THE COURT OF APPEAL

UNAPPROVED

Record Number: 2021/204
High Court Record Number: 2018/548P
Neutral Citation Number: [2022] IECA 265

Edwards J.

Noonan J.

Collins J.

BETWEEN/

SUSAN O'MAHONEY

PLAINTIFF

-AND-

TIPPERARY COUNTY COUNCIL,
JOSEPH CORBETT AND KEVIN KIELY

DEFENDANTS

Record Number: 2021/203
High Court Record Number: 2018/1850P

BETWEEN/

SARAH KENNEDY

PLAINTIFF

-AND-

TIPPERARY COUNTY COUNCIL,
JOSEPH CORBETT AND KEVIN KIELY

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 18th day of November, 2022

1. These two appeals are brought in two personal injury actions that arose in virtually identical circumstances, albeit on different dates. Both claims were dismissed by the High Court and it is against that dismissal that the appellants (the plaintiffs or respectively Ms. O'Mahoney and Ms. Kennedy) appeal.

The Facts

2. On the 30th March, 2016, Ms. O'Mahoney, who was born on the 26th July, 1967, was present in a children's playground at Newcastle, County Tipperary in the course of minding a toddler who was two years and ten months old. She got onto a swing, known as a basket or bird's nest swing, with the toddler beside her. After a short period, she sought to get off the swing and in so doing, her right ankle became trapped underneath the swing resulting in her suffering an injury consisting of a fracture of the ankle. Ms. Kennedy was involved in an almost identical accident on the 13th July, 2016. She was born on the 10th October, 1994 and at the date of the accident, was looking after her 16 month old cousin. She also got on the swing with her cousin and in attempting to get off it, her right ankle also became trapped beneath the swing and she too suffered a fractured ankle.

3. Because of the close similarity of the two accidents and the fact that the same legal team and same engineer acted on behalf of both plaintiffs, the High Court heard the trials together and delivered a single judgment. The bird's nest swing was, as its name implies, a round swing with a rigid perimeter and suspended from this was netting or mesh into which the user could sit. Unlike a more conventional and standard type of swing, the bird's nest swing appears to be designed to move relatively gently in all directions. The netting or mesh naturally falls to a level lower than the surrounding rigid frame. The plaintiffs' case is a

relatively simple one. They say that the swing is set too low and represents a trap to users, and further breaches the relevant safety standards for this type of swing. Had that standard been complied with, the plaintiffs say the swing would have been some distance higher, and this would have entirely avoided the accidents.

Evidence in the High Court

4. It was common case between the parties that the relevant safety standards for playground equipment such as the swing involved in these accidents were BS EN 1176 and BS EN 1177. These standards specify that the minimum ground clearance at rest for a bird's nest swing is 350mm. Ground clearance is defined in the standard as being the distance between the lowest part of the seat and the ground.

5. In the normal way, each side relied on the evidence of a consulting engineer who prepared forensic reports in relation to each accident which were exchanged pursuant to SI 391. The engineer on behalf of the plaintiffs was Mr. John Hayes, and on behalf of the defendants/respondents (hereinafter for convenience referred to as "the Council"), Mr. Paul Twomey. During the course of Mr. Hayes' direct evidence, the following exchange took place:

> *"Q. Now, you measured the height of the basket from the floor to the ground, Mr. Hayes, and photograph 3, I suppose, may assist you with regard to where you took your measurements from?*
>
> *A. Yes, judge. I took my measurement – the British standard is very clear. What the British standard says, judge, is that the ground clearance is the distance between the lowest point of the seat and the ground …*
>
> *A. And I measured that and I found that claims (sic) to be 187mm …*

A. And I know from experience that the ground clearance, the British standard, requires minimum ground clearance. And the British standard states that the minimum ground clearance should be 350."

6. Towards the end of Mr. Hayes' direct evidence, the following exchange took place:

"Q. Is there any particular reason why an older person, be it an older teenager or a young adult or, indeed, a more senior adult; is there any reason why it would be unsafe to sit on this thing as a piece of furniture as such, given the right clearance? The clearance, in other words, as what you have as a minimum of 350mm; is there any – ?

A. Yes.

Q. – like contraindication to any adult person sitting on it?

A. Well, there is. Obviously if somebody like me sat on it with my size 15 foot –

Q. Yes?

A. That I am obviously at a significant risk –

Q. Alright?

A. – because I'm a big person.

Q. Yes?

A. But the standards are designed to take account of that range of ages and the range of physical attributes of those ages …

I'm obviously at a significant …

Q. And what about the question of minding a toddler, for example, or a person, two – to three year old type, if the person has to be minded on the basket as such; do you follow me?

A. Well, I cannot say whether the standards took into account that a minder might sit on the seat. But I think, you know, common sense will tell us that a child or an adult might sit on the seat to protect a two year old.

Q. Yes?

A. And in fairness to the British Standards, I have no doubt that they would have taken that into account when setting the ground clearance –

Q. Right?

A. – at 350."

7. It was put to Mr. Hayes in cross-examination that Mr. Twomey took his ground clearance measurement from the top of the blue circular frame from which the seat netting is suspended and found it to exceed 350mm. Mr. Hayes strongly disagreed with this approach, saying that this was the wrong point from which to take the measurement and stressing repeatedly that the standard could not be clearer. Counsel for the defendants put the following question to Mr. Hayes:

"Q. So, I think we can agree that on an engineering basis, when it comes to deviation of the applicable standards, and there is agreement, judge, about the applicable standards, and that Mr. Hayes has outlined, the real difference when it comes to that standard is from what point you take the measurements. You've measured it from

the bottom of the net and the defendant's engineers have measured it from the top or the bottom of the blue frame?

A. The purpose of the British Standards, judge, is to eliminate the risk of entrapment, that's between the ground and whatever part of the piece of equipment is going to cause the entrapment. I cannot see how you can interpret the wording in that way when it's clear from the standard what one has to measure."

8. Mr. Hayes' cross-examination concluded with the following discussion:

"Q. Well, just to summarise, I suppose, the defence position on the engineering evidence in relation to whether or not there has been a technical discrepancy between the clearance as recommended by the standards and the equipment as measured really depends on where you measure from and it will be the defence case that the only sensible point from which to measure is from the blue circular frame; you disagree with that, because of the wording of the standards?

A. The standard couldn't be clearer.

Q. And irrespective of compliance with those standards, if we put that aside for a moment, I suggest to you that the ground clearance that you have identified from the bottom of the netting had nothing whatsoever to do with this accident and that the only relevant consideration has to be the clearance from the frame to the ground?

A. Well, the first part of the question is a matter for the court.

Q. Alright?

A. The second part of the question, I repeat, I don't share that view. It's very simple, the British standard could not be clearer. The ground clearance is measured from

the lowest part of the equipment to the ground. If the bottom line, in my view, is if the British standard requirement had been met, this lady could not have caught her leg. The accident couldn't have happened."

9. It is relevant to note that, although it was put to the plaintiff, at no time during the course of the cross-examination of Mr. Hayes was it suggested that it was inappropriate for an adult to sit on the swing with a toddler, or that it was designed for use by children only, or that the concluding part of Mr. Hayes' direct evidence referenced above was incorrect.

10. Mr. Twomey's evidence was, as in his report, to the effect that the 350mm ground clearance of the swing was to be measured not, as Mr. Hayes thought, from its lowest part but rather from the rigid frame, which was the main point of difference between the engineers. The following question was put to Mr. Twomey in cross-examination:

"Q. – But I have to suggest to you that irrespective of what you think is appropriate, what you think is appropriate does not comply with the plain language of the British standard; would you go that far with me?

A. No, because this playground was assessed when it was installed."

11. As will subsequently become apparent, there is some significance in that answer of Mr. Twomey insofar as he appears to place reliance in reaching his conclusions on the fact that an earlier assessment of the playground was undertaken when it was installed which he took to be confirmation that the height of the swing in question did in fact comply with the relevant standards.

12. It is relevant to note also in relation to Mr. Twomey's evidence that at no time did he suggest that the swing was not designed for adults. While he did say at the conclusion of his

direct evidence that he did not think it was appropriate for an adult to use the swing, he gave no reasons for this conclusion.

13. Mr. Twomey referred to, and took photographs of, a notice that was posted in the playground which included the following:

> *"This playground is for the use of all children 12 years and under …*
>
> *Children must be accompanied and supervised by a responsible adult.*
>
> *Adults must be accompanied by a child…"*

14. Mr. Twomey provided two reports which were put in evidence. He does not suggest in either of these reports that the swing was not designed for adults. In the second report, he refers to the sign, saying:

> *"There is clear signage that this playground and this equipment should not be used by an adult but for the purposes of my report I did take dimensions with an adult."*

15. In his first report, Mr. Twomey referred to the fact that many inspections had been carried out of the playground. In particular, under the heading *"Installation"*, Mr. Twomey in his first report says:

> *"ROSPA (Royal Society for the Prevention of Accidents) carried out a post-installation inspection on the 27th August 2009. I am in receipt of that report.*
>
> *There are no issues highlighted by the inspector with regard to the frame.*
>
> *Specifically, the report states that the dimensions are correct and that it complies with the standards EN 1176 and EN 1177."*

In his concluding comments, Mr. Twomey again refers to this:

"The playground is certified by ROSPA and is inspected regularly by a ROSPA approved engineer with Tipperary County Council."

16. Mr. Twomey's second report followed a further inspection of the playground and reiterates his previous conclusions. Again, in this report he says:

*"**ROSPA***

My previous report refers. This playframe was inspected and installed by ROSPA approved contractors and was inspected post installation and found to comply with BS EN 1176 and 1177."

17. In his concluding comments, he says:

"The playground was inspected by ROSPA and approved by them and it has continued to be used for many years without any adjustments."

18. Although an attempt was made in the course of Mr. Hayes' cross-examination by counsel for the defendants to put to him the findings of the ROSPA report referred to by Mr. Twomey, objection was taken to it on the basis that no witness from ROSPA was going to give evidence and accordingly it was not pursued further.

Judgment of the High Court

19. Although the judgment is lengthy and detailed, insofar as liability is concerned, I think it fair to say that the trial judge was unimpressed by the fact of adults bringing claims for using an apparatus in a playground, which he held was designed for children under 12. At the outset, the judge said that his judgment proposed to consider the *"chilling effect"* of claims such as these on the provision of play or adventure facilities for children. Setting out

the background, the judge said that *"the swing in question is designed for children"*. He also referred to the first line of the notice mentioned above which states:

> *"This playground is for use of all children 12 years and under"*

The judge said that the plaintiff's engineer provided evidence that this swing was designed for children from age 1 up to adolescence.

20. This is a clear finding of fact by the trial judge which is repeated throughout his judgment. The judge appears to have extrapolated from his finding that the swing was designed solely for children rather than for children and adults accompanying such children. At para. 37 of the judgment, the judge said:

> *"Similarly, in this case, 'reasonable adults of normal intelligence' know, or should know, not to use swings designed for children."*

He subsequently clarified this (at para. 38), as being designed for use by children under 12. He reiterated this finding at para. 44 in considering the contention of the plaintiffs that the swing was too low:

> *"44. Yet the purpose of these changes sought by the plaintiffs to a child's swing, to the detriment of the children who use it, would be to prevent it becoming an entrapment risk for persons such as the plaintiffs, i.e. adults, for whom the swing was not designed and where no evidence had been provided of any entrapment risk to children using the swing."*

21. In relation to the dispute between the two sides' engineers as to where was the appropriate point on the swing from which to measure the ground clearance, the judge noted

that the British Standard specified that the clearances to be measured *"between the lowest part of the seat or platform and the playing surface when the swing is at rest."*

22. In considering which evidence to prefer, the judge referred to the evidence of Mr. Twomey in the following terms:

> *"27. However, the defendant's engineer points out that this is not a traditional swing and that the most appropriate place to measure the clearance is from the hard rim, since this is the point from where one gets on or off. He supports this interpretation by referring to the revisions to the BS made in 2017 (EN 1176 – 2:2017). While this revised BS did not apply at the relevant time of the accidents, he relies on this change to support his interpretation of how the original BS should be applied to non-traditional swings, such as the bird's nest swing. This revised BS provides that the clearance (which have increased to 400mm in the revised BS) is to be taken from the 'underside of the rigid part of the seat in its most onerous position' ".*

23. The judge went on to prefer the evidence of the defendant's engineer for the following reasons:

> *"30. It seems to this court that there is logic in the interpretation proposed by the defendant's engineer, such that the appropriate point from which to measure the clearance is from the bottom of the rigid part of the swing, for the simple reason that this is the point at which a child exits the swing. If the clearance is measured from this point, then the swing is in compliance with the BS standard. That is the end of the personal injuries claim, since there was no breach of duty/negligence on the part of the Local Authority, as it complied with the BS. However, even if this court is wrong in that regard, for the reasons set out below, it finds that, in any case, the Local Authority has not breached any duty, statutory or otherwise, to the plaintiffs."*

24. The judge then identified a range of reasons why the claims should be dismissed even if the local authority had not complied with the relevant standard. Without setting these out exhaustively, they included that common sense would suggest that an adult should not use a child's swing, a finding of negligence would have a negative social effect on children's playgrounds and a chilling effect against a provider of play activities. The judge considered what he thought to be other policy issues militating against a finding of liability in this case which included the necessity to protect the freedom of the individual and the necessity not to deny children the joy of playing. His conclusion on liability was as follows:

> *"70. This court has concluded that there was no breach of duty by the Local Authority as it did in fact comply with the relevant BS standard for the height of swings. However, even if this was not the case, it is not necessary for this court to determine whether in fact there was a deviation in relation to the swing, from the British standards applicable at the time. This is because there is a complete absence of causation between the alleged breach of duty (being the failure to raise the swing) and the occurrence of the accident. This is because the 'legal cause' of the accident was not the fact that there was an alleged shortfall in the clearance between the child's swing and the ground, making it unsafe for use by the plaintiffs, who are both adults. Rather, the legal cause of the accident was that two adults chose, on several occasions, to use equipment which was designed for children and which (as stated implicitly by the terms of the notice but also based on common sense), was not for use by adults."*

The Appeal

25. The original notice of appeal in essence complains that the trial judge was in error in concluding that the swing in question complied with the British standards and further that

the plaintiffs were prohibited from using it when accompanying a small child. However, subsequent to the service of the notice of appeal, a new development occurred. In February 2022, the plaintiffs brought a motion before this Court for leave to adduce new evidence on these appeals. The application was grounded on the affidavit of the plaintiff's solicitor, Thomas O'Mahoney. In his affidavit, Mr. O'Mahoney avers that after the conclusion of the trial in the High Court, Ms. O'Mahoney became aware that the Council may have had in its possession a relevant safety report in relation to the swing which had not been previously disclosed.

26. Arising from this information, Ms. O'Mahoney submitted a freedom of information request to the Council seeking a copy of any such report. In response, the Council provided Ms. O'Mahoney with a document entitled *"RPII Annual Playground Inspection Report"* dated the 24th June, 2020, one year prior to the hearing of the case in the High Court. This report emanated from an entity called Play Services Ireland ("PSI") and is in tabular format. It comprises an assessment of four pieces of apparatus in the Council's playground, the third of which is the basket swing the subject of these proceedings.

27. The table comprised in the report is presented as an assessment of, *inter alia*, the swing by reference to its compliance with BS 1176. In the column under *"Compliance With BSEN 1176 Y/N"* is entered the initial *"N"*. *"Y/N"* means yes or no and the entry *"N"* signifies that the PSI assessment concluded that the swing did not comply with BS 1176. In a further column in the table entitled *"Actions"*, signifying actions to be taken on foot of the findings of the report, the author states, *inter alia*, *"Raise basket by 300mm".*

28. In other words, the conclusion of the author of the PSI report was that in order for the basket swing to comply with BS 1176, it required to be raised by 300mm. A further column in the report is headed *"Item Priority"* and under this is entered the number *"2"*. The

footnotes to the report show that a designation of *"2"* means that the identified action is required within one month.

29. Under the heading of *"The Use of Swings by Carers"* Mr. O'Mahoney in his affidavit refers further to a document called the Yeats Playgrounds Brochure, which he exhibits, and which appears to suggest that swings of the type involved in this accident are designed to be used by adults and children to swing together, promoting social and interactive play and which *"allows a child to sit or lie with support from a family member or carer."* This document however was not the subject of the plaintiff's application for leave to adduce new evidence.

30. A replying affidavit was sworn by the Council's solicitor, Finbarr Tobin in which Mr. Tobin discloses the fact that PSI had actually provided three reports on the playground dated respectively 2018, 2019 and 2020, the last only of which was received by Ms. O'Mahoney pursuant to her FOI request. In his affidavit, Mr. Tobin confirms that neither he, his instructing insurers nor Mr. Twomey had any awareness of the existence of these reports prior to the hearing in the High Court. Mr. Tobin explains in his affidavit that arising from the issues raised by the plaintiff in the motion, he requested the Council to carry out its own internal enquiries and as a result, it emerged that the *"Corporate Services"* section of the Council which deals with claims of the kind arising here was unaware of the existence of these reports as they were provided to the *"Community and Economic Development"* section of the Council, an apparent case of the left hand not knowing what the right was doing.

31. By order of Costello J. of the 11th March, 2022, the court ordered that the three reports be adduced as evidence at the hearing of the appeals.

Discussion

32. There were two central features to the trial judge's decision on liability. The first was his conclusion that the swing complied with the BS. The second was that even if it did not comply, the cause of the accident was not such non-compliance but rather the decision of each adult plaintiff to sit on a swing designed solely for children under 12.

33. Taking first the proposition that the swing complied with the BS, that conclusion was arrived at by the trial judge preferring the evidence of the Council's engineer as to the correct "interpretation" of the BS. However, I cannot accept the proposition that the British Standard in question fell to be somehow construed as though it were in some sense ambiguous. As Mr. Hayes said repeatedly in the course of his evidence, it could not be clearer. The standard stipulates that ground clearance is the distance between the lowest part of the seat and the ground. There can be no ambiguity about this.

34. The fact that Mr. Twomey may have considered that a more appropriate place to carry out the measurement is from the hard rim of the swing is entirely immaterial. Further, his reliance on a subsequent 2017 BS as a justification for this approach seems to me to be entirely misplaced. The fact that the new BS substituted a different measurement to be taken from a different place, *i.e.* the *"underside of the rigid part of the seat in its most onerous position"* - (whatever that may mean) - cannot conceivably provide a justification for applying the same formula to the earlier standard which provides for something entirely different. In effect, Mr. Twomey's evidence was that the BS does not mean what it says. That was, with respect, not a credible position to adopt.

35. In considering the competing views of experts, it is incumbent on a trial judge to analyse the views of each expert and come to a reasoned conclusion by, inter alia, the application of logic and common sense – see *James Elliott Construction Limited v Irish*

Asphalt Limited [2011] IEHC 269 *per* Charleton J. at para 12, approved by the Supreme Court in *Donegal Investment Group plc v Danbywiske & Ors* [2017] IESC 14. That analysis by the trial judge should more readily facilitate review by an appellate court. Thus Clarke J. (as he then was) said in *Danbywiske*:

> *"5.5 However, as Charleton J. pointed out in Elliott, an important part in the assessment of any evidence is the application by the trial judge of logic and common sense to the testimony heard. That approach is particularly relevant in the context of expert evidence. Where experts differ the position adopted by the other side will be put to each of the expert in cross-examination. Their reasons for maintaining their view can be examined in some detail. The trial judge can, therefore, assess whether the reasons given by one expert or the other stand up better to scrutiny.*
>
> *5.6 While it is true, therefore, that the assessment of all evidence, whether expert or factual, requires both the application of logic and commons sense, on the one hand, and an assessment of the reliability or credibility of the witness gleaned from having been in the courtroom, on the other, it may be fair to say that it is likely that a decision based on expert evidence will be significantly more amenable to analysis on the basis of the logic of the positions adopted by the competing witnesses and the assessment of the trial judge of their evidence on that basis.*
>
> *5.7 Precisely because a decision to prefer the evidence of one expert over another is likely to be influenced, to a much greater extent than might be the case in respect of factual evidence, by the rationale put forward by the competing witnesses, there may be somewhat greater scope for an appellate court to assess whether the reasons given by a trial judge for preferring one expert over another can stand up to scrutiny. That being said it must remain the case that an appellate court should show*

significant deference to the views of a trial judge on the question of findings based on expert evidence because the trial judge will have had the opportunity to see the competing views challenged and scrutinised at the hearing."

36. It is of course fundamental to the assessment of expert evidence, as with any other evidence, that the trial judge must engage with the competing positions of the witnesses before coming to a reasoned conclusion as to why one expert's view is to be preferred over the other. It is not always necessary to provide an elaborate analysis, but it should at least be sufficient to enable the parties and an appellate court to understand the reasons why one expert's view was preferred over the other.

37. What appears to be absent from the analysis in this case is any meaningful assessment of the evidence of Mr. Hayes and, in particular, why it was viewed by the judge as being incorrect. Insofar as the judge believed there was logic in the approach of Mr. Twomey, that again appears to be no more than an acceptance that it might be a better idea to measure the ground clearance from a point different to that actually specified in the standard. Again, that entirely misses the point and, in my view, any proper analysis of the expert evidence in this case could not have concluded other than Mr. Twomey's evidence on this issue was simply not credible.

38. In the evidence highlighted above, the evidence of Mr. Twomey concerning compliance of the swing with the BS appears to have been influenced to some extent by the fact that he had sight of an installation report by ROSPA who appear, on Mr. Twomey's understanding of it, to have accepted that the swing did in fact comply with the standard. His answer in cross-examination above appears to confirm this. It of course remains to be seen whether his response, and indeed his views generally, would have been as he expressed them to be had his client, the Council, provided him with all the relevant documents,

including the later discovered reports, which would have informed his view. As I have already noted, Mr. Twomey appeared in both his reports and his oral evidence to place some emphasis on the fact that the unseen ROSPA report had concluded that the swing complied with the BS, which he considered lent support to his "interpretation" of the BS.

39. Most importantly however the newly adduced evidence on this appeal appears to me to be at a minimum, capable of having had a very significant, if not indeed decisive, effect on the judge's conclusions about compliance with the BS. Had this evidence been available, it seems to me that it would have provided very fertile ground for cross-examining Mr. Twomey with a view to significantly undermining the views he expressed as to the correct method of measuring the ground clearance of the swing and consequently, its compliance with the BS.

40. Accordingly, the conclusion arrived at by the trial judge that because the swing did in his view comply, "that is the end of the personal injuries claim" cannot be sustained. However, the judge went on to hold that even if he were wrong about that, the claim would still fail for the second reason he identified, namely that these adult plaintiffs should not have been using a swing exclusively designed for children under 12. That conclusion appears to me to have been entirely unsupported, not just by any credible evidence at the trial, but any evidence at all.

41. As I have endeavoured to show, no witness gave evidence to the effect that this swing was designed exclusively for young children. The nearest Mr. Twomey came was the statement in his report referred to above to the effect that there was clear signage that "this playground and this equipment should not be used by an adult". Insofar as that amounted to Mr. Twomey's interpretation of the meaning of the signage at the playground, it is to my mind plainly wrong. While the playground sign stated that the playground was for the use

of all children of 12 years and under, it also stated that all such children must be accompanied and supervised by a responsible adult. The Council accordingly expected and required all children in the playground to have an adult with them to supervise their play activities, which of course included going on the swing.

42. What the Council presumably sought to discourage and prevent was people over 12 years of age such as teenagers and adults using the playground on their own without being accompanied by a young child. That, while perfectly understandable, is entirely different from suggesting that an adult with a toddler in her care was prohibited by the notice from going on the swing with the toddler to protect the child. It appears to me quite wrong to suggest that this latter activity was something that was prohibited by the notice posted in the playground. Insofar therefore as Mr. Twomey's evidence suggested that the sign meant otherwise, it was patently incorrect.

43. There was no real dispute between the parties as to the applicable legal principles. It was conceded by the Council that ordinary common law principles of negligence were applicable as well as the Council's statutory duties pursuant to s. 4 of the Occupiers Liability Act, 1995. The plaintiffs were properly regarded as recreational users as defined by the statute and were owed a duty by the Council to maintain the playground in a safe condition. In *Ryan v Office of Public Works* [2015] IEHC 486, the High Court (Murphy J.) observed:

> *"Once installed however, a properly constructed playground must be maintained in a safe condition by the occupier. Injury resulting from a failure to do so can render the occupier liable under ordinary negligence principles, which apply pursuant to s. 4(4). Thus, if a play unit collapses, injuring a user because of erosion or missing bolts or other maintenance failure, the injured recreational user can sue for breach*

of the duty of care and does not have to establish recklessness on the part of the occupier."

Conclusion

44. Having regard to the foregoing, it seems to me that the judge's dismissal of the plaintiffs' claims was erroneous. While this Court was invited by the plaintiffs to substitute its own findings on the liability issue for those of the High Court, it seems to me that such a course of action is not open where the new evidence put before this Court was never the subject of any consideration by the High Court. In those circumstances, it appears to me that the only course open is for this Court to direct a retrial of both actions in the High Court.

45. Because the claims were dismissed, it was obviously unnecessary for the trial judge to assess damages. The trial judge did however embark *obiter* on an extensive analysis of what he considered to be the appropriate principles to be applied in the assessment of damages for personal injuries. The trial judge also purported to express views on the level of damages to which the plaintiffs would be entitled had their claims been successful. As I have said, all of these observations are clearly *obiter* and it is unnecessary for me to express any view on them other than to say that the proper approach to the assessment of damages for personal injuries has been the subject of many judgments of this Court in recent years. However, having regard to the views on damages clearly expressed by the trial judge, it seems to me desirable that the retrial of these claims should proceed before a different judge of the High Court.

46. I would therefore allow these appeals and direct accordingly.

Costs

47. With regard to costs, my provisional view is that as the appellants have been entirely successful, they should be entitled to their costs. It seems to me that even in the absence of the new evidence, the appeals would still have succeeded and that the plaintiffs are therefore entitled to their costs. In my view, they are so entitled for the additional reason that a retrial would in any event have been necessary by virtue of the failure of the Council to properly instruct its engineer with the three PSI reports which, although they post-dated the plaintiffs' accidents, would clearly have been highly material to his consideration of the relevant British standards. It was entirely misleading to furnish Mr. Twomey with a ROSPA report which appeared to support his conclusions and upon which he placed reliance, without also furnishing him with the full suite of subsequent reports that came to a different conclusion. For the same reason, I am satisfied that the plaintiffs are entitled to the costs of the motion to adduce new evidence.

48. If the Council wish to contend for a different costs order, it will have liberty to so inform the Court of Appeal Office within 14 days of the date of this judgment and a short supplemental hearing will be arranged. In default of application, the order proposed will be made.

49. As this judgment is delivered electronically, Edwards and Collins JJ. have authorised me to record their agreement with it.