THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED
Record Number: 2022 163
High Court Record Number: 2018/9183P

Noonan J. **Neutral Citation Number [2023] IECA 118**

Haughton J.

Allen J.

BETWEEN/

FIONA NANGLE

PLAINTIFF/RESPONDENT

-AND-

RYANAIR DESIGNATED ACTIVITY COMPANY

DEFENDANT/APPELLANT

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

1. In these personal injury proceedings, the plaintiff, a member of the cabin crew on one of the defendant's aircraft, claims to have slipped and fallen during a flight, thereby suffering an injury to her right arm. The High Court (Owens J.) found in her favour and awarded damages in the total amount of €94,071 comprising general damages of €70,000 and agreed special damages of €24,071. The defendant appeals the findings on both liability and quantum, and the plaintiff cross-appeals on both issues also.

Background

2. The accident happened on the 11th February, 2018 at around 9.30am, shortly after the aircraft on which the plaintiff was working departed Dublin for Warsaw. Earlier that morning, the same plane had flown to and from Birmingham, again with the plaintiff onboard as a member of the crew. The evidence established that it was a cold, breezy and dry day at Dublin Airport where in the early part of the morning, the temperature was around, or just above, freezing. At 04:35hrs, airport staff carried out a de-icing operation on the plane which took about 10 minutes to complete. The plane was then stationed at Stand 119R at Dublin Airport. Each numbered stand can accommodate two aircraft, one on the right and one on the left side. Another aircraft was parked on Stand 120L adjacent to the plaintiff's aircraft and that other plane was also de-iced at around 05:25hrs, again over about a 10-minute period.

3. The plaintiff arrived for work in the normal way in time for the aircraft's departure to Birmingham at about 6am. The plane in question was a Boeing 737-800 Series and the initial flight to Birmingham was full. The plane returned from Birmingham and again, the flight was full. When the plane returned to Dublin, it parked on Stand 120L where the earlier de-icing operation had taken place on another plane. The flight to Warsaw again had a full complement of passengers. The plane has a capacity of about 180 passengers who embarked and disembarked from the plane across the tarmac to the terminal building from both the front and rear of the plane on each flight.

4. The plaintiff was the senior steward in charge of the cabin and there were four cabin crew on each flight, two stationed at the front door and two at the rear door. The plaintiff and her colleague were located at the front of the plane and were required for take off to sit

on two rear facing "jump seats" just inside the front door of the aircraft. The plaintiff was seated beside the door and her colleague beside the aisle. Shortly after take off, the captain gave the signal to "release" the cabin crew from their seated position to attend to their duties while the plane was still climbing.

5. The plaintiff immediately got up to move towards the galley, past her colleague and the passengers in the front row. As she did so she moved from the mat located inside the door of the aircraft onto the vinyl floor surface beside the galley which at that point was about 9 inches wide. As she placed her right foot onto the vinyl surface, her evidence, which was not contradicted by any other witness – and indeed no other person on the flight gave evidence – was that her right foot slipped suddenly from under her and she fell to the ground, striking her right arm violently against the side of the galley and suffering a displaced spiral fracture of her right humerus in the process.

6. The plaintiff claimed that the cause of her slip and fall was the presence of de-icing fluid on the vinyl surface onto which she stepped. She agreed that there was nothing to be seen on the floor after her accident.

7. The evidence also established that in the two-month period prior to the plaintiff's accident, three other accidents occurred on aircraft operated by the defendant where cabin crew slipped and fell on de-icing fluid, suffering injury, on the 17th December, 2017, the 28th December, 2017 and the 9th January, 2018. Each of these accidents occurred in the aft gallery at the rear of the aircraft as distinct from the plaintiff's accident. The evidence also established that on the day following the plaintiff's accident, the 12th February, 2018, the defendant issued an advisory notice to all staff advising them to be vigilant for the presence of de-icing fluid tracked onto the plane by passengers and staff coming on board. A similar notice had been issued over the previous winter period which was seen by the plaintiff.

8. Evidence was given for both sides by expert witnesses. For the plaintiff, evidence was given by Mr. Pat Culleton who is a Chartered Physicist, Chartered Scientist and Chartered Engineer. For the defendant, evidence was given by Mr. Anthony Tennyson, a Chartered Engineer.

Hearing in the High Court

9. The plaintiff's evidence was that she slipped on de-icing fluid which was present on the vinyl floor surface. She conceded however that there was nothing to be seen on the floor, and in particular, that there was no spillage of water or anything else. She was insistent that it had to be de-icing fluid because there was no water and the only other thing that can get carried on board is de-icing fluid on the feet of passengers who have walked across the tarmac subsequent to the carrying out of de-icing operations. It was put to her that because of the mechanism of the fall, it was more likely that she had tripped but she was adamant that she slipped. No contradictory evidence was called and as noted previously, no other person present on the aircraft gave evidence. In effect, the plaintiff's evidence was that there was no other possible cause of her fall than the presence of de-icing fluid.

10. Mr. Culleton's evidence was that the de-icing fluid is composed of 75% water and 25% of a fluid called propylene glycol. He said that propylene glycol has a higher boiling point than water so it is less likely to evaporate than water. So when de-icing fluid is present on a surface, the water will evaporate, leaving behind a residue of propylene glycol. Mr. Culleton described this as leaving a thin greasy film on the surface. Mr. Culleton said that the documents discovered by the defendants included a risk assessment which did not address the risk of de-icing fluid being tracked onto an aircraft. He was asked in direct examination what steps should have been taken following the occurrence of the three falls

prior to that of the plaintiff. He said that the employer should have identified the risk and addressed it, but did not.

11. It was put to Mr. Culleton in cross-examination that the defendant's evidence would be that when the de-icing fluid dries out, it dries out to a powder. He responded that the manufacturer's information states that "the fluid dries out to a thin greasy film/fine white powder." He said further that his understanding was that the de-icing fluid could linger on a surface for "several hours". With regard to the presence of de-icing fluid on the floor of the aircraft, Mr. Culleton's view was that at the time of the plaintiff's fall, it was more likely that it was present as a result of the second boarding (the Warsaw flight) rather than the earlier flight, although it could have been from the latter.

12. In the course of cross-examining Mr. Culleton, it was put to him that the defendant's evidence would be that after a plane has been de-iced and moves off-stand, a vehicle from the Dublin Airport Authority comes immediately to clean the area and this occurs on each occasion when de-icing of planes takes place. This line of questioning was immediately objected to by counsel for the plaintiff on the basis that such a proposition had never been pleaded, nor did it feature anywhere in Mr. Tennyson's report which had been disclosed to the plaintiff.

13. Counsel submitted that this was the first time such a suggestion had been made and no documents had been discovered that disclosed the involvement of DAA in this alleged cleaning operation. Counsel submitted that had the plaintiff been on notice of this case, consideration might have been given to joining DAA as a co-defendant and/or seeking discovery from DAA of relevant documents. In reply, counsel for the defendants submitted that it was unnecessary to plead this because it had already been pleaded that all reasonable steps were taken by the defendant.

14. The judge indicated that he did not accept that submission and counsel for the defendant then indicated that he would have to apply to amend his defence. Counsel for the plaintiff in reply objected to any proposed amendment of the defence *inter alia*, on the grounds that it would be unfair to the plaintiff to permit an adjournment, presumably on the basis that an application to amend would necessitate the trial being adjourned, a motion to amend being brought and heard and if granted, a subsequent consideration by the plaintiff as to the necessity for the joinder of further parties or the seeking of further discovery. Notwithstanding that submission, it would appear that counsel for the defendant did not in fact seek such an adjournment.

15. The judge rose briefly to consider the matter and delivered his ruling, refusing to allow counsel to pursue the line of questioning indicated and directing that the trial should proceed. Following that ruling, counsel for the defendant reserved his position with regard to any appeal that might arise from the ruling.

16. The defence called a witness from the DAA, Mr. Leonard, who was involved with ramp cleaning operations following the de-icing of aircraft and he offered the view that the de-icing fluid would dry to a powder on the ramp within about an hour or so. Mr. Tennyson was asked the same question and he estimated a similar period of time without being precise about it. He disagreed with Mr. Culleton's view as to the duration of the de-icing fluid on a surface and expressed the opinion that if de-icing fluid had got onto the plane following a de-icing operation at 4.45am, it would have been long gone by 9am.

17. He also believed that any de-icing fluid from the operation that occurred on the adjoining stand about an hour later would also have been well-evaporated by the time of the plaintiff's accident. Mr. Tennyson agreed under cross-examination that de-icing fluid on a

vinyl floor is a hazard, and once an employer becomes aware of it, they had statutory obligations which included undertaking a risk assessment.

18. Mr. Tennyson agreed with this proposition and also agreed that no risk assessment had in fact been carried out. He also agreed that, notwithstanding the fact that three of the defendant's staff had been injured in accidents involving de-icing fluid, no step was taken by the defendant to ameliorate the problem.

Judgment of the High Court

19. The judge commenced his judgment with an analysis of s. 12(1) of the Civil Liability and Courts Act, 2004. This section refers to the requirement for specificity in pleadings introduced by the 2004 Act, to which I refer further below. In the context of these proceedings, the section was relevant to the judge's consideration of the defence delivered by the defendant and the attempt to introduce evidence of a cleaning system operated by DAA, in respect of which no notice had been given to the plaintiff.

20. The judge noted that it would have been a simple matter for the defendant to plead this in its defence and that parties to personal injury actions are no longer allowed to hold back the substance of their case. He also found it unsatisfactory that the plaintiff's engineer only received a copy of the defendant's engineer's report on the first day of the trial which in his view ran counter to the purposes of disclosure under the rules made pursuant to s. 45 of the Courts and Court Officers Act, 1995.

21. Turning to the facts of the case, the judge said that he reached a provisional conclusion at the end of the hearing that the likely cause of the plaintiff's injury was that a glycol-based fluid used to de-ice aircraft was tracked on footwear into the plane on which the plaintiff was working. He was still of that conclusion.

22. With regard to the conflicting views of the parties' respective experts concerning the duration of the presence of de-icing fluid in the cabin, the judge said (at para. 18):

> *"I am marginally more persuaded by the evidence of the plaintiff's engineer on the period over which de-icing fluid is likely to disintegrate to a point where it ceases to be a slipping hazard. The plaintiff's engineer relies on information supplied by the manufacturer of the product in a technical information sheet which sets out its dry-out behaviour."*

23. The judge went on to say that he accepted the plaintiff's evidence that she slipped and that her right foot went from under her on something slippery on the vinyl floor. He said there was no evidence of a tripping hazard and he was not persuaded that the plaintiff's evidence relating to the mechanism of her fall was inconsistent with the slip. He noted that the de-icing fluid dries to a thin greasy film and (at para. 26):

> *"Unless there was something slippery on the vinyl floor, there was no reason why the plaintiff should slip on it."*

24. He was of the view that Mr. Tennyson's evidence was heavily influenced by the evidence of the DAA employee, Mr. Leonard, regarding observing powder on the concrete apron after about an hour. He noted that Mr. Tennyson accepted that this related to the performance of the substance on a different surface to that of the interior of the aircraft and that his evidence was that it is not known how long a spillage of the substance will stay liquid, either on the ground or on the deck of the plane and there were too many variables to assess that. Having analysed the evidence of both experts, the judge said (at para. 40):

> *"My conclusion is that the technical opinion of the plaintiff's engineer relating to the capacity of this product to survive in a slippery residue is more likely to be*

correct. This relies on the manufacturer's technical information that the product dries to a thin greasy film. The defendant's engineer accepts that because of absorption, the rate at which degradation of the product due to temperature and airflow will take place will be different on different surfaces."

25. He noted the three previous accidents that had occurred as a result of slips on de-icing fluid which led to the advisory email advising that:

"Due to winter operations and de-icing passengers and crew may walk de-icing fluid into the cabin. Crew should remain vigilant to this at all times."

26. With regard to the DAA evidence of clean up on the apron after aircraft de-icing, excluded by the judge during the trial, he said the following (at para. 46):

"I have taken into account the evidence introduced by the defendant that Dublin Airport authorities engage in a clean up after de-icing of aircraft. On reflection, I have decided to treat this evidence as admissible."

27. Despite this however, the judge went on to say that there is a recognised risk that de-icing fluid will be tracked into aircraft on footwear and while it is more likely that this would happen through the rear passenger door, the evidence was sufficient to establish a real risk that persons entering via the front steps of the aircraft may introduce this material into the cabin. This was in his view the likely cause of the plaintiff's slip. In the light of these findings, the judge said (at para. 52):

"The result of my findings is that the plaintiff has established that the defendant failed to ensure, so far as is reasonably practicable, her safety at her place of work. The defendant failed to give due warning to cabin crew of the danger that de-icing

fluid tracked into the aircraft could cause a slipping hazard on the vinyl floor surfaces within the cabin."

28. He noted that the warning issued by the defendant in this regard had come on the day after the plaintiff was injured but she should have been told to keep an eye out for this. The judge said (at para. 54):

"If such a warning had been issued earlier, the plaintiff would have been reminded of this hazard. She would have checked for it as she was the cabin supervisor responsible for the front section of the aircraft. In my view such a warning would have been sufficient to discharge the duty of the defendant to ensure, so far as is reasonably practicable, the safety of the plaintiff in relation to this hazard."

29. The issuing of warnings in previous winters was not sufficient in the judge's view to establish that the plaintiff should have known about the hazard of de-icing fluid at the time of the accident and the defendant had an obligation to remind cabin crew of the seasonal potential hazard.

30. As all the medical evidence was agreed in the form of reports, the judge assessed the plaintiff's general damages in the amount of €70,000 which, together with agreed special damages of €14,790, resulted in a decree for €84,790.

The Appeal

31. The notice of appeal contains no fewer than 30 grounds of appeal, many of which are repetitive and unnecessary. These can be summarised as:

(1) The judge interjected excessively to the prejudice of the defendant.

(2) The judge was wrong to rule out the evidence about DAA cleaning up operations and the associated cross-examination.

(3) The judge was wrong to accept the evidence of the plaintiff's expert over that of the defendant.

(4) There was no evidence that there was de-icing fluid on the floor of the aircraft.

(5) The judge was wrong to conclude that the plaintiff needed to be reminded of the hazard from de-icing fluid.

(6) The quantum of general damages was excessive.

32. In her cross-appeal, the plaintiff essentially raises two issues, first that the quantum of general damages was inadequate and second, that the defendant's duty was incorrectly found to be limited to issuing a warning to staff of the risks of de-icing fluid being tracked onto aircraft. The plaintiff pleads that the judge erred in failing to determine that the defendant owed a duty to the plaintiff to take appropriate steps to address the hazard.

The presence of de-icing fluid

33. The defendant strongly challenged the plaintiff's assertion that she slipped. It was put to her in cross-examination that the mechanism of the accident was not consistent with a slip and that in fact it was far more probable that she tripped. This was despite the fact that the defendant did not plead that the plaintiff had tripped, nor was there evidence led by the defendant to contradict the plaintiff's account.

34. Mr. Culleton was cross-examined on the same basis and was of the view that it was possible for the plaintiff to have fallen in the manner described as a result of slipping. The judge found as a fact that the plaintiff slipped and did not trip, and there was more than ample evidence in my view to entitle the judge to reach that conclusion. It is a finding of fact

supported by credible evidence with which this court cannot interfere on well settled *Hay v O'Grady* principles.

35. One of the central planks of the defendant's appeal is that there was no evidence which established the presence of de-icing fluid on the floor of the aircraft. That is clearly not so. The plaintiff was adamant in her evidence that she slipped on de-icing fluid. Again, the plaintiff was strongly challenged on this evidence and it was put to her that she only came to this conclusion while in hospital subsequently. It was thus suggested by the defendant that the plaintiff merely assumed, without knowing, that she fell on de-icing fluid.

36. There is some validity in this point. After falling, the plaintiff was naturally concerned with her injury and not what caused it. Even had the plaintiff, or anyone else, examined the area immediately following the accident, it was common case that there would be nothing to be seen, given that de-icing fluid dries to a thin, greasy and transparent film. The only indication of its presence is that the floor becomes dangerously slippy.

37. Mr. Culleton's evidence was similarly criticised on the basis that he proceeded on the assumption of the presence of de-icing fluid rather than establishing that it was in fact there. However, contrary to Mr. Tennyson's views, Mr. Culleton gave evidence which clearly accounted for the possible presence of de-icing fluid at the time of the plaintiff's accident.

38. It seems to me that the defendant's real complaint in this regard is that its evidence was not preferred to that of the plaintiff. The judge found as a fact that there was de-icing fluid on the floor. This was a matter of inference. As the judge noted, there was no reason for the plaintiff to slip unless there was something slippery on the floor.

39. Insofar as judge drew an inference from the evidence that there was de-icing fluid present, I agree with the defendant that this court is in as good a position as the court of trial

to draw such inferences, albeit that it should be slow to do so. I can see no reason why the judge was not entitled to prefer Mr. Culleton's evidence over that of Mr. Tennyson regarding the drying out properties of de-icing fluid. He considered that Mr. Culleton's evidence corresponded with the information supplied by the manufacturer of the de-icing fluid which provided a perfectly reasonable and rational basis for accepting Mr. Culleton's evidence over that of Mr. Tennyson. Far from being mere speculation that such an accident could be caused by the presence of de-icing fluid, there was clear and undisputed evidence that this was a known hazard that had manifested itself by causing three different accidents on aircraft within a matter of weeks of the plaintiff's fall.

40. In *Whelan v Dunnes Stores* [2022] IECA 133, the plaintiff slipped and fell on a slippery floor at the defendant's supermarket but was unable to identify the presence of any substance on the floor that might have caused her fall. As here, the judge inferred the presence of such a substance which the defendant contended was an error in the absence of any direct evidence. In that case, the plaintiff agreed that she saw nothing on the floor and the defendant submitted on appeal that this should have been fatal to her case. Dismissing that argument, I said (at para. 78):

> *"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."*

This case is no different.

The Evidence of a clean up by DAA

41. The suggestion that the defendant intended to lead evidence of a clean up operation on the stand by DAA was made for the first time in the course of Mr. Culleton's cross-examination. This came as a bolt out of the blue to the plaintiff. It was evidently a surprise to Mr. Tennyson also, as nowhere is it mentioned in his report. Counsel for the plaintiff objected to this line of questioning of Mr. Culleton on the basis that the plaintiff was completely blindsided by the suggestion that evidence of this nature was to be given. It certainly did not feature in any meaningful way in the defendant's defence and the suggestion that it was somehow encompassed by the defendant's plea that it had taken all reasonable steps was rightly dismissed by the judge.

42. This prompted the judge to make the opening remarks in his judgment concerning s. 12 of the 2004 Act. That section requires a defence in a personal injuries action to specify *"the grounds upon which the defendant claims that he or she is not liable for any injuries suffered by the plaintiff."* Section 13 further requires that any pleadings served by a defendant should contain full particulars of each denial or traverse, and of each allegation, assertion or plea, comprising the defence. Section 14 requires the parties to verify their pleadings on affidavit. Corresponding obligations are placed on plaintiffs.

43. These provisions were considered in the judgment of this court in *Crean v Harty* [2020] IECA 364. Speaking for the court, Collins J. observed in relation to the 2004 Act (at para. 23):

> *"It is, of course, highly unusual for the Oireachtas to legislate for the form of pleadings in any area of litigation. That is generally left to the relevant rules committee. It seems wholly implausible that the Oireachtas intended simply to enshrine into primary legislation the existing principles of pleading under the rules,*

as developed in the jurisprudence. That impression is strongly confirmed by the relevant provisions of the 2004 Act. I agree with Hogan J. [in Armstrong v Moffatt [2013] 1 IR 417] that the Act makes very significant changes to the system of pleading in personal injury action. That the requirement for pleadings to be verified on affidavit is a very significant innovation. In addition, the provisions of sections 10 – 13 of the Act are clearly intended to ensure that parties (including defendants) plead with greater precision and particularity so that, in advance of trial, the actual issues between the parties will be clearly identified. Even if not a regime of 'maximum disclosure', the pleading regime introduced by the 2004 Act certainly imposes obligations of enhanced disclosure on personal injury litigants."

44. His views were reiterated in *Morgan v ESB* [2021] IECA 29. The relevant provisions of the 2004 Act, as the judgments interpreting them demonstrate, are designed to avoid precisely the situation that arose in this case, commonly referred to as trial by ambush. The attempted introduction of the evidence of a cleaning operation by DAA was nothing if not an ambush, and a significant injustice would have been visited upon the plaintiff had the judge permitted this evidence. As counsel for the plaintiff pointed out, it had the potential to entirely change the complexion of the case.

45. The defendant had not pleaded these matters, as it was obliged to do if they were to be introduced. The defendant had evidently given no instructions to its own engineer about the alleged cleaning operation and further, had made no discovery of any document related to it which might have alerted the plaintiff to what was coming. It was produced to Mr. Culleton like a rabbit out of a hat and he likewise was taken by surprise and had no opportunity to consider the matter in advance. Again, as counsel for the plaintiff submitted to the trial judge, had this information been known, the plaintiff might well have been

required to adopt an entirely different approach to the case by considering whether further discovery or non-party discovery might be required, against DAA in particular, and whether the latter's joinder as a defendant might also arise for consideration and so on.

46. However, before any of that arose for consideration, the first thing that had to happen was for the defendant to amend its defence. In that regard, it seems to me that a somewhat half-hearted application was made to the trial judge to amend, on the spot as it were. That of course would be entirely unsatisfactory and irregular as if an amendment was required, as it surely was, the proper course was to seek an adjournment to enable a motion to amend to be brought grounded on affidavit which would have to explain a number of things, including why the proposed new pleas had not been made originally. If an application for an adjournment had been made and granted, it would almost certainly have involved a costs order being made against the defendant, quite possibly for all of the costs of the aborted trial to that point.

47. No application to adjourn to enable an amendment application to be brought was made to the trial judge. When asked about this by the Court during the appeal, counsel for the defendant said that the judge had made his position plain that he was not going to permit the evidence to be given and it was pointless therefore seeking an adjournment as the court's view was already clear. In effect, counsel said there was no point in seeking an adjournment because he was not going to get it.

48. However, it is notable that none of the defendant's grounds of appeal are addressed towards any failure or refusal to allow an amendment of the defence or to adjourn the case so that this could be done. Instead, the bald complaint is made that the judge erred in ruling out the evidence. That complaint is wholly unmeritorious for the reasons I have explained.

Interjections by the Judge

49. This ground of appeal is predicated on the suggestion that the defendant was prejudiced in its defence of the proceedings by virtue of an unreasonable and excessive number of interjections by the trial judge. The authority relied upon by the defendant in support of this ground of appeal is *R. v Gunning* (1994) 98 Cr. App. R. 303 which was concerned with a criminal trial before a jury. A passage from the judgment of the Court of Appeal of England and Wales is relied upon which suggests that a judge should refrain from excessive questioning which could give the impression to a jury that the judge does not believe what the particular witness is saying when that is solely and exclusively a matter for the jury.

50. It is difficult to see how that can have any relevance to a civil trial before a judge sitting alone. I have to say that I have difficulty in comprehending the defendant's complaint here. It is certainly true that the judge in this case was very proactive and asked a lot of questions of witnesses, all of which were clearly designed to enhance his own understanding of the evidence. At no stage was counsel for the defendant precluded from asking any question he wished to ask, subject only to the issue discussed above, and more tellingly, counsel was unable to point to any particular prejudice to the defendant said to have arisen from the interventions of the judge.

51. Nor was any objection taken during the trial to the judge's interventions. What is more, it is clear that the judge reflected carefully on the transcript of the evidence after the hearing before giving his considered judgment. In conducting a trial of this nature, judges ought not be expected to stay mute and maintain a lofty silence. The view is frequently expressed by practitioners that they would far prefer an interactive judge to one who is inscrutable. As Fennelly J. observed in *O'Callaghan v Mahon (No. 2)* [2007] IESC 17:

> *"Judges, on a daily basis, express opinions in the form of questions, statements or arguments in the course of a hearing. The whole purpose of these exchanges is to enable the parties to address doubts or difficulties raised by the judge. Arguments are tested and contested. This can, and frequently does, enable counsel to change the judge's mind … of course a judge may so behave that he steps outside his judicial role. If he does, it will be obvious …"*

52. There will be cases where, as Fennelly J. noted, the judge intervenes to such an extent and in such a manner that the parties are hindered, or even in an extreme case, prevented, from effecting the fair and reasonable presentation of their cases so that it cannot be said that a fair trial was had – see for example *O'Connor v Judge O'Donohoe* [2017] IEHC 830. Such cases will however be very rare and as Fennelly J. suggests, obvious.

53. Nothing remotely approaching that standard arises here. I have carefully read the transcript and I am satisfied that while the judge asked many questions of the witnesses on both sides, he was scrupulously fair in doing so and both sides were entirely uninhibited in the manner in which they were permitted to present their cases as they wished.

54. This ground of appeal fails.

Other issues

55. One of the defendant's complaints is that the trial judge, having ruled out the clean up evidence in the course of the trial, then purported to take it into account in a way which was prejudicial to the defendant because it was not allowed to lead the evidence in the way it had wanted. I have already referred to the comment made by the judge in this regard at para. 46 of his judgment. I agree with the submission of the defendant that the trial judge ought not have considered the clean up evidence after he said he was ruling it out. That was a clear

error. However, it was not an error that has resulted in any unfairness to the defendant because insofar as the judge took account of it at all, it could only have been for the benefit of the defendant. Had the case been dismissed, this might well have formed a legitimate ground of complaint on appeal by the plaintiff but it cannot avail the defendant.

56. The defendant also complains that the judge was wrong to find that the plaintiff needed to be reminded of the de-icing hazard, particularly in circumstances where, it is said, she was aware of it. However, the judge found, and was entitled to find, that if the warning had been issued before the plaintiff's accident, she would have been reminded of the hazard and would have checked for it as the cabin supervisor responsible for the front section of the aircraft.

57. On the issue of contributory negligence, the judge was of the view that it was precisely because of the failure to give the warning that the plaintiff could not be said to be negligent herself in failing to keep an eye out for the hazard. The defendant was fully aware of the hazard, of the fact that it had given rise to three accidents in quick succession and that it had failed to take any action to protect its staff following those events. In those circumstances, I agree with the judge's conclusion that there was no contributory negligence on the part of the plaintiff.

The Cross-Appeal

58. As indicated above, apart from the issue of quantum, the cross-appeal is confined to a complaint that the judge, having found that the defendant was negligent in failing to give a warning of the hazard, should have gone on to find that the defendant was further negligent in failing to take any steps to eliminate or ameliorate the hazard in circumstances where it was conceded that no risk assessment had been carried out following reports of earlier accidents.

59. While it is true to say that the failure of the defendant to carry out a risk assessment did amount to a breach of statutory duty, the evidence fell short of establishing that there was any resulting step that the defendant ought to have taken. For example, there was no suggestion that some form of cleaning of the floor of the aircraft should have taken place following the de-icing operations nor was there any evidence to suggest that some form of additional matting on the floor was required to deal with this hazard. In the absence of any such evidence, I cannot see how it could be said that the trial judge was in error in the conclusions he arrived at.

Quantum

60. Both sides have appealed the quantum but, unsurprisingly, for opposite reasons. The medical reports were agreed in this case and consequently, with the exception of the plaintiff's scar, this court is in as good a position as the High Court to assess the plaintiff's injury.

61. The plaintiff was examined by Mr. James Colville, consultant orthopaedic surgeon, on behalf of the defendant, on the 10th July, 2018, about 5 months post-accident. She had suffered a displaced fracture of the right humerus which required open reduction and internal fixation by Mr. Hannon Mullett, consultant orthopaedic surgeon at Beaumont Hospital. At the time of Mr. Colville's examination, the plaintiff's right shoulder was quite stiff and she could not straighten her right elbow. The fingers of her right hand were somewhat weak.

62. She had loss of 30 degrees of elbow extension which Mr. Colville considered should recover. He felt the weakness in her right wrist would settle. She had a 25-centimetre tender scar along the back of her arm which Mr. Colville photographed. Mr. Colville noted that she also suffered an injury to her axillary nerve which was recovering and nerve conduction studies appeared positive.

63. On the 15th March, 2019, at 13 months post-accident, the plaintiff was examined again on behalf of the defendant by Mr. David Moorhouse, consultant neurologist, who noted that the plaintiff had suffered a right radial nerve palsy as a result of the fracture of her humerus. At the date of his examination, Mr. Moorhouse was of the opinion that this nerve had fully recovered and examination was normal. She did however have a small area of sensory disturbance which he felt would resolve over a further period of two years. It would not lead to any functional impairment and was purely of nuisance value in his opinion.

64. Mr. Mullett provided two medical reports of the 29th March, 2018 and the 5th June, 2019 respectively. Mr. Mullett's first report was done for PIAB on its pro-forma template six weeks post-accident and he describes her initial injury, treatment and progress. In his follow-up report, he offered the view that the plaintiff had made a good recovery and was pain free. She had some mild weakness but could manage her normal activities and was due to return to work as normal. He describes her scar as being a well healed 15-centimetre scar. The only abnormal finding on examination was that the plaintiff had some altered sensation in the area of the radial nerve, i.e., the dorsum of the wrist and the area of the thumb. He described this as minor and thought that it should recover in time, although this was not guaranteed. The plaintiff was not at risk of developing arthritis from the injury.

65. The final report is of Dr. Fiona Molloy, consultant neurologist and neurophysiologist dated the 17th January, 2020, almost two years post-accident. Dr. Molloy was concerned with the plaintiff's nerve injury and was of the opinion that clinically, the plaintiff's symptoms had improved significantly. Complete recovery of the radial nerve was unlikely and some degree of longer term decreased function in the radial nerve may be experienced, for example on heavy lifting.

66. As this case predates the coming into effect of the Personal Injuries Guidelines, it is governed by the Book of Quantum. The category that most closely matches the plaintiff's injury appears on page 39 of the Book dealing with fractures of the humerus and the moderate category is described in the following terms:

> *"Fractures to the humerus that may have required surgery with either a full recovery expected or minimal low level ongoing pain but not lack of movement to the arm."*

That appears to me to very closely mirror the plaintiff's injury and accordingly to be the relevant category. The plaintiff's injury probably falls into the middle to upper range of that category.

67. The Book of Quantum of course makes no specific reference to scarring in this section although it is clearly implicit in the moderate category, which includes fractures requiring surgery, that there would be resultant scarring. However, I accept that the plaintiff has been left with a significant scar variously described by the doctors who examined her as being between 15 and 25 centimetres in length. As is commonly the case, this Court is not in a position to independently assess the plaintiff's scar without the benefit of medical photographs contemporary with the High Court hearing.

68. While the Court has seen the photograph taken by Mr. Colville, that was only five months post-accident when the scar was still quite red and not fully healed. Obviously the trial judge viewed the scar which was at that stage some four years post-accident and was accordingly in a much superior position to assess it. I am satisfied that the judge was entitled to uplift the damages somewhat beyond the moderate category to take account of the plaintiff's significant scar in concluding that the appropriate level of general damages was €70,000. There is nothing in my view that has been advanced by either side in this appeal to suggest that the High Court erred in this regard, at least to the extent that it could be said

to amount to an error of law under the relevant rubric to be found in *Rossiter v Dun Laoghaire County Council* [2001] IESC 85.

Conclusion

69. In the event therefore, I would dismiss both the appeal and the cross-appeal both on liability and quantum.

70. With regard to the costs of the appeal, as the plaintiff has been entirely successful, it would seem to follow that she should be entitled to the costs of the appeal. With regard to the cross-appeal, while the cross-appeal on liability has been dismissed, it does appear to me that it was essentially brought by way of response to the defendant's appeal with a view to possibly safeguarding the plaintiff's position on liability were this Court to have concluded that the trial judge erred in finding for the plaintiff on the basis of the failure to give a warning alone.

71. To that extent, in my view the plaintiff was justified in cross-appealing on the undoubted failure of the defendant to conduct a risk assessment. In truth, it appears to me that neither the cross-appeal on liability or damages added anything in terms of duration or complexity to the appeal and in those circumstances, I think the justice of the case is best met by making no order as to costs in respect of the cross-appeal.

72. Both parties will have 14 days from the date of this judgment to contend for a different costs order if they wish to do so by way of a written submission not exceeding 1,000 words. The opposing party will have 14 days to respond likewise.

As this judgment is delivered electronically, Haughton and Allen JJ. have authorised me to record their agreement with it.