THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

[2022] IECA 133
Record Number: 2020/266
High Court Record Number: 2019/4037P

Whelan J.

Donnelly J.

Noonan J.

BETWEEN/

DORIS WHELAN

RESPONDENT/PLAINTIFF

-AND-

DUNNES STORES

APPELLANT/DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 15th day of June, 2022

1. This appeal arises from an alleged slip and fall accident that befell the respondent (Mrs. Whelan or the plaintiff) at the supermarket premises of the appellant (Dunnes or the defendant) at Ashleaf Shopping Centre, Walkinstown, Dublin 12 on Thursday 27th June, 2013 shortly before lunchtime. It is not in dispute that Mrs. Whelan fell and suffered some injury while shopping in one of the food aisles in the supermarket. However, the cause of the plaintiff's fall is very much in dispute, as is the extent of her injuries arising from that fall. In an *ex tempore* judgment delivered on the 1st December, 2020, the High Court (Hanna

J.) found in favour of the plaintiff and awarded her damages totalling €83,250. Dunnes brings this appeal against both the liability and quantum findings of the High Court.

Background

2. Mrs. Whelan was born on the 22nd January, 1962 and was 51 years of age at the date of the accident. She is a sales assistant and lives in Nurney, County Kildare. It is relevant to note that at the time of the accident, Mrs. Whelan's husband had recently been diagnosed with a terminal illness. In addition to being her husband's primary carer until his death in 2018, Mrs. Whelan continued to work.

3. Of central importance to the case is the fact that the aisle where Mrs. Whelan fell was covered by a CCTV camera which recorded Mrs. Whelan's fall and other relevant events both before and after that happened. It is also relevant to note that the CCTV footage does not take the format of a continuous recording in the way of a film or television broadcast. Rather it comprises a series of still photographs, or snapshots, taken at one second intervals. The plaintiff's engineer, Mr. Paul Romeril, gave undisputed evidence that the still images in each frame cover an exposure of less than one tenth of a second so that, in effect, 90% of what occurs during the relevant one second interval is not recorded.

4. The video footage shows Mrs. Whelan's fall as occurring at 12:41:57. At the time of the accident, Mrs. Whelan did not have a trolley or a basket but only her handbag on her elbow. She was holding her mobile phone in one hand and a cake she intended to buy in the other. As a result of the fall, the contents of her handbag were strewn over the floor and her mobile phone disintegrated so that parts of that were also scattered around. The plaintiff was wearing what are described as wedge shoes, noted in the Dunnes Accident Report Form as *"*Flat shoes*"* and both of these came off Mrs. Whelan's feet in the fall.

5. The relevance of this is that it became the basis for a suggestion by Dunnes that the plaintiff's shoes were ill-fitting and that the cause of her fall was that she tripped over her shoes or feet and did not, in fact, slip at all. Because of the limitations of the CCTV as explained, the footage does not clearly show the mechanism of Mrs. Whelan's fall but rather one second, she is walking and the next she is on her knees having fallen.

6. Within a minute or so of the accident, the store manager, Mr. Alan McGarry, arrived on the scene and rendered assistance to the plaintiff. After a short interval, he was joined by a security operative, Mr. Przemyslaw Turczak. Mr. McGarry is seen on his hands and knees, endeavouring to retrieve the contents of Mrs. Whelan's handbag and the parts of her phone.

7. Until shortly before the commencement of the trial, the narrative advanced on behalf of the plaintiff as to how the accident occurred was that the floor was slippery as a result of being highly polished and having what was described as a mirror-like finish. Consistently throughout the plaintiff's narrative account was that she had slipped on this surface. Her evidence was that when Mr. McGarry and Mr. Turczak came on the scene, Mr. McGarry slid his foot from side to side on the area where she fell, performing a sort of "shuffle test" and said to Mr. Turczak "Oh my god, it's like a mirror, it's like glass, you can see your face through it." and that he would have to talk with the cleaners first thing in the morning. Both Mr. McGarry and Mr. Turczak denied that this conversation ever took place. At no time did Mrs. Whelan say that she had observed a spillage of liquid, or anything else, on the floor and she agreed that there was no evidence of any liquid on her shoes or clothing after the fall.

The CCTV

8. The CCTV was shown extensively to the trial judge and was commented on by each of the witnesses and in particular, the respective sides' engineers, Mr. Romeril for the plaintiff and Mr. Kevin Roche for the defendant. The footage itself was made available to

this Court also. The following events and timings are of relevance to the issues and all relate to the camera covering aisle six:

- 12:16:13 A gentleman, described as a shelf stacker, moves a stock trolley containing products to an area in aisle 6 (the aisle where the accident occurred) and proceeds to stack the shelves around. It emerged from the evidence that this gentleman was not a Dunnes Stores employee but rather an employee of a franchisee or supplier whose products were sold by Dunnes. The area where the trolley is located in this still was subsequently described by Mr. Romeril in his evidence as area A.
- 12:34:24 A Dunnes cleaner, subsequently identified as Mr. Dean Shanahan, is shown sweeping the floor. As he passes the area where the shelf stacker's trolley is, he does not sweep the right side of the aisle, which is the side on which the plaintiff falls.
- 12:37:24 The shelf stacker begins to move his trolley towards another area, subsequently designated by Mr. Romeril as area B, being the area where the plaintiff falls.
- 12:37:30 The shelf stacker stops his trolley in area B. He walks around the cage looking apparently downwards. While there was some dispute as to what exactly he was looking at, he appears to be looking at either the cage or the ground or possibly both. He does not carry out any shelf stacking operation at area B.
- 12:37:46 The shelf stacker leaves the area with his cage.
- 12:41:56 Mrs. Whelan is seen walking down the aisle towards the camera.
- 12:41:57 Mrs. Whelan is seen on her knees on the floor having fallen. Over the next number of minutes, Mr. McGarry and Mr. Turczak arrive at the scene. There is no footage showing Mr. McGarry moving his foot across area B doing the "shuffle

test" described by the plaintiff, although it appears to be common case that this could have occurred without necessarily being picked up on the CCTV. Various other events occur including Mr. McGarry getting a chair for the plaintiff and getting down on all fours to search for Mrs. Whelan's items. Mr. McGarry's evidence also was that he was down on all fours for the dual purpose of both getting Mrs. Whelan's things and examining the condition of the floor. Mr. McGarry remained adamant throughout and "100% certain" that there was nothing on the floor in the nature of a spillage, liquid or anything else which could have caused the plaintiff's fall. He said that he examined the floor at least five times. He denied that he had done any shuffle test or that he had had the conversation with Mr. Turczak about the mirror-like floor. Mr. Turczak gave evidence to like effect.

- 12:47:08 Mr. Shanahan, the cleaner, approaches the scene with his sweeping brush sweeping the aisle, apparently on a routine circuit.
- 12:47:13 Mr. McGarry speaks to Mr. Shanahan. Mr. McGarry is seen taking the brush from Mr. Shanahan and dispatching him off. Mr. McGarry's evidence was that he sent Mr. Shanahan to get a roll of blue absorbent cleaning tissue.
- 12:52:06 Mr. Shanahan returns to the locus with what appears to be a blue roll of paper.
- 12:52:34 Mr. Shanahan is seen down on his hands and knees cleaning the floor with the tissue at area A for 25 seconds.
- 12:53:10 Mr. Shanahan moves to area B where he again engages in cleaning with the tissue for some 14 seconds.
- 12:53:25 Mr. Shanahan leaves.

The Plaintiff's Pleaded Case

9. The proceedings originally commenced in the Circuit Court on foot of a personal injury summons issued on the 23rd December, 2015. In it, the plaintiff pleaded that she was caused to slip and fall on a slippery floor at the defendant's supermarket. The particulars of negligence included a plea that the defendant caused or allowed a slippery substance to remain within an area where patrons were walking. There was also a complaint about a failure to have an adequate cleaning system in place and a plea that the plaintiff would rely on the doctrine of *res ipsa loquitur*.

10. The defendant raised a notice for particulars asking, *inter alia*, at item 7 what allegedly caused the plaintiff to slip/fall. The plaintiff's answer was that the floor was slippy at the time of the accident.

11. The defendant delivered its defence on the 1st June, 2016 requiring proof of various matters including that the plaintiff fell by virtue of the fact that the floor had a deleterious substance present as alleged. The particulars of contributory negligence claimed that the plaintiff had failed to notice the presence of the alleged deleterious matter on the floor. The particulars of contributory negligence did not include any allegation that the plaintiff tripped over her shoes or feet.

12. The plaintiff's consulting engineer, Mr. Romeril, inspected the locus of the accident on the 3rd May, 2017 jointly with the defendant's engineer, Mr. Roche. In his report, Mr. Romeril gives details of the incident as recounted to him by the plaintiff who said that her right foot suddenly slipped forward causing her to fall back somewhat and then she threw herself forward and fell heavily onto her knees with a large bang. Mrs. Whelan told Mr. Romeril that she noticed that the floor was very polished and recalled Mr. McGarry doing a shuffle test and telling his colleague that there was something wrong and they needed to

speak to the cleaners. Mrs. Whelan informed Mr. Romeril that she didn't see any spillage and felt that the problem was the way the floor had been cleaned.

13. On the 30th October, 2018, the defendant's solicitors raised a notice for further and better particulars containing one item, namely that the plaintiff had declined to adequately respond to the previous query in relation to what caused her to slip/fall. Full and detailed particulars were sought. The plaintiff's solicitors replied on the 30th November, 2018 stating:

> "… [T]he Plaintiff instructs that her right foot suddenly slipped forward causing her to fall back somewhat and when she reacted to the manoeuvre she fell forward heavily on to her knees. The Plaintiff instructs that the locus of the accident was treacherously slippery and after the accident the Plaintiff noticed that the tiles seemed to be like a polished mirror."

14. Mr. Roche's report is dated the 4th May, 2017 but was presumably not seen by Mr. Romeril until shortly before the trial as a result of an exchange of expert reports pursuant to S.I. 391. In a section dealing with events post-incident, Mr. Roche records the fact that a member of staff wiped the floor surface with tissue paper in the general vicinity of the locus at 12:52:50. Mr. Romeril's evidence in the High Court was to the effect that until he saw Mr. Roche's report, he was unaware that any cleaning of the locus had occurred shortly after the plaintiff's accident.

15. Mr. Romeril conceded that this was on the CCTV footage to be seen but he did not examine the footage subsequent to the plaintiff's accident. He had no reason to do so as he was not informed by Mr. Roche at the joint engineering inspection that in fact post-accident cleaning of the locus had occurred shortly thereafter. There was no criticism of Mr. Roche in this regard because he was equally unaware of the subsequent cleaning at the time of the

joint engineering inspection and only noted it on a later viewing of the CCTV. This new piece of information led Mr. Romeril to reassess the video footage and prepare a second report on the 24th September, 2020, a few days before the commencement of the trial on the 28th September 2020. As a result of revisiting the footage, he concluded that the floor in aisle 6 was contaminated in two small areas, probably by a clear, oil based product.

16. On receipt of Mr. Romeril's second report, Mr. Roche provided an addendum report consisting mainly of a commentary on Mr. Romeril's second report.

The Evidence before the High Court

17. The plaintiff gave evidence of the relevant events as already described. It was put to her in cross-examination that the "shuffle test" had not been undertaken by Mr. McGarry and no conversation of the kind alleged by the plaintiff had taken place between him and Mr. Turczak. The plaintiff remained adamant that her recollection was correct. Her evidence concerning the mechanism of the accident was (Transcript, Day 1 at page 23):

> "… [A]s I was walking down the aisle, I slipped, I went backwards, I went forwards, my knees went bang, my two knees hit the ground and then my hands."

18. Under cross-examination, she agreed that until shortly before the trial, her case had been that the floor was over-polished and "like glass". She agreed with this proposition and also that she did not see anything on the floor, nor were her shoes or clothes contaminated by anything on the floor. She did however say that it may have been the case that the floor was slippy as a result of a clear liquid that could not be seen. A suggestion was made to the plaintiff in cross-examination that her footwear may have been ill-fitting and in some way responsible for the accident, but she firmly denied this or that she tripped over herself.

19. Mr. Romeril gave evidence following the plaintiff and dealt with the shelf stacker's trolley at areas A and B and noted that at area B, the shelf stacker appeared to be examining the floor around the trolley. Mr. Romeril, however, conceded that the Court was in just as good a position as he was to evaluate what was to be seen on the video.

20. He had no criticism of the floor itself which would, in the normal way, have excellent slip resistance. However, it would become treacherous if contaminated by an oily substance. He said (Transcript, Day 1, p. 144) that the plaintiff had described a slip and fall and he found it very hard to believe that she would have slipped on the floor because she was wearing wedge soled shoes. This, in his opinion, indicated that there was some form of contamination on the floor and that was why he took an interest in the shelf stacker.

21. Mr. Romeril described the actions of Mr. Shanahan, when he returned with the blue roll some 11 minutes after the accident, as being on his knees and vigorously wiping the floor. He did so for 25 seconds at area A and 14 seconds at area B. Mr. Romeril also observed that he wondered how Mr. Shanahan knew where to go to carry out this exercise. When asked what he thought Mr. Shanahan was addressing in these areas, Mr. Romeril said (Transcript, Day 1 at p. 149) that, in his view, the cleaner was addressing a small spillage of clear oil or something like that. He went on to add that if it was a small area, it would be possible for lots of people to walk across it without actually putting their heel on the point of the spillage.

22. In cross-examination, it was put to Mr. Romeril that there was no evidence of a spillage to be seen on the CCTV footage and Mr. Romeril responded that it would not be possible to see it on the CCTV. On Day 3 at p. 39, Mr. Romeril expressed the view that the evidence was that the floor was very slippery, that someone got down on their hands and knees and rubbed the floor where the incident happened and that there was no reason why

one would do that unless there was something on it. During the course of Mr. Romeril's cross-examination, it was put to him by counsel for Dunnes that the evidence would be that the cleaner, Mr. Shanahan, was told by Mr. McGarry to go back to the locus in order to make sure that there was nothing there, in case Mr. McGarry himself had missed something. Mr. Shanahan's actions in this respect were described as being a "belt and braces" approach.

23. It is relevant to observe at this juncture that the S.I. 391 disclosure schedule served by Dunnes included Mr. Shanahan as a witness as to fact. S.I. 391 of 1998, enacted pursuant to s. 45 of the Courts and Courts Officers Act, 1995, requires, *inter alia*, that the parties in an action shall exchange the names and addresses of all witnesses intended to be called to give evidence as to facts in the case. Accordingly, the listing of a witness as to fact in a party's S.I. 391 disclosure schedule is a confirmation by that party that it intends to call that witness to give evidence.

24. The current disclosure regime and its operation was recently considered by this court in *O'Flynn v HSE & Ors* [2022] IECA 83, where I said: -

> "23. The passage of the Courts and Courts Officers Act, 1995, and in particular s. 45, ushered in a new era in the conduct of personal injuries litigation. It empowered the Rules Committees of the Superior Courts and the Circuit Court to adopt rules requiring parties to personal injuries actions to disclose to each other the expert reports upon which they intended to rely at trial and to identify in advance any witness as to fact intended to be called. It also empowered the Rules Committees to impose sanctions for non-compliance with any such new requirement.
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> 24. This resulted in S.I. 391 of 1998 – Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements), 1998. This S.I. added new rules 45 to 51

into O. 39 of the RSC dealing with evidence. In *Naghten (A Minor) v Cool Running Events Limited* [2021] IECA 17, I described the new rules thus: -

> '32. S.I. 391 of 1998 was introduced to bring about a degree of transparency designed to avoid trial by ambush and as a consequence, in theory at least, to facilitate earlier resolution of personal injuries litigation. This was seen as particularly important in the context of expert evidence where there was a perceived absence of equality of arms or, to use a more current expression, a level playing field. The requirement for simultaneous exchange of expert evidence meant that plaintiffs no longer laboured under the disadvantage of having to call their expert evidence without knowing what the defendant's expert might say, or indeed if the defendant had an expert at all. This conferred litigious advantage on defendants which was rightly seen as unfair.'
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> 25. Even a cursory examination of the new rules disclosed a clear intention to avoid unfairness and ensure that parties met on equal terms. They were intended to address, amongst other things, the litigious advantage previously enjoyed by defendants described above. To borrow an analogy from another area of litigation, the intention was to ensure that both sides went into the trial with their cards face up on the table. Judicial consideration of the rules since their introduction have interpreted them, where necessary, to ensure the fairness and transparency they were designed to bring about."

25. While *O'Flynn* and the authorities referred to therein were primarily concerned with expert witnesses and their reports, it is relevant here to the extent that it explains the rationale implicit in S.I. 391 that parties are entitled to know, before they face into a trial, who will,

or relevantly here, who will not be giving evidence and, in the case of experts, what they will say. Therefore, it cannot be a legitimate application of the S.I. to list witnesses that a party knows, or has no reasonable grounds for believing otherwise, will not be available to give evidence. While it may well have been reasonable for Dunnes to list Mr. Shanahan as a witness at an early juncture when it may have hoped or anticipated that he would be available, that was certainly not the case when Dunnes served its final schedule on the day of the trial. Not only was this far from having its cards face up on the table, it was, in effect, keeping one up its sleeve.

26. The plaintiff's lawyers believed, as they were entitled to, that Mr. Shanahan would be giving evidence. It was repeatedly put in cross-examination to the plaintiff's witnesses that the defendant's evidence would be that Mr. Shanahan was told to do, or not to do, certain things centrally relevant to the accident. The tenor of the cross-examination, in addition to the disclosure schedule, appeared to give the impression that Mr. Shanahan would be giving evidence and no indication to the contrary was given at any stage during the course of the evidence of the plaintiff's witnesses. The trial judge was certainly given this impression as he himself said during the course of the trial and subsequently in his judgment.

27. Following the cross-examination of Mr. Romeril, he was re-examined by counsel for the plaintiff and the following exchange took place (Transcript, Day 3 at pp. 63 – 64):

> "208 Q. Yes. But I am just curious, apparently we are going to hear, I don't want to make too much comment, we are going to hear evidence from a man who says he went down on his knees and cleaned a clean floor, we'll deal with that hereafter.
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> [Counsel for Dunnes]: Sorry, he didn't clean it, he inspected it, there was nothing to clean.

> [Counsel for the plaintiff]: A man got down on the floor with an absorbent toilet tissue and applied himself to it vigorously because it was clean, that's the proposition the judge is going to hear but we'll deal with that hereafter…"

28. The question to Mr. Romeril posed by counsel for the plaintiff was clearly and unambiguously predicated on the assumption that Mr. Shanahan would be giving evidence. As events subsequently transpired, Dunnes was aware for some period of time before the trial that Mr. Shanahan could not be located. While Dunnes had a telephone number for Mr. Shanahan, it did not know his address or whereabouts and consequently, despite issuing a subpoena, could not serve it on him. This all transpired well in advance of the trial.

29. Despite the fact that counsel for the plaintiff was obviously labouring under the misconception that Mr. Shanahan would be giving evidence, rather than correcting the misconception, the comment by counsel for Dunnes appeared, if anything, to reinforce it. This, whilst perhaps inadvertent, is somewhat regrettable as both the Court and the plaintiff's legal team were left to assume that the activities of Mr. Shanahan seen on the video would be fully explained and accounted for by him.

30. The first witness to give evidence for Dunnes was Mr. McGarry. His evidence was that he had inspected the floor on five different occasions, including on his hands and knees and was 100% certain that there was nothing on it. He denied having any conversation with Mr. Turczak of the type described by the plaintiff. He was again, 100% sure that this did not happen. He then described his interaction with Mr. Shanahan and said that he had asked him to go and get some paper towels so that he could inspect the floor with him. This was just in case there was something that they would have to deal with.

31. Having inspected the floor with Mr. Shanahan, Mr. McGarry was asked what did he say to Mr. Shanahan and what did he instruct him to do. His answer was that he said to Mr.

Shanahan that there was nothing on the floor but he should go back and double/triple check again to make sure there was nothing on the floor because he had already checked it five times and there was nothing (Transcript, Day 3 at pp. 94 – 95). Mr. McGarry proceeded to say that Mr. Shanahan went back into the lane and came back out of the lane. At that point, Mr. McGarry was warned by counsel for Dunnes to be careful not to tell the Court what Dean had said because Dean was not present and they did not have him. This gave rise to an objection by counsel for the plaintiff and legal argument before the Court concerning Mr. McGarry's evidence. In the course of debate, the trial judge observed that he had understood that Mr. Shanahan would be giving evidence, as had counsel for the plaintiff.

32. Under cross-examination, Mr. McGarry said that he was unaware of why the plaintiff fell and he never asked her why she fell, suggesting that he was unaware as to whether she had slipped or tripped. He was asked why Mr. Shanahan was to be seen on the video concentrating on rubbing the floor at areas A and B. Mr. McGarry's response was "I don't know; you'll have to ask Dean that" (Transcript, Day 3 at p. 140), despite Mr. McGarry clearly being aware that Mr. Shanahan was not going to be present.

33. Mr. McGarry went on to say that he did not point out areas A and B to Mr. Shanahan and could not explain why he had rubbed these two specific areas. He again confirmed in response to questions from the judge that he had no explanation for why Mr. Shanahan cleaned the specific areas A and B. On re-examination, Mr. McGarry was asked by Dunnes' counsel what did he think Mr. Shanahan was doing down on the floor at areas A and B, and his response was "[h]e was checking the floor to see if there was anything on the floor." (Transcript, Day 3, p. 144). The judge expressed some scepticism at this answer.

34. Mr. McGarry's evidence was followed by that of Mr. Turczak. It should be noted that during Mr. McGarry's evidence, Mr. Turczak was not physically present in the courtroom

because of the then applicable Covid-19 restrictions. Mr. Turczak described the functions of his job and with regard to the plaintiff's accident, he said that he had been told that there was a slip and fall and accordingly, he looked to see if there was anything on the floor. In response to a question from the judge, he said that he had been told that it was a slip and fall by Mr. McGarry (Transcript, Day 3 at p. 151).

35. Mr. Turczak said that he took notes at the scene of the accident. It was put to Mr. Turczak that Mr. McGarry's evidence had been that at no stage did he ask the plaintiff what had happened to her, but Mr. Turczak again confirmed that Mr. McGarry had told him that the plaintiff had slipped and fallen. Mr. Turczak confirmed that he had filled in the accident report form after he had reviewed the CCTV. The entry made by Mr. Turczak on the form was that "Customer was walking in Aisle 6 when she slipped and fell". It was put to him by counsel for the plaintiff that she slipped and fell and he agreed with that. He confirmed this in his evidence several times. With regard to the plaintiff's footwear, Mr. Turczak recorded in the accident report form that she was wearing flat shoes. He said the relevance of this was in contrast with somebody wearing high heels where there was a bigger chance that they might fall.

36. Mr. Turczak also agreed with the proposition that Mr. Shanahan was engaged in his circuit cleaning duties when he was stopped by Mr. McGarry and he would only be stopped if there was good reason to do so. He said that he, Mr. Turczak, looked at the floor and there was nothing to be seen. Counsel then asked Mr. Turczak why, if there was nothing to be seen, was the cleaner being stopped in his circuit. He said it was maybe just to double check the floor, although he was uncertain. He confirmed that this was the case despite the fact that Mr. Turczak had checked it, Mr. McGarry had checked it multiple times and now they wanted Mr. Shanahan to check it to confirm that there was nothing there.

37. In a follow up question, he was then asked if Mr. Shanahan looked at the floor to confirm that there was nothing there, why was he not permitted to continue with his normal cleaning circuit but instead told to get a roll of tissue. Mr. Turczak insisted that he did not know what Mr. Shanahan was going to do when he came back. He confirmed that he had no idea why Mr. Shanahan did what he did. In reply to a further question from the judge (Transcript, Day 4 at p. 36) as to why, if there was absolutely no possible identifiable cause as to why the plaintiff slipped, he did not say this on the accident report form. Mr. Turczak replied that the form contained basic information of what had happened and is not really commenting and the customer was walking in aisle 6 and slipped and fell.

38. The last witness to give evidence was Mr. Roche, Dunnes' consulting engineer. He agreed that if there was an oil based product on the floor, it would be absolutely treacherous. In commenting on the fact that the plaintiff lost both her shoes in the fall, Mr. Roche said it was possible she fell over her own feet (Transcript, Day 4 at p. 52). He also noted that at least one person appeared to walk directly over the same spot before the plaintiff's accident and there may have been two further people also (Transcript, Day 4, p. 55).

Judgment of the High Court

39. Although the judgment was delivered *ex tempore*, it is lengthy and detailed. It was given some time after the conclusion of the hearing and represents an in-depth consideration of the issues in the case. Having recited the facts, the judge succinctly summarised the issue between the parties as follows (at p. 9): -

> "The Plaintiff's case is that she was caused to slip on some oily or similar contaminant whose likely source was the stock trolley.

> No such substance was to be found on the floor, according to the Defendant's witnesses. The Plaintiff did not slip. The probable cause of the Plaintiff's accident was that she tripped over her own feet or otherwise fell, probably as a consequence of ill-fitting footwear."

40. From his own observation of the CCTV and the evidence, the judge concluded that after the shelf stacker moved the trolley from the locus, perhaps two people walked unaided over the area where the plaintiff fell before her accident. All others either missed it or were "weight assisted" by which the judge meant that they had physical support, either from someone else or a trolley. The judge noted that the CCTV showed Mr. Shanahan reappearing at around 12:52 and engaged in cleaning in the two areas where the stock trolley had been stopped. He accepted Mr. Romeril's description of an apparent "vigorous" cleaning action. He said it was of significance that when Mr. Shanahan returned to the scene, he cleaned those areas referred to without prompting or indication from anyone.

41. With regard to the plaintiff's evidence, the judge said (at p. 14): -

> "I was impressed by the Plaintiff as someone who was striving to give an honest account of what had occurred. It stands to her credit that she did not seek to embellish her tale by identifying some subsequently discovered substance on her clothing or footwear."

42. With regard to Mr. McGarry getting down on his hands and knees, the judge was satisfied that he was focusing on looking for parts of the plaintiff's phone and was not convinced by the alternative narrative that he was performing a quasi-dual function, both of looking for the phone and carrying out an inspection of the floor. In considering Mr. McGarry's evidence, the judge said (at p. 15 – 16): -

> "A telling aspect of the evidence, in my view, was that Mr. McGarry said that he did not know what had caused the plaintiff to fall and he did not inform Mr. Turczak of the mechanism of the plaintiff's fall. This is contradicted by Mr. Turczak (who had not previously heard Mr. McGarry's evidence due to his absence from Court under the current Covid-19 restrictions). He told us that Mr. McGarry had informed him that the plaintiff had slipped and that he had duly recorded this fact in his notebook and on the accident report form.
>
> In my view it is unlikely that Mr. Turczak would have recorded the fact of a slip and fall accident in the manner in which he did, including on the accident report form, had he not been so informed by Mr. McGarry. This important contradiction of Mr. McGarry's evidence causes me to doubt the certainty with which Mr. McGarry offered his recollection of events. On more than one occasion he referred to his '100%' certainty as to what he saw and observed. It is, frankly, difficult to imagine such certainty given the passage of over seven years from this incident."

43. The judge then went on to deal with the manner in which the plaintiff's case had changed, something of which the defendant was strongly critical during the course of the trial, and again on this appeal. In that respect, the judge said (at pp. 16 – 18): -

> "The Plaintiff's case undoubtedly changed as it evolved. She alleged at first that her fall had been caused by an over-polished condition of the floor way. The case, as presented to the Court, relied on the probable presence of an oil-like substance. A change of this degree, quite understandably, could give rise to the suspicion of an opportunistic, tactical shift in the face of inconvenient evidence, or of spurious reliance upon an entirely coincidental and previously unidentified fact.

> Having considered the provenance of this change, I do not feel that such a suspicion is justified in this case. The Plaintiff's engineer, Mr. Romeril, having prepared his report based upon the Plaintiff's impression that an over-polished, shiny floor had led to a fall, learned subsequently, when considering the report of Mr. Walsh (*sic*), the Defendant's engineer, that the floor had been cleaned after the event. This, in turn, led Mr. Romeril to examine in greater detail aspects of the CCTV footage to observe, *inter alia*, the activities of Mr. Shanahan.
>
> I have already observed that I found the Plaintiff to be a genuine and honest historian in giving her account of what occurred before, during and in the years subsequent to her accident. Mr. Romeril's revised analysis of events, without doubt, gives her a more concrete case. It is worth observing that she did not seek to avail of this potential tactical enhancement of her case to embellish her recollection of her fall. This is something that would have lain with ease in the grasp of a mendacious litigant.
>
> Taking an overall view of the case, the evidence, and my observation and demeanour of the Plaintiff, I am not persuaded that I should draw any inference adverse to the Plaintiff insofar as any alteration in her case goes."

44. The judge then analysed the proposition advanced by the defendant that the presence of an oil-like substance on the floor was inconsistent with the fact that other shoppers had passed over it before the plaintiff for that mishap. The judge's view was that perhaps two people had placed their feet in the precise area where the plaintiff fell, although it was impossible to be certain about this. He considered that if the plaintiff's case was correct, the amount of the offending substance would have been very small indeed and probably not come to the attention of shoppers looking at the shelves rather than their feet. He felt it was quite possible that the small number of shoppers to whom he referred had been protected by

a near miss or simple good fortune whereas it was the plaintiff's bad luck that she was the first and only person to encounter the hazard.

45. With regard to the defendant's suggestion concerning ill-fitting shoes, the judge said (at p. 20): -

> "The Plaintiff's clear evidence was that the shoes that she was wearing were a perfect fit, were comfortable, flat shoes that she had purchased previously in Dunnes Stores. I accept her evidence in this regard that the mechanism which led to her fall was a slip."

46. The judge then turned to comment on the actions of two persons who did not give evidence, the unnamed shelf stacker and Mr. Shanahan. With regard to the shelf stacker, the judge's view of the CCTV suggested, to his eyes, that when the shelf stacker stopped at the second location, area B, where the plaintiff fell, he appeared to be examining something while looking downwards. The judge said that the plaintiff had invited him to infer that on the occasions on which the trolley was parked, small leakages of a deleterious substance took place onto the floor and he should regard the apparent "inspection" of the trolley as a response to "something being wrong" with it. He noted the defendant's objection that this was all complete speculation but he felt that in the overall context of all the evidence, some weight may be attached to it.

47. He described the involvement of Mr. Shanahan as "disquieting", an apparent reference to the fact that he did not give evidence. In commenting on Mr. Shanahan's actions, the judge said that notwithstanding the fact that neither Mr. McGarry nor his fellow employees were able to observe anything on the floor, Mr. Shanahan was despatched to get tissue and return to make sure there was nothing on the floor. The evidence disclosed that those instructions and discussions took place, not just as observed on the CCTV but out of

sight of the camera after the plaintiff, Mr. McGarry and Mr. Turczak had left the scene of the accident.

48. A further discussion took place near the information desk after which Mr. Shanahan returned to the scene and carried out the apparent cleaning operation at the two locations already identified. At p. 24 – 26, the judge made the following observation: -

> "As already stated, the narrative put forward on behalf of the Defence is bound in with the involvement of discussions with Mr. Shanahan, who appeared in the Defendant's schedule of witnesses. His name also appeared in a revised schedule of witnesses which was presented by the Defence to the Plaintiff's lawyers at the commencement of the trial. The Plaintiff's case was conducted and the Plaintiff and Mr. Romeril, her engineer, examined and cross-examined in the not unreasonable understanding that Mr. Shanahan would be giving evidence.
>
> I find it disquieting that it was only during the examination-in-chief of Mr. McGarry for the Defence, and after the closing of the Plaintiff's case, that we learned that Mr. Shanahan would not be giving evidence. This information emerged in a throwaway fashion during the examination-in-chief of Mr. McGarry by counsel for the Defendant. This came as a surprise to the Plaintiff's lawyers and, I might observe, to the Court. We were told that the Defence had been unable to locate Mr. Shanahan despite efforts to do so.
>
> Accepting that to be so, assuming that the original schedule of witnesses was furnished with a *bona fide* belief that Mr. Shanahan might have been available to give evidence, it is difficult to escape the conclusion that the schedule of witnesses furnished at or around the beginning of the trial was designed to give the impression

again that Mr. Shanahan was going to be a witness when the Defendants knew that he was not going to be available.

This gave rise to a situation where the Plaintiff's case proceeded in the reasonable expectation that Mr. Shanahan would explain, at some stage, why he appeared on the CCTV to expend considerable efforts in an apparent act of cleaning the floor way, upon which, according to the Defendant's evidence, there was nothing to be cleaned."

49. Thereafter, the judge came to the following conclusions concerning Mr. McGarry's evidence (at p. 26 – 27): -

"Mr. McGarry offered an explanation for [the foregoing]. Notwithstanding his five inspections to satisfy himself that there was nothing on the floor, what Mr. Shanahan did was with a view to making absolutely sure that there was nothing on the floor. I have little doubt that Mr. McGarry was fully aware throughout the course of his evidence that Mr. Shanahan was not going to be available to confirm Mr. McGarry's description of his conversations with and directions to Mr. Shanahan. He most certainly was aware of Mr. Shanahan's absence at that stage of his evidence when, under cross-examination, and when confronted with the apparent contradiction between Mr. Shanahan's actions, apparently in cleaning the floor, and Mr. McGarry's contention that there was nothing on the floor, Mr. McGarry's response was to the effect that 'you would have to ask Mr. Shanahan that'.

Mr. McGarry presented as a witness who was articulate. I have little doubt that he discharges his functions ably and diligently. However, I find less than convincing the degree of certainty with which he seemed to recall in detail happenings of some seven years previously. I appreciate that his use of the mantra '100% sure' may well

have been a figure of speech but, even so, it is a figure of speech that gave me the impression of advocacy rather than recollection. I do not accept his evidence that he was unaware of what caused the plaintiff to fall. I think it is more likely that he formed the view that she had slipped and he imparted this information to Mr. Turczak.

I found his attitude in response to cross-examination by Mr. Condon SC on behalf of the plaintiff on the issue of the apparent cleaning actions of Mr. Shanahan after the incident to be unhelpful. As a whole, I found Mr. McGarry's evidence to be unduly and unhelpfully partisan. Accordingly, I approach it with some caution.

As regards the details of his reported interaction and conversations with Mr. Shanahan, I am afraid that I cannot place reliance upon them."

50. The judge referred to *Mullen v Quinnsworth Ltd (No. 2)* [1990] 1 IR 59 as authority for the proposition that once the plaintiff established that she had slipped on a contaminant, the matter became *res ipsa loquitur*, thereby shifting the burden of proof to the defendant to establish an appropriate cleaning system. The judge said that the defendant did not seek to address this but confined the case to alleging that there was no contaminant.

51. The judge then gave his conclusions as to liability. He said (at p. 30): -

"I am satisfied that there was a small amount of a slippery oil-like substance on the floor, and that the likely source of this was the stock trolley. This was of sufficient amount not only to cause the accident but also to require the vigorous cleaning action of Mr. Shanahan to remove the residue some twenty minutes after her fall. I accept Mr. Romeril's evidence that even a small amount of such a substance could render

this floor hazardous. I should stress that the particular floor covering was otherwise perfectly appropriate and fit for purpose in the absence of such a contaminant."

52. With regard to Mr. McGarry, contrary to his evidence, the judge was of the view that he carried out a cursory examination of the floor while standing and was not persuaded that the act of getting down on his hands and knees for about five seconds was done for any purpose other than looking for bits of the plaintiff's phone.

53. The judge said that he accepted the plaintiff's recollection that a discussion did take place between Mr. McGarry and Mr. Turczak concerning the condition of the floor, thus rejecting their evidence on this issue. That led him to the following conclusion (at p. 33): -

"It is probable that Mr. McGarry, over and above any involvement of the cleaning staff the next morning, came to the view that immediate action was required. In my view, this is the most likely explanation as to why Dean Shanahan was stopped in his tracks carrying out his brushing duties, relieved of his brush/mop and sent off to acquire a roll of tissue paper.

For the reasons above stated, I feel it unsafe to rely upon Mr. McGarry's account of his conversations with Mr. Shanahan. What is clear is that Mr. Shanahan ultimately returns to the sites corresponding to where the stock trolley has been parked. One of those was the area where the Plaintiff fell. It is clear that Mr. Shanahan proceeded to clean those areas in a vigorous and scrubbing action. I am persuaded, on the balance of probabilities, that his actions were prompted by the fact that these areas still contained traces of contaminant that needed to be cleaned for the purposes of safety."

54. He also commented that there was no explanation as to why the cleaning log, while it recorded other spillages, was devoid of any reference to the plaintiff's accident. This, the judge said, was not explained. Given the circumstances of the plaintiff's fall, no issue of contributory negligence arose and accordingly, the judge found that she was entitled to succeed fully on liability.

The Appeal

55. I think it is fair to say that the primary thrust of Dunnes' appeal was that there was no evidence that there had, at any time, been a contaminant on the floor which caused the plaintiff's accident and the judge's findings otherwise were based on speculation and conjecture.

56. The grounds of appeal complained that the judge failed to give proper weight to the evidence of Mr. McGarry and Mr. Turczak concerning the absence of contaminant on the floors or the fact that the plaintiff herself stated that she did not see any. There is also a complaint that the judge ought not have permitted the plaintiff to make a new case, contrary to that that was pleaded. It is said that the judge erred in finding that a contaminant leaked from the stock trolley and that there was limited footfall in the area where the plaintiff slipped. The judge is also criticised for not finding the evidence of the plaintiff's shoes coming off to be significant and drawing adverse inferences from the absence of evidence from Mr. Shanahan or the shelf stacker. The finding that there was no adequate cleaning system was also in error and finally, the damages were excessive.

57. In its written submissions, Dunnes argued that the inferences drawn by the trial judge from the evidence were not justified and as a matter of law, this court is in as good a position as the High Court to draw inferences from that evidence. Dunnes further submits that the plaintiff failed to plead that there was a deleterious substance on the ground and it was called

upon to meet a case that had not been pleaded or made. It was said that Dunnes was prejudiced as a result of the trial judge permitting the plaintiff to proceed in this way. Finally, Dunnes contended that the only reasonable inference open on the evidence was that there was no spillage on the ground.

58. In oral submissions before this court, the defendant's approach to the appeal changed to a significant extent to focus on criticisms of the manner in which the High Court conducted the trial.

59. Counsel went so far as to suggest that a reading of the Transcript showed that the trial judge had not kept an open mind throughout the trial in relation to what happened. Counsel purported to give instances of this and said, for example, in the context of the engineering evidence, that the judge had "got down from the bench" and entered into "the engineering pit". He described the judge as wanting "to cavil with Mr. Roche", the defendant's engineer. Further, with regard to Mr. Roche, counsel said in relation to the judge's approach to his evidence that (Transcript, p. 26-27): -

> "It just doesn't suit the trial judge's purposes and that is why he is having difficulty with it. That is a problem I keep coming back to where the trial judge unfortunately gets down from what I say the place he ought to have stayed back from the evidence and then to assess it to try and comment on the evidence where it in effect didn't appear to suit the hypothesis from the plaintiff's point of view."

60. At this latter point, the court questioned counsel as to whether it was being alleged that the trial judge was biased, pointing to the fact that this was not apparent from the notice of appeal. Counsel said he was not making this suggestion. Despite that, counsel then went on to make yet further complaints about the trial judge intervening inappropriately and

interfering with his cross-examination while at the same time adding, “I don’t want to say he was biased.” (Transcript, p. 28)

The Liability Issue

61. I wish to comment first on the latter submission concerning the judge’s approach to the trial, made for the first time in oral submissions to this court. This was a specific and targeted attack on the judge’s impartiality. It was not an off the cuff, or spur of the moment, comment but a topic to which counsel repeatedly returned and was clearly considered in advance. The complaint about the judge is not one that found its way into the defendant’s notice of appeal or written submissions, as I have said. Nor is it one that can be disavowed by disclaiming that the defendant is alleging bias. That is precisely what is alleged.

62. The suggestion that a judge may not express a critical view of evidence as it is being given is untenable, and indeed goes to the essence of the judicial function. Even if the judge expressed scepticism towards some of the defendant’s evidence, he explained why and was well within his rights to do so. It must be remembered that he was being asked to accept a proposition by the defendant which, on its face, appeared entirely improbable, if not indeed absurd, namely, that a cleaner was asked to, and did in fact, clean up something which never existed. The judge is then criticised for an apparent unwillingness to accept that proposition.

63. Having carefully read the transcript, I am satisfied that the judge behaved entirely properly throughout and the criticism of his impartiality is quite unwarranted and, it has to be said, very regrettable. It is perhaps consistent with that approach that in the course of the trial, Mr. Romeril’s impartiality was also impugned in cross-examination with the suggestion that he was biased against Dunnes.

64. I turn next to the contention that the judge permitted the plaintiff to run a case that has never been pleaded or made and this operated to the prejudice of Dunnes.

65. Reliance in that regard was placed on recent decisions of this Court, including *Morgan v Electricity Supply Board* [2021] IECA 29 in which Collins J. noted the need for clarity and specificity in pleadings, particularly in the context of personal injuries actions, now given statutory recognition in s. 13(1)(a) of the Civil Liability and Courts Act, 2004.

66. I referred to this judgment in *McGeoghan v Kelly & Ors.* [2021] IECA 123 where 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."

67. The failure by a plaintiff to plead their case properly again arose for consideration in the judgment of this court in *Nemeth v Topaz Energy Group Limited* [2021] IECA 252. There, the plaintiff sued her employer as a result of an injury she allegedly sustained to one of her knees as a result of prolonged squatting. Her case was pleaded explicitly on that basis, and her engineer's report was similarly predicated on the same assumption. However, on the morning of the trial, the plaintiff, her legal team and engineer viewed CCTV footage of the accident for the first time and discovered that in fact the plaintiff was not squatting at all, her injury being described as classical of squatting, but in fact she was kneeling on the affected leg.

68. In the opening of the case, her counsel criticised the defendants for failing to provide her with a stool or a kneeling cushion and other matters which had never been pleaded, nor even referred to in her engineer's report. Despite that, she succeeded in the High Court but the defendant's appeal was allowed, primarily on the basis that the findings of the trial judge concerning the foreseeability of the plaintiff's injury were unsupported by any credible evidence.

69. The case here is quite different. As I have already pointed out, the pleadings in this case specifically alleged that there was a slippery substance on the floor of the aisle where the plaintiff fell and that the defendants had no adequate cleaning system. Her replies to particulars again explicitly claimed that she fell by virtue of the fact that the floor had a deleterious substance present on it. Her solicitors confirmed in response to further queries from the defendant's solicitors that the locus was treacherously slippery after which the plaintiff noticed the tiles seemed to be like a polished mirror. She gave a similar account to Mr. Romeril, which formed the basis for his initial report.

70. However, through no fault of anybody, new evidence, or at least evidence of which Mr. Romeril was unaware, came to light shortly before the trial and Mr. Romeril provided a second report arising from this new evidence. This was provided in the normal way, by way of exchange, to the defendant's solicitors. This did not prompt any response from the defendant to the effect that it was taken by surprise by this new allegation, or that it required an adjournment to investigate and consider this new case, or obtain further evidence to deal with it. On the contrary, the defendant simply elected to proceed with the case. It seems to me that it could not properly be said that the defendant was being asked to meet an entirely new case. The plaintiff's case always was that she slipped and that the cause was a treacherously slippery floor.

71. The only difference now was that the plaintiff was saying that, rather than the floor being treacherously slippery as a result of being over-polished, it was in that condition because of some spillage. The defendant, in its submissions, contends that it was prejudiced in meeting the plaintiff's case at trial by this sudden shift but does not in any way explain what the prejudice is or how it arises. For example, at no time did the defendant suggest that had they been on notice of this "new" case in sufficient time, it would have been in a position to adduce further evidence as to its system of cleaning. Even if such prejudice had been demonstrated, the remedy was, as I have said, to apply for an adjournment and if necessary, costs against the plaintiff, but that was not done.

72. In my judgment, the trial judge's assessment of this change in the plaintiff's case was entirely correct. A late change of account in a case such as this will often give rise to a significant undermining of the plaintiff's case, not because it embarrasses the defendant, but it tends to suggest that the plaintiff, at best, has a faulty recollection and at worst, is deliberately lying. The judge confronted this concern head on, noting that such a change in the plaintiff's case could give rise to a suspicion of an opportunistic, tactical shift.

73. He noted that although Mr. Romeril's revised analysis of events gave the plaintiff a more concrete case, she did not change her evidence in any way to suit that case where it might have been open to a dishonest plaintiff to do so, again emphasising that he found her to be a genuine and honest historian in giving her account. I am accordingly satisfied that, to the extent that the plaintiff's case did change in a material way shortly before the commencement of the trial, the judge analysed and decided this issue correctly.

74. At its core, the defendant's appeal is premised on the assertion that the trial judge's conclusions were based on no more than speculation and conjecture rather than evidence. The defendant says that no evidence was tendered by the plaintiff which established that

there was any contaminant on the floor. Indeed, the defendant goes further and says that the evidence positively established that fact, being the evidence of Mr. McGarry, Mr. Turczak and the plaintiff herself.

75. Dealing first with Mr. McGarry, it is abundantly clear from the judgment that the judge found him to be an unreliable witness and rejected his evidence in key respects. He gave clear and cogent reasons for arriving at that conclusion which, it seems to me, is not one with which this court can interfere, being one of the essential functions of a trial judge.

76. The judge found Mr. Turczak to be, what he described as, a less assertive witness than Mr. McGarry. Mr. Turczak accepted that the passage of time had affected his recollection of events. The judge considered that Mr. Turczak was primarily concerned with attending to the plaintiff and documenting the events in his notebook, as part of his duties as a security man involved filling out the Accident Report Form for his employer. While the judge accepted that Mr. Turczak did perhaps look at the floor and did not observe anything, he was equally satisfied that his attention was directed principally elsewhere and that any substance that was on the floor would not have been immediately apparent to him. Here again, this was an assessment of a witness that was clearly reasonably open to the trial judge.

77. With regard to the suggestion that as the plaintiff's evidence also established that there was nothing on the floor, I think that is to mischaracterise that evidence. The plaintiff certainly agreed that she did not see anything on the floor other than noting it to be highly polished or mirror-like. However, she equally asserted under cross-examination that she didn't see anything on the floor because she wasn't looking at the floor. She said it was possible that there could have been a clear liquid on the floor which she did not see.

78. In light of the foregoing, it cannot be said by the defendant that the evidence before the trial judge was only consistent with there being nothing on the floor that could have

caused the plaintiff to slip. To some extent, it appears that the defendant's case rests on the basis that the trial judge was not entitled to infer that there was a slippery substance on the floor in the absence of direct evidence of that fact. That argument is misconceived. Here again, the judge was perfectly entitled to infer the existence of such a substance from the evidence as a whole, provided that the inferences drawn were ones that were reasonably open on that evidence.

79. Insofar as the inferences drawn by the judge were based on findings of fact made by him, it is I think useful to identify what those findings of fact were and they appear to me to include: -

(a) The plaintiff slipped on the floor and did not trip over her shoes or feet as the defendant sought to allege. Indeed, such a suggestion was not even pleaded by the defendant.

(b) In the absence of a contaminant, the floor was perfectly safe and enjoyed a high slip resistance. However, in the presence of an oil-like substance, it would become treacherously slippery. This was a finding about which there was no dispute.

(c) Although he rejected Mr. McGarry's evidence generally, he specifically rejected four pieces of evidence given by Mr. McGarry:

(i) that Mr. McGarry had no conversation with Mr. Turczak concerning the condition of the floor as the plaintiff testified;

(ii) that he had a conversation with Mr. Shanahan of the kind he suggested;

(iii) that he never told Mr. Turczak that the plaintiff had slipped, because he never asked her what happened; and

(iv) that he had carried out multiple detailed inspections of the floor, including on his hands and knees, which showed there was nothing present.

(d) The conversation alleged by the plaintiff with Mr. McGarry concerning the condition of the floor did in fact occur;

(e) The CCTV evidence showed Mr. Shanahan vigorously cleaning the floor in both places where the stock trolley had been located, including where the plaintiff fell; and

(f) That a small number of people passed over that precise area.

80. Based on those findings of fact, the judge appears to have drawn inferences which included the following:

(a) The plaintiff would not have slipped absent an oil-like substance on the floor;

(b) The behaviour of the shelf stacker was consistent with there being a problem with the stock trolley, which was probably a leak onto the floor;

(c) The plaintiff's conversation with Mr. McGarry showed that there was a difficulty with the floor which required the intervention of cleaners;

(d) Mr. Shanahan would not have cleaned the floor as he did unless there was something there to clean;

(e) The vigorous cleaning by Mr. Shanahan of the floor in the precise locations where the stock trolley had been parked, without any explanation from the defendant as to why he did so, could only be consistent with:

(i) him being directed there by Mr. McGarry or somebody else; or

(ii) Mr. Shanahan having determined from his own observation that there was contaminant on the floor that required to be cleaned.

81. It appears to me that these inferences were all reasonably open to the trial judge on the evidence, as he found it, and thus the contention that there was no basis upon which he was entitled to determine that there was a contaminant on the floor is quite misconceived. As the defendant correctly submits, this court is in as good a position as the court of trial to draw inferences from the facts as found by the trial judge and for my part, I would draw precisely the same inferences as those drawn by the High Court.

82. One of the defendant's grounds of appeal is that the judge erred in attaching significance to the failure of the defendant to call either the shelf stacker who was using the stock trolley or Mr. Shanahan. It is not apparent to me that the trial judge drew any inference adverse to the defendant in this regard. It is undoubtedly true, however, that he was critical of the defendant's tactics regarding Mr. Shanahan. He concluded, and I agree, that the defendant intentionally gave the misleading impression to both the court and the plaintiff's lawyers that Mr. Shanahan would be called to give evidence. This is manifest from the S.I. 391 schedule served at the commencement of the trial.

83. It would appear that the defendant perceived that revealing the non-availability of Mr. Shanahan would expose a potential weakness in their case which they chose to conceal for tactical reasons until they could no longer avoid doing so. I have already pointed out that the language of s. 45 and S.I. 391 indicates that the listing of a witness on a party's schedule is an indication of an intention to call that witness. That, however, is not to be equated with an obligation to call the witness and a party must of course remain free to decide at trial what witnesses it will or will not call. However, to indicate an intention to call a witness that the party concerned knows cannot be called seems to me to be improper, contrary to the statutory provisions to which I have referred and an abuse of process. The trial judge was perfectly entitled to criticise this behaviour by Dunnes but did no more than that.

84. A further ground of appeal is the defendant's contention that the judge ought not have found that there was no adequate cleaning system in place given that there was no complaint about the cleaning system or criticism of it by the plaintiff's witnesses. That of course is to ignore the express plea in the plaintiff's personal injury summons that the defendant failed to have an adequate cleaning system in place. There was in any event evidence, to which the judge referred, on the CCTV which showed that Mr. Shanahan passed by the spot where the plaintiff fell before her accident but only cleaned on the opposite side. It does seem to me that this complaint rings somewhat hollow in circumstances where the sole and only case made by the defendant at all times was that there was nothing on the floor.

85. The defendant elected not to call any evidence as to its cleaning system despite the fact that it was aware, certainly from the time it received Mr. Romeril's second report, that there was going to be an allegation that there was deleterious material on the floor. Having made that decision, the defendant cannot now be heard to complain that there was no criticism of the cleaning system. The defendant was at all times well aware, and indeed it was common case, that where the plaintiff established the presence of a contaminant which caused her to slip, the onus shifts to them to establish the presence of an adequate cleaning system – see *Mullen v. Quinnsworth*. They elected not to do so.

86. For these reasons therefore, I am satisfied that the trial judge's conclusion on the issue of liability was perfectly sound and cannot be interfered with.

Quantum

87. Mrs. Whelan suffered soft tissue injuries to both her knees as a result of the fall. Her evidence, which the trial judge accepted, was that she was symptom-free in relation to her knees prior to the accident. Scans of her knees taken subsequently demonstrated

degenerative changes in the knee, likely to have pre-dated the accident but was asymptomatic.

88. The plaintiff began to experience pain and clicking of her knee joints made worse by standing for prolonged periods or going upstairs. These symptoms increased with the passage of time. The plaintiff did not attend a qualified doctor until some 20 months post the accident and she was strongly challenged about this in cross-examination, the suggestion being that she only developed symptoms shortly prior to her attendance with her general practitioner in February 2015 which were thus unlikely to be related to the accident.

89. It will be recalled that shortly prior to the accident, the plaintiff's husband was diagnosed with a terminal illness, one of the effects of which was that his personality changed and he became very challenging, which Mrs. Whelan found very difficult and stressful to cope with. She said that her preoccupation with and devotion to her husband's care prevented her from focusing on her own complaints, although she did in fact attend a bone setter in 2014 which gave her some relief. She continued to work part-time as best she could as a shop assistant despite her difficulties with prolonged standing.

90. The trial judge was satisfied that her complaints were genuine and that prior to the fall she had lived a full and active life, free of symptoms in her knees.

91. She came under the care of Mr. John Rice, Consultant Orthopaedic Surgeon, in 2015 and he took the view, having regard to the plaintiff's young age of 51 when she had the accident, that potential knee replacement surgery should not be considered at that stage, although it might ultimately become necessary. However, the plaintiff's symptoms, despite conservative treatment, continued to worsen to the extent that she had to have a full left knee replacement in June 2020 at the age of 58, which the judge noted would not normally have been contemplated until she was around 70 years of age. A further effect of this early knee

replacement was the fact that the requirement for a further revision replacement during the plaintiff's lifetime became much more likely.

92. The judge referred to the evidence of the defendant's medical expert, Mr. James O'Flanagan, Consultant Orthopaedic Surgeon, who did not support any nexus between the plaintiff's original injury and subsequent history. However, the judge noted that Mr. O'Flanagan laid emphasis on the delay between the accident and the onset of symptoms. The judge noted that Mr. O'Flanagan had not been made aware of the plaintiff's husband's illness or the consequential domestic problems arising from it which he considered created a significant lacuna in the information available to Mr. O'Flanagan.

93. The judge considered that he preferred the evidence of Mr. Rice for this reason and also having regard to the fact that Mr. Rice was both a treating as well as a reporting doctor in the case. There is no appeal against any of these findings save in one respect only, namely that it is said that the judge failed to have regard to the evidence regarding the plaintiff's first attendance at a medical practitioner and her own evidence about that. That appears to me to be patently incorrect. The judge clearly did have regard to the interval between the accident and the plaintiff's GP attendance and dealt with it fully, as I have explained.

94. The judge accepted Mr. Rice's evidence that as a result of the aggravation of her pre-existing condition, the plaintiff's knee replacement surgery was brought forward by approximately 12 years and further that it is likely that she will have to undergo a revision within the next 10 years. There is no appeal against this finding of fact.

95. With regard to the plaintiff's right knee, the judge said that it was unclear what the future holds but he would assume for the purposes of the judgment that it would be dealt with surgically within the normally expected lifespan, although the plaintiff was entitled to be compensated for the aggravated symptoms of that knee.

96. On this basis, he assessed general damages to date in the sum of €45,000 and damages for the future at €35,000, being a total award for general damages of €80,000.

97. The appropriate principles to be applied in the assessment of damages for personal injuries have been discussed and repeated in a series of judgments of this court in recent years and I think there is little to be gained by reiterating those in detail yet again. They are, when distilled to their essence, that the award must be proportionate to the maximum that may be awarded at €500,000, it must be proportionate to awards given by the courts for comparable injuries, it must be fair to both parties and finally, if the Book of Quantum is relevant, the Court is obliged to have regard to it.

98. In *McKeown v Crosby* [2020] IECA 242, a judgment delivered about seven weeks before the commencement of the trial herein, this court, in commenting on the relevance of the Book of Quantum, said (at para. 31): -

> "It seems to me therefore that in cases where the Book of Quantum is clearly relevant, it would assist the court's considerations to hear submissions from the parties about how it should be applied, or perhaps whether it should be applied at all. Recent judgments of this court, such as *Nolan v Wirenski*, have drawn attention to the fact that it is important for trial judges to explain how particular figures for damages are arrived at, since otherwise the appellate court is left in the dark about the trial judge's approach and whether it ought to be regarded as correct or not. The review process on appeal would be greatly assisted by reference to the categorisation and severity of the injury provided for in the Book of Quantum, assuming that to be feasible. If on the other hand the trial judge considers that the Book has no role to play in the particular circumstances of the case, it would be very helpful for the appellate court to know why that is so."

99. It is therefore perhaps a matter of some surprise that in this case, neither party made any submissions to the High Court concerning the application, or non-application, of the Book of Quantum. Indeed, it seems to me that the trial judge may well have had *McKeown* in mind when, in the course of his judgment, he said: -

> "At the conclusion of the evidence I invited counsel to make oral submissions. My primary intention was that counsel might refresh me with an up-to-date statement of the law, including a recent decision of the Court of Appeal. I received oral submissions which were almost exclusively addressed to the facts of the case. Mr. Fox SC for the plaintiff did refer to *Mullen v Quinnsworth* [1990] IR 59, but no other authority was identified to me as either relevant or at all by either party. No book was opened, not even a photocopy was proffered."

100. In the light of that, I find surprising the complaint identified at para. 81 of the defendant's written submissions that the trial judge erred in his assessment of the award of damages because, *inter alia*, he failed to consider the Book of Quantum. Even more surprising is the fact that, during the course of this appeal, and despite an invitation from the court, counsel for Dunnes declined to make any submissions on the Book of Quantum, suggesting it was something the court could look at itself. The defendant's written submissions similarly offer this court no assistance whatever about how or whether this court should consider the Book of Quantum, despite complaining that the High Court should have done so. I find this approach, to say the least, unsatisfactory, particularly in circumstances where knee injuries are explicitly catered for in the Book of Quantum.

101. Section 5D of the Book deals with knee injuries and separates them into soft tissue injuries, dislocations and fractures of the patella. The first category, soft tissue injuries, is the one that is relevant in this case. It, in turn, is divided into four sub-categories of minor,

moderate, moderately severe and severe and permanent conditions. However, the section dealing with soft tissue injury appears to be confined to knee sprains which relates to damage to ligaments including stretching and rupture. To that extent, it does not appear to me to present a precise analogue of the plaintiff's injury here, where no direct ligament injury was identified but rather an activation of a previously quiescent condition, arthritis, ultimately resulting in knee replacement.

102. The severe and permanent condition category of soft tissue knee injury refers to severe sprains caused by complete tearing or rupture of a ligament resulting in severe pain, loss of movement, widespread swelling and bruising and the inability to bear weight. While that level of immediate severity of injury does not arise in the present case, it is perhaps significant that, in relation to the latter category, the Book notes that these injuries will have required extensive treatment and surgery and include where a knee replacement has been carried out. The range of damages provided for here is €65,700 to €81,600.

103. In the instant case, Mrs. Whelan was not injured to the level of severity just described, certainly at the initial stages. However, the fact that her requirement for a knee replacement was brought forward by some 12 years is a very significant matter in a comparatively young person such as the plaintiff. That is particularly so in circumstances where the plaintiff has had to undergo the knee replacement during the course of her working life, with consequent knock-on effects to her occupation, whereas in the normal way, such surgery might be anticipated during retirement. A further very significant factor, and one not expressly contemplated by the Book, is the likelihood that the plaintiff will have to have further revision surgery to her knee which might otherwise have been avoided in the absence of the accident.

104. Taking all these factors into account, I am not satisfied that the defendant has demonstrated any error by the judge in his assessment of general damages, less still an error of sufficient seriousness as to amount to an error of law, that being the relevant test – *per* Fennelly J. in *Rossiter v Dún Laoghaire Rathdown County Council* [2011] 3 IR 578.

Order

105. For the reasons I have explained therefore, I would dismiss this appeal.

106. It would appear to follow that Mrs. Whelan should be entitled to her costs of the appeal but if Dunnes wishes to contend for a different order, it will have liberty to apply to the Court of Appeal Office for a short supplemental hearing on the issue of costs within 14 days of the date of this judgment. If such hearing is requested and results in the order proposed, Dunnes may be additionally liable for the costs of such hearing. In default of application, an order in the suggested terms will be made.

107. As this judgment is delivered electronically, Whelan and Donnelly JJ. have indicated their agreement with it.