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THE COURT OF APPEAL

Neutral Citation: [2023] IECA 27
Record Number: 2022/140
High Court Record Number: 2019/7056P

Noonan J.

Haughton J.

Allen J.

BETWEEN/

GUNTA KADEGE

RESPONDENT/PLAINTIFF

-AND-

DUNNES STORES

APPELLANT/DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 15th day of February 2023

1. The plaintiff claims to have fallen off a ladder and broken her left ankle in the course of her employment with the defendant. The defendant says she was never on the ladder and in fact tripped over it, thereby suffering an injury for which the defendant says it is not responsible. The High Court (Hanna J.) accepted the plaintiff's version of events and awarded her general damages of €120,000 together with agreed special damages. The defendant appeals against the finding of both liability and quantum.

Evidence in the High Court

2. The plaintiff is a Latvian national who was born on the 10th April, 1967. She was employed since 2006 at the defendant's Leopardstown supermarket as a sales assistant. As part of her duties, she was required at the end of the day to *"face off"* the supermarket shelves. This activity involved bringing items to the front of the shelf and arranging them to present a well-stocked and neat appearance. In order to perform this task, the plaintiff needed to use a small light stepladder to access and arrange the higher shelves.

3. The stepladder in question was one of a number available in the store to employees. It was a light aluminium 'A frame' ladder of a kind seen typically in a domestic setting with three steps and a platform at the top.

4. The plaintiff moved the steps around the various aisles and shelves as she *"faced off"* and went up and down the ladder on many occasions on the evening of the accident. The circumstances of the plaintiff's fall became the central controversy in the case. A CCTV system was in operation at the time of the accident, which occurred in Aisle 9. One camera, Number 21, was located at the end of the end of Aisle 9 but the precise spot where the plaintiff fell was somewhat obscured by a hanging sign over the aisle. A second camera, Number 20, was located in a similar position in adjoining Aisle 8 and captured an oblique view of Aisle 9 also, albeit only at the level above the top of the shelving.

5. One might reasonably have thought that the availability of CCTV footage of the accident from two different cameras would resolve any doubts as to how it in fact occurred. Surprisingly, the opposite was the case. In particular, consulting engineers for both sides gave diametrically opposing evidence as to what the CCTV footage showed. The evidence

of the engineers was lengthy and detailed but in summary, the plaintiff's engineer, Mr. David Browne, said that the CCTV footage was consistent only with the plaintiff having fallen off the ladder. The defendant's engineer, Mr. Donal Terry, on the other hand, said that the footage was consistent only with the plaintiff having tripped over the ladder.

6. The footage itself was shown repeatedly and in detail to the trial judge with commentary from each of the engineers as to what was to be seen in it. Of importance, the CCTV footage comprised still photographs taken by each camera at one second intervals with a time log stamp on each frame, *e.g.*, 20:53:11. Also of some significance, it emerged during the course of the expert evidence that although cameras 20 and 21 may bear the same timestamp to the whole second, they were not necessarily recording precisely the same instant in time because of the nature of the system, described as a multiplex CCTV system. This system comprised some 30 cameras in the store which apparently all captured an image during the same second but sequentially. This meant that as between two adjoining cameras such as 20 and 21, there could be a very small time differential between the images captured of the order of 1/30th of a second. Mr. Terry placed particular reliance on this differential in coming to his conclusions on the appropriate interpretation of what the CCTV demonstrated.

7. The plaintiff's own evidence as to how the accident happened was, at best, confused and at various times, she appeared to believe she was climbing the ladder and, at others, coming down.

8. What was not in dispute however was that the plaintiff suffered a severe injury to her left ankle, consisting of a trimalleolar fracture. The plaintiff was obviously unable to walk after the accident and remained where she fell until, after a protracted period of some hours, an ambulance arrived. In what transpired to be an important aspect of the case, the plaintiff,

while she remained on the floor in the aisle, completed a written statement of what had happened, as she was aware that the defendant's protocol required this and she would otherwise have to return to complete a statement. This was done by her, as described by the trial judge, *"in extremis"*. In her written statement, the plaintiff said the following:

> *"Accident happened when I faced off Aisle nr. 9. I used ladder to face off top shelf. I was climbing down from the ladder when my leg slipped from the last step from the ground. The ladder falled and I was on the floor with strong pain in my left ankle area…"*

9. At the trial, evidence was given for the defendant by Mr. Martin Murphy, the floor manager of the store. He was the first to arrive on the scene, two or three minutes after the accident happened. His direct evidence was that he asked the plaintiff if she fell off the ladder and she said no. He asked her a second time was she sure that she didn't fall off the ladder and again she replied no. The stated reason for this enquiry by Mr. Murphy was that he was concerned that the plaintiff might have suffered a head injury in the fall. Under cross-examination, Mr. Murphy was asked if he too had completed a written statement about the accident and he confirmed that he had. He said he filled out the statement and gave it to the security manager.

10. When asked where his statement was, he said he did not know. The statement was filled out on the day following the accident, the 21st September, 2018. When asked what had happened to his statement, he said that he was told it was missing and lost. He confirmed that this information was given to him by the defendant's executive, Ms. Maureen Dooley, who contacted him for the first time regarding the circumstances of the accident two weeks before the trial, that is to say approximately three and a half years after the accident. Mr.

Murphy confirmed that this was the first time he was asked to remember what had occurred. Mr. Murphy said he had never heard of a statement being lost before.

11. Another document put in evidence was an Accident Report Form which, according to Mr. Murphy, was completed by the security manager of the store. It is however signed by the store manager, Mr. Colm Downes. The Accident Report Form bears a date stamp of the 26th September, 2018, six days after the accident. However, it appears to have been signed by Mr. Downes on the 21st August, 2019, 11 months later. These discrepancies were not explained by the defendant. The narrative portion of the Accident Report Form says the following:

> "*On CCTV footage it looks that Gunta tried to move and pass by ladder and instead she tripping over on the ladder and falling onto the ground.*"

12. This commentary is notable in several respects. First, the author is not identified; although Mr. Murphy believed it to have been the security manager. Second, Mr. Murphy said the security manager filled in this statement on the day following the plaintiff's accident which is inconsistent both with the date stamp and signature date which I have mentioned. Third, it makes no reference to the plaintiff's account of events as it appears in the statement that was presumably in the possession of whoever completed the Accident Report Form. Nor does it make any reference to Mr. Murphy's alleged statement. Finally, it appears to express a clear view on what is to be seen in the CCTV footage despite the fact that this very issue taxed two consulting engineers and the trial judge greatly. The members of this court, at the invitation of the parties, had the opportunity of also viewing the CCTV footage and it must be said that at face value, it is of poor quality and entirely inconclusive.

13. A number of documents were admitted in evidence which included the engineers' reports, medical reports, CCTV stills and medical records of the plaintiff's initial attendance

at St. Vincent's Hospital. The hospital records show that on admission at 01:45hrs on 21st September, 2018, the plaintiff's presenting history was:

> "*Twisted and fell down from ladder ? injury to left ankle prominent bony deformity visible.*"

14. The plaintiff's Consultant Orthopaedic Surgeon, Mr. Conor Hurson, in a report of the 16th January, 2019 noted the plaintiff's history that *"she was working on a stepladder when she fell and injured her left leg"* and in his opinion/comment and prognosis section, Mr. Hurson says that "*Ms. Kadege's injuries are consistent with her accident."*

15. Whatever about the precise mechanism of the accident, it was common case between the parties that as a result of the accident, the ladder fell to the right onto the ground while the plaintiff fell to the left.

Judgment of the High Court

16. The judge gave an *ex tempore* judgment, albeit one that was considered as it was delivered three days after the conclusion of the trial. At the outset, the judge noted that the plaintiff's case was that the ladder was defective which led to her falling from it whereas the defendant claimed the plaintiff was walking past the ladder, caught it somehow with her right foot, tripped and this brought her down heavily onto her left ankle. The judge said the plaintiff's evidence was that, looking back on it, she was actually going up the ladder and might have got as far as the second rung when the ladder went and she fell. In relation to that the judge said:

> *"Now, she gave her evidence on oath and that was the evidence she gave to me. I found her to be an honest, believable person. She told it as it was, as best she could remember."*

17. The judge then referred to the fact that the plaintiff had made a statement as she lay on the ground, as he said *"in extremis"*, and commenting on the statement, the judge said:

> *"And whereas she does describe herself in that statement as coming down the ladder, she is absolutely clear in that written statement that she was on the ladder when the accident happened. Now, she's there in extremis – not in her first language – no time to try and work out 'how can I cunningly disguise this so I can bring a case?' – She's there in extreme pain with a trimalleolar fracture and I think she's telling it as best she can and trying to communicate as best she can. Now, she says 'coming down', but there's no doubt she was on the ladder. That's what she says and I think that reflects her genuine belief that she has honestly given here."*

18. The judge then considered the evidence of Mr. Murphy and the fact that his written statement had gone missing despite what the judge described as the *"meticulous examination system in Dunnes Stores."* The judge's conclusion about Mr. Murphy's evidence was that he had *"misremembered"* what had occurred and expressed the view that it seemed to him *"improbable"* that such a meticulous investigation system would allow Mr. Murphy's statement, which he characterised as *"forensic gold dust"* to disappear.

19. The judge then referred to the Accident Report Form and it is clear that he was sceptical to an extent of the narrative contained therein. He noted that there was no explanation for the conflicting dates on it nor was there any explanation as to who the author was, noting that it appeared that English might not be the first language of the person supplying the narrative. Commenting on that narrative, the judge said:

> *"Now, we've had a debate between two eminent engineers instructing us as to what we ought to see. Now, anyone who could with such confidence say presumably from just – if they saw the CCTV at all – that that's what it looks like, hats off to them,*

*because we have all looked it (*sic*) here and I simply cannot believe that somebody seriously could have come to such a certain or an apparent certain conclusion so early on, given the extent which were are debating it in this court – all looking at the same video, all perhaps having different ideas as to what was going on. And I suspect that what is there is a reported narrative that has been put down and that (inaudible) – there is no other foundation for that narrative. And if that narrative was seriously believed, like it or not, the statement that this lady wrote when she was in extremis on the ground at the time completely contradicts it, because it says she was on the ladder, words to that effect. So I have these two narratives there and it seems in terms of the evidence absent the CCTV, it seems to me more probable that the plaintiff's version is correct."*

20. He went on to express himself satisfied on the balance of probabilities that the plaintiff probably made it just about to the second rung when matters *"became unstuck"*.

21. The judge also said with regard to Mr. Hurson's report:

"For what it is worth, it is also significant that Mr. Hurson in his medical report identifies the fact that her injury is consistent with the accident as described by her, i.e., a fall from the ladder."

22. The judge went on then to discuss the evidence concerning the CCTV saying:

"The debate on the CCTV, I have two different versions, two different theories and, on the whole, I prefer the view put forward by Mr. Browne and that seems to me to be more plausible insofar as the CCTV assists. But that's all it does. It underpins the evidence of the plaintiff, which I accept."

23. The judge then turned to considering the evidence concerning the instability in the ladder given by both Mr. Browne and Mr. Terry. The judge noted that the footings of the ladder were broken and/or worn and that there was what he described as a *"significant wobble"* in the ladder, which he had seen on video. He said he preferred Mr. Browne's evidence about the extent of this, considering it to be significant in the context of the relative speed with which the plaintiff was carrying out her work. The judge said:

> *"So the wobble, which was significant, was, in my view, sufficient to cause the accident as this lady was going about her task, going up the ladder to try and carry out the function in question. The wobble was caused by the fact that the frame itself had become loose. …*
>
> *There was no evidence of any risk assessment. Nor was there any evidence of any inspection. And the want of the risk assessment, the want of the inspection, in my view, lies at the root of this accident because the plaintiff was then using a ladder which was in all the circumstances not suitable for the purpose, be it as a platform under one of the 2007 Regulations, or as a ladder, that it simply wasn't suitable to carry out the task for the reasons which I have stated."*

24. Accordingly, the judge's conclusion on liability was as follows:

> *"I accept Mr. Browne's narrative as to how the fall occurred, even though it's not captured on the video. As such, the prequel and the aftermath is that the lady mounted the ladder – it went to the right, she went to the left, she came down on her left foot and that's what caused the accident. And I am satisfied that the injury was caused as a consequence of the negligence and breach of duty and specifically the breach of statutory duty of the defendant in the circumstances."*

The Appeal

25. Insofar as the liability issue is concerned, I think the grounds of appeal can be broadly summarised in the following way. It was said that the plaintiff's evidence was confused and contradictory and she gave no coherent evidence of a fall from the ladder. This was to be contrasted with the clear evidence of Mr. Murphy. The judge characterised his evidence, wrongly it was claimed, as having been *"misremembered"*. The incoherence of the plaintiff's account also has to be viewed in the light of the evidence of Mr. Terry which, it was said, the judge failed to engage with at all. Had the judge done so, he could not but have concluded that the plaintiff's evidence must have been incorrect about being on the ladder.

26. Separately, it was said that the alleged defect identified in the ladder, namely the 40mm *"wobble"*, had never been causally linked to the accident and the plaintiff had failed to establish how this alleged defect could have given rise to her allegedly falling from the ladder. The judge, it was said, failed to give any reasons for preferring the evidence of the plaintiff's expert over that of the defendant.

Liability

27. As has been said countless times, this court cannot interfere with findings of fact that are supported by credible evidence, no matter how voluminous and weighty the evidence may be that might support a different finding. It is of the essence of the trial process that the judge who hears and sees the witnesses is best placed to assess their evidence. Where a

judge finds a witness to be honest and truthful, that is a critical value judgment which will not normally be open to review on appeal, unless it is clear that such a conclusion was not, in reality, open on all the evidence. As MacMenamin J. noted in *Leopardstown Club Ltd. v Templeville Developments Ltd.* [2017] IESC 50, [2017] 3 I.R. 707, a finding of credibility is a finding of fact – at para 3.

28. The mere fact however that a judge says he or she believes a witness and accepts their evidence does not immunise that finding from appellate scrutiny where an analysis of the evidence as a whole shows clearly that the evidence in question simply could not be correct. It is not enough for an appellant to say that the weight of the evidence was against a particular conclusion, if there was at least some credible evidence capable of supporting it.

29. Here, the plaintiff's case always was that she was on the ladder when the accident happened. The defendant says the judge ought to have rejected that evidence for essentially three reasons. First, the plaintiff's evidence was contradictory because at various times, she claimed she was going up the ladder and at others, that she was coming down. She did not know where she was on the ladder when she fell and she agreed in cross-examination that she had asked to view the CCTV footage in order to see what had actually happened to her. Her evidence therefore, it was submitted, fell short of establishing on any reliable basis what had happened to her and she therefore failed to discharge the onus of proof.

30. Secondly, the defendant contended that in contrast to the plaintiff, the evidence of Mr. Murphy was very clear that he was told, not once but twice, by the plaintiff that she was not on the ladder at the time of the accident. Thirdly, it was said that Mr. Terry's evidence concerning the CCTV established that it was simply not possible for the accident to have happened in the way the plaintiff said it did because she was never captured by CCTV actually on the ladder and that could not have happened if she was on it as she said. Further,

it was said, his evidence explained why the CCTV footage was consistent with a trip *over* the ladder and inconsistent with a fall *from* the ladder.

31. Taking each of these propositions in turn, the defendant is undoubtedly correct that the plaintiff's evidence showed that she was entirely unclear about the precise mechanism of the accident and was not able to describe with any clarity how she fell or why she fell. She was however clear and consistent throughout about one thing, namely that she was on the ladder at the time of or immediately before the accident. There were a number of pieces of evidence that supported her in this. First, and most obvious, was her own evidence that she was on the ladder, which the judge found to be honest.

32. Second is the fact that while on the ground waiting for the ambulance, no doubt in severe pain, or *"in extremis"* as the judge described it, she wrote out a statement saying that she was on the ladder without, as the judge noted, any obvious motive or opportunity to concoct a false version of events. Third, the plaintiff gave the same narrative a couple of hours later in the Accident and Emergency Department of St. Vincent's Hospital. Fourth, Mr. Browne's evidence was to the effect that her fall was only consistent with a fall from the ladder and inconsistent with tripping over it. Fifth, Mr. Hurson said in his report that her injury was consistent with the accident as she described it to him.

33. As regard Mr. Murphy's evidence, the trial judge rejected this on the basis that his recollection was incorrect. He did not suggest that Mr. Murphy was being deliberately untruthful. However, it seems to me that there were some serious questions about his evidence. First, it is not obvious to me – as I suspect it was not to the trial judge – why in the two to three minutes post-accident, the plaintiff should tell a manager, her superior officer, that she was not on the ladder, allegedly twice, and then a short time later state

categorically the opposite in writing in a statement given to the same manager, albeit that there is no evidence that he actually read it.

34. Mr. Murphy claimed to have made a statement in writing himself the next day in accordance with his oral evidence and gave it to the security manager, who was then presumably in possession of two mutually contradictory versions of the accident. Yet, if he did not know it already, nobody apparently told Mr. Murphy that the plaintiff had written something completely different to what she had told him or pursued this crucial inconsistency in any way with either Mr. Murphy or the plaintiff. On the contrary, seemingly some indefinite time later, the Accident Report Form was completed by an unidentified person who makes no reference to either statement but purports to interpret the CCTV footage with a certainty and clarity that baffled the trial judge.

35. Further, Mr. Murphy was not called upon to recollect these events until two weeks before the trial when he was told that his statement – correctly described as *"forensic gold dust"* by the judge – had been lost in circumstances which were never explained. In all those circumstances, I cannot see how it could be said that the judge was not entitled to prefer the plaintiff's evidence over that of Mr. Murphy.

36. Turning now to the evidence of Mr. Terry, the defendant complains that not only did the judge not give any analysis of Mr. Terry's evidence or reasons for not accepting it, but he barely mentioned it. Such complaints by appellants of non-engagement with the evidence, and in particular expert evidence, frequently rely on authorities such as *Doyle v Banville* [2012] IESC 25 and *Donegal Investment Group Plc v Danbywiske & Ors.* [2017] IESC 14. These judgments make clear that where the evidence of one expert is preferred over another, particularly in cases which turn on complex expert evidence, the judge must engage with some analysis of that evidence, at least sufficient to demonstrate why one side's

evidence is preferred over the other. This requirement in turn arises so that the parties may go away with a clear understanding of why they won or lost, rather than being left merely to speculate on why a particular result eventuated. The same applies with equal force to an appellate court which cannot perform its function if left in the dark by the court of trial as to the reasons for the outcome.

37. While that may be so in the context of esoteric or technical scientific opinion evidence, in many cases elaborate analysis is not required where the reason for the result is perfectly obvious or is reasonably to be inferred. Complaints of non-engagement with evidence are easily made but less easily proved. As Collins J. pointed out in *McCormack v Timlin & Ors.* [2021] IECA 96, *"... appellate courts must be astute not to permit Doyle v Banville – inspired complaints of 'non-engagement' with the evidence to be used as a device to circumvent the principles in Hay v O'Grady;"* – at para. 58. The threshold requirement for succeeding in such an argument is high as is evident from the comments of MacMenamin J. in *Leopardstown Club*:

> *" 'Non-engagement' with evidence must mean that there was something truly glaring, which the trial judge simply did not deal with or advert to,* ***and*** *where what was omitted with (sic) went to the very core, or essential validity of his findings. There is therefore a high threshold. In effect, an appeal court must conclude that the judge's conclusion is so flawed to the extent that it is not properly 'reasoned' at all. This would arise only in circumstances where findings of primary fact could not 'in all reason' be held to be supported by the evidence. (See Henchy J. in M. v An Bord Uchtála, cited earlier, quoting his earlier judgment in Northern Bank Finance Corporation v Charlton [1979] I.R. 149). 'Non-engagement' will not, therefore, be established by a process of identifying other parts of the evidence which might*

support a conclusion, other than that of the trial judge, when there are primary facts, such as here. Each of the principles in Hay v O'Grady are to be applied."

38. Many recent authorities consider the role of expert evidence in cases such as the present and I think it is true to say that it is common for experts to give evidence about matters which are, in reality, not matters for expert evidence at all but well within the range of knowledge and experience of most people.

39. So, for example, in a road traffic accident case, an expert may be called to produce a map and photographs of the locus of the accident and describe any features that may be relevant. These are not strictly matters calling for special expertise. That is not for a moment to suggest that the court hearing such evidence may not derive considerable assistance from it and the expert concerned, as the person who has visited the locus and taken photographs, may be in a position to point out important features of such photographs and give relevant measurements which may not be immediately obvious to the casual observer. As I have said, this can often be of great assistance to the court in better understanding the facts of the matter at hand, but care has to be taken in distinguishing between such assistance given by an expert, on the one hand, and matters of opinion that fall squarely within the particular expertise of the witness concerned. In the case of the former type of testimony, such evidence does not enjoy any special status merely because it has been given by an expert.

40. It seems to me that the evidence concerning the CCTV given by the experts in this case was largely within the former category, in other words evidence designed to assist the court's understanding of what was to be seen in the CCTV footage as distinct from evidence that was purely expert opinion evidence. The shortcomings of the CCTV are well illustrated by the fact that in one still, Mr. Brown was certain that the plaintiff had her back to the camera and Mr. Terry was equally certain that she was facing it. To that extent, as the judge himself

recognised, he was in as good a position as anyone else to determine what was to be seen from the CCTV footage and still photographs. The judge appears to have considered, and I agree with him, that the CCTV was of limited assistance given its fairly poor quality and the limitations already identified.

41. The judge attracts criticism from the appellant for indicating merely that he preferred the view put forward by Mr. Browne as to what was to be seen on the CCTV. In saying this however, the judge was not expressing an acceptance of a scientific opinion on a specialist topic given as between two experts. It seems to me that all the judge was saying was that his own viewing of the CCTV accorded more closely with Mr. Browne's impression of what it showed than Mr. Terry's. I do not think the judge needed to go any further than that, or to engage in extensive analysis of Mr. Terry's evidence for that and an additional reason. Mr. Terry's evidence in its entirety was predicated on the basis that the plaintiff was not on the ladder but instead tripped over it. Once the judge satisfied himself that the plaintiff's version of events was the more probable for the reasons I have already explained, then it seems to me that no further analysis of Mr. Terry's evidence was required because it simply did not arise on the facts as the judge found them.

42. To an extent, the same considerations apply to the judge's conclusions about the play or *"wobble"* in the ladder. The plaintiff herself identified the ladder as being wobbly in her direct evidence. Mr. Browne agreed with this. His evidence was that the ladder should be rigid and he considered that the relevant working at height regulations specified that the working platform must be rigid and this one was not. He took a video as previously mentioned to demonstrate the play in the frame. When asked about the importance of the ladder being rigid in the context of the work being done by the plaintiff, Mr. Browne said (Day 2, p. 30):

"A. It's paramount, judge, it must be rigid. The ladder should not be loose, should not be able to move when its being used in normal circumstances because it can cause the user to lose their balance and fall.

139 Q. And?

A. And that is the problem with the ladder being unstable."

43. Mr. Browne reiterated (at Day 2, pp. 52 – 53) that the ladder going to the side, as he described it, would cause the plaintiff initially to lose her balance and fall. It was put to him in cross-examination that the movement in the ladder could in no way account for it moving in the sense of falling away (Day 2, p. 54) but Mr. Browne disagreed, saying it could cause the plaintiff to lose her balance.

44. Mr. Browne showed the judge the video taken of the movement at the top of the ladder which he considered to have been a breach of statutory duty and the cause of the plaintiff's fall. I see no reason why the judge was not entitled to accept this evidence which identified a clear causal link between the defect in the ladder and the accident suffered by the plaintiff. While Mr. Terry disagreed that the working at height regulation applied to ladders, and identified a specific regulation directed to ladders, that regulation itself required the ladder to be fit for the purpose for which it was being used and clearly on the basis of Mr. Browne's evidence, it was not. It seems to me that in truth, the defendant's complaints about the trial judge's supposed failure to engage with its evidence is in substance a complaint that its evidence was more persuasive and ought to have been accepted. That, as I have explained, is not the test.

45. I am therefore satisfied that the trial judge was entitled on the evidence to conclude that the plaintiff was on the ladder at the material time and that as a valid finding of fact, this

court on well-established *Hay v O'Grady* [1992] WJSC-SC 502 principles cannot interfere with that finding. The judge was in my view equally entitled to hold that the evidence called by the plaintiff established that the ladder was defective and further, that the defect caused the accident. These were findings that were properly open on the evidence and arrived at appropriately by the trial judge. Accordingly, the appeal on liability must fail.

Quantum

46. The defendant's appeal in this regard is confined to the straightforward ground that the damages assessed were excessive, having regard to the Book of Quantum and other indicators.

47. The principles to be applied in the assessment of general damages for personal injuries have been restated on many occasions in recent years in this court so that it is unnecessary to revisit them in any detail. The jurisprudence establishes that the award must be proportionate both in the context of the maximum general damages that may be awarded of €500,000, established in *Morrissey v HSE* [2020] IESC 6 and in the context of awards for other injuries. It must be fair to both parties and if the Book of Quantum is relevant to the particular injury in question, the court must have regard to it as a guide to the award. An appellate court will not interfere with an award of damages unless satisfied that no reasonable proportion exists between it and what the appellate court might be inclined to give and for interference to be warranted, the error must be serious enough to amount to an error in law.

48. Unlike in the case of *viva voce* evidence, where medical evidence is given by way of agreed reports, the appellate court will generally be in as good a position as the trial judge

to assess the evidence although the trial judge's superior position in assessing the impact of the evidence on the particular plaintiff must be recognised.

49. As previously noted, the plaintiff suffered a trimalleolar fracture dislocation of the left ankle. As described in Mr. Hurson's first report, it involved an intra-articular fracture of the distal fibular and intra-articular fractures of the posterior and medial aspect of the distal tibia. This required treatment by open reduction and internal fixation and the application thereafter of a cast. The plaintiff subsequently developed difficulties with one of her wounds requiring weekly dressings in the clinic. Mr. Hurson's second and final review of the plaintiff was on the 4th March, 2020 being some one and a half years post-accident. He noted that the plaintiff had limitation of movement which she was unlikely to ever regain and was likely to suffer post-traumatic osteoarthritis in the future. This may require further treatment but Mr. Hurson's view was she was likely to suffer from ongoing pain and stiffness in the ankle into the future.

50. She was further assessed by Mr. Gary Colleary, Consultant Othopaedic Foot, Ankle and Trauma Surgeon on the 12th April, 2021, some two and a half years post-accident. He noted that the plaintiff was unable to return to work for a period of one year and eight months. She complained of a limp in the morning which improved as the day went on. She complained of increasing discomfort and stiffness after a long day at work or a prolonged period on her feet. She had some six months of sleep disturbance. Prior to the accident she was a keen hill walker and gardener, but she had been unable to return to these pursuits. She was also limited in her ability to walk up hills.

51. On examination she had significant limitation of ankle movements. She had various areas of tenderness. Mr. Colleary's conclusion was that because the plaintiff cannot dorsiflex above neutral, this limits most weight bearing activities. As noted, she has

difficulty going up or down hills or stairs or doing anything requiring her to go down on her hands and knees or squat forward. She had already developed osteoarthritis when seen by Mr. Colleary and he was of the view that her symptoms would likely deteriorate. Consequently, it is likely that she will require an ankle fusion in the medium to long term and this, while relieving pain, will further limit the function of her left ankle on a permanent basis.

52. The trial judge noted that while the plaintiff returned to work initially, eventually she took redundancy, primarily because she developed significant rheumatoid arthritis unrelated to the accident. The judge considered in detail the medical reports as I have outlined them and concluded that the appropriate valuation for general damages was €50,000 to date and €70,000 into the future. The special damages were agreed in the amount of €40,961 giving an overall decree of €160,901. The judge indicated that he took account of the Book of Quantum but it might not necessarily reflect the full value of the case.

53. Section 5 of the Book of Quantum deals with ankle injuries and under the heading of *"Severe and Permanent Conditions"*, and states:

> *"These injuries include all three bones of the ankle structure which required extensive surgery and extended healing but may result in an incomplete union and the possibility of having or has achieved arthritic changes or degeneration of the ankle joint and may affect the ability to walk unaided."*

54. The range for such severe and permanent conditions is given as €80,500 to €93,300. It will therefore be seen that the judge's award of €120,000 is almost one third above the maximum for this category of injury. Cases such as *McKeown v Crosby* [2020] IECA 242 suggest that where a particular injury falls readily within an identified category in the Book of Quantum, that will generally be the appropriate level at which general damages should be

assessed. In the present case, it appears to me that the plaintiff's injury is one which falls pretty squarely within the described category in the Book of Quantum and there were no other injuries of significance that ought to have affected the assessment of damages.

55. It seems to me that the trial judge gave little or no explanation as to why he considered damages so much in excess of the Book of Quantum category to be appropriate in the circumstances of this case. As such, I am of the opinion that the award must be viewed as disproportionate in the present case in the sense that that expression is used in the relevant authorities.

56. In my judgment, the plaintiff's injury in this case falls within the category I have identified and probably towards the upper end. What does not appear however to be expressly contemplated by this category is the fact that in the present case, the plaintiff will in the future have to undergo further and additional pain, discomfort and inconvenience as a result of having to undergo an ankle fusion which will result in even greater limitation of movement, but offer significant pain relief.

57. To that extent, I would allow some uplift on the figure given in the Book of Quantum, and in my view, the appropriate figure for general damages is, as the judge held, €50,000 to date but a reduced figure of €50,000 for the future.

58. To that limited extent therefore, I would allow this appeal and substitute for the order of the High Court judgment in the sum of €140,901.

59. With regard to costs, the parties should deliver written submissions within 21 days of the date of this judgment, not to exceed 1,000 words.

60. As this judgment is delivered remotely, Haughton and Allen JJ. have authorised me to indicate their agreement with it.