

THE HIGH COURT

[2021] IEHC 750

[Record No. 2012/6852 P]

BETWEEN: -

THERESA QUINN

PLAINTIFF

AND

TOPAZ ENERGY GROUP LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Egan delivered on the 1st day of December, 2021

Introduction

1. The plaintiff brings these proceedings against the defendant, Topaz Energy Group Limited, her employer, for damages for nervous shock suffered in connection with a murder in the defendant's service station, where she worked. The plaintiff's case is that she suffered avoidable trauma and psychiatric injury because she had no safe means of summoning assistance. In particular, the plaintiff contends that she did not have access to a mobile panic alarm, notwithstanding that the defendant's safety statements, risk assessments and emergency response plan (to which I shall refer collectively as the defendant's "H & S protocols") provided that panic alarms ought to have been available to staff members. In addition, the plaintiff maintains that her trauma and resulting injury were aggravated by a lack of training on how to respond to emergencies.
2. The defendant's case is that this event, which had all the hallmarks of a contract killing, was entirely unforeseeable; that the defendant cannot be held liable for its consequences; that, the plaintiff should have been wearing a mobile panic alarm at the time of the incident as set out in the defendant's H & S protocols; and that, as a panic alarm could not have prevented the incident occurring or any resulting nervous shock suffered by the plaintiff, its absence is irrelevant.
3. For the reasons set out in this judgment, I have concluded that the defendant acted negligently and in breach of statutory duty in failing to implement its own H & S protocols and thereby failing to provide the plaintiff with a mobile panic alarm. In addition, I find that, although this extremely violent event was not foreseeable, this is not a good answer to the particular case made by the plaintiff.

Events giving rise to proceedings

4. The plaintiff, who was born on the 30th July, 1986 and was 24 years old at the time of the incident, was employed by the defendant as a deli assistant at the delicatessen counter of the defendant's service station at Caherdavin, Limerick. On 22nd February, 2010, the plaintiff arrived for work a little before 6 am. One other colleague was on duty, working at the till area, which was equipped with a static panic alarm. The deli area was not so equipped because cash was not directly handled at the deli counter.
5. As the plaintiff commenced her duties, a Mr. Treacy, the bread delivery man who was known to the plaintiff, entered the shop. At approximately 6.34 am, whilst the plaintiff was in conversation with Mr. Treacy, another individual who has since been identified as Mr. Coughlan, entered the shop carrying a bag from which he drew a gun, and in front of

the plaintiff, shot Mr. Treacy in the head. On observing this, the plaintiff's colleague, who had been at the till, vaulted over the counter and left the shop without, it seems, activating the static panic alarm at his station. As a result, the plaintiff was alone in the shop with the assailant and, because she was behind the deli counter, she could not activate the static panic alarm at the till area. Company policy, reasonably enough, was that staff were not permitted to have mobile phones on their person whilst on duty and phones would usually be left in lockers located in a separate part of the shop. However, on this occasion the plaintiff's mobile phone was in her coat in a cloakroom adjacent to the deli counter. On witnessing the shooting, the plaintiff dropped to the floor behind the deli counter. She then crawled to the cloakroom in order to access her phone. When she got to the cloakroom, she heard more shots being fired in the shop and could smell the gunpowder. The assailant appears to have shot Mr. Treacy several times. The plaintiff retrieved her mobile phone. In a state of dread she called the emergency operator and explained the position as quickly and in as hushed a voice as possible. Because the plaintiff could hear that the assailant was still in the shop, she was terrified that he would hear her. The assailant had made no effort to cover his face. The emergency operator attempted several times to call the plaintiff back. The plaintiff's mobile phone was not on mute and therefore rang aloud. The plaintiff repeatedly hung up on the incoming calls and attempted to mute her phone as she was afraid that the assailant would hear her phone ringing, find her and kill her. The plaintiff stated in her evidence: "*I thought I was going to die*".

6. At one stage during the incident the plaintiff peeped around the door of the cloakroom to see if the assailant was still in the shop and observed him picking up spent cartridges. The plaintiff could not precisely recall if this occurred before or after she had phoned for help but thought that it was the latter. I find that this is more likely to be the case as it makes sense that the plaintiff would have looked around the cloakroom door after calling for help, rather than before. The assailant left the premises just after 6.26 am, although the plaintiff did not know this until 6.27 am approximately when she heard other people enter the store. Roughly five minutes after the assailant had entered the store the Gardaí arrived, having been alerted by a call from a customer in the garage forecourt.

The pleadings

7. The case, as pleaded in the personal injury summons which issued in July of 2012, is somewhat generic. Essentially the plaintiff pleaded that the defendant failed to take adequate or reasonable precautions for her safety and failed to provide a safe system of employment. The plaintiff also pleaded that the defendant acted in breach of the provisions of the Safety Health and Welfare at Work Act, 2005 ("the 2005 Act"), in particular ss. 8, 9 and 10 thereof.
8. After the exchange of notices for particulars and replies thereto, the defence was delivered in December of 2012. Discovery was made in 2015 of, *inter alia*, documents relating to (a) the defendant's H & S protocols and (b) the plaintiff's training.
9. The case was very slow coming to trial. Expert reports were exchanged pursuant to S.I. 391 of 1998 two weeks before the trial wherein the plaintiff disclosed, *inter alia*, a report

from Mr. Martin Stairs, security consultant. The pleadings had not advanced the criticism made by Mr. Stairs concerning the defendant's failure to equip the plaintiff with a mobile panic alarm. In legal submissions at the end of the case, the defendant relied upon the judgment of the Court of Appeal in *Edina Nemeth v. Topaz Energy Group* [2021] IECA 252 in which, Noonan J. commented unfavourably on the fact that, as it was being opened before the High Court, the case as originally pleaded was entirely abandoned such that the defendant was faced with meeting a new case. However, the circumstances of *Nemeth* were more extreme than in the present case. In *Nemeth*, the case ultimately made at trial was neither pleaded nor defined in the plaintiff's disclosure pursuant to S.I. 391 of 1998. The defendant in *Nemeth* had no notice whatsoever of the case ultimately advanced by the plaintiff at trial. In the present case, although the plaintiff's case emerged very late in the day (eleven years post event), it was exhaustively set out in Mr. Stairs' report. Crucially, the defendant did not contend that it was unable to deal with the new case and made no objection to Mr. Stairs' evidence. Furthermore, although the defendant indicated that there had been difficulty in sourcing an independent security expert in the short time available, it did ultimately retain its own security expert to address the issues raised in Mr. Stairs' report. Therefore, although it is undesirable that the plaintiff's case in relation to the absence of the panic alarm was first intimated at such a late stage, nonetheless the case presented by the plaintiff at trial was fully defended by the defendant; and I will deal with the case on that basis.

Matters not in issue in the case

10. It may be of assistance to outline those issues which are not in dispute. First, it is common case that the defendant's policy and the intention of its H & S protocols, is that all employees, including those at the deli counter, should wear portable panic alarms (these are small devices, worn on a belt or on a lanyard, which when pressed, alert the emergency operator to an incident). Secondly, the parties' respective experts considered that policy to be a reasonable and practicable safety measure for this particular premises. The defendant never suggested that it was not intended that this policy be complied with by its deli staff. Nor was it suggested that compliance was unnecessary or that implementation of this policy would be too expensive, too onerous or otherwise impracticable. None of this was in issue. What was in issue, however, was that the defendant maintained that the plaintiff herself ought to have known that she should wear a panic alarm and that her failure to wear one on this occasion could not be laid at the defendant's door. Thirdly, it is common case that the terrifying incident which the plaintiff witnessed was entirely unforeseeable. Thus, no case is made by the plaintiff that the defendant could have taken any steps to prevent the assailant from entering the shop and murdering Mr. Treacy in front of her. Fourthly, it is common case that, as a result of these events the plaintiff sustained a recognisable psychiatric illness, post-traumatic stress disorder ("PTSD"). Fifthly, it is not in dispute that this PTSD was shock induced and was sustained by reason of actual or apprehended physical injury to the plaintiff and another person, namely, Mr. Treacy. Sixthly, the plaintiff accepts that she would have sustained a recognisable psychiatric illness, most likely PTSD, in any event, merely by witnessing the shooting and that some injury was unavoidable. However, the plaintiff maintains that her

shock, trauma, and resulting psychiatric illness were avoidably aggravated by reason of her vulnerability, isolation and inability to summon assistance.

Legal principles

11. It is convenient to briefly set out the applicable legal principles relating to employer's liability at common law and under statute, and to the recovery of damages for psychiatric injury for nervous shock.

12. The plaintiff and the defendant rely upon *Geraldine Martin v. Dunnes Stores Dundalk* [2016] IECA 85 in which, at para. 18, Irvine J. (as she then was) stated:

"Time and time again the courts, in personal injuries litigation, have stressed that the duty of the employer to their employee is not an unlimited one. The employer is not to be taken as an insurer of the welfare of their employees. In Bradley v. C.I.E. [1976] I.R. 217 at 223, Henchy J. stated as follows: -

- a. *'The law does not require an employer to ensure in all circumstances the safety of his workmen. He will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances.'*
- b. *The duty owed by an employer of course varies depending upon the knowledge and experience of the employee. Further, the more hazardous the work in which the employee is involved the more stringent the duty of the employer to protect the worker. However, their duty is met once they take reasonable and practicable steps to avoid accidental injury. As has often been stated, it is not possible to eradicate all risks and accidents."*

13. Later at para. 24 of the judgment Irvine J. stated:

"Critical to my conclusions on this appeal is the extent of the onus placed on an employer to take due care for the safety and welfare of their employee. ... In the context of this case, it is reasonable to say that the obligation of the defendant was to identify potential hazards likely to affect the safety and health of the plaintiff and then, whether through training or the implementation of procedures and precautions which were practicable in all the circumstances, to guard against those risks: see Quinn v. Bradbury [2011] IEHC per Charleton J."

14. At para. 36 Irvine J. characterised the obligation of the employer in these terms: *"to identify potential hazards and then implement procedures designed to protect the employee from the risks pertaining to such hazards..."*

15. Not every failure to comply with a statutory duty entitles a person injured to recover compensation from the party in breach. However, the general scheme and context of the 2005 Act evinces an intention that the duties and obligations which it imposes upon employers are such that their employees are intended to benefit therefrom and that an employee should be entitled to sue in respect of a breach thereof provided, of course,

that the employee can establish a causal link between the specific breach of statutory duty and the infliction of damage.

16. Section 8 (1) of the 2005 Act provides:

"Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees."

17. Subsection (2) of section 8 is of particular relevance:

"Without prejudice to the generality of subsection (1), the employer's duty extends, in particular, to the following:

- (a) managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;*
- (e) providing systems of work that are planned, organised, performed, maintained and revised as appropriate so as to be, so far as is reasonably practicable, safe and without risk to health;*
- (g) providing the information, instruction, training and supervision necessary to ensure, so far as is reasonably practicable, the safety, health, and welfare at work of his or her employees;*
- (h) determining and implementing the safety, health and welfare measures necessary for the protection of the safety, health and welfare of his or her employees when identifying hazards and carrying out a risk assessment under section 19 or when preparing a safety statement under section 20 and ensuring that the measures take account of changing circumstances and the general principles of prevention specified in Schedule 3;*
- (i) having regard to the general principles of prevention in Schedule 3, where risks cannot be eliminated or adequately controlled or in such circumstances as may be prescribed, providing and maintaining such suitable protective clothing and equipment as is necessary to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;*
- (j) preparing and revising, as appropriate, adequate plans and procedures to be followed and measures to be taken in the case of an emergency or serious and imminent danger;"*

18. In this context, it is also relevant to note that the words "reasonably practicable" are defined in s. 2 (6) of the 2005 Act, as follows:

"For the purposes of the relevant statutory provisions, "reasonably practicable", in relation to the duties of an employer, means that an employer has exercised all due

care by putting in place the necessary protective and preventive measures, having identified the hazards and assessed the risks to safety and health likely to result in accidents or injury to health at the place of work concerned and where the putting in place of any further measures is grossly disproportionate having regard to the unusual, unforeseeable and exceptional nature of any circumstance or occurrence that may result in an accident at work or injury to health at that place of work.”

19. It is also important to note that the employer’s duty is balanced in s. 13 (1) (a) of the 2005 Act, by emphasising that it is the duty of every employee while at work to take reasonable care for his own safety, health and welfare.
20. The leading authority on liability for negligently inflicted psychiatric damage is the decision of the Supreme Court in *Kelly v. Hennessy* [1995] 3 IR 253 which effectively held that, in order to recover damages for nervous shock, a plaintiff must establish:
- i) That he or she has actually suffered a recognisable psychiatric illness;
 - ii) That such illness was shock induced;
 - iii) That the nervous shock was caused by the defendant’s act or omission;
 - iv) That the nervous shock sustained was by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff; and
 - v) That the defendant owed the plaintiff a duty of care not to cause him or her a reasonably foreseeable injury in the form of nervous shock as opposed to personal injury in general.
21. In the present case, there is no dispute as to criteria i), ii) or iv). The parties differ on criterion iii), namely whether the plaintiff’s shock was caused by the negligence of the defendant. Although not disputing its obligation to furnish its staff with panic alarms, the defendant maintains that they had made one available to the plaintiff and that she herself was responsible for not wearing one on the occasion in question. For reasons explained below, I reject this argument. In addition, criterion v) is in issue: the defendant maintains that the injury to the plaintiff was not foreseeable and that it therefore did not owe her a duty of care to avoid it. I explain below why I reject this argument also.

Factual evidence on the provision of panic alarms and conclusions in relation thereto

22. As stated, it is accepted that the intention of the defendant’s H & S protocols is that all employees, including deli counter assistants, would wear panic alarms and, further, that this was an appropriate and necessary measure to guard against the risk of criminality. It is not therefore necessary for me to decide whether a failure by the defendant to make panic alarms available to its staff represents a departure from the conduct of a reasonable and prudent employer.
23. Therefore, the relevance of the defendant’s H & S protocols is limited to ascertaining if there is substance in the defendant’s contention that the plaintiff herself knew that she

should have worn a panic alarm on the occasion in question and is responsible for any consequences of not having done so.

24. The plaintiff started working for the defendant in 2005, initially at the defendant's premises at Dock Road, Limerick. Insofar as it is relevant, on 15th January, 2005, the plaintiff completed a training module and thereafter filled out an "*On the job training manual/workbook*". This posed a series of questions to trainees including "*when should you wear your panic alarm?*" to which the plaintiff replied, "*at all times*". Likewise, the plaintiff signed a safety statement on 20th November, 2008 which provided, *inter alia*, that station staff will "wear panic alarms".
25. On the other hand, the defendant's more recent safety statement/risk assessment dated February 2008 is less clear on this issue. Thus, although the table in the risk assessment identifies the relevant hazards - violence against the person (with a low risk of assault on staff or customers) and criminal activity (with a low risk of robbery) - and states that "*staff*" should wear panic alarms, it also states that the station manager is obliged to ensure that personal panic alarms are provided to "*all staff that work with cash*". This safety statement was, it seems amended in April 2008. As amended it identifies roughly the same hazards - robbery and security incidents - and provides that "*The manager or supervisor in charge is responsible to take the appropriate action*" and includes the advice that: "*Only if it is safe to do so should you press your panic alarm*". This document is not site specific and is not signed by any member of staff at the Caherdavin premises, although I understand that it was available on site in a folder for staff to consult.
26. The defendant also produced an emergency response plan, which is similar to the safety statement dated February 2008 and which, in a signed document dated 5th February, 2008, the plaintiff acknowledged that she had "*read and understood*".
27. On considering the defendant's H & S protocols as a whole, it seems to me that whilst the plaintiff's initial training documentation was to the effect that all staff should wear personal panic alarms, the written documentation available at the Caherdavin premises was ambiguous on the wearing of panic alarms. Therefore, in assessing the defendant's argument, the court must have regard to the evidence of both parties about the practical implementation, or otherwise, of the defendant's H & S protocols relating to panic alarms.
28. The plaintiff's uncontradicted evidence, was that she had never seen a deli assistant wearing a panic alarm; that she had only ever seen till staff wearing panic alarms; and that her own impression had been that deli staff were not required to wear, and indeed would not be furnished with, portable panic alarms.
29. The plaintiff said that she had never at any stage been given a panic alarm. It was not put to the plaintiff that she had been furnished with a panic alarm; nor that she had been informed, shown or made aware of where panic alarms were kept on site. Rather, in this latter regard, it was put to the plaintiff that there were four panic alarms on site and that the "*usual procedure*" was that they were kept in a manager's office. However the difficulty with this is that the incident occurred shortly after 6 am and the manager does

not, and on this occasion did not, come on duty until 7 am. If the alarms were stored in the manager's office, then it is difficult to infer that the plaintiff had access to them. Even if the manager's office was not locked at the time of this incident (and the evidence is that it might well have been), it is unreasonable to suggest that, without prior instruction or permission, the plaintiff ought to have taken it upon herself to go into the manager's office prior to the arrival of the manager and search for a panic alarm.

30. The plaintiff was asked in direct examination whether she had been trained in the use of a personal panic alarm. She responded that she had only ever seen a photograph of a panic alarm. That evidence was not contradicted by the defendant. This is of some significance in circumstances where it appears that the particular panic alarms stored in the manager's office had two separate buttons which must be pressed simultaneously in order to avoid a false alarm. Therefore it was not self-evident how to use this type of personal alarm.
31. The plaintiff's direct line manager, although listed on the defendant's schedule pursuant to S.I. 391 of 1998, was not called to give evidence. The defendant's factual evidence was given by Ms. Áine Grealish, area manager, whose responsibility it was to visit the shop approximately once a month and to assess, *inter alia*, compliance with safety protocols. Ms. Grealish's evidence was that this shop was low risk and that the only incidents which had occurred in the store in the previous five years, were "drive offs" rather than violent incidents.
32. Although Ms. Grealish confirmed that there were four panic alarms in the store, she gave no evidence that she had ever seen any deli counter assistant in the store wearing a panic alarm, or that anyone else had instructed deli counter staff to wear a panic alarm or told them where they could be found.
33. She gave evidence of an inspection of the store a matter of weeks before the incident when she had "noted" that an employee was not wearing a panic alarm. The employee in question worked, not at the deli counter but at the till, and there is no suggestion that the plaintiff was present or aware of Ms. Grealish's visit. Ms. Grealish stated that the plaintiff had not raised any issue in relation to panic alarms at any of her site inspections. This is not surprising given Ms. Grealish's evidence that, although the intention was that all employees would wear a panic alarm, the "focus" (by which I infer the focus of her inspections and the learnings emanating therefrom) was on employees who handled cash.
34. Ms. Grealish gave no indication that there was any particular practice in operation for making panic alarms available to employees in the shop. She stated that the "usual practice" in Topaz was that panic alarms were either kept in the manager's office or that employees would obtain their panic alarms from their predecessor at shift change. It goes without saying that the latter practice would only be effective if deli staff were regularly wearing panic alarms which it seems they were not. In any event, the plaintiff was the first employee on duty at the deli counter on 22nd February, 2010.

35. Ms. Grealish accepted that notwithstanding that the defendant's emergency response plan contemplated training in the procedures laid out therein, there was no evidence of any staff training concerning panic alarms.
36. In summary, there is no evidence whatsoever that, during the several years of her employment at the shop, the plaintiff was ever informed by her line manager, by Ms. Grealish or by anybody else, that as a deli assistant, she ought to wear a panic alarm, or indeed informed of where she might find one, or how to use it.
37. I find that notwithstanding the plaintiff's early training documentation, in light of the practice in the premises where she worked, it was reasonable for her to believe that panic alarms were intended only for staff who handled cash. In this regard, it is surprising that the defendant did not call the plaintiff's direct line manager, any of her co-workers or any other witness, to give evidence that the plaintiff, or any other deli assistant working in the Caherdavin premises, wore, or were instructed to wear, panic alarms. It would have been reasonable and, indeed, expected for the defendant to call such a witness if it had wished to establish these matters and no explanation was provided as to why they did not. In these circumstances, I find that the evidence of the plaintiff on this issue is further strengthened. (see *Whelan & Lynch v. Allied Irish Banks plc & Ors* [2014] IESC 3).

Expert evidence on scope of duty of care and conclusions in relation thereto

38. The plaintiff called evidence from Mr. Stairs, security and risk management consultant. Mr. Stairs holds a Master of Science, MSc (MER) in security and risk management and has over 38 years' experience in the security industry in the areas of risk assessment and design and development of security systems and procedures. He has held a variety of offices with the Irish Security Industry Association. He has represented the security industry before the National Standards Authority of Ireland and was part of an industry group which worked with the Gardaí to develop the Garda Alarm Policy. He has worked closely with the security industry regulator, the Private Security Authority. He was a contributor to the development of an independently assessed quality standard for the Irish security industry. He was the Irish Security Industry Association's representative on the Security Congress of Ireland and has represented Ireland at European level at the Confederation of European Security Services.
39. The defendant's expert, Mr. John McLoughlin is a security and investigations manager at Ashtree Risk Group since 2016. For 20 years previously, he was a senior incident coordinator for An Garda Síochána specialising in serious crime investigation including multiple manslaughter and murder cases. He also holds a BA (Hons) in Law and Administration of Justice from the Institute of Public Administration, UCD.
40. I find that both experts are qualified to give expert opinion on the issues arising in these proceedings. The plaintiff tentatively objected to Mr. McLoughlin's expertise on the basis that his qualifications and experience were not comparable to those of Mr. Stairs and because he was not independent, as since 2016, Ashtree Risk Group had been retained by the defendant to assist in the development of the defendant's H & S and emergency protocols. However those objections, go to weight rather than admissibility. I am satisfied

that both experts gave evidence in non-partisan manner. Indeed, what is striking is that there was very little difference between the evidence of the two security experts. Thus, both security experts proceeded on the basis that the defendant's policy was that all employees should wear a panic alarm and that, in the circumstances, this was a reasonable and practicable policy having regard to the risks identified. In particular, Mr. McLoughlin's view was that the measures identified were reasonable, cost effective and practical to meet all known and foreseeable risks. There was no suggestion that it was not reasonably practicable to make panic alarms available to all employees and both experts noted that the shop had been supplied with four portable panic alarms for this purpose. I therefore find that the measures identified in the defendant's H & S protocols both define and reflect the parameters of the defendant's duty of care to its employees at this shop.

41. The two experts differed on the issue of training, exercises and drills. Although I find that the defendant ought to have given the plaintiff some basic training and instruction on where to locate and how to activate the panic alarm, I don't think that their obligation goes much further than that. I reject as unreasonable the proposition advanced by Mr. Stairs to the effect that the defendant had an additional duty, analogous to that applying in the case of fire drills, to conduct regular drills/simulations practising how these security measures would be put into effect in the event of a robbery/security incident. I think that this is going too far, particularly as criminality and security incidents were extremely rare.

Sequelae, expert medical evidence and conclusions in relation thereto

42. Unsurprisingly, the plaintiff, who had no prior psychiatric history, was terrified and extremely distressed. She was brought to the accident and emergency department of Limerick Regional Hospital, assessed and anti-anxiolytic medication was prescribed. The plaintiff was discharged to the care of her General Practitioner, Dr. Ray O'Connor whom she attended the following day and approximately seven times thereafter. In light of the plaintiff's chronic distress, Dr. O'Connor referred her to the care of Dr. Patrick Doyle, consultant psychiatrist, who prepared two reports and also gave evidence to the court. The plaintiff first attended Dr. Doyle's clinic in August 2010 and was diagnosed with PTSD. Anti-depressants and hypnotic medication were prescribed and psychotherapy was arranged.
43. The plaintiff's PTSD included the following symptoms: irritability, depressed mood, hypervigilance, easily startled, avoidance of reminders of the incident, flashbacks to what had occurred, panic attacks, weight loss and agoraphobia. In this latter respect, it is notable that the plaintiff was unable to go outside her house alone for eighteen months' post incident.
44. Dr. Doyle reviewed the plaintiff in October 2011. She had improved somewhat but still had residual symptoms. She continued to experience problems sleeping, had nightmares and flashbacks (albeit less frequently) and was still hyper alert. In addition, whilst she had previously experienced panic attacks about once a week, they were then a monthly occurrence. Dr. Doyle's report indicated that the plaintiff had remained on anti-depressants for a number of months and had required at least 20 sessions of psychotherapy.

45. The defendant's psychiatrist, Dr. Catherine Corby, who did not give evidence to the court, provided a report based on an examination of the plaintiff in June of 2017 to which I have also had regard. Dr. Corby's report indicates that, in addition to the treatment outlined above, the plaintiff also attended the Henry Street Adult Counselling Service for a number of years. When Dr. Corby reviewed the plaintiff in 2017 she was still fearful and although still undergoing counselling, was taking no medication. The plaintiff reported that she was not reliving her experience as frequently as previously; that she continued to have nightmares; and that she would still not go out on her own, which Dr. Corby attributed to "*realistic fear*". Dr. Corby agreed that the plaintiff had experienced PTSD but felt that, having undergone treatment, she no longer met the criteria for PTSD.
46. Dr. Doyle's most recent report was based on an examination of the plaintiff in September 2021. The plaintiff's symptoms have improved a good deal and are now less frequent and less intrusive. The plaintiff, however, still requires to be accompanied to the shops. The plaintiff has had two children since these events and Dr. Doyle noted that she worries excessively about their safety.
47. Dr. Doyle's report indicated that the plaintiff had developed chronic PTSD and that he expected her symptoms to continue in the long term. In his oral evidence, Dr. Doyle stated that the residual symptoms experienced by the plaintiff "*may not qualify for full PTSD*"; that he could not say that she would not continue to experience symptoms in the future; that she may also suffer a future relapse; that she was at an increased risk of depression in later life; and that trauma increases the risk of hypertension.
48. The plaintiff gave evidence as to her injuries in an understated manner. Her evidence in relation to her symptoms and treatment was consistent with Dr. Doyle's evidence. In particular, she gave evidence of a long period of agoraphobia during which she did not wish to go outside and remained alone in the house. The plaintiff stated that she still will not go to the shops alone.
49. The plaintiff was off work for five or six months after the incident. I would like to emphasise that the defendant was very supportive over this time, both in relation to time off work and in arranging counselling. It is also notable that when the plaintiff did return to work, she felt able to work again behind the deli counter, but in a different shop, in the defendant's service station at Dock Road. Initially, the plaintiff worked part time but gradually increased her hours to full-time. The plaintiff unfortunately found this too stressful and cut back her hours again in May 2011. She is now working a four-day week rather than a five-day week. Special damages, including an element of past loss of earnings, are agreed at €7,000 and no claim is made for future loss of earnings.
50. It is natural that, on witnessing the incident, the plaintiff would have feared for her own life. It is common sense to conclude that the plaintiff's terror would have been substantially increased by having to make a telephone call to the Gardaí and by her phone ringing aloud on several occasions, which the plaintiff feared the assailant would hear. The plaintiff's experience was far worse than it would otherwise have been, had she been able to silently and secretly press an alarm and know that help was coming. I accept

the evidence of the plaintiff and Dr. Doyle in this regard. It is true that the incident lasted only a very short time and that the Gardaí arrived on the scene within five minutes. Notwithstanding, it is not disputed that the plaintiff developed PTSD as a result of the incident. The brevity of the incident does not dictate the severity of the psychiatric response. In my view that would be an entirely false equation. Dr. Doyle's uncontradicted evidence was that the plaintiff's psychiatric injury has been avoidably aggravated as a direct result of her inability to safely summon assistance. In these circumstances, I find that the plaintiff's injury was so aggravated.

Conclusions on breach of duty and breach of statutory duty

51. The defendant's H & S protocols identify, *inter alia*, the risk of robbery and security incidents. It is common case that, having identified these potential hazards, the procedures, which were designed to protect the employee from such hazards, included furnishing portable panic alarms. It cannot be sufficient simply to identify potential hazards and devise procedures and precautions to guard against them. It is necessary also to ensure that those procedures and precautions are given effect through implementation and training as appropriate. It is common case that the defendant devised an "excellent" system/protocol. However, it then failed to implement the procedures and measures designed to protect the plaintiff. Thus, as is apparent from my review of the factual evidence at paragraphs 22 to 37 above, a panic alarm was simply not available to the plaintiff when this incident occurred. This is a breach of the defendant's common law and statutory duty of care to the plaintiff. I find that the plaintiff reasonably believed that portable panic alarms were for till staff only, and therefore responsibility for her lack of access to a panic alarm lies with the defendant and not with the plaintiff. Accordingly, subject of course to issues of causation and foreseeability, and to considerations of countervailing public policy, it would seem just and reasonable that the plaintiff should be entitled to recover in respect of this breach.
52. The defendant placed considerable emphasis on the fact that the plaintiff did not complain in the immediate aftermath of the incident, nor at any time until recently, that her injuries had been exacerbated as a result of the absence of a panic alarm. I do not believe this fact to be determinative. Whether or not the absence of a panic alarm caused or contributed to the plaintiff's injuries is an objective matter to be determined by the court on the basis of the medical evidence.
53. Equally, I should say that I lay no emphasis upon the fact that, when the plaintiff returned to work at the defendant's Dock Road premises five or six months after the incident, she was immediately furnished with a panic alarm. I am in agreement with the view expressed by Noonan J. in *Nemeth* that a subsequent change in protocol or practice cannot be construed as an admission of liability.

Conclusions on causation of plaintiffs injuries

54. The defendant acknowledges - and could not but acknowledge - its duty to provide panic alarms to its staff, but contends that is not the end of the matter because the plaintiff must satisfy the court that its failure to do so caused the plaintiff to suffer the psychological injuries for which she is seeking to be compensated. The defendant argues

that, as it is accepted that the plaintiff would have suffered psychological injuries merely by witnessing the murder, it cannot be said that any default on its behalf caused the plaintiff to suffer injury. This, however, is to misunderstand the plaintiff's case. The plaintiff is not seeking compensation for the totality of the PTSD which she suffered as a result of witnessing the murder. Rather, the plaintiff is seeking recovery only for such aggravation of the PTSD as is attributable to the additional sense of isolation, vulnerability and panic which she experienced as a result of her inability to safely summon assistance.

55. This same nuance also answers the defendant's contention that the murder was an unforeseeable event for which the defendant cannot be held liable. Unforeseeability would only be an answer to the plaintiff's case if she was claiming compensation for the totality of her PTSD. It is correct to say that the defendant, as a reasonable and prudent employer, could not have anticipated, or taken any particular precautions to prevent, the murder. However it is incorrect to say that the defendant, having anticipated criminality and devised measures to guard against same, would not anticipate that failure to implement those measures could be a cause of harm. I do not accept that merely because the incident was at a far higher level of violence than expected, the defendant can successfully argue that the systems devised to protect employees including the plaintiff are irrelevant.
56. To my mind, this nuance also distinguishes the present case from some of those relied upon by the defendant in these proceedings. In this respect, the defendant placed significant emphasis on *Nuala Matthews v. Irish Society for Autism and the National Autistic Association* [1997] IEHC 64. In that case, the plaintiff, who was carrying an excessively heavy and awkward load of material along a public footpath, suffered injury when an unidentified passing pedestrian collided with her, causing her to fall. Laffoy J. held that the accident was entirely attributable to the collision; that the fact that the plaintiff was carrying a heavy and awkward load did not contribute to her fall; and that the accident would have happened in the same way and with the same consequences if the plaintiff had not been encumbered by her load. The same cannot be said in the present case. Were it not for the defendants' breach of duty in failing to provide the plaintiff with a panic alarm, the events would have unfolded in a different way from the plaintiff's perspective and as a consequence, her injury would have been appreciably less.
57. Both the plaintiff and the defendant referred the court to *Patrick Breslin v. Noel Corcoran and the Motor Insurer Bureau of Ireland* [2003] IESC 23. In *Breslin*, a driver, who had left his motor vehicle unlocked with the keys in the ignition, was held not to be liable for the actions of an unknown person who stole the car, drove negligently and collided with the plaintiff. I agree with both counsel that the present circumstances are distinguishable from *Breslin* and note that the defendant in this case did not rely upon the doctrine of *novus actus interveniens*. It is accepted that the assassin's actions were unforeseeable. However, the plaintiff's cause of action is based on circumstances within the control of the defendant; the implementation by the defendant of its H & S protocols.

58. Likewise, the case of *Brendan O'Neill v. Dunnes Stores* [2010] IESC 53, is distinguishable as it concerned liability for injuries suffered by a "rescuer", who had intervened to assist a security guard who was trying to apprehend a shoplifter. The question was whether it was necessary that the precise nature of the attack on the plaintiff might have been foreseen. The Supreme Court decided that it was enough that the type of damage, in that case, physical injury caused by an attempt to restrain a wrongdoer, was readily foreseeable as a consequence of the employer failing to have an effective method of communication in a case of emergency, thereby avoiding the necessity for intervention by a member of the public. Like Breslin, however, *O'Neill* concerned the attempted imposition of liability on the defendant for the act of the third-party wrongdoer. This is not in issue in this case as, at risk of repetition, the plaintiff is not seeking to hold the defendant liable for the actions of Mr. Coughlan.
59. The evidence in this case is to the effect that the plaintiff's ability to cope, both on a practical and psychological level with the unprecedented situation with which she was presented, was severely compromised because she could not safely summon assistance. As a result, she experienced an ordeal which was significantly exacerbated.
60. Accordingly, I find that, whilst the assassination was, of course, not foreseeable, general criminality was. Once this general mischief was foreseeable, the unforeseeability of the particular form of mischief which occurred in this case is not determinative.

Conclusions on quantum

61. It is common case that the plaintiff would have developed PTSD in any event. However, the medical evidence is that, had the plaintiff been supplied with a panic alarm, the injury would have been less serious. It is now over ten years since the incident, and the plaintiff continues to experience residual symptoms, albeit not currently meeting the criteria for a formal PTSD diagnosis. She is agoraphobic and unable to go to the shops on her own. The plaintiff is still a young woman and this is a significant limitation on her life. I also accept that the plaintiff will be vulnerable to relapse in the future.
62. The plaintiff underwent reasonably extensive treatment, attending a psychiatrist, psychotherapist, and counselling services and taking psychotropic medications. However, it does not appear that the plaintiff has received any treatment in the last several years. It is therefore difficult to determine the extent to which the plaintiff's present and long-term sequelae are attributable to actionable aggravation to the original PTSD injury. The cessation of treatment may also have contributed to these sequelae.
63. In assessing compensation I note that this case predates the application of the Judicial Council Personal Injuries Guidelines. If the plaintiff were to be compensated for the "total" psychiatric injury which she has suffered to date and will suffer into the future, then I would assess general damages at the level of €100,000, being €30,000 for the first year to eighteen months, €55,000 for the intervening ten years or so, and €15,000 into the future. As matters stand, I find that the plaintiff's PTSD was aggravated as a result of the defendant's negligence for the first year to eighteen months post incident. For that period, I would assess the aggravation to the plaintiff's PTSD at €10,000. Over the

intervening decade, I would assess the aggravation to the plaintiff's PTSD at €20,000. For the future, I think it is hard to say that any such symptoms as the plaintiff may experience are necessarily due to the actionable aggravation of the PTSD and I do not therefore award any sum in respect of future general damages. Overall, therefore, it seems to me that a sum of €30,000 general damages is reasonable. To that figure I add €3,000 special damages, making a total award of €33,000.

Closing observations

64. It is important to note that I make no finding that all members of staff in every service station, still less in every retail premises, ought to have access to a portable alarm. The expert evidence was that other premises might meet the risk of robbery or security incidents in a myriad of other ways. Mr. Stairs was very careful to say that "*one cannot broad stroke the defendant's [H & S protocols] across the entire retail sector or even across service stations in general*". Likewise, I make no finding that, in another case in which a security incident may occur, an employee will recover damages merely because they can point to specific measures in their employer's health and safety statements that were not implemented. In this case, however, there is a strong connection between the particular non-implementation of which the plaintiff complains and the aggravation of the injury suffered. This case therefore turns on its own specific facts.
65. As this judgment is being delivered electronically, the parties will have two weeks within which to file brief written submissions in relation to the terms of the final order, on costs and on any other matters that may arise.