So did those on the consent forms.

[387] She had not been aware of the pursuer's health at the time when the questioned signatures were said to have been made. It having been said to her that injuries to his right

arm, wrist and hand she agreed that the signatures on 5/10/17, 5/10/48 and 5/2/286 were very different to those on the pursuer's police statement.

[388] She reiterated that the signature on 5/10/17 was not the pursuer's genuine signature.

It was not like the pursuer's normal signature.

[389] The signatures on the police statement would require some knowledge of how the signature was written.

*Reports by Mrs Fitzsimons to Embassy; and by Rebecca to Mrs Fitzsimons*

Mrs Fitzsimons

[390] Mrs Fitzsimons did not say anything in her evidence about having been in contact with or speaking to anybody from the British Embassy.

[391] She said that Rebecca had given her an account of what happened. She had described the other vehicle as being a truck like an oil tanker. A metal cylinder. She could not recall the colour. Rebecca had told her it had stopped, the driver got out for a few minutes, then got back in.

[392] Mrs Fitzsimons said she had no personal recollection of the accident circumstances. She had spoken to Rebecca while she was in hospital and Rebecca had looked at her a bit surprised and said:

“Do you not remember a truck coming round the corner?’ She (Rebecca) had seemed to be aware when it came round the corner. She said it hit us and I think that it hit us again. She said that Keith and I came off the bike and hit the cliff. She had informed our family. I know that there was another large vehicle which came round the corner and hit us.”

[393] Under cross examination, Mrs Fitzsimons said that Rebecca said the truck had stopped and the driver got out for the few minutes, then he got back in and drove away. She could not recall if Rebecca said what the driver did.

[394] At the time, Mrs Fitzsimons did not know what happened or where the pursuer was. It was a very distressing time. She had had a head injury and was concerned about a 16-year-old (Rebecca) dealing with this. There was quite a lot going on. She did not push Rebecca and assumed that it would be part of something else. She went on to repeat her current understanding of what had happened based on what Rebecca had told her.

### Rebecca

[395] Rebecca said that she had spoken to her mum. She had arrived at the hospital and discovered that Mrs Fitzsimons had spoken to the British embassy. She went on

“She told me what had happened. I said ‘what are you talking about mum – that’s not what happened’. I explained they had been hit by a truck and pushed into the side of a mountain. She didn’t know what happened. She thought it had been an accident or dad had lost control.”

[396] Under cross examination she was asked about her discussion with Mrs Fitzsimons at the hospital, after Mrs Fitzsimons had spoken to the British embassy and asked if she knew when Mrs Fitzsimons had spoken to the embassy about the accident. Rebecca did not know and said “She (Mrs Fitzsimons) told me she’d tried to describe what happened”. The passage of evidence continued as follows:

Q. Was that account ‘hit a rock’? A. No. I think she described it as thinking she had to put her hands up.

Q. Did she remember anything of the accident? A. Not of the accident. She remembered what she was doing.

Q. Did your mum say that Keith had lost control? A. As far as I’m aware it was thinking she had to put her hands up.

Rebecca was referred back to the passage in her evidence in chief when she had said that her mother had said words to the effect that she just thought her dad had lost control. She was asked whether that was what her mother had told the British embassy. She replied that a lady had come to the hospital and that had been face-to-face. Rebecca had not met this person. That was not the same day as the accident but one or two days later.

*Reports to William Riddell*

[397] Rebecca said that she had spoken to Mr Riddell but was not specific about when this was or what she had said to him. Mrs Fitzsimons did not speak to any conversation with her brother or the terms of messages passing between them.

[398] Mr Riddell spoke to a conversation he had with Mrs Fitzsimons and a series of electronic messages passing between them: 5/13/111 – 115.

[399] Mr Riddell said that he had initially been advised by his sister, Christine, that Mrs Fitzsimons and her husband had been involved in a quad bike accident. He was unable to say when that was.

[400] He said that he thought he had contacted Mrs Fitzsimons. He had messaged her and she had called him. When he had spoken to her, Mrs Fitzsimons had just said that she had been in a quad bike accident. She did not have much recollection. She was in a bit of a state. She was separated from her husband and worked up and panicky.

[401] He was asked if he had got more information and said that he was told that there was a fuel truck. Only that Michelle and Keith had been involved in a traffic accident. That was as much as he was told. Michelle and Keith had been pretty bad – they did not have much memory. Mrs Fitzsimons said that there was a truck and they ended up in hospital.

[402] The first message was from Mrs Fitzsimons to Mr Riddell dated 20 July 2016 and timed at 18:55. It said that they were on holiday, that there been a serious crash and gave a little bit of information about the extent of the injuries.

[403] Mr Riddell responded to that at 11:25 on 22 July 2016. Mrs Fitzsimons responded with more information about injuries. Mr Riddell then asked how Rebecca was and Mrs Fitzsimons said that she was “traumatised” was in the quad bike in front and “had seen it all happen”.

[404] Mr Riddell had then asked what had happened and Mrs Fitzsimons sent him a further message saying

“It was accident the lorry and us and small roads I really thought we weren’t going to make it. It was awful it still is to be fair. We are in neck braces trying to protect the spine.”

[405] There was then some further messages concerning travel home and Mr Riddell sent a message saying “Take it yous rolled it over” to which Mrs Fitzsimons responded:

“If u want I will give you a call in we (*sic*) while when I get off ferry lots to explain on text. No we where (*sic*) pushed into a cliff”: 5/13/111.

*Other accounts given by pursuer*

[406] On 29 July 2016, the pursuer sought treatment at Glasgow Royal Infirmary. His account of the accident as noted in the records is “Driving quadbike, swerved to avoid oncoming lorry flipped<sup>5</sup> quadbike into ditch, not wearing helmet”: 5/2/77. The record also notes “(seen with wife – also a patient)”. He said that his daughter had been present with him at hospital.

---

<sup>5</sup> It may be “tipped”. The writing in the note is not clear.

[407] On 1 August 2016, the pursuer attended Queen Elizabeth University Hospital. The admission sheet records “quad bike RTC in Greece on 17/7/16. – No recollection of event but daughter reports swerved to avoid oil tanker + went into ditch -> came off bike”: 5/2/251.

[408] On 23 August 2016, the pursuer spoke to his GP. He is recorded as having said “Tried to avoid oil tanker, went into ditch”: 5/4/429.

[409] On 20 February 2018, the pursuer saw Dr Mumford in connection with the preparation of a medico-legal report. In the course of doing so, he gave the following account:

“He was pushed off the road initially into a small ditch and then onto rocks. The oil tanker stopped briefly and then continued on its journey”: 5/5/441.

[410] On 9 March 2018, the pursuer saw Mr MacLean and provided the following account:

“Believes ... he was involved in a collision with an oil truck coming from the opposite direction”: 5/4/423.

[411] On 18 July 2018, gave an account to Mr McLean, thus: “... later told by his daughter that he swerved to avoid collision with an oil tanker” (5/3/414).

#### *Other accounts*

[412] The following narrative appears in Mr Moschos report:

“F was driving his quad bike on the right hand of the road, with a hill to his right; as he approached a corner, an oil truck came around the corner ... the truck clipped the rear part of the quad bike propelling the claimants into the hillside... the truck only stopped briefly to remove the quad bike from under it before carrying on.” 5/17/8.

*Accounts of accident given in evidence*

Pursuer

[413] The pursuer's evidence was that he could remember nothing of the circumstances of the accident.

Mrs Fitzsimons

[414] Mrs Fitzsimons gave some evidence about the nature of the tour which had been undertaken by the group prior to the accident happening. Her recall of the accident itself was limited. Rebecca and Dylan had been in front and she and her husband had been behind. They had swapped quad bikes. She and her husband had been on the bigger one and Rebecca and Dylan were now on that one and in front. They came down the road and there was a corner. Her last memory was seeing the wheel in the ditch. She put her hands up to her face. She remembered a loud noise but did not remember the actual accident. She only knew what her daughter had told her. She did not know why it happened.

[415] She came to standing in the road. She had shouted to Rebecca to get towels from the back of the quad bike. The pursuer was unconscious in the ditch.

[416] Under cross examination she was asked whether her last memory was the wheel of the quad bike being in the ditch to which she replied "on the grass verge". She was then asked Q. "So the quad bike had already lost control?" A. "I don't know."

[417] In a supplementary question, Mrs Fitzsimons was asked whether she had thrown her hands up and if this was before after the wheel of the quad bike was on the grass.

Mrs Fitzsimons responded to the effect that she thought she was going to have to put her hands up – it was a thought not an action.

Rebecca

[418] In her evidence in chief, Rebecca gave a brief description of the road layout and locus and said that a lorry passed the quad bike she and Dylan were on. It had then “Hit Dad and Mum front on and pushed them into a cliff. It then hit them at the back and put them in the air.”

[419] The lorry had been on the left-hand side heading uphill. She could not remember the colour but said it was large “like a big cylinder”.

[420] Asked how she had been able to see what happened, she said that there were really big wing mirrors on the front of the quad bike and that she had seen it by chance. She had then turned round (looking over her right shoulder) and saw the lorry clip the back of the quad bike and spin her mum and dad into the air.

[421] The quad was still on the right side of the road just beyond where her mum and dad were lying.

[422] Under cross examination, Rebecca said that the truck hit the quad bike at the front and pushed it into the cliff and then hit the back making it spin round. The first contact had not thrown it up in the air – it was more like pushing. Then it had clipped the back. It had clipped the left back wheel. After the quad bike had been clipped it was “pushed back behind them”. It was behind them on the right side of the road. Her mum and dad had spun. She had not seen the bike spinning. They were thrown straight upwards. Her mum had landed on the road and her dad was in the ditch.

[423] She said the lorry had stopped right where it had clipped the quad, on the left hand side of the road. The driver had got out, looked about and then got back in and driven off.

[424] At the end of Rebecca’s evidence, I asked her if there had been any damage to her parents’ quad bike. She said that the storage box had come off but she did not recollect any

other damage. The quad bikes had been left where they were. She had gone back to the hire company to collect her dad's driving licence. The owner was quite angry. They had explained what had happened. Somebody had been sent to pick the quad bikes up.

### Dylan

[425] Dylan's account of the earlier part of the day was largely consistent with what others had said and was uncontroversial.

[426] He said that they had come to a bend and had come round. He had spotted the oil truck. They had got a bit further down the road. He saw the accident in the mirror. He heard a bang and saw Keith's bike flipping.

[427] The bend had been to the right. He assumed it was an oil tanker.

[428] He saw the front of Keith's quad clashing with the oil truck. The road was reasonably wide – not tight.

[429] He was asked about the noise and what came first and said "I looked in the mirror and heard the noise. They happened together."

[430] He was unable to give the exact size of the mirrors on the quad bike. They were the same as a rear view mirror on a car. There was one on each side.

[431] The lorry had hit the front of the quad bike. The quad flipped and crashed.

[432] He was asked where the truck was and said "I believe it stopped for a couple of minutes". He did not remember seeing the driver.

[433] Under cross examination, Dylan said that the place where the accident happened was like a big open road with a rock cliff on one side and a big drop on the other. The rock was on the right-hand side. The road was wide enough for two cars.

[434] The oil truck was driving towards them up the hill. He was not sure if it was articulated. It was a whitish colour but the road had made it dirty and it was hard to tell. It did not have any signage on it that he remembered.

[435] They had not been that close to it and had not needed to move out of the way. He had no concerns. It was not going that fast as it was coming uphill.

[436] He saw the lorry in his left wing mirror. He had been naturally looking in the mirrors. He had come out of the bend. He saw the quad bike flipping and crashing.

[437] He thought there had been a single noise.

[438] The quad bike took a roll from side to side. It went up and along and towards the rock cliff. He thought Michelle and Keith had been on the bike while it was rolling. He did not know how many times it rolled. They were not crushed under the bike as it rolled.

[439] It was mostly in his wing mirror that he had seen this.

[440] Dylan then gave some evidence about the immediate aftermath. He did not know where the pursuer's quad bike was – it was on the road or in the ditch. The tanker had been there but only for a couple of minutes. He did not see the driver. The truck may have left by the time he had got the towels.

[441] He was not sure if there had been damage to the truck. He had seen the front of the quad clip the truck. The part of the quad which hit the truck was the guard of the front left wheel. It had hit the rear of the truck. He had heard a single noise.

### *Analysis of evidence*

[442] I did not find Louise Riddell's or Mrs Mary Riddell's accounts of the former's initial telephone conversations with Rebecca reliable as to timing or content. A telephone call by Rebecca and from the scene of the accident was not spoken to by Rebecca herself or by

anybody else who might have been in a position to witness it, namely Dylan or (perhaps) Mrs Fitzsimons. According to Ms Riddell, this was a dramatic moment when she asked Rebecca to check on whether her father was still breathing. That being so, it seems very surprising that this is not something that would have stuck in Rebecca's memory.

[443] Furthermore, there was clear evidence that there was no phone reception at the accident locus.

[444] Even assuming that there was a call at that very early stage from the accident locus, I was not persuaded that it was likely that the mechanism of the accident would have been the main topic of conversation.

[445] In addition, for reasons which I set out more fully below, I do not accept that Rebecca herself articulated the version of a collision with a lorry until sometime later. If that is correct, then it is inherently unlikely that she would have shared such a version with her aunt during a phone call which is said to have taken place immediately after the accident occurred.

[446] I think it is more likely that the version involving a lorry which Rebecca eventually came to articulate - albeit with in a relatively short time - is one which came to be shared with other members of the family over succeeding days and that Ms Riddell has understandably no precise recollection of what information or account of the accident she received when.

[447] I did not find the pursuer's evidence about the account of the accident which he says Rebecca gave him at the hospital to be reliable. As noted elsewhere, the pursuer was in a poor condition and told Dr Mumford (for example) that he had no memory of the accident and that his memory of events in hospital was "snapshots". Rebecca said that she did not discuss the detail of the accident with her father at that time. Furthermore, if the pursuer

had been given an account of the accident involving a lorry by Rebecca – whether in hospital or later - why did his initial accounts on his return to Scotland as recorded in the medical records not reflect that?

*Police statements*

[448] Before turning to the content of the police statements, there was a dispute between parties as to how they should be treated as a matter of evidence. The parties competing submissions about this are set out above.

[449] The principles applicable not in dispute. My initial observation is that in a number of the cases cited, the issue arose where evidence was led with a view to establishing certain facts from which an inference of negligence (which is a mixed question of fact and law) might be drawn. In these cases, the approach being applied by the courts was in the context of a failure by the defenders to lead evidence either at all or directed at countering a *prima facie* inference of negligence. *O'Donnell, Binnie and Wisniewski* all fall into that category.

[450] *Regina v IRC* is a special case concerning presumptions in relation to tax assessments. *Davidson* concerned a commercial dispute, but in that case the defenders did not seek to challenge the evidence for the pursuer or lead any evidence at all about one aspect of the quantification of the pursuer's claim, namely the value to be attributed to goodwill in an action of count, reckoning and payment.

[451] Furthermore, while there may be criticisms about the effectiveness and timeliness of the steps taken by the defender to secure the attendance of Lt Athanasios to give evidence (whether in person or by some other means), this is not a case where a deliberate decision was taken (sometimes referred to as a "tactical decision") not to call him.

[452] Indeed, as I understand it, the opposite was the case. Mr Murray wanted to call him and anticipated doing so. It was only when it became apparent that would not happen that he closed the defender's case.

[453] From the foregoing, I have concluded that the extent to which the approach urged on me by Mr Wilson can be applied is dependent on the circumstances prevailing, on a case-by-case basis, including the nature of the claim, the issue(s) in dispute (on which the "missing" evidence would potentially bear), whether or not there is a complete absence of evidence on that/those issue(s), and the reason why the "missing" evidence is not available.

[454] On that latter point, while I accept that the letter from the Hellenic Police is not a production or a piece of evidence, I am not persuaded that the explanation for a witness not being called is something which always requires to be supported by evidence, in the form of a document spoken to by a witness, oral testimony or the like (though that may be appropriate in some cases). In the present case, I am invited to proceed on the basis of *ex parte* submissions made by counsel as officers of court and I am content to do so.

[455] Looking at the information provided, and the sequence of events, it is clear that efforts were being made on behalf of the defender to secure the evidence from one or more of the police officers. It may be, that with hindsight, more robust steps could have been taken earlier but there is no hint of bad faith.

[456] In any event, this is not a case where no evidence was led by the defender concerning the police statements. As I shall come to, Mr Repapis gave detailed evidence about his recollection of the circumstances in which the statements were taken and the procedure adopted in obtaining them.

[457] It is true that he was not able to provide detailed evidence about the content of the statements from his memory (hardly surprising given the passage of time since 2016) and

had to rely partly on his memory and partly on inferences (e.g. from the presence of his signature on them) as to their accuracy as a record of what was said.

[458] If the dispute concerning the statements had arisen in a different way, the absence of the police officers may have been very significant. For example, if the pursuer and his family had all agreed that statements were taken from them and there had been a dispute about the accuracy of the content; and those four witnesses had given evidence about the content, then the absence of evidence from police officers who were said to have taken the statements as to the content might have permitted the application of the presumption argued for by the pursuer.

[459] But that is not the position here. Here the pursuer's case is that the statements are not ones which were made or signed by the four witnesses and are forgeries. Accordingly, the dispute is focused in the first instance on the circumstances in which the putative statements were created - and it cannot be said that there is no evidence about that. (Naturally, the decision about that issue has an important - not to say critical - bearing on a decision as to the accuracy of or otherwise of the contents).

[460] I am not satisfied that this is a case where the absence of evidence from a particular source on a particular matter gives rise to an inference being drawn that the account of the pursuer's witnesses is to be preferred. The lack of detailed evidence from the police about matters such as which questions were asked is concerned is an issue to be evaluated as part of the overall circumstances of the case.

[461] With that introduction, I now turn to consider the evidence concerning the statements themselves.

Mrs Fitzsimons, Rebecca and Dylan

[462] The evidence about the statements of Mrs Fitzsimons, Rebecca and Dylan can usefully be dealt with together.

[463] The defender's averments about the circumstances in which it is said the statements were taken goes into some detail and is met with a blanket denial followed, somewhat curiously, by an averment that if Mrs Fitzsimons, Rebecca and Dylan gave statements, they were not read back to them before they were signed.

[464] The reality is that all three of these witnesses accepted that they had had some degree of interaction with the police. Cumulatively, it is clear that even on their evidence (for example) the police spoke to Mrs Fitzsimons, Rebecca and Dylan; appeared to be making notes at the time when speaking to Rebecca and Dylan; Rebecca signed "something"; and Dylan accepted that the signature on the second page of his statement was probably his.

[465] On the basis of these witnesses' evidence, the logic of the pursuer's case is that the police attended the hospital, made enquiries of some type of the witnesses to a serious accident, did not seek any information from Mrs Fitzsimons about what had happened (which she was apparently able to volunteer to somebody from the British embassy shortly afterwards); recorded accurate details such as names and so on (that information having been obtained from the witnesses or their passports); and then ignored what they had been told about the involvement of another vehicle and made up fictional accounts; all this being done with the knowledge and connivance of the court appointed interpreter, who then signed off documents, the contents of which he knew were false and the signatures on which he knew to be forgeries. While it is important that no stereotypical assumption is made (e.g. about the likelihood or otherwise of police officers acting dishonestly), the seriousness of

these allegations requires cogent evidence and must be examined through the prism of probability.

[466] In addition, all of this has to be set against the account of Mr Repapis. Mr Repapis was challenged on the basis that he had “an interest”, in the sense of giving evidence to support the integrity of the statements. Somewhat disarmingly, he said that he did have an interest but I think he may have missed the nuance of the point which I understood was being put to him, namely that he was giving inaccurate evidence to protect himself and his reputation.

[467] The same point could of course be made about the evidence given by Mrs Fitzsimons, Rebecca and Dylan, given their relationship with the pursuer. Moreover, Mr Repapis gave what I considered to be detailed evidence about his attendance at the hospital and what transpired there. He accepted he could not remember everything such as the exact words used. Although he did not have direct memory of what the witnesses said, he was clear about the process used and was adamant that that is what would have happened and that the witness statements were signed off by him as an accurate record of what the witnesses said.

[468] The absence of a direct and specific memory by Mr Repapis as to the specific words used by the police in questioning the witnesses or in the witnesses’ responses is neither surprising nor, in circumstances, material. An analogy here made the situation which crops up regularly in clinical negligence claims, for example. It is not unusual for medical practitioners to have no specific memory of the interaction with a particular patient at some earlier date, particularly if unprompted by medical records. But evidence as to the procedure followed by a medical practitioner as to, their practice in, for example, (i) obtaining patient consent or (ii) the procedure followed in carrying out a medical

procedure, cross-referenced to a patient's medical records which contain documents consistent with the practice described may be accepted as evidence that consent was obtained or a procedure was followed (as the case may be) in a particular case, even if the doctor has no specific memory of it. That is the position here.

[469] Mr Repapis' memory was faulty in some respects. For example, his recollection was that there were only two police officers present at the hospital but it seems clear that there were three. Nevertheless, he was able to give evidence about matters of detail. He correctly described the group (a seriously injured man hospital bed who was breathalysed; and adult woman whom he knew to be the injured man's wife; and two "youths"). He remembered that it there had been a road accident.

[470] Against that, we have Mrs Fitzsimons who herself had sustained quite a serious head injury and, as she said in evidence, concerned about her husband and her daughter who was only 16.

[471] Rebecca was barely more than a child and at the accident scene had been panicking and hysterical. The whole situation must have been immensely stressful for her.

[472] Dylan came close to accepting that the terms of the statement were an accurate record of what he had said time.

[473] I observe that Rebecca and Dylan both referred to difficulties created by the language barrier. Nevertheless, Mrs Fitzsimons said that the police had asked her in English if she knew where her husband's driving licence was and if her husband had been drinking. Dylan said that he tried to explain that another vehicle had been involved. If the police officer who Mrs Fitzsimons was the same one who spoke to Dylan (according to the statements, Lt Athanasios was involved in interviewing both), it seems odd that he would not have understood if another vehicle had been mentioned.

[474] Part of the explanation for the disjunction between these three witnesses evidence and that of Mr Repapis may simply be down to their emotional state at the time. It was undoubtedly a traumatic event and a difficult situation. It would not be surprising if there were gaps in people's memories.

[475] In addition, I have concluded that on the other evidence the theory, which appears to have emanated from Rebecca, of a collision between a truck or lorry and the quad bike which her parents were on, was not articulated by her or by anybody else until after the day of the accident. I am unable to be precise about the timing of this but it appears that it was within a few days at most. On Rebecca's evidence, it was articulated by her to Mrs Fitzsimons on the day they had discussed the version given by the latter to the lady from the embassy. That discussion was, as I understood it, "a day or two" after the accident, though Rebecca was not precise as to the timing.

[476] It also appears that Rebecca's theory has taken root more firmly as time passed. See, for example, the evolution in the accounts given by the pursuer over the year or so succeeding the accident. It would not be surprising if, in seeking an explanation for what happened, the family and Dylan began to replace gaps in their knowledge or confusion as to what happened with a version which absolved the pursuer.

[477] That being so, it may also be that over time, the witnesses came to genuinely believe that the version about the tanker was the one which they had known or learned of right from the beginning and also believed that that version was the one given to the police. That collective belief was thrown into disarray by the disclosure of the police report containing the statements.

[478] That having happened, how could the disjunction between the collective belief and the police statements be explained? I am satisfied that what has happened here is that in

order to make sense of the situation and to maintain the integrity of the belief that another vehicle had been involved in the accident, the pursuer, Mrs Fitzsimons, Rebecca and Dylan have been forced into the position of maintaining that the statements are false, despite the other evidence.

[479] There was an issue as to how the passport details of four members of the party came to be in the statements when the witnesses themselves could not remember details such as passport numbers. Mr Murray invited me to hold that the explanation was that the passports had been obtained soon after the police arrived at the hospital. Mr Wilson said that the presence of these details (which the witnesses all said they did not know) undermined the evidence of Mr Repapis to the effect that the statements had all been finalised, signed and approved at the hospital on 17 July 2016.

[480] Rebecca and Dylan spoke to going to the apartment with the police officers to obtain the passports occurring after the police had spoken to them.

[481] I think that that is more probable and that the explanation is that having obtained the passports after speaking to the witnesses, the details (passport number, country of issue) from the passports were simply copied into the first page of each statement, which had otherwise been completed and signed. That is consistent with the evidence of Mr Repapis who said that asking for passport details was not a question that was asked. If (say) a person's name and address has been noted at the time statements is taken, then the addition later of information taken from a passport may be regarded as a convenient way to record details about their identity for record purposes. The witnesses not being Greek nationals, it is understandable why the police might seek to obtain and record "official" details from a document such as a passport. In any event, even if the details were added afterwards, they

do not impact directly on the content of the statement. They are not controversial. In short, even if these details were added later, I do not find that there is anything sinister in that.

[482] As far as the signatures are concerned, no examples or analysis of the signatures of Mrs Fitzsimons, Rebecca or Dylan were produced and the pursuer did not offer to prove that the signatures were not genuine. Thus, the evidence on this point is merely the *ipse dixit* of the witnesses. As such, I reject it given the weight of the other evidence. Mrs Fitzsimons did say that the signature looked as if it had only one M whereas she signed with two – but Mr Fitzsimmons' evidence was that he used the spelling as in the instance and that his wife "spells with one M".

[483] In relation to the statements of these three witnesses, I preferred the evidence of Mr Repapis. I consider that the statements were obtained in the manner described by him and thus, as far as they go, contain an accurate record of the account given at the time.

#### The pursuer

[484] Different considerations arise in relation to the pursuer's statement.

[485] Taking the evidence of the pursuer about the signature and the medical and handwriting evidence which I have summarised above, it is not controversial to say that it is beyond doubt that the signature is not the pursuer's genuine signature (i.e. not his "normal" signature).

[486] I was not persuaded by Ms MacDonald's opinion evidence to the effect that the pursuer's signature was a forgery designed to create the impression that it had been signed by the pursuer. In my opinion, she went too far in reaching that conclusion.

[487] While the technical explanation she gave about the type of fluent movement used might be persuasive in its own right, the confidence which can be placed on that opinion is undermined by a number of factors.

[488] The first and most important of these is that she was not aware of, nor does it appear she took account of, the injuries which the pursuer had sustained. Mr MacLean, the orthopaedic surgeon accepted that he had not looked at the signatures in the medical records for the purpose of forming an opinion on whether the pursuer could have attended a signature. He also accepted that he is not a handwriting expert. Thus any opinion he might have offered would have been of limited value. But he did say that the pursuer could have held a pen, albeit in a pinch rather than a prehensile grip.

[489] Accordingly, Ms MacDonald appears to have given her original opinion not considering whether in the light of his injuries the pursuer may have been attempting a genuine signature but with an abnormal grip.

[490] A similar point arises in relation to the circumstances in which the document was signed. Might the pursuer have been prone e.g. in a hospital bed? Might he have been attempting a signature with his non-dominant left hand? These points do not seem to have been actively considered.

[491] Furthermore, Ms MacDonald said that it was probable that the author of the signatures had something to simulate. But the evidence of Rebecca and Dylan was that the passports were obtained after the police had spoken to them; and there was no evidence as to any other possible source of an example signature which might be simulated.

[492] Even if I am incorrect to reject outright Ms MacDonald's opinion on this point, it does not necessarily follow that I am bound to find as a fact that the signature was a forgery.

[493] The point is that the determination of that issue is ultimately a question for the court taking account of all of the evidence, on which an expert opinion is but one part.

[494] In examining that issue, I (unlike Ms MacDonald) had the benefit of hearing all the other evidence in the case.

[495] I have already given my views on the evidence of Mr Repapis. The pursuer's condition whilst at the hospital was materially poorer than that of Mrs Fitzsimons, Rebecca or Dylan.

[496] I have concluded that the pursuer has not proved that the signature on the statement was not his.

[497] I also accept Mr Repapis' evidence to the effect that the police did take a statement from the pursuer.

[498] The pursuer could not remember speaking to a police officer. Mrs Fitzsimons said that a police officer did speak to him, which is consistent with Mr Repapis' evidence.

[499] The pursuer's position was that he was in no fit state to speak to the police but I believe that he was able to do so to some extent. For example, shortly after the statement was signed, he was able to sufficiently follow instructions to be able to give a breath sample.

[500] Nevertheless, I do have concerns about the content of the pursuer's statement. The pursuer said in evidence that he did not recollect the accident. I accepted that evidence.

That being so - and taking account also of his injured condition - I do not see how he could have volunteered anything about the accident. Specifically, I consider it unlikely that he could have answered in any meaningful way an open question such as "what happened?".

[501] On the other hand, Rebecca and Dylan had already given their statements so the police already had some information about the accident circumstances before they spoke to the pursuer.

[502] So it may be that through lack of experience or skill or because the pursuer was having difficulty answering or remembering, he was prompted by a closed question such as (for example) "did you hit a rock?", thereby allowing the pursuer to apparently agree with a

brief response or even a nod of the head and have that taken as him affirming as accurate account being put to him.

[503] It is on that kind of detail that the absence of direct evidence from the interviewing police officers is significant.

[504] Given the other evidence about the pursuer's physical and medical condition and his lack of memory of the accident circumstances, I have concluded that no weight can be attached to his statement.

*Report by Mrs Fitzsimons to British Embassy; and by Rebecca to Mrs Fitzsimons*

[505] Rebecca was not specific about when she had discussed the accident circumstances with Mrs Fitzsimons at the hospital. But she did say that it had happened when she had arrived at her the hospital and discovered that Mrs Fitzsimons had spoken to the British embassy some time earlier. The timing of the conversation about this between Mrs Fitzsimons and Rebecca is important. It is consistent with Rebecca not articulating her theory as to what had happened until (at the earliest) a day or two after 17 July.

[506] I was left unclear also as to exactly when the Rebecca understood Mrs Fitzsimons to have spoken to the lady from the embassy. But on Rebecca's evidence, Mrs Fitzsimons felt able to give some sort of account of the accident to a British government official which made no mention of another vehicle and was broadly consistent with her police statement, either on or shortly after the day of the accident and before anyone else (i.e. Rebecca or Dylan) had told her what they had remembered happening. That tends to undermine Mrs Fitzsimons evidence as she did not recollect the accident and did not know what happened.

[507] Rebecca's evidence about her conversation with her mother was also interesting.

Her evidence in chief was initially inspecific as to what her mother's version (as related to

the lady from the Embassy) had been, but she then went on to say that that her mother "... told me what had happened". That suggests that her mother was able to give an account which Rebecca then told her was wrong. But Rebecca then went on to say that her mother did not know what happened.

[508] My impression was that when this subject was broached with her during cross examination, Rebecca - perhaps because she had let something slip in her examination in chief - was reluctant to give straight answers to what she was asked. She confirmed that that Mrs Fitzsimons told her she had tried to describe what happened. That is of course consistent with giving some sort of account and is different from saying "I don't know" or "I don't remember" what happened.

[509] Rebecca was asked about the account her mother had given then and said "I think she described it as thinking she had to put her hands up." That was not the account she gave in examination in chief of what her mother had told her - but is almost word for word what her mother said in evidence she remembered at the conclusion of her evidence on the previous day of the proof. (It is not what Mrs Fitzsimons said in her evidence in chief either - see below).

[510] Rebecca appeared to me to try to avoid answering a question about whether her Mum had said that Keith had lost control, despite that being what she (Rebecca) had related during her examination in chief has her Mum's words.

[511] I found this passage of Rebecca's evidence to be unsatisfactory. I conclude that her evidence about what her mother told her she had said to the lady from the Embassy is accurate and that Mrs Fitzsimons did give such an account. It follows that Mrs Fitzsimons either remembers more than she admitted, or that she was relaying a version of events which she had heard from somebody else. But there was no evidence that when

Mrs Fitzsimons spoke to the lady from the Embassy that any account at all had been given to her by the only two obvious candidates, namely Rebecca or Dylan.

*Report to William Riddell*

[512] Rebecca's evidence about when she had spoken to Mr Riddell and what she had said to him was inspecific.

[513] Mrs Fitzsimons did not speak to any conversation with her brother or the terms of messages passing between them. The messages passing between Mrs Fitzpatrick and Mr Riddell are, typically for that medium, cryptically expressed. Nevertheless, it is notable that none of the messages specifically mention a collision with another vehicle, the high water mark in that sense being "It was accident (*sic*) the lorry and us and small roads I really thought we weren't going to make it" and "...we where (*sic*) pushed into a cliff."

[514] Taken at face value, these messages describe some kind of accident but do not specifically mention a collision. Even the word "pushed" is interesting. It might suggest a physical force, but it is not a word typically used to describe a vehicle collision, such as "crashed".

[515] In any event, it seems likely that these exchanges took place took place after Mrs Fitzsimons had spoken to Rebecca at the hospital and learned of the version of events said to involve another vehicle. Given the date of the first message by Mr Riddell to Mrs Fitzsimons, any conversation between them must have been several days after the accident.

[516] Mr Riddell did not say that he had been told that there was a collision with another vehicle, but simply that "...he was told that there was a fuel truck" and that Mrs Fitzsimons "...had said that there was a truck and they ended up in hospital".

*Other accounts given by pursuer*

[517] The pursuer's account on 29 July 2016 at Glasgow Royal Infirmary does mention the presence of a lorry but not a collision with it. It appears that he was with his wife and daughter and neither corrected this account.

[518] The account given on 1 August 2016 at Queen Elizabeth University Hospital mentions an oil tanker but no collision and attributes this to having come from Rebecca.

[519] On 23 August 2016 the pursuer gave a similar account to his GP.

[520] It was not until 20 February 2018 that the pursuer is first recorded as suggesting a collision, though again the word used is "pushed" and it is suggested that the tanker stopped briefly and then continued on its journey.

[521] On 9 March 2018, the pursuer specifically uses the word collision, but also uses the word "believes", though this may be a reflection of his lack of direct knowledge of the accident circumstances. On 18 July 2018, the account given reverts to what was said in 2016.

[522] So the result is that in four out of six accounts given by the pursuer, he does not describe a collision but rather action taken by him to avoid a collision.

*Statement in instructions to Moschos*

[523] Mr Murray also relied on the account given in Mr Moschos report: 5/17/8. As the precise source of this version is not known, it is difficult to make much of it. Nevertheless, it is probably fair to assume that it came originated from a statement or information provided by an eye witness (or some synthesis thereof). As such, it is yet another version of events, which at the very least tends to muddy the waters.

*Damage to quad bike*

[524] At the end of Rebecca's evidence, I asked her if there had been any damage to her parents' quad bike. She said that the storage box had come off but she did not recollect any other damage. The quad bikes had been left where they were. She had gone back to the hire company to collect her dad's driving licence. The owner was quite angry. They had explained what had happened. Somebody had been sent to pick the quad bikes up.

[525] There was no other evidence about damage to the quad bike, so the only evidence is of a missing storage box. That appears to me to be consistent with the quad bike rolling over. But that in turn is consistent with a wheel going into a ditch without any prior collision.

[526] There was a large difference in the relative momentum of the two vehicles said to have collided. The transfer of energy on them coming into contact would have been significant. One would think that the lighter vehicle would have exhibited signs of damage at the point or points of impact, especially if the collision was head on. Yet according to Rebecca, the only damage was a missing storage box. I find that surprising.

*Accounts of the accident*

[527] I accepted that the pursuer had no recollection of the accident. Nevertheless, he did give accounts of it. Leaving aside his police statement to which I have attached no weight for the reasons given above, the first three accounts which he is recorded as having given on his return to Scotland are consistent in that they mention the presence of another vehicle but do not mention a collision. As a matter of probability, that account came from Rebecca. It was not until 2018 after the police report had been recovered that the pursuer the pursuer mentions a collision for the first time. That is consistent with the evolution of the account

from one where there was another vehicle in the vicinity which played but no collision to one where there was a collision.

[528] During Mrs Fitzpatrick's evidence, I felt that she was giving her evidence about the accident circumstances in a guarded way. I have carefully reviewed all of her evidence and have concluded that she remembered more than she was letting on. On Rebecca's evidence, Mrs Fitzsimons was confident enough of her memory to give a description of what she believed had happened to a British government official (see above).

[529] In her evidence in chief, I have her noted as saying that her last memory was seeing the wheel in the ditch and that she put her hands up to her face. Under cross examination, Mrs Fitzsimons was asked if she had thrown her hands up before or after the wheel of the quad bike was on the grass and as I understood her answer, she indicated that she did not throw her hands up but thought she was going to have to. The significance of this alteration in her position is not altogether apparent to me, but the latter version is the one which Rebecca spoke to Mrs Fitzsimons giving when she spoke to her a day or two after the accident. I find it odd that that distinction – which Rebecca apparently remembered – was not what Mrs Fitzsimons volunteered in evidence when first asked.

[530] In any event, so far as her account of the accident circumstances are concerned, I agree with Mr Murray that if the last thing she remembers is the wheel going into the ditch and thinking that she was going to have to put her hands up, that begs the question as to why she does not remember the collision, which must, on the pursuer's case, have occurred just before that?

[531] That account omits any mention of another vehicle, so cannot directly assist the pursuer's case. Going further, it is consistent with the account with the quad bike going out

of control without the influence of another vehicle. It is not precisely the same as the account her police statement, but neither is it totally dissimilar.

[532] I agreed with Mr Murray's critique of Rebecca's and Dylan's evidence. The accounts were at odds with one another and lacking in detail. I was not convinced by Dylan's suggestion that he saw what happened in his left wing mirror when what is said to have occurred happened (according to him) in the same lane in which he was travelling and would therefore have been directly behind him. That appears to me to be improbable.

### *Conclusion*

[533] I have put the pursuer's police statement on one side. The police statements of Rebecca, Dylan and Mrs Fitzsimons are not a "trump card" for the defenders. They are not very detailed and absent evidence from the police officers took them, I cannot say with confidence how their content was elicited.

[534] Nevertheless, there is the evidence of Mr Repapis which I accepted as credible and substantially reliable as to the process used. So significant weight can still be attached to them as part of the overall evidential picture. The short point is that if there was another vehicle at the locus at the time of the accident (which I accept there was, on the testimony of Rebecca and Dylan), why was it not mentioned at all to the police if it was relevant to the accident circumstances? In addition, there is Mrs Fitzsimons' account to the British government representative; the absence of evidence about any damage to the pursuer's quad bike consistent with a collision with a large vehicle travelling in the opposite direction; the pursuer's accounts given on return to Scotland which in all likelihood originated with Rebecca; Mrs Fitzsimons' account of the accident itself; and the disparities in the accounts of Rebecca and Dylan.

[535] Taking that body of evidence as a whole, I am satisfied that the pursuer has not proved his averments as to the circumstances and cause of this accident.

[536] That being so, the various points of law argued become moot (other than the one dealt with above concerning the significance or otherwise of the absence of evidence from the Greek police officers). Therefore, I can deal with these relatively briefly.

### *Liability of the Auxiliary Fund*

[537] My conclusion is that there is no merit in this point as contended for by the defender.

[538] First, there is force in Mr Wilson's argument that the point raised concerns procedure and as such is a matter for the *lex fori*. It concerns the liability of the Greek Auxiliary Fund in circumstances where a claim is being brought in the Greek courts. But that question of procedure is not a matter of Greek Law for purposes of the present proceedings: Article 1(3) of Rome II - Rome II does not apply to evidence and procedure. I agree that Article 1(3) should be interpreted strictly given the scope of Article 15; the desirability of certainty and consistency in litigation; and the requirement to meet the principle of equivalence.

[539] Second, the issue of compliance with the requirement desiderated (if applicable) is not, on one view, separable from the merits of the case. There are two points which arise from that.

[540] The obligation of "average reasonable care" lay on the pursuer. But on his account, he could remember nothing of the accident. I cannot see how there can be an obligation to provide information that one does not have (or which cannot relatively easily be obtained).

[541] In any event, if I had accepted the evidence led for the pursuer about the circumstances of the accident and its aftermath, that would have encompassed a finding in

fact that the police *were* told of the presence and involvement of another vehicle, namely the tanker.

[542] On that hypothesis, it would then have been a matter for the police to try and obtain information about that. The eye witnesses may or may not have been able to provide more, such as a description of the vehicle. But, put shortly, if information about the involvement of another vehicle had been passed the police, then even if that information was lacking in some detail (because the witnesses were unable - as opposed unwilling - to provide it) that would have fulfilled the requirements of the exercise of “average reasonable care”.

[543] Even the issue falls to be analysed by reference to the steps taken after the police report had been recovered - which appears to me to be doubtful – I am satisfied that the steps taken then were reasonable. Greek lawyers were engaged, including one who made specific enquiries on Zakynthos. In my opinion, that alone was a reasonable step and the pursuer would inevitably have been guided by his Greek legal adviser as to what was a reasonable and feasible.

[544] Mr Murray did suggest that the opinion of Mr Moschos on whether the pursuer had fulfilled this requirement should be treated with caution.

[545] I do not agree. He and Mr Papadopoulos were, ultimately, at one on the legal test to be applied and Mr Moschos was able to support his opinion by reference to decide case law from the Greek courts. I found Mr Moschos to give his evidence in a thoughtful and professional manner and detected no signs of partiality.

### *Law on liability*

[546] There was a large measure of agreement between the parties as to the applicable law.

[547] Article 914 of the Greek Civil Code (‘GCC’) provides:

“A person who has caused illegally and through his fault causes prejudice to another shall be liable for compensation.”: 5/24/1.

[548] The words used in Article 914 of the GCC have the following meanings:

i. “Illegally” is constituted by: (a) a violation of statute or regulation granting a right or legal protection of an interest; or (b) a violation of a general duty of care with respect to the safety of persons or property.

ii. “Fault” in this context means either an act or omission which is intentional or negligent. Fault can be proved by evidence that a tortfeasor has failed to fulfil a duty placed on him or her by a statutory provision, or by creating a dangerous situation from which damage might be caused to others.

iii. “Prejudice” in this context is a synonym for “Loss”. It is the adverse change to the legal rights or interests of a person.

iv. “Caused”: in order to establish causation in Greek law, it must be proved that the negligent act or omission led directly to the loss, but also that such negligent acts or omissions have a general tendency to lead to such losses. The second leg of this test is not met in situations where the loss is unexpected and unforeseeable, or where the factual causation is interrupted by an unrelated subsequent event.

[549] A negligent act or omission is one which was not intended to cause loss to another, but where loss occurs as a result of the tortfeasor failing to pay the attention that could and should have been shown. Whether an act or omission is negligent is a mixed question of fact and law.

[550] Broadly speaking, liability arises under Article 914 where the tortfeasor negligently commits an unlawful act which causes loss to another person.

[551] A contravention of a provision of the Greek Traffic Code ('GTC') is unlawful and will constitute a violation of statute for the purpose of Article 914 GCC.

[552] A contravention of a provision of the GTC will result in liability for negligence if the contravention is causally connected to the loss. A contravention of a provision of the GTC which does not have any causal connection to the loss does not result in liability for negligence.

[553] The following provisions of the GTC may be relevant in this case:

[554] Article 12:

"General Provisions

(1) Any person using the streets shall avoid any behaviour that might compromise or obstruct traffic, expose persons or animals to danger or damage public or private property. Drivers shall drive carefully and with caution at all times ... their behaviour shall not cause fear, concern or otherwise harass other road users ...

...

(6) It is mandatory for drivers and passengers of mopeds, motorcycles and three-wheel vehicles without an enclosure, to wear a protective helmet, adequately strapped ...": 5/27/97.

[555] Article 16:

"Position on the carriageway

(1) Within the national road network applies the right-hand traffic direction.

Every driver of a vehicle shall, under provisions of Article 12(1) and Article 17(6) of this Code, at all times keep their vehicle near the edge of the right side of the carriageway, even if the entire carriageway is free of vehicles.

...

(4) No driver shall take the carriageway situated on the side opposite to that appropriate to the direction of traffic ... unless absolutely necessary or when special regulations allow them to.": 5/27/ 99.

[556] Article 18:

"Passing of oncoming traffic

(1) When passing oncoming traffic, a driver shall leave sufficient lateral space, moving close to the right side of the carriageway. If, in doing so, the progress of the vehicle is impeded by an obstruction or by any other obstacle. The driver shall slow down and if necessary shall stop to allow the oncoming road user ... to pass.

(2) On steep roads, where the passing of oncoming vehicles is impossible or difficult, it is the driver of the vehicle travelling downhill who should pull into the side of the road in order to allow any. Vehicle proceeding uphill to pass.”: 5/27/100

[557] Article 19:

“Speed and distance between vehicles

(1) Every driver of a vehicle shall in all circumstances have his vehicle under control so as to be at all times in a position to perform all manoeuvres required of him.

(2) The drivers shall, when adjusting the speed of their vehicle, pay constant attention to the circumstances, in particular the lie of the land, the state and traits of the road, the condition and load of their vehicle, the weather conditions and the density of traffic, so as to be able to stop their vehicle short of any foreseeable obstruction, within their range of forward vision. The drivers shall slow down and if necessary stop whenever circumstances so require.

(3) In particular, drivers shall slow down their vehicle in road sections where visibility is limited, when turning ... when travelling on steep downhill ... This obligation also applies when passing from narrow roads and when it is difficult to interfere with other vehicles ...”: 5/27/101.

[558] Article 300 of the GCC provides *inter alia*:

“Prejudice imputable to own fault

If the person who has suffered prejudice contributed by his own fault to the prejudice or the extent thereof, the Court may refrain from granting compensation or reducing the amount thereof. The same rule shall apply in the event where the person who has suffered prejudice failed to avoid or mitigate the prejudice ...”: 5/20/83.

[559] Although articulated in slightly different language, the foregoing principles are readily recognisable as having equivalents in Scots law.

[560] On the hypothesis that the pursuer’s averments have been proved, the relevant findings in fact would have been that the tanker, having successfully passed the first quad bike without incident and then crossed from the correct, right hand lane (for the tanker driver) into the left-hand lane ( i.e. that for oncoming traffic ) and collided with the pursuer’s quad bike. That would constitute breaches of some or all of Articles 12, 16, 18 and 19 of the GTC, entitling the court to make what might be called a finding of primary liability in favour of the pursuer against the driver of the tanker under Article 914 of the GCC.

*Contributory negligence*

[561] It was common ground that contributory negligence in Greek law operates in a similar way to contributory negligence in Scots law.

[562] On the hypothesis that the pursuer's version of events was proved, there is no scope for an argument that he was guilty of contributory negligence in relation to the collision. Had I accepted the evidence of Dylan and Rebecca, my finding would have been that the tanker crossed onto the wrong side of the road and collided with the pursuer's quad bike. There was no evidence that the pursuer was incorrectly positioned on the road or that there were any steps which they should (and could) have reasonably taken to avoid the putative collision.

[563] The pursuer said that he had made "a choice" not to wear a helmet. But on the evidence, I am not satisfied that it has been shown that in not wearing helmet, the pursuer as contributed to the loss (including injury) suffered as a result of the accident.

[564] As Dr Mumford said, at a common sense level, one could make that assumption, but the reality is more complex. It involves questions of engineering – including velocity, forces, type and strength of helmet and so on. There was no evidence about any of these matters. Dr Mumford's opinion, which I accept, is that it is not actually a question of medicine (albeit that there are medical aspects to it). I cannot assume that had pursuer been helmet he would not have suffered a skull fracture (for instance). In the circumstances, had I been making an award of damages, I would not have been any deduction for contributory negligence.

*Damages – the legal framework*

[565] In Greek law, non-pecuniary damages are awarded in respect of tortious liability under Article 932 of the GCC. It provides:

“Article 932

Reparation for moral prejudice

Independently of the compensation for pecuniary prejudice, the Court may, upon the occurrence of an unlawful act, allot a reasonable amount of money to be determined in the Court’s appreciation as reparation for moral prejudice. This provision shall apply especially in regard to a person who suffered harm in his health, honour or purity or who was deprived of his liberty. In the case of death of a person, such monetary reparation may be allotted to the victim’s family, on account of emotional distress.”: 5/25/93.

[566] Damages under Article 932 may be awarded in respect of compensation for physical and psychological damage resulting from insult to health, honour, dignity and freedom.

Such damage includes: physical or mental pain and suffering caused by loss of physical or mental integrity, temporary or permanent impairment or invalidity, permanent or long-term cosmetic change of appearance, damage to sexual function, loss of social life, loss of expectation of life, suffering from long-term dependency on medical treatment, loss of ability in recreation or sporting interests. They are approximate to awards of *solatium* in Scotland, or general damages in England.

[567] The assessment of quantum under this head of claim is a matter for the discretion of the court. It should be determined on the basis of what the court considers “reasonable”.

There is no punitive element of damages under Article 932, nor are exemplary damages competent. However, the court may take into account the gravity of the wrongdoer’s fault or negligence in assessing quantum of this head of claim.

[568] Pecuniary damages are available in Greek law under Article 298 of the GCC. It provides:

“Compensation includes the diminution of the existing fortune of the claimant (positive damage), as well as lost profit. Such profit is considered to be the one expected with probability and in accordance with the usual course of things or the special circumstances and in particular any preparatory measures that have been taken.”

[569] In addition, future pecuniary losses are available in Greek law under Article 929 of the GCC. It provides *inter alia*:

“Article 929

Harm to body or health

In the case of harm to the body or health of a person, the compensation shall include in addition to medical expenses and the prejudice hitherto caused, anything, which the victim shall be deprived of in future, or any further burden he shall bear by reason of an increase in his expenses ...”: 5/25/93.

[570] Under Articles 298 and 929, a claimant may be awarded damages in respect of losses which approximate to the Scottish law heads of damage: (1) past and future loss of earnings; (2) past damage to any moveable property (including clothing, personal possessions or similar items); (3) past or future out-of-pocket expenses incurred as a result of physical injuries (including medication, medical devices or disposables, treatment costs, aids and adaptations). Damages may only be awarded under these provisions in respect of future losses where the loss is certain to arise. Whether a loss is certain to arise is a question of fact.

[571] There is a third category of damages in Greek law, available under Article 931 of the GCC. It provides:

“Article 931

A physical disability or disfigurement sustained by the victim shall be taken especially into consideration when allotting compensation if such occurrence affects the victim’s future.”: 5/25/93.

[572] Damages under Article 931 are awarded in respect of a potential effect on a claimant’s future, but where that effect is not certain and cannot be calculated with

precision. It is often awarded as a lump sum, the quantum of which is a matter for the court's discretion.

[573] Damages in respect of a disadvantage on the labour market as a result of an injury causing long-term sequelae could be awarded under Article 931 of the GCC (see e.g. *Supreme Court*, 670/2006: 5/92/28]; *Supreme Court* 1645/2006: 5/95/47; *Supreme Court* 381/2007: 5/91/24]; *Supreme Court* 762/2007: 5/96/ 50.

### *Quantum – valuations*

[574] There was a substantial overlap between Mr Moschos and Mr Papadopoulos as to the appropriate awards. There is no sound reason not to follow what they said where they were in agreement.

### *Art. 929 of GCC – Pecuniary Damages*

#### Loss of earnings

[575] It was ultimately agreed between parties that the pursuer would be entitled to receive as compensation a sum equivalent to the earnings he would have been entitled to receive in the year he was absent from work post-accident, ignoring any sums (such as sick pay) actually received from his employers in that period. Unfortunately, there was not a complete agreement as to what the figure should be. Mr Wilson submitted that the pursuer would have earned £17,929.00 net whereas Mr Murray said the correct figure was £17389 gross – 5/2 of process. The letter from the pursuer's employer gives pay rates which bring out the above figures, but I suspect these are gross figures: 5/6/2. If the award is to reflect what the pursuer would have earned during his absence, then I would have thought that the calculation should be based on net figures.

[576] In the normal situation where somebody is off work and not earning, the wage loss would be calculated by reference to the net pay for the period prior to the absence commencing, but also taking account of any known pay rises, which there appears to have been here, taking effect from 1 April 2016.

[577] The pursuer's accident did not occur until July 2016. So his pay during April, May and June was presumably "typical", though that paid in mid-April would relate to work done in March at the pre-existing, lower rate. After the pursuer's accident, he received full pay for some months. (It appears that his "pay date" was changed from mid-month to end of the month in August 2016.) The figures for May and June (and July) - about £1160 - are very similar to those for initial period post-accident. From this I infer that they reflect reasonably accurately what the pursuer would have been earning had he been at work.

Assuming that the foregoing analysis is correct, the correct award under this heading would be  $12 \times £1160 = £13,920$ .

#### Misc Costs/Expenses

[578] I was invited to award €5,000 under this head of claim, comprising €500 for a collar; €500 for a medical certificate and approximately €3,000 - €4,000 for other unspecified expenses. I agree with Mr Murray that one could reasonably expect some vouching or even specification as to how this sum was arrived at. I accept the claim for the cost of the collar and the medical certificate but in the absence of more compelling evidence, would restrict this part of this claim to €1000.

[579] Mrs Fitzsimons also spoke to increased expense/costs once at home, but again these were not really specified and there was no vouching. I accept that some that some other expenses would have been incurred. I think pyjamas were mentioned and there would

things like transport to and from hospital. In the absence of more compelling evidence, I would have been able to do no more than make a notional award of £500.

#### Relative's services

[580] Mr Wilson suggested a total of a bit over £10,000, whereas Mr Murray suggested £4,000.

[581] I accepted the evidence about the services provided and find no fault in the methodology adopted by Mr Wilson. I would have valued this at £10,375.

#### *Art 932 of GCC - Non-Pecuniary Damages*

[582] In light of the consensus between the experts, I would have valued this head of claim at €30,000.

#### *Art 931 of GCC - Disfigurement or Invalidity/Compensation for Future Negative Impact*

[583] The range of awards suggested by the two parties' respective experts overlapped at €20,000. I would have awarded that sum.

#### ***Interest***

[584] The position concerning interest was a little less clear, but ultimately I understood it to be common ground between Mr Moschos and Mr Papadopoulos that interest accrued from the date on which proceedings were commenced and was calculated on the whole of the damages awarded (including future losses). The real dispute was the rate of interest applicable to the different heads of claim. Mr Moschos' position was that there was an arrears rate of 7.25%; and (litigation interest rate of 2% above the base rate (i.e. 9.25%)

applicable from the commencement of proceedings; and then a rate of 10.25% applicable from the publication of the final decision : 5/19/62.

[585] As I understood to be evidence of Mr Papadopoulos he agreed that what might be called the “base rate” applicable was 7.25%. But his position, under reference to Article 346 of the GCC and developed in his responses under cross examination was that while a rate of 9.25% could be applicable, a request for non-implementation would be filed (presumably by the party ordered to pay) in respect of the 2% surcharge and as a general rule the courts did not award surcharge in respect of claims falling under Articles 931 and 932, but would be applicable for other claims, such as those under Article 929 for pecuniary losses.

[586] Mr Papadopoulos did not suggest that disapplication of the 3% surcharge applicable from the date of the publication of the court’s decision arose.

[587] Therefore, had been making an award in this case, I would have awarding interest on (a) (i) the sum awarded under Article 929 at 9.25% per year and (ii) the total of the sums awarded under Articles 931 and 932 at 7.25% per year from the date of the commencement of these proceedings through to the date hereof; and (b) the total of all sums awarded at the rate of 10.25% per year from the date hereof until payment.

### **Disposal**

[588] On the evidence, the pursuer has not proved that as a matter of fact that his injuries were caused by the quad bike on which he was travelling coming into collision with a tanker or other large vehicle travelling in the opposite direction and encroaching onto the side of the road on which the pursuer was travelling. I shall grant decree of absolvitor in favour of the defender. I reserve all questions of expenses. If the hearing on expenses is required, this should be arranged through the Sheriff Clerk’s office.