



THE COURT OF APPEAL

**UNAPPROVED
NO REDACTION NEEDED**

**Neutral Citation Number [2021] IECA 252
Record Number: 2020/115
High Court Record Number: 2017/7926P**

Noonan J.

Faherty J.

Binchy J.

BETWEEN/

EDINA NEMETH

PLAINTIFF/RESPONDENT

-AND-

TOPAZ ENERGY GROUP LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 7th day of October, 2021

1. The respondent (the plaintiff) suffered an injury to her right knee in the course of her employment with the appellant (the defendant) at its filling station in Clonshaugh, County Dublin on the 28th January, 2017. The High Court found the defendant responsible for the plaintiff's injury and awarded her €40,000 in general damages together with €13,682.95 for special damages. The total award was €53,682.95 and costs. The defendant appeals against that finding.

The Pleaded Case

2. The plaintiff was born on the 13th February, 1975 and was 41 years of age on the date of the accident. She was employed by the defendant three months earlier, in October 2016, as a trainee assistant manager at the filling station. The injury to the plaintiff's right knee occurred during a routine stocktaking. In her personal injuries summons, she pleads: -

“... [T]he plaintiff was caused, instructed and required to assume a squatting position to be held for a sustained period of time, and in a congested workspace. Having done so for a number of minutes, the plaintiff then sought and attempted to rise to a standing posture, when she suffered sudden and severe pain and injury to her right lower limb and knee.”

3. The particulars of negligence are almost entirely generic with the usual complaints of a failure to provide a safe system of work, proper training and so forth. The only specific pleas relate to causing, instructing and permitting the plaintiff to squat low and work in such a posture while conducting a stock take and failing to provide adequate seating for the work the plaintiff was directed to perform.

4. In answer to a notice for particulars asking, *inter alia*, who instructed the plaintiff to assume a squatting position, the plaintiff answered (at para. 16): -

“The plaintiff was directed to complete a full stock-take, which included magazines in the press at floor level. During training on manual handling provided by the defendant to the plaintiff, the plaintiff was instructed to always put the weight on her legs while completing tasks rather than bending her back.”

5. This is a reference to a manual handling course provided by the defendant to the plaintiff in November 2016 in which she received the customary advice about lifting, namely to bend her legs rather than her back.

6. In updated particulars of negligence provided by the plaintiff on the 9th April, 2019, specific breaches of the provisions of the Safety, Health and Welfare at Work Act, 2005 and the General Application Regulations S.I. 299/2007 were given, which again are largely generic save for (v): -

“Failing to ensure that the plaintiff, and employees were physically suited to carry out the task the subject matter of the within proceedings.”

7. The plaintiff's S.I. 391 disclosure of medical and engineering reports was consistent with the pleaded case. She told both her own doctors and those of the defendant that she was squatting at the material time. She told Dr. Robert McQuillan who examined her on behalf of the defendant on the 3rd April, 2018 that she had to squat to count magazines for about twenty five minutes. A joint engineering inspection took place on the 11th September, 2018 at the premises attended by Mr. Alan Conlan, consulting engineer, on behalf of the plaintiff and Mr. Sean Walsh, consulting engineer, on behalf of the defendant. In his report, Mr. Conlan records the instructions given to him by the plaintiff in the following terms: -

“Edina Nemeth reports that at the time of the accident she was doing a stock check of the newspapers and magazines in the cupboard behind the serving counter. They were stored on a low shelf inside the cupboard. She reports that while she was doing this she squatted down; she did a full squat, she was squatting down for between five-ten minutes counting the newspapers and magazines. She reports that it is quite a congested area. She reports that at the time she suffered an injury as she was attempting to stand up from a squat her right knee cap popped out, as a result she

suffered injuries. She couldn't stand up, she was left squatting... She reports that she is 1.72 metres tall and weighed approximately 90 kilograms.”

8. A similar description is to be found in Mr. Walsh's report although he says that the accident was described in terms of the plaintiff having been squatting “for a few minutes”.

9. The plaintiff was medically examined on behalf of the defendant by Mr. James O'Flanagan, consultant orthopaedic surgeon, who provided a medical report which in common with all the medical reports in the case, was agreed without the necessity for formal proof. Mr. O'Flanagan notes that the plaintiff told him that she sustained an injury to her right knee whilst squatting at work. In his conclusion and prognosis, Mr. O'Flanagan says:

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“This lady sustained a bucket handle tear of the lateral meniscus while squatting at work on the 28th January 2017. The mechanism of injury described is quite classical for such an injury.”

10. In the “Discussions” section of his report, Mr. Conlan noted that there was very little published information available on lower limb disorders in the work context but one which he had come across was published by the European Agency for Safety and Health at Work entitled “E-Facts 42”. This identifies certain risks associated with squatting at one location for at least half an hour or, intermittently, at two or more locations for more than two hours a day. It is common case that neither of these arise in the present situation.

11. Mr. Conlan also notes in his report that because of the plaintiff's large build, this probably increased the risk to which she was exposed in squatting and lifting herself up from a squat. His opinion was that it was probably a combination of the action of squatting and the plaintiff's individual risk profile which resulted in her injury. He refers to various

statutory provisions relevant to employers which appear to be reproduced in the updated particulars of negligence, but Mr. Conlan does not specifically suggest in his report that any of these were breached by the defendant. His conclusion was that: -

“It is likely that Edina Nemeth’s employers did not give due consideration to her risk profile when assigning her to this task.”

The Trial

12. The trial commenced on the 10th March, 2020. As is often the way in such cases, a central feature of the trial was CCTV footage of the accident itself and the plaintiff’s activities in the lead up to it. This footage was available to the plaintiff’s legal team for several years prior to the trial but somewhat remarkably, it was not viewed by the plaintiff herself, her lawyers or engineer until the morning of the trial. What it shows is something quite different from the case made by the plaintiff up to that point in time.

13. The plaintiff is seen in the video attending at a ground level press behind the counter in the filling station. In order to access this press, the plaintiff squats on her left leg but critically, kneels on her right knee. She is holding a scanner and appears to scan approximately nine magazines. There appears to be no dispute about the fact that this activity by the plaintiff took between one and two minutes and a viewing of the video suggests that the duration of this event was 1 minute and 7 seconds. As the plaintiff rises from the kneeling position of her right leg, she appears to suddenly suffer pain in that leg.

14. In opening the case to the trial judge, counsel for the plaintiff referred to the fact that the defendant had ceased storing newspapers and magazines in the low cupboard since the accident and this was of importance because Mr. Conlan would say that the magazines should have been stored at a higher level and had this happened, the accident could have

been prevented. It is notable that in his disclosed report, Mr. Conlan does not make this criticism of the defendant. Counsel continued with his opening and said the following (Transcript Day 1, p. 4): -

“And during the course of this, she had been adopting a kneeling and/or squatting position at various times over that period. Now, there is some debate about whether she was squatting or kneeling. I understand the CCTV footage, which the court will see, shows her certainly kneeling on the injured knee prior to the particular injury that she sustained. I am not sure a lot actually turns on whether it was squatting or kneeling. I don’t believe it does. But she will tell you that while down low in a kneeling position on her right knee certainly carrying out this duty, as she was doing this for a few minutes and as she tried to stand up she immediately experienced severe pain in her right knee ...”

15. Counsel’s suggestion that nothing turned on whether the plaintiff was squatting or kneeling is surprising, to say the least, given the case consistently made by the plaintiff, to which I have already referred, up to that moment in time.

16. Counsel then went on to refer to the E-Facts 42 publication saying (at Transcript Day 1, pp. 5-6): -

“... And in that regard, judge, we say that if a stool had been provided to the plaintiff and these are common case in factories and shops and offices, and they may be called an elephant’s foot type stool... these are stools that you can stand on or sit on and... they make life just that bit easier when trying to work at a lower level. And we say if such an item or, indeed, any type of item like that, including perhaps a cushion, had been provided that this injury could have been completely avoided.”

17. Here again, counsel introduced two entirely new features to the case, an allegation that the plaintiff ought to have been provided with a stool or in the alternative, she should have been provided with a cushion, presumably to kneel on. The question of providing a cushion had never previously featured in the case, presumably for the obvious reason that there was never a suggestion that the plaintiff was kneeling when the accident happened. With regard to the provision of a stool, there is, as I have already pointed out, a fleeting reference in the particulars of negligence in the personal injuries summons to an alleged failure to provide adequate seating. However, given the fact that neither the question of a stool or a cushion is referred to in Mr. Conlan's report, it seems to me that the defendant was entitled to disregard that allegation as no reliance was being placed upon it by the plaintiff's expert.

18. Counsel further suggested in opening that there was a complaint about the plaintiff's training to the extent that it only consisted of generic manual handling training which placed an emphasis on keeping one's back straight. It was said that this was what the plaintiff was trying to do when the accident happened. Counsel also suggested that the defendant was under a particular duty to have regard to the plaintiff's height and weight in assessing risks relating to her.

19. In the plaintiff's evidence in chief, she rather surprisingly suggested, despite having just seen the video earlier that morning, that she was at the locus of the accident for about 15 to 20 minutes. She was asked what kind of equipment she thought would have been helpful and her answer was maybe a very small stool or a leaning pillow. On the second day of the trial, the plaintiff was cross-examined about this and the following exchange took place (Transcript Day 2, pp. 2-3): -

“Q. But you see, isn't the fact that you saw – when did you see the CCTV footage, did you see it in the last 24 hours?”

A. Yes, I did.

Q. You did. And during when you viewed the CCTV footage didn't you realise at that stage, notwithstanding your solicitors have had this for years, months, that you realised that the history that you'd given to all of the doctors with the exception perhaps of Dr. Behari on the night of the incident was that you were squatting. There was no question of you saying I was kneeling on my right knee and I was squatting on my left leg; isn't that right?

A. That's right.

Q. And so you suddenly moved your entire case around on the basis that you have now seen the CCTV and you realise that you weren't squatting, in fact you were kneeling on your right knee and squatting with your left; isn't that right?

A. Yes.

Q. So this is where this thing about cushions comes from. There's not – a kneeling cushion, there's not a reference anywhere in any of the reports, any of your engineers' reports, any of the pleadings, updated particulars of negligence, breach of duty, to a kneeling cushion. So that's something that you decided should be in the case as of yesterday; isn't that right? Because you didn't realise that you were kneeling when you had the incident; isn't that right?

A. I have mentioned the kneeling pillow before.

Q. And the thing about the stool, that only emerged yesterday as well; isn't that right?

A. No."

20. The plaintiff went on to suggest that she had raised the issue of a stool before with her colleague Agnis, a manager in the filling station. This again was a new allegation.

21. In his evidence in chief, Mr. Conlan said that his main issue of concern was the stature of the plaintiff having noted that she suffered the injury as she was coming up from what she described as a full squat. He thought because of her risk profile that was the major issue as to why she suffered the injury. Even though it now transpired that she was not squatting on the affected leg, he was still of the view that as she stood up from the kneeling position she would still have come up from a squat and even though she was supporting herself with the cupboard, there was still an increased risk because of her profile.

22. Under cross-examination, Mr. Conlan agreed that his report was premised entirely on the basis that the plaintiff was at the time of the accident engaged in a full squat. He only became aware that this was incorrect on the morning of the trial. Similarly, he only learned of the existence of the CCTV footage at the same time. Mr. Conlan also agreed that if the plaintiff was following the correct procedure when lifting an item, she would equally be required to perform a squat, but while agreeing with that proposition, he suggested she would be at risk when she did so. He also conceded that his view that the plaintiff was at risk of the injury because of her physical make up was not based on any medical documentation or other evidence.

23. The defendant's engineer, Mr. Walsh, gave evidence that the E-Facts 42 document was, as is apparent from the document itself, not relevant to the circumstances of this case. He said the risks associated with squatting might require assessment for example in people like floor fitters or carpet fitters and other jobs involving prolonged work at low level. He said (at Transcript Day 2, p. 56): -

“... But attending to a low level press where no weights are involved briefly for something, is something that most of us do at some stage, whether in our work or as I say socially or domestically. It’s simply not considered and not considered as a risk.”

24. In similar vein, in answer to the trial judge’s question that what the plaintiff was doing was more than simply fetching something from a cupboard, Mr. Walsh said (Transcript Day 2, p. 58): -

“Indeed, Judge, but at the same time we are attending at the press for a very short period of time. If I read the video correctly, looking at scanning I think about nine magazines, yes, but I would still consider that to be quite a cursory interaction compared to the types of work that would need to be meaningfully addressed. If we get down to that level, I think employers would be in theory risk assessing every second of every day which doesn’t happen and isn’t required in my view.”

25. Under cross-examination, Mr. Walsh said he had never come across a risk assessment for this type of task but even if there was, he was not sure what any such risk assessment would suggest other than what was done. It was suggested to him that the newspapers and magazines could be moved to a higher level and in answer, Mr. Walsh said that the notion of prohibiting fetching anything from a low level press anywhere is not, in his view, practical. He disagreed that it was necessary to warn people of the dangers of getting up from a squatting or kneeling position and he did not understand what warning could be given in this regard. He said that standing up from a low press was not an onerous activity.

Judgment of the High Court

26. The trial judge delivered an *ex tempore* judgment on the 18th March, 2020. He noted that the plaintiff was partially squatted on one leg and put her knee on the ground and was in that position for about one minute and thirty seconds. The judge referred in some detail to the contents of the E-Facts 42 document introduced by Mr. Conlan and having done so, said (at para. 23): -

“No measures appear to have been addressed in the training which the plaintiff undertook with regard to lower limb injuries, apart from lifting weights.”

27. He referred to relevant provisions of the 2005 Act and the well-known dicta of Henchy J. in *Bradley v CIE* [1976] IR 217: -

“The law does not require an employer to ensure in all the circumstances the safety of his workmen. He will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances.”

28. On the issue of risk assessment, the trial judge said at para. 31 that the risks identified by the defendant’s risk assessment did not deal with lower limb injuries which were likely to be caused by squatting or kneeling.

29. The central finding of the judgment is to be found at para. 32: -

“In cases claiming negligence, the test to be employed is that the injury must have been reasonably foreseeable and the employer must have failed to take reasonable care. In this case the mechanism of injury was classical as reported by Dr Flanagan. The court is satisfied it has been well established that kneeling or squatting can cause lower limb disorders (LLDs) such as the one sustained by the plaintiff. Therefore, it is foreseeable. The court notes that any risk was not adequately assessed by the

employer as required by them under s. 9. The court is satisfied that the employer failed to carry out their duties to identify risks for the task of stock taking at a height or level that requires kneeling, squatting or a combination of both. The court is also satisfied that the employer did not provide appropriate equipment to prevent the potential injury.”

30. A less significant finding, but nonetheless one important to the trial judge’s conclusion, appears at para. 34: -

“In the court's view, the employers current use of the cupboard is an acknowledgement that this was not an appropriate place to store newspapers and magazines which require a regular stock take. The court is of the view that the employer is liable on the basis that the task required an employee to kneel or squat - positions which are known to cause Lower Limb Disorders – which is the type of injury sustained by the plaintiff. The employer could have taken steps to prevent the injury by introducing preventative measures such as; mechanical aids, seating, shift rotation, foam mats, knee pads or equipment most appropriate for the task. Preventative measures can be identified at the assessment stage of employers statutory requirement to assess risks in the workplace.”

31. He concluded that the plaintiff had established liability and proceeded to assess damages.

Discussion

32. I think there are a number of difficulties arising from the passages in the judgment to which I have referred but also, there are, in my view, difficulties with the judgment from the perspective of things that are not referred to.

33. First and foremost, the trial judge makes no reference of any kind to the fact that, right up to the commencement of the trial, the plaintiff's case, both in her pleadings, verified by her on affidavit, and in all of the expert reports furnished to the defendant, was premised solely and exclusively on an injury suffered by the plaintiff as a result of prolonged squatting. This was the case the defendant came to court to meet. As the case was being opened, the original pleaded case was entirely abandoned without a backward glance by the plaintiff when it emerged from a viewing of the CCTV that in truth, this is not how the accident happened at all.

34. The defendant was then faced with meeting a new case based on matters which included failing to supply her with a stool, failing to supply her with a kneeling cushion and failing to move the magazines and newspapers to a higher level, none of which were even hinted at in the plaintiff's engineering report. Such a report must contain the substance of the evidence of the expert in question but one searches in vain to find any reference to any of these matters in Mr. Conlan's report.

35. Mr. Conlan is not to be criticised in that respect because he was instructed that the accident happened in quite a different way to what actually occurred. Inexplicably, he was not even told that there was a video of the accident until the morning of the trial. He was then in a situation where, without being disrespectful to him, he was left to make it up as he went along. The fact that none of this attracted any comment from the trial judge is of concern.

36. A not dissimilar situation was recently considered by this court in *McGeoghan v Kelly and Ors* [2021] IECA 123. There I noted (at para. 21): -

“It is important to note that the case the defendants came to court to meet was the case defined in the pleadings and the S.I. 391 of 1998 disclosure. The purpose of

pleadings is of course to define the issues between the parties at trial. The introduction of S.I. 391 of 1998 was intended to consign to history the notion of trial by ambush. This is particularly important in the context of experts, the substance of whose evidence must be notified to the other side in advance.”

37. In that case, I concluded that the trial judge had found the defendants liable on a case never actually pleaded or made but rather something that, almost incidentally, arose from the evidence. That appears to me to apply with equal force in the present case. In *McGeoghan*, I also referred to the fact that precision in pleadings in personal injuries cases is of particular importance since the passing of the Civil Liability and Courts Act, 2004 and I referred to the earlier judgment of this court (Collins J.) where he considered this issue in *Morgan v ESB* [2021] IECA 29. Having referred to that judgment, I noted (at para. 29): -

“The essential basis upon which the trial judge held the defendants to be negligent was not one that was ever pleaded or made by the plaintiff, but simply one that fortuitously emerged in the course of the evidence. The provisions of the 2004 Act to which I have referred, and more generally the requirement for pleadings to define issues, would be robbed of any meaningful effect if courts were at large to determine the outcome of litigation on such a basis. Far from the parties being confined to the issues defined by the pleadings, claims would fall to be decided on an inquisitorial rather than adversarial basis.”

38. These comments are equally apposite on the facts of this case. In truth, the view originally offered by Mr. Conlan in his report, to which he clung as best he could, even when the altered circumstances emerged, was that because of the plaintiff’s physical characteristics, she should have been the subject matter of some sort of bespoke medical risk assessment by her employer. Such a proposition does not really withstand any scrutiny.

39. First, Mr. Conlan is an engineer, not a doctor, and as pointed out in his cross-examination, there was absolutely no evidence to suggest that the plaintiff was more vulnerable to the injury that befell her than anybody else. The logical consequence of the position adopted by Mr. Conlan is that every employer would have to have every employee or prospective employee medically vetted to decide whether they might be subject to particular risks which would require them to have a bespoke risk assessment carried out. If this is not to happen in the case of every employee, current or prospective, then how is the employer to pick candidates for assessment? Surely it cannot be seriously suggested that the employer is, by looking at a person, to decide whether special medical assessment is called for. Such a proposition has only to be stated to demonstrate its absurdity.

40. Several recent judgments of this court commenting on expert evidence, of consulting engineers in particular, have suggested that where the evidence of such experts deals with ordinary everyday matters with which most people would be expected to be familiar, the court may to an extent, and should, where appropriate, bring its own common sense to bear on the issue. That is not to say that a court is simply free to disregard expert evidence with which it might not agree but where ordinary everyday matters are being considered, some rational analysis should be brought to bear on what might be described as more extravagant theories about such commonplace things. Different considerations apply where highly specialised areas of, for example, medical or scientific expertise are concerned – see *Byrne v Ardenheath* [2017] IECA 293, *Naghten v Cool Running* [2021] IECA 17 and *Dunphy v O'Sullivan* [2021] IECA 171. *Byrne* was a case where this court on appeal held that the High Court erred in accepted an expert's evidence on an alleged design defect in a car park which was in the court's view simply not credible.

41. The task here being undertaken by the plaintiff was an ordinary everyday activity of a kind undertaken very frequently by most people in a domestic and work setting. It falls to be considered as such. While Mr. Conlan was entitled to express his view as to whether such activity presented any particular risks, it seems to me that the view he did express, namely that the plaintiff was at an increased risk of this injury because of her physical characteristics, was one outside his competence as an expert and not supported by any medical or scientific literature or research put before the court.

42. In so far as the trial judge appeared to place significant reliance on the E-Facts 42 document, such reliance was erroneous in circumstances where it was clear from all the evidence, and from the document itself, that it had no application to the facts of this case. Consequently, the trial judge's conclusion that the defendant was required and failed to address training measures with regard to lower limb injuries is one entirely unsupported by the evidence. The same applies to the trial judge's reference to the fact that the risk assessment did not deal with lower limb injuries which were likely to be caused by squatting or kneeling. Here again, there was no credible evidence that such an assessment was required or necessary.

43. At para. 32 of his judgment, the trial judge correctly identified the test to be employed as being that the injury must have been reasonably foreseeable and the employer must have failed to take reasonable care. However, he goes on to say that the mechanism of injury was classical as reported by Mr. O'Flanagan and appears to extrapolate from this that it was therefore foreseeable by the defendant.

44. That conclusion appears to me to be erroneous on two bases. First, when Mr. O'Flanagan said in his report that the mechanism of injury described was quite classical for such an injury, he was referring to an injury caused by squatting, as advised by the plaintiff.

That transpired to be incorrect. Secondly, it seems clear that what Mr. O'Flanagan was referring to was the fact that injuries of this kind are typically precipitated by squatting. That of course is quite different from saying that if one squats, one is likely to suffer such an injury. It is difficult to see on what basis such an expression of opinion by a consultant orthopaedic surgeon can be relied upon to base a conclusion that the risk was reasonably foreseeable by an employer.

45. Accordingly, in my judgment, the conclusion of the trial judge as to the foreseeability of this injury was one unsupported by credible evidence.

46. The trial judge's conclusion that because the cupboard in question is now used for a different purpose, this amounted to an acknowledgement that it was not an appropriate place to store newspapers and magazines requiring a regular stock take appears to be purely speculative by the judge. There was no evidence supporting it and certainly none from which such an inference could be drawn.

47. Even if there was any association between the plaintiff's accident and the subsequent change of use of the cupboard, of which there was no evidence, that cannot be construed as an admission of liability. It is commonplace for defendants to introduce new measures in response to accidents such as placing a mat on an allegedly slippery floor or making changes to a system of work. The fact that a defendant makes such changes, alterations or adaptations cannot be construed as an admission of liability. To do so places a defendant in an impossible situation. If he tries to improve matters by making a change, that is construed as an admission. If he fails to make the change and another person has a similar accident, then it will be alleged that he is liable because he failed to do so. There may have been any number of reasons why cleaning materials, which still have to be accessed by staff, rather

than newspapers and magazines, are now stored in this cupboard and it was not open to the judge to assume or infer that this was done in response to the plaintiff's accident.

Conclusion

48. It is often said that an employer is not an insurer and to impose liability on the defendant in this case would in my judgment amount to exactly that. The plaintiff here unfortunately suffered an unpleasant injury performing an ordinary everyday activity which called for no special training, no particular assessment or the provision of any particular equipment.

49. It seems to me that the trial judge made a number of speculative leaps which the evidence did not support. He appeared to accept Mr. Conlan's evidence but without bringing any forensic analysis to bear on that evidence. Mr. Conlan's reference to the E-Facts 42 document really arose in the context of it being the only document he was able to discover which had any bearing on lower limb disorders but when analysed, it clearly had no application to the facts of this case and in fairness to Mr. Conlan, he effectively conceded as much. Accordingly, the trial judge's reliance on it as a basis for holding the defendant liable was quite mistaken. A trial judge is obliged to engage with the evidence, be it expert or otherwise, in a way that makes clear how the ultimate conclusion is arrived at.

50. Where conflicts of evidence on the facts occur, the trial judge is uniquely placed to resolve such conflicts by seeing and hearing the witnesses' testimony. However, as the authorities emphasise, it is not sufficient for a trial judge to simply prefer the evidence of one witness over the other without at least a brief explanation why he or she does so. Otherwise, the parties, and an appellate court, are left in the dark as to why one side won and the other lost.

51. The same rationale applies to conflicts of expert evidence involving matters of expert opinion. Here again, some explanation, however brief, is required to show why one opinion is preferred over another and this necessarily involves engagement with, and analysis of, the competing views of the experts. This is absent in the present case. Although the trial judge refers to Mr. Conlan's evidence, and misunderstands it as I have found, he makes little reference to the evidence of Mr. Walsh, other than summarising it in very brief terms. There is no engagement with the starkly contrasting views of Mr. Conlan and Mr. Walsh nor is there any attempt to bring a rational analysis to bear on those competing views, less still any explanation as to why one prevailed.

52. In all the circumstances, I am satisfied that there was no credible evidence before the trial judge which could have supported his finding of liability against the defendant, which must therefore be set aside. I would accordingly allow this appeal and dismiss the plaintiff's claim.

53. As the defendant has been entirely successful in this appeal, my provisional view is that it is entitled to its costs in this court and in the High Court. If the plaintiff wishes to contend for an alternative order, she will have liberty to notify the Court of Appeal Office accordingly within 14 days and a brief supplemental hearing on the issue of costs will be arranged. If such hearing is sought and results in the order I have proposed, the plaintiff may be responsible for the additional costs of such supplemental hearing. In default of application, an order in the terms proposed will be made.

54. As this judgment is delivered electronically, Faherty and Binchy JJ. have indicated their agreement with it.