THE HIGH COURT

[2023] IEHC 540

RECORD NO: 2017 9574 P

BETWEEN

MARGARET REID

PLAINTIFF

AND

VALIANT PHARMACEUTICALS IRELAND T/A BAUSCH & LOMB

DEFENDANT

Judgment of Mr. Justice Mícheál P. O'Higgins delivered on the 31st July 2023

1. This is a claim for damages for personal injuries allegedly suffered by the plaintiff in an accident in the defendant's factory on the 30th of May 2015. The defendant was the plaintiff's employer at the time of the accident and operated a factory premises on the Cork Road in Waterford, trading under the well – known name of Bausch & Lomb.

2. The plaintiff was a trained accountant but at the time of the accident was a factory operative. She was then 54 years of age and is now 62. The defendant manufactures soft contact lenses in the factory in Waterford. The company employs in the region of 1,650 staff and has been in Waterford since 1980.

3. Liability was fully in issue in the proceedings and the case raised issues of negligence, breach of statutory duty, causation, foreseeability, admissibility of certain documents and legal issues concerning the quantum of damages. The defendant asserted *inter alia* that the plaintiff had exaggerated and misstated her injures and, in that regard, relied upon video footage from a private investigator, which I will come to presently.

4. The accident occurred at the injection moulding department of the Bausch & Lomb factory. The facility is a state-of-the-art plant built to the highest standards of hygiene to produce soft contact lenses. The plaintiff was employed as an automonomer operator and her job was to run the machines which make the contact lenses in the moulding department. The plaintiff was taking blocks of cassettes of lens moulds, known as "towers", from a series of roller tracks on a large, wheeled trolley known as a stand – down rack. The tower of moulds is essentially a magazine which holds moulds for automated feeding to the contact lens making process. All told, there are 12 roller tracks, called cavities, on the trolley on three levels, each with four tracks. The stand – down trolley is used for storage of the mould towers. Injection moulding operators place the towers on their appropriate tracks and the monomer operators (such as the plaintiff) take the towers away, at the other end of the trolley, according to a production schedule issued to the operator by a computer.

5. Both parties provided the court with helpful photographs showing the system of work and the plaintiff's vantage point at the time of the accident. Looking at photograph no. 3 in Mr. Flahavan, the engineer's photographs, the red coloured stoppers on the trolley show the outfeed end where the plaintiff was working at the time of the accident. Photo 4 shows the infeed end where the infeed operator loads the towers of moulds at the other end of the trolley. It is helpful to note that the outfeed stoppers are coloured red whereas the infeed stoppers are coloured white. As the photographs show, the tracks on the trolley are identified by plastic numbers/stoppers at the end of each track. The stoppers act as a safety mechanism

to prevent the tower falling off the track and falling off the trolley. To take a tower off the track, an operator will usually lift the number and pull the tower over the number, and it will then be available to lift off the track. Once the tower is off the track, the stopper is supposed to flip back into the upright position automatically to stop any further towers falling.

6. The agreed evidence was that the incident occurred at approximately 10:15 on a Saturday night shift on the 30th of May 2015. The plaintiff had come from her workstation at the monomer area in order to collect a number of towers of moulds for processing. She brought her own smaller trolley (see photograph 5 of Mr. Flahavan's photographs) to the outfeed end of the stand – down trolley on Inject 35 and was taking towers from the outfeed end in accordance with her instruction printout. She had nearly completed loading her trolley and was bending down at the outfeed end to take some towers off the bottom shelf of the stand – down trolley, which the plaintiff believes was numbers 10 or 11 in the photographs. Her unchallenged evidence was that suddenly and without warning a tower fell from one of the upper levels off the rack and struck her forcibly on the right shoulder. She believed that there were two injection moulding operators in the area at the time. An operator named Pauline Lonergan was running injection moulding machines 34 and 35 and another operator named Geraldine was on machines 36 and 37. Because she did not see the offending tower fall, she does not know what caused the tower to fall on top of her, but she believed that Pauline or whoever was loading the towers at the other end of the trolley may have been pushing towers down the track along the rollers, causing the tower to fall off the rack at the outfeed end and down onto her shoulder.

7. The agreed evidence is that the accident was investigated by the defendant but no witnesses to the actual incident, other than the plaintiff, were found. There were however witnesses to the aftermath of the incident when moulds from the fallen tower were scattered

on the floor and it was soon realised that the plaintiff had suffered an accident. I will come back to the investigation carried out by the company presently.

8. As explained in the report of Mr Harte, the plaintiff's engineer, at the front of each shelf of the stand – down trolley one finds the catches or stoppers that I have described. These have numbers on them, and these stoppers are 15 mm wide by 75 mm high and the top of these stoppers project 15 mm above the rollers. The stoppers are flipped up to a horizontal position to allow removal of the towers from the shelves (see photograph no. 4 of Mr. Harte's photographs). Photograph no. 6 shows a close up of a tower of moulds *in situ* on the rack. All of the towers are of uniform dimensions and weight. The tower is 175mm by 180 mm long by 320 mm high. Each tower contains 25 trays of lenses. A typical tower weighs about 5.63 kg which I am told in "old money" equates to a little under 1 stone in weight.

9. In the discussion section on page 4 of his report Mr. Harte makes the straightforward point that with the plaintiff being in the position which she was, i.e. crouched down to remove a tower from the bottom shelf, then in his view it would not have been physically possible for her to cause a tower to fall from one of the upper shelves. In his oral evidence, which I will consider in detail later on in this judgment, Mr. Harte is heavily critical of the defendant's system of work and in particular what he regards as the failure of the defendant to take practical steps to prevent or at least mitigate the risks presented by the system of work which the defendant chose to operate.

Evidence of witnesses on liability

10. All told, the court heard from fourteen witnesses in this case. These were the plaintiff, Margaret Reid, Dr. Catherine Corby consultant psychiatrist, Susan Tolan vocational consultant, Bernard Hart, the plaintiff's engineer, Dr. Catherine Feeney the plaintiff's general practitioner, Neil Riley, the plaintiff's consultant ENT surgeon, Jabir Nagaria, the plaintiff's

consultant neurosurgeon, Edward Flahavan, the defendant's engineer, Pauline Lonergan, an employee of the defendant, Ann Marie Hayes, an employee of the defendant who gave the plaintiff first aid, Michael O'Riordan, the defendant's consultant orthopaedic surgeon, the private investigator Mathew O'Brien, Tony Power, the safety director of the defendant and Alan O'Loinsigh, the defendant's vocational consultant.

11. Six of these witnesses gave evidence on liability: for the plaintiff, the plaintiff herself and her engineer Bernard Harte. For the defendant, the engineer Mr. Flahavan, Pauline Lonergan who worked in Bausch and Lomb, Ann Marie Hayes who gave the plaintiff first aid and Tony Power, the head of health and safety.

12. The defendant did not call evidence from Elaine Lee who had apparently been told in the aftermath of the accident that the tower had fallen from cavity 6 of the stand-down trolley and who had apparently checked cavity 6 after the accident and found it to be in working order. Nor did the defendant call Robert Dunphy, an in-house engineer who investigated the circumstances of the accident. I will come back to the significance or otherwise of those two witnesses not giving evidence later on in this judgment.

Evidence of the plaintiff on liability

13. The plaintiff gave evidence that she was originally from East Cork but lives now in Kilmacow, County Kilkenny. She is married and has four children, two boys and two girls all of whom have done well. Growing up, the plaintiff attended the Mercy Convent in Dungarvan as a boarder and did her inter cert and leaving certificate exams there. She achieved good results in her leaving certificate and from 1978 to 1980 attended Cork Regional College and did a two year certificate in business studies. From 1981 to 1982 she completed a certificate in junior management with ANCO. From 1982 to 1985 she studied accountancy in the evening and at weekends at Cork Regional Technical College. She

completed her association of Chartered Certified Accountants examinations in 1985. Whilst doing that study, from 1981 having registered with a recruitment agency she did temporary bookkeeping work with a number of different employers. From 1981 to approximately 1984 she did contract work as an accountant with a number of different companies and from 1984 to 1988 she had a full time position as an accountant with the Waterford Foundry company reporting to the financial controller. She got married in 1986 and when her first child became due in 1988, she was unwell and had to give up work at that stage. For the next fourteen years from 1988 onwards she devoted herself to being a full time stay at home mother, looking after her children and organising the household.

14. The plaintiff returned to the workforce in November 2002 and for some nine years (between 2002 and 2011) she worked as a general operative with Bausch and Lomb. She worked weekends while her husband looked after the children. Her husband worked the shift during the week, and she worked weekends. Things improved for the plaintiff from 2011 when she was given a day shift by Bausch and Lomb, and she worked the day shift in between the period 2011 to 2014. She worked as a lab technician with the defendant's microbiology department for that three year period. In 2014/2015 Bausch and Lomb were purchased by Valeant Pharmaceuticals and the plaintiff was moved back to weekend work at that stage. This involved working for 24 hours over a weekend period. She earned between €15 and €16 per hour and therefore approximately €422 net for a weekend work.

15. The plaintiff told the court that she never had any accidents, never had any chemical spills. She never had any difficulty working the various jobs she was asked to perform and she feels she was a good and competent worker. From the above summary of her working career, it is clear to me that the plaintiff is a competent, hard working and determined person who strove not just to educate herself to a high standard but to ensure that her children also received a good education and a promising start in their lives. For financial reasons, having

not refreshed her accountancy skills and qualifications, the plaintiff in order to make ends meet decided to take up a role in Bausch & Lomb as a factory operative.

16. Around 2015 she started to consider whether she wanted to continue being a factory worker. She says her plan around 2015 was that her youngest son was in the middle of his course and she was hopeful of getting redundancy because whenever redundancy she could manage to get would enable her son finish out his course and she was hopeful that at some point after she finished up at Bausch and Lomb she would go back to working in the accountancy area. She applied for a voluntary redundancy scheme around this time. Some time after her accident which was in May 2015 she learned that her application for redundancy had been successful. She took up the redundancy offer and received the redundancy payment. Accordingly, regardless of the effects of the accident, she was going to finish with Bausch and Lomb in 2015. She told the court that her plan in relation to her future career at that stage was that she would go back and upskill in terms of her accountancy training and that she would return to working for small firms doing accounts and bookkeeping.

17. As to the accident circumstances, the plaintiff explained by reference to the photographs that she was required to stand at the outfeed end of the large trolley that was evident in the photographs. She had to take towers from the output end and place them onto a small trolley. She was required to take the towers of moulds in sequence from the stand down trolley, in accordance with a computer printout that she was given each day. She explained that the different cavities of the trolley have metal discs with numbers on at the end of each cavity. These are known as stoppers and were numbered one to twelve. The numbers are coloured red at the end of the trolley she was working on, whereas the numbers/stoppers at the input end are coloured white. She said that she was required to pick the correct towers off the trolleys and do so in sequence.

18. At the time of the accident, she had been doing this particular job for about a year and a half. She started her shift on the day of the accident at about 9 o'clock in the evening. She had nearly finished filling her own trolley with towers of moulds taken from the outfeed end. She couldn't remember precisely how many towers she had loaded from the stand-down trolley into her own trolley, but it may have been around 20. She said that she was bending down to collect a tower from the bottom shelf at cavity 11 or 12. She crouched down but not to kneeling point. She says she couldn't kneel because if you knelt down you were unbalanced and it would be difficult to get up again. She says it was her practice that when you put down the stopper she would put one hand on top of the tower and one hand underneath so that the trays within the tower wouldn't spill out. She says that as she was crouching down to collect the tower from the bottom shelf, she felt a blow to her right shoulder and neck area. She says it was a hard blow because she remembers jerking her neck to the left and she just stood up and said what's after happening. It was only afterwards that she realised a tower of moulds had fallen on her. She remembers going around the trolley and the girl who was on the next line came over to her and asked how she was. There was debris all around her. The tower was down on the ground and the moulds had fallen out. She was dazed and didn't know what to do. She tried to push the trolley back towards her workstation. Some people came to her assistance. She told Mr Lanigan O'Keefe that she didn't know from which shelf or cavity the tower had fallen but "I would have thought the top one". The plaintiff said that in the middle of the trolley the towers are too tightly packed in, whereas at the top shelf of the trolley the towers are more open and less packed. She said that they could barely get out a tower from the middle shelf, whereas there is more clearance in the top shelf. She said it was her belief that the tower that fell on her came from the top shelf, the shelf where there is more clearance. When asked by counsel if she was just deducing that and can't be certain about it, she replied that she would have said it was the top shelf. She says it

couldn't be the bottom shelf because she was crouching down at that level when the tower landed on her shoulder from above.

19. After the accident, she said the pain was getting worse and she wanted first aid. She was in area 6 and the first aid was in area 1. She went to her locker and then she went to the nurse's station. She wanted to get paracetamol from her locker but she was unable to put the key in the locker such was the pain in her hand. She was unable to open the locker as a result. She was taken to the nurse's station which is towards the entrance to the factory where she met the first aider from area 1. The first aider tried to give her an icepack, but the plaintiff couldn't bear it on her shoulder because it was too much pressure on her. The first aider was trying to look at her shoulder, but the plaintiff could not get on top of the pain. She indicates that the first aider said "you better go to hospital" and the plaintiff was anxious to contact her husband and if she was going to hospital she wanted her husband to bring her. Somebody from the factory contacted her husband and he came and brought her to the hospital. In the hospital, she was seen and given pain relief and they sent her for an x – ray. She says the doctor strapped it up and gave her painkillers to go home which were very strong painkillers. Because it was the Bank Holiday, she was told she was told she would have to come back in and see the consultant or the specialist. She said the pain was in her neck and in her shoulder. The pain developed such that as she was going out of the hospital she couldn't even breathe with the pain. Some time later, she was seen by a specialist and when asked did the pain get better at all, she says it was after swelling up and the consultant gave her pain relief.

20. As to her injuries, the plaintiff in the period following the accident had pain in her neck, in her shoulder and in her arms. She was referred to Mr. Nagaria, the neurosurgeon. He arranged for the plaintiff to have pain blocking injections. She says they didn't work, so she discussed with him the next step. She had an MRI done and she decided to have a spinal fusion performed. The operation was performed in 2016 at the C5 / C6 level. Mr. Nagaria

performed the operation by way of a frontal approach. She had an anterior cervical discectomy and fusion of the C5 / C6 level. She says she was in hospital for four or five days. After the operation, she couldn't do anything for about 16 weeks, and she found that a difficult period and "nearly cracked up". She was told not to do anything physical during that period and her husband had to put on her socks. She said the operation brought relief in terms of the neck pain but did not solve the problem of her shoulder pain and pain going down her arms.

21. The plaintiff told the court that over the years, she had difficulty with depression, and she would get down a bit. She coped with this by being busy and keeping the house tidy and attacking any cleaning jobs. She was referred to Dr. Ruth Delaney for further treatment and was given some injections to her shoulder. These brought relief for a while, but then the pain returned. She said that she did physiotherapy on Dr. Delaney's advice. She was referred subsequently to Mr. Hannan Mullett, for consideration of surgery on her shoulder. He recommended against surgery and instead provided pain blocking injections.

22. She told the court that her injuries affected her independence – she wasn't the busy active person that she was prior to the accident. She said that she had taught all of her four children to drive, and now all of a sudden, she was having to ask somebody to driver her everywhere as she "drives very little".

23. The plaintiff also told the court that her physical injuries impacted her mental health. This was particularly the case when in the aftermath of the spinal fusion surgery, she discovered that she had lost power in her voice. She said that her right vocal cord was paralysed as a result of the operation. This means she speaks with a low voice which is often hoarse. It impacts her in terms of going out. If she and her husband go to a wedding, she will go to the church and maybe go to the meal, but come home shortly afterwards. Her voice difficulty embarrasses her in social situations, and she avoids crowded areas. All told, losing

the power in her voice had a big impact on her, psychologically and socially. She says she spends her time now mainly pottering around the house.

24. As she was determined to get herself right medically, she and her husband spent what money they had on pursuing medical treatment and they incurred approximately €50,000 in medical expenses, including the cost of surgeries. She paid for this from her husband's modest inheritance and also from her own redundancy money from Bausch & Lomb.

25. In cross – examination, the plaintiff confirmed that she had handed in her redundancy notice prior to the accident, and also that she was winding down at the time of her last child being in the middle of his third level education. It was suggested to her that it didn't sound like she was going to take up any other employment, and she disagreed. She acknowledged that she had not upskilled or refreshed her accountancy skills. She said she was prevented from doing so because she could barely breathe with the pain. She was asked if she could lift her arm and she said she could not, and nor could she drive at that time.

26. In terms of the accident, she was asked if she had told the first aider, Anne Marie Hayes, that the tower of moulds had fallen from cavity 6. She denied this and said she had never mentioned cavity 6. It was put to her that Anne Marie Hayes had written this down 15 minutes after the accident. She was asked if she was on her knees when bending down to remove the moulds and she said she was not. She also denied that she was quite close to cavity 6. It was put to her that there was an investigation and check of the stoppers after the accident and that the stopper at cavity 6 was found to be in working order. She was asked if she was saying that there was somebody at the other end of the trolley when the accident happened, and she said that there had to have been. It was put to her that the person she had nominated (Pauline Lonergan) wasn't pushing any moulds from the other side, and the plaintiff said that if she wasn't, then somebody else was. She denied any suggestion that she pulled the moulds down on top of herself. It was put to her that when she went to the hospital

there was no bruising on her shoulder and no cuts. She replied that the doctor was there, and he strapped it up and she had very little movement in her shoulder, and the doctor gave her very strong painkillers. She agreed there were no cuts to her shoulder and she couldn't see any bruising. It was put to her that there were two separate MRI scans performed for Mr. Hannan Mullett and for Dr. Ruth Delaney and these were essentially clear. The plaintiff replied, "I had an MRI scan for my neck and I don't think Mr. Nagaria would have done an operation, neither would I, if I didn't need it".

27. The plaintiff was asked if she was restricted in her right hand lifting things and taking things down because of the injuries and the accident and she said she was. She said this continued all along since the accident. She was asked if she could drive any distances and she said she could only drive a short distance. She was asked if she could lift things and she said anything she lifts would have to be very light. She was asked how she does shopping and she says that she goes shopping with her children. She confirmed that she goes shopping in the Hypermarket in Waterford and also in the Aldi supermarket in Ardkeen. The plaintiff was then questioned about video footage take by a private investigator which, on the defence case, showed the plaintiff being able to do tasks which she claimed to doctors she could not do. I will come back to that aspect of the evidence later on.

28. The plaintiff was asked about what she had told the defendant's orthopaedic surgeon, Dr. O'Riordan. He examined her in February 2020 and November 2020. It was put to her that she told Dr. O'Riordan that she could do very little and had lost her independence and that she has to get people to do her shopping. She clarified this and said she believes that she told Dr. O'Riordan that her children help her to do the shopping and that she was doing her best to explain roughly what she does. She agreed that she told Dr. O'Riordan that "you would find it hard to bend down and to reach up to the shelves". She agreed that she told him that she would have had a problem doing her shopping. She said that it wasn't the case that she

couldn't do her shopping. She said she is the type of person who would be determined to get on with things. She told the court that she would have told the doctor most of what is recorded in his reports. She was pressed as to whether she would need to get people to bend down for her when shopping and she said that her helper would try. She was asked if she was able to reach up to shelves, and she says sometimes she could. She acknowledged saying to Dr. O'Riordan that she was weak and stiff all over. When pressed as to whether she told Dr. Riordan that she couldn't use her right hand, she said that her right hand would have been weak. She acknowledged telling Dr. O'Riordan that she had broken many irons because of dropping things and she acknowledged also saying that she couldn't dress the beds in the house. She was asked if she told Dr. O'Riordan that she wasn't able to go for a walk and she says that she wouldn't have been able to go far, and certainly not as far as she had gone previously before the accident.

29. As to driving, the plaintiff was asked if she told Dr. O'Riordan that she could drive in a straight line but she could not drive on the roads as she cannot turn her head. The plaintiff responded that what she meant was that if she goes into a parking space, she will choose a parking space that she is able to pull in and out of with ease. She acknowledged that she told Dr. O'Riordan that she could not turn her head to see around corners or reverse a car. She denied saying to the doctor that she is essentially totally disabled.

Private Investigator's video footage

30. As to the private investigator's video footage, it was put to her that the investigator followed her on four different days, and on three of those days she was driving, going to shops or going to the vet. The first surveillance was the 27th of October 2017. At 16:10 she was observed driving her black coloured Honda Civic away from the vicinity of her home in the direction of Carrick on Suir near the village of Grannagh in Co. Kilkenny. At 16:40 she

arrived at a car park at Suirside Veterinary Clinic in Carrick on Suir. She had driven approximately 21.6 km and it was put to her that there are plenty of bends in that road between Kilmacow (her home) and Carrick on Suir. The plaintiff responded that the point she was making about the impact on her driving was that she could not turn her head fully to look over her shoulder, but that she never said she couldn't drive around a bend. It was put to her that she was observed by the investigator emerging from the veterinary clinic holding the lead of a dog, walking the dog to the Honda vehicle, opening the boot of the Honda using her right hand, which she raised above head height. It was put to her that she then rearranged some items in the boot using her right hand and then put her right hand under the dog and lifted the dog into the boot compartment. The plaintiff responded that she would have done anything for her dog, and she accepted she would have used both hands to lift up her dog. It was put to her that on the video footage she has no difficulty using her right hand for a number of different tasks. She replied that she never said she couldn't use her right hand.

31. It was put to the plaintiff that on a second occasion on Friday the 10th of January 2020, she was again observed by the private investigator, and she was seen driving her silver Corolla from her address towards Waterford city. On this occasion she was shopping in the Aldi supermarket in the Ardkeen Centre in Williamstown. She was accompanied by a male who travelled as a front seat passenger in the Corolla. In the course of the shopping in Aldi she was observed at 13:26 selecting five 2 – litre bottles of flavoured water with her right hand and placing them in the trolley in succession. She was also observed picking up a six – pack of two litre bottles of water from a high shelf and placing them in the trolley. It is put to her that a six – pack of two litre bottles is almost 12 kg and it is suggested to her that that is quite a weighty item in her right hand. The plaintiff replied, "I can't remember, I'm sorry". It is put to her that she continued to shop, selecting more items from the display units and for nearly all of these can be seen using her right arm. It was put to her that she also used her

right hand to push the trolley. It was put to her that the footage shows her leaving the shop where she again used her right hand to open the boot of the vehicle she was driving and also took a six – pack of glass bottled beer from the trolley and put it into the boot. Later, she is observed walking the empty shopping trolley back to the trolley bay outside Aldi.

32. Mr. McCarthy also put a third piece of video surveillance to the plaintiff. This concerned footage taken on Saturday the 11th of January 2020 when she travelled from her home towards Waterford city as a front seat passenger in a grey Volkswagen Tiguan to do some shopping in the Hypermarket in Ballybricken in Waterford city. Again, the footage was shown to the plaintiff and then she was asked questions by Mr. McCarthy. It was put to her that the footage showed that she had no apparent difficulty turning her head in the car. The plaintiff responded that what she had said was that she could drive short distances. She does the best that she can and she tries to keep her life as normal as possible. It was put to her that the trip to the vet in Carrick on Suir was a round trip of 42 km. She responded that it was a journey that she had to take because it was something of an emergency for her dog. It was put to her that the footage showed that when she was doing the shopping in Aldi and in the Hypermarket, she used her right hand all the time and not her left. The plaintiff responded that she is normally right handed and that she was trying to get her life back to normal. She said that the person one sees in the footage is not her, and didn't reflect the person she was back in 2015 before the accident. She said that she has put on three or four stone in weight. It was put to her that her weight problem had not arisen as a result of the accident because in 2013 when she saw Sean O'Laoghaire, the consultant neurosurgeon for something else, he made reference to her being significantly overweight. The plaintiff responded that she wasn't that overweight. She said that when she went to Tadgh Lynch (another specialist) he gave her injections and after that she lost all the weight.

33. Mr. McCarthy put to the plaintiff that she had had previous accidents, which she accepted. She accepted that in August 2013 she had an accident at the clinic in Whitfield outside Waterford.

Evidence of the plaintiff's engineer, Bernard Harte

34. Mr. Harte told the court that he weighed the individual tower of moulds. The tower was 5.63 kg in weight which is about 12.5 lbs, which he says is just sort of a stone. There are effectively three shelves on the stand – down trolley. The lowest shelf is 490mm above floor level. The middle shelf is 900mm (about 3ft) above floor level, and the top shelf is 1320mm (about 4.5ft) above floor level. He explained that in each cavity, there is a dual set of rollers and the purpose of these rollers is to facilitate easy movement of the towers around the trolley. The rollers run the distance from the infeed side to the outfeed side. The catches or stoppers when in the vertical position, project approximately 15mm which is just over half an inch, above the rollers. The purpose of this is to operate as an end stopper for the towers that are being pushed from the far end up to the outfeed end. The towers of moulds contain 25 trays of moulds for contact lenses and the outer casing is made of steel. Mr. Harte said that the catches / stoppers are spring loaded on a hinge, and he said if they are performing as designed, a tower should not come off the cavity. Mr. Harte referenced the in – house investigation report which indicated that some catches from another trolley were defective. No objection was taken to this. He was asked what the consequences of a catch being defective are, from a health and safety perspective, and he said that if a tower is being pushed along the cavity, the lead tower can fall off the trolley. He was asked in terms of the defendant's system of work which involves a loading person at the infeed end and somebody removing it from the outfeed end, whether this creates a danger. He responded that simultaneous loading and unloading carries a risk, which is not present where unloading takes

place at a different time to loading. The risk this gives rise to is predictable, being that the tower may come off the trolley and strike somebody. He measured the tower of moulds, and it was 7 inches x 7 inches by 1foot.

35. In terms of the mechanism of the accident, Mr. Harte said, given the agreed circumstances that a tower had fallen from an upper level on to Mrs. Reid while she was crouched down at the lower level removing a tower from the bottom shelf, in his view the catch must have been faulty. When asked if it would require the operator at the infeed end to have done something, he said yes, because the towers will stay on the rollers, and the rollers are level. He says that unless there is some force exerted, the towers won't spontaneously come off the trolley. Significantly, he stated that he was unable to conceive of any circumstances other than the catch in question having been faulty and an operator at the infeed end having been loading along the rollers. He stated that if the plaintiff was taking something off the shelf, her hands would be outstretched in front of her and it is hard to see the mechanics of how that would have resulted in a tower hitting her shoulder.

36. Mr. Harte was then brought through the statutory obligations of an employer to carry out a risk assessment and the requirement to take steps to reduce risks associated with a particular task. He said a risk assessment would have shown a number of risks inherent in this work system. In view of the possible failure of the safety catches, there should be regular inspection of the catches. He stated that two very basic controls that could have been followed were regular inspection of catches and the elimination of dual operation. He says he would expect there to have been an inspection regime of possibly once a week. It would not be a lengthy inspection; it would only take a few minutes. He hadn't himself ever come across such an operation before, involving a single trolley with a simultaneous infeed / outfeed function. He stated that if these basic risk measures had been taken, the accident could not have happened. He says he was not condemning outright the system of work

insofar as it involved the infeed/outfeed simultaneous operation, but he was emphasising the point that if the employer chooses such an operation, they must ensure to take the necessary controls to mitigate the risks thereby created.

37. Mr Harte stated that as far as he was concerned, the employer in this instance failed to conduct the work activity in a way that ensured, as far as was reasonably practicable, the safety health and welfare of the plaintiff. He said that the combination of failing to separate the infeed and outfeed functions and the failure to carry out inspection of the catches and regular maintenance means that there was a breach of s. 8 of the employer's obligations under the Safety, Health and Welfare at Work Act 2005 and the associated Regulations. He was unaware of whether a risk assessment had been carried out, but he felt that had if one been carried out, this particular system of work would not have withstood a proper risk assessment. He said the defendant had failed to educate their employees as to the risks involved and to caution them as to the need to be extra vigilant and that therefore there was a breach of s. 9 of the Regulations. He stated that in the light of the plaintiff's evidence that there had been a prior incident of a tower falling off, this indicated that there was an inadequate inspection and maintenance system. All told, he offered the view that the system of work was not safe and the equipment that the plaintiff was provided with was not adequate or appropriate.

38. In cross – examination, Mr. Harte was asked if he accepted that the tower that fell on the plaintiff fell from cavity 6. He said he was not satisfied to do that because he was not sure how that immediate assessment was actually concluded. He was asked if the tower that fell on the plaintiff fell from cavity 5, 6, 7 or 8, would that allow a fall of any significance. He said that it would not and it certainly wouldn't be a fall from any great height. He was asked that if the tower had fallen from cavity 6, giving the plaintiff the benefit of the doubt, what would the highest differential be between the position of her arm and the level of cavity 6. Mr. Harte said that if one takes the top of the tower, that would be about eight inches from

her shoulder. So, if the tower came from cavity 6, it would involve the tower falling eight inches onto her shoulder. He also stated that the plaintiff wouldn't be any great distance out from the trolley because she would have been reaching in to get to the bottom tower.

39. The engineer confirmed that it would be common sense to say that the higher the fall, the greater the risk of injury. He was also asked to agree that the greater likelihood was that the plaintiff's arm or shoulder would be marked in some way by the falling metal tower, and he responded "not necessarily – you're not talking about sharp edges to the tower". He said that if such a tower falls on your shoulder, you may not sustain a bruise, depending on your clothing. He agreed that a person is more likely to be bruised the higher the distance the tower has travelled. Mr. Harte reiterated that a flat item falling on a person's shoulder may not incur a bruise. It was put to him that the tower is a metal tower, and it has sides and edges and corners. He replied it does, but it doesn't have sharp items or sharp edges. The witness also said that whether or not particular injuries are likely is really a matter for the medics.

Evidence of Mr Flahavan, the defendant's engineer

40. Mr. Flahavan indicated that he examined the defendant's system of work in this particular area, and he found that it was generally very satisfactory. There were two features that led him to this view. The first was the fact that the safety stoppers have what he termed a "fail – safe" operation whereby their default position is the safe position, preventing anything from coming off the track out of the cavity. The second feature that he found helped safety was that the stand – down trolley was on level ground. It does not move and so none of the towers can move without being either pushed or pulled by somebody. He stated that he was happy the until the operator releases the catch to withdraw the tower, it cannot fall off the trolly. In examination in chief, he reiterated the view that the system is a "fail – safe system" where the default position is to go into the stop position to prevent anything coming from the

track in an untoward fashion. He said that he was puzzled by how the plaintiff suffered her injury, particularly in circumstances where the person nominated by the plaintiff to have been pushing the towers had confirmed that she had not been pushing the towers (Pauline Lonergan). He said that he found it difficult to see how a tower could come from cavity no. 6 (if it had come from that cavity) in circumstances where it had by all accounts had a working stopper on it (this is a reference to the disputed email of Elaine Lee in respect of which the plaintiff raises an admissibility objection). Moreover, the stand – down trolley is a very heavy piece of kit, so it is not the kind of thing that could be dislodged by vibration or by moving trolleys. He stated that in the absence of Pauline Lonergan pushing the towers, he did not know how the accident had occurred to the plaintiff.

41. In cross – examination, Mr. Flahavan accepted that if on the information he receives he cannot figure out how an accident occurred, that in itself speaks to some deficit in the information that he has received. He was asked whom he was accompanied by at the time of his inspection, and he confirmed it was a Bausch & Lomb representative, Conor Mullins. He said that he would have attended at the premises maybe two or three times a year. He confirmed that he was provided with a copy of the engineer Robert Dunphy's investigation report into the cause of the accident. He confirmed that within that report there is a reference to a health and safety review on the 2nd of June 2015, and to an inspection and finding that catch 12 was found to be defective. He was then asked to explain why there was no mention of this in his engineering report that he prepared for the case. He was pressed on this and asked why in circumstances where he had mentioned the accident report form, he didn't mention this other document that happened to show that a catch was defective. It was put to him that the safety of the system of work is *substantially* dependent on the catches working, and he said that it was *partially* dependent on the catch. It was put to him that a document which the defendant had not provided to the plaintiff on disclosure, namely the report

showing a defective catch, ought to have been included in his report for balance. He accepted that yes, he should possibly have included a reference to it.

42. He was then asked whether he could stand over that part of his report that indicated that his instructions were that the stoppers at the end of the tracks were examined after the incident and found to be working satisfactorily. He replied that he probably should have said that this applied to the numbered stopper at the end of the track which was involved in the accident. It was suggested to him that what he had conveyed in his report was that the stoppers (plural) at the end of the tracks were examined after the incident and found to be working satisfactorily, and he was asked if that was a true representation. He responded, "perhaps not". It was put to him that his report was manifestly untrue in that regard, and he did not demur.

43. The defendant's engineer was then asked about a key section of his report at para. 4.22 where he had stated that in his opinion the system of work to retain the towers on their tracks until the operator releases the catch to withdraw the tower is satisfactory and that he considered the catches to be "fail-safe in their operation". It was put to him that he had a report and photographs in front of him which show that a catch failed within days of the incident. That being so, it was suggested to him that as an independent engineer, he had no business (a) it not disclosing the report, and (b) in advancing a proposition that the catches were fail–safe, because, it was suggested, he knew quite the opposite to be true. The engineer replied that the fail–safe system may not always work perfectly and that that was a fact of life. It was put to him that the stoppers are hinged, and one sees this from photographs 9 and 10 of his photographs, and he confirmed that they are spring loaded to return to the upright position. It was put to him that as a matter of basic and common sense, springs can fail and hinges can get caught, and he agreed. The witness accepted that this may come about as a result of a "permanent banjaxing" or "transient banjaxing" of the stopper. It was put to him

that the system was unnecessarily risky because these hinges and stoppers are being impacted every day, day in day out, by towers. It was put to him that the system was unnecessarily unsafe because it involved the propulsion of towers along rails up towards the outfeed end. The witness accepted that this was so. It was put to him that if the catch does not stop the tower at the outfeed end, one is looking at a significant risk of injury to an operative in that area. He responded that the system of work depends on having a competent operator keeping watch.

44. The engineer was asked whether he would be happy with a system without stoppers, which would involve towers falling willy nilly out into the area where people were working. He accepted that a system without catches would present a risk. That being so, it was put to the engineer that everything depended on the viability of the catches. The witness was asked if he had ever, apart from Bausch & Lomb, seen a situation where infeed and outfeed is operated on the same trolley, and the witness confirmed that he had not – this was a unique system of work operated by Bausch & Lomb.

45. Elsewhere, Mr. Flahavan was asked if he had seen the Bausch & Lomb risk assessment and he indicated that he did not think that he had. He was unable to remember if he had asked to see the risk assessment for this particular area. He accepted that it was a basic and standard obligation of an employer to risk assess a work activity and that this was covered under s. 19 of the 2005 Act. He agreed. The witness was asked if he agreed with the plaintiff's engineer that there should be a system of routine regular checks on the catches. He replied that may be the case if there were reports of the catches being defective. The witness was asked if that made sense, that one would introduce the system of work and if it proves to be defective at that point, you then introduce the system checks, but not before. The witness said that the frequency of checking will depend on the frequency of failure, and the frequency of failure being observed and the employees complaining to management that something is

broken. The engineer was pressed on this again, and it was put to him that the logic of the position he was advancing was that management would wait until an employee is injured, maybe seriously injured, and then at that point you introduce a system of checks? The witness was asked what he had been told by Bausch & Lomb as to their system of checks on these catches. He responded that he had not been given any information on the system of checks. It was put to him that he could not therefore indicate to the court that there was any system in place, and he said no.

46. Elsewhere, the Engineer was asked if he accepted as a matter of basic sense, that if somebody is not pushing the towers forward along the rails, then the risk is massively reduced of a tower coming out the far end. The witness agreed. The witness also agreed that another precaution that could have been taken would be for infeed operatives to be told they shouldn't push the towers along the rails when there is an outfeed operative at the other end. It was suggested to the witness that it wouldn't be a great hardship to Bausch & Lomb to introduce a simple tag system involving that sort of precaution. The witness responded, "I don't know enough about their system or their process to say".

47. The witness was also cross – examined on the heights of the three levels on the trolley, as depicted in a diagram prepared by the witness. He was asked if the plaintiff was taking a tower from cavity 6, given the measurements on the diagram, did this mean there was no way she could have spilled the item onto her own shoulder ? Mr. Flahavan confirmed that if the plaintiff was removing it from cavity 6, it could not have fallen onto her shoulder.

Evidence of Pauline Lonergan

48. Pauline Lonergan told the court that she had been working in Bausch & Lomb for 23 years. At the time of Margaret Reid's accident, she was working on a moulding machine. She had to take moulds off in trays and put them into the towers. She confirmed that Margaret

Reid was working on the day in question. She said that her function at the time was running the machine and taking the trays off the machine to put them into towers underneath. She was aware that Margaret Reid had had an accident, but she did not see the accident. She was asked if she had to push the towers along the trolley, and she said no, she wasn't pushing the towers, because the towers wouldn't have been full for them to be taken off the machine. She says that the reason she knew Margaret had had an accident was she had heard a bang. It was put to her that somebody had said she had been pushing, and she said she had not been. She knew this because she wouldn't have been in a position to push the towers along the rollers unless she was backfilling from the back. The towers that she was filling weren't full enough to take them off the machine she was working off and put them in at the back of the stand – down trolly. She was asked if there was anyone else in the location at the time she heard the bang and she said she only noticed one other person, John Murphy, who had started sweeping up the towers.

49. In cross – examination, Ms. Lonergan was asked if one has a number of towers backed up at the back of the infeed end, presumably as a matter of good sense, one would push them up so that they would be available for whoever else was going to be lifting them off at the other end. The witness said she would do this but would always make sure it was safe to push them up. The witness confirmed that sometimes she will load and push forward the towers on the rollers when she is loading the tower. If there weren't towers up the front, she might just push them forward to make sure there were towers available up at the front, and the witness agreed that that made sense. The witness said that there would be three operatives in the area at a given time, each operative operating two injecting moulding machines.

Evidence of Anne Marie Hayes

50. Anne Marie Hayes told the court that she worked as a set up technician on injection moulding and also had a role as a first aid attendant. She stated that she was working on the evening in question when the accident happened, the 30th of May 2015. She got a call to attend Mrs. Reid for first aid. She filled in a treatment injury form at the time. The form recorded that Margaret was "*removing a tower from Cavity 11 / 12…. A tower from the above Cavity 6 fell out and hit her right shoulder…Margaret in extreme pain so advised to go to AE".* Ms. Hayes confirmed that she had written those words and she also confirmed that she had received that information from the plaintiff. She says she took the plaintiff to the treatment room and asked her if she could look at her shoulder. She applied an ice pack but it was taken off after about two minutes as the plaintiff didn't want it on her shoulder. She advised Margaret that because the pain was increasing that she should go and get it looked at in A&E.

51. Under cross – examination, Ms Hayes confirmed that she had completed two documents. The first was the injury treatment form that counsel had read out. This was prepared in the treatment room with Mrs. Reid. She confirmed that this is not a formal accident report ie a more formal document for the purpose of an investigation. The witness was asked if prior to her discussion with the plaintiff she had obtained a history from anybody else. She said she had not. She had received a call from Mrs. Reid's manager Elaine Lee, who asked her to take a look at Mrs. Reid. She confirmed that if she didn't have the injury treatment report form, she would not have an independent memory of what Mrs. Reid had said. In other words, she was relying on the form to give her evidence as to what the plaintiff had said to her. The witness confirmed that she had also completed a witness statement (p. 10 of 15 of the investigation compiled by Robert Dunphy). She confirmed that in filling out such a statement, she would be very careful to put in all relevant information. It was put to her that it was clear from her statement that she had in fact received information

from Elaine Lee about the circumstances of the incident. The witness accepted this and said that she had already said this in evidence. It was put to the witness that the information that the tower had fallen from cavity 6 did not come from the plaintiff and may well have come from Elaine Lee or another source. The witness answered "no" to this. When asked if she remembered the detail of what Ms. Lee had told her about the incident she responded that she didn't remember word for word.

52. Ms Hayes confirmed that in her more formal accident report form statement, there was no mention of the detail that the tower had come from cavity 6. When asked why was that the case, she responded she didn't know. It was put to her that it was likely that she was unsure as to the source of her information and that's why she didn't include it in the statement. She answered no. In redirect, Anne Marie Hayes stated that the only person in the treatment room when she filled out the treatment form was the plaintiff and herself. She confirmed this was fifteen minutes after the accident, and that that form refers to cavity 6. She reiterated that the information came from Mrs. Reid and she confirmed that the accident report form statement was completed five or seven days later.

53. Significantly, in further questioning from Ms. Morgan, the witness was asked "with her first aid hat on" was she satisfied that the plaintiff was in extreme pain when she was attending to her, and the witness confirmed that she was, and she also said that she was nauseous with the pain. She was asked if this was a serious presentation and she confirmed that it was, and she says it was she who had suggested that the plaintiff needed hospital treatment.

Evidence of Tony Power

54. Mr. Power told the court that he was the global environmental safety director for the Bausch & Lomb business. The company employs about 1650 people. He heads up a team of

about five environmental health and safety employees and his role was the day to day management of all matters in relation to employee safety and health across the site. He said that a Mr. Robert Dunphy was an EHS adviser allotted to the particular manufacturing area. He reported back to Mr. Power around the 2nd of June. He said the process was that an on–shift supervisor would complete the initial accident report. If a subsequent first aid report also issued, that would be delivered to the EHS officer, who was on–site. He confirmed that Anne Marie Hayes was the first aid officer on site, and he confirmed that she did a report, and four copies of that report were circulated. One copy would go to the shift manager, one would go to occupational health because they have a full time nurse, one would go into the file for the particular area and one would go to Tony Power himself, as the head of health and safety.

55. Mr :Power told the court that the defendant uses something called a CAMS system – Common Automated Manufacturing System. This system essentially allows each element of the process to be tracked for batch tracing all the way through, so when a tower is placed on a stand – down rack, it has an identifier barcode which is registered onto the CAMS system. When it goes through certain stages of the process it scans into different process steps. He said that on the initial investigation when the report of the accident came back to him, primarily they would be looking at whether there was anything amiss that they needed to implement corrective action for. He said that the circumstances as far as he was concerned warranted that there be further investigation of the matter, so he asked had any towers on the night in question been scrapped from the CAMS system. He says this can happen for various reasons, for instance you might have the end of a lot where the tower needs to be just taken out of commission. In this scenario, he asked had any tower fallen or been dropped from the particular trolley. You then get the process people to go into the CAMS system and they can retrieve the memory data to see what towers have been de – allocated at the time. He said that this was done in this case, and he obtained a report. This is to be found at Appendix 7 to Mr.

Dunphy's report which provides a table of towers that are de – allocated. It was agreed between the parties that the Court could receive the de-allocation report *de bene esse*, with the parties reserving their rights to make submissions later on the admissibility of the document. Relying on this table, which he accepted he had not produced or created, Mr. Power said that the de – allocation printout indicated that the tower in question had fallen from Inject 35 at Cavity 6. I will come back to the issue as to the admissibility of this de – allocation table later on in this judgment.

56. As to the system of work itself, Mr. Power explained that the stand – down racks fulfil a particular function in the manufacturing process. At one end, the operator would load onto the stand – down rack towers that have come from two injection moulding machines. The placing of the towers on the stand – down rack is, he says, an essential process step because the plastic that makes up the moulds needs to "stand down" for a period of time, because the plastic needs to cool down after it has been heated up. How long will vary for the product family. In general, it can range from anything from up to four and six hours while the towers remain on the racks. At the end of the necessary period, the towers are removed by an operator and put onto another machine. The operator who removes the towers is given a "pick list" by way of computer printout. By this means, they are told what cavity to pull from. He explained that the stand – down trolley or rack is not a machine, it is simply a storage rack where the towers of moulds need to be placed for a period. He said that the operator on the other side would take off about eight towers per hour, because the machine is capable of processing eight towers.

57. Mr. Power said that in terms of the carrying out of checks, what management tries to do across the site is that where any defects are visible, the operators are the first people to report them. On the process side, operatives can put up on a computer system for technicians to address any mechanically related issues with the process. They can also report a problem

to their team leader, their production manager. Thirdly, he said they also have a safety observations book, where an operator can write in the book difficulties that have arisen. He also said that there were inspections by safety officers, i.e. by his team, who do inspections and audits of the process areas "several times a week". He said also that the production managers must do dedicated EHS inspections. This would involve the production managers checking the machines for defects, any pieces that are not operationally working, guarding issues, cracks on the machine, visible defects that may be apparent. He also said that they use a system of access known as MS Access Database for the generation of risk assessments, whereby they look at any foreseeable hazards in the site and they assess them. He said that the process hasn't really changed in many years, even before he joined the company, which was 13 years ago.

58. Mr. Power referred to a risk assessment document bearing the date 26th of February 2022 entitled "Injection moulding hazard class – struck by object". It referred to a hazard description as to the potential of a tower being dropped or falling from a trolley. The controls that were implemented to address this hazard are mechanical stop plates to prevent the towers from rolling off the end of the trolley. Mr. Power said the checks are captured on the regular inspection by the maintenance people. He was asked by his counsel if there had been any problems with towers coming off the end of the injector moulding trolley. He said that they had had towers being dropped by people but there were no reports of incidents of towers falling off the infeed and outfeed end. He also said that in his 13 years working with the company, he had not been involved in an accident that involved a tower falling from a height.

59. Significantly, Mr. Power confirmed that his section did get complaints of damage to stoppers from time to time. When that occurred, the process was that the on – shift technician would repair the stopper. Each area has a shift maintenance supervisor plus some technicians.

He said that the process involved taking a cavity of the trolley out of commission and de – allocating it until the problem was fixed.

60. Mr. Power was asked about a report that was done on the 7th of March 2012 in relation to reports of damaged end stops on the tower racks. By agreement of the parties, the court was provided with a copy of the March 2012 document which reads as follows: -

> "*We are getting reports of some damaged end stops on the tower racks. This is a safety concern as a malfunctioning stop can result in a full tower of moulds falling off the opposite end of a tower rack during loading, with the potential of causing injury to a passer-by. As most of the racks back onto a corridor, the risk is increased.*
>
> *This communication is to increase awareness so that if an issue is raised it is resolved.*
>
> *The end stops may become damaged if the row of towers hit the end stop with too much force – so when loading the racks, gently move the towers down the rack towards the end stop.*
>
> *If you notice a defective tower stop, i.e., one that does not function as a stop – report it to the manager. If a repair cannot be carried out quickly, seal off that row before the end of your shift".*

61. The same document included photographs of tower racks backing on to a corridor and a separate photograph of an example of a malfunctioning end stop which was stuck in the flat position such that it didn't operate as a mechanism to prevent towers falling off the rack.

62. Mr. Power confirmed that the plaintiff had met with Robert Dunphy as part of his investigation into the accident. He also stated that there were no safety concerns brought to Mr. Power's attention by the plaintiff, Mrs. Reid.

63. In cross – examination, Mr. Power stated that he did not remember anybody getting injured in consequence of a tower falling from a height of a rack, but he acknowledged that

towers do fall off the racks. He also agreed that towers falling off racks is a treacherous and dangerous circumstance for operators working in the region of the racks. He confirmed that the only risk assessment that the company had was the one dating from February 2022. There were earlier risk assessments, but the system overwrites them, such that the earlier ones are not available. In relation to the 7th of March 2012 document, he confirmed that that was not a risk assessment but was rather an "EHSS Department" communication. He was asked if he had any records to show that the document was actually communicated to staff, and he said no, he didn't have any signed records to say that was done. He said he did not have any records to show that these were delivered or presented to a "toolbox talk" to staff working on the machines. He confirmed that he himself did not deliver or communicate the document to staff members. He also confirmed that the Dunphy investigation report did not contain any reference to the March 2012 communication. It was put to him that that was strange in circumstances where Mr. Dunphy was conducting an EHS review under Mr. Power's supervision into the incident in June of 2015, particularly in circumstances where risk assessments and staff communications are central to any process of health and safety. He was asked if this 2012 communication was operative in 2015, one would expect to see it writ large in the Dunphy report. He indicated he could not answer that question because the details of the Dunphy report did not relate to any communication issued three years prior.

64. Counsel put to Mr Power that if that communication from 2012 was in any way acted upon, it would feature prominently in Mr. Dunphy's report. Mr. Power did not accept this to be the case. It was put to him that in Mr. Dunphy's report there is no reference to a risk assessment on towers falling from racks at all and he agreed. He was asked had he brought to court any documentation to show communication of a risk assessment on the rack and trolley to staff members, and he said no. He was asked if he agreed that a risk assessment isn't worth much if it remains in a drawer, and he agreed. He was asked what measures were identified

by the company as control measures in any risk assessment to reduce the risks of towers falling from the racks, and he replied that the end stops were the control measures in question. He said that the initial position was that the rack was entirely open without any stoppers. So the control measure that was decided upon at some time prior to 2012 was the putting in of the safety stoppers and this was done before his time in the company in 2010.

65. Mr. Power was asked about the CAMS system, which is the Computer Automated Management System whereby a barcode is placed on a tower of moulds and can be scanned by employees, and this is then fed into some central processing system within the factory. Mr. Power confirmed that the stand down trolley itself is not a feature of the CAMS system. There is no CAMS arrangement on the stand down trolley itself. Rather, the CAMS scanning is on the towers of moulds. He confirmed that when Pauline Lonergan, for example, puts a tower on the trolley, there is no automatically generated computer record of her so doing. Mr. Power confirmed that that was the case and he said that she would scan the tower with a hand held barcode scanner and she would do so at the injection moulding machine. He confirmed that there was no computer record of the operative putting the tower onto the stand – down trolley. He also confirmed that there is no computer generated record of a tower being removed from the outfeed end of the trolley. He said that this means the company doesn't have any automatically generated computer record of the "on and off" of the stand – down trolley. He said that when the operator on the infeed side removes the towers to place them on to the stand down trolley, they scan them at that stage and place them on the trolley. That scan basically says that the tower is off one trolley used in the process and has been moved on to another trolley used in the process. He said that the barcode scanner is akin to a scanning device used at the cash register in supermarkets. The purpose of it is for batch traceability across the whole manufacturing platform.

66. The witness was asked about the de – allocation table that was included as an appendix to Mr. Dunphy's report. He agreed that the de – allocated column in the table is a human input exercise such that the record of de – allocation or the record of a fallen tower is entirely dependent on someone going to the computer and entering that information. He confirmed that there will not be an entry on the table "tower fell from rack" unless a human operative puts it in. The witness agreed that a person reading the de – allocation table could not conclude that there were not other towers from Machine no. 35 on the night which went astray.

67. Significantly, Mr. Power was unable to say who had inputted entries into the table or who had downloaded the table. He believed it would have been one of the process operatives that would have given it to Robert Dunphy. He was unable to say when it was downloaded. He was unable to say whether an entry in Column 3 on the de – allocation table can be amended after it had been first entered. The witness confirmed that he himself does not use the CAMS system.

68. Mr. Power was also asked about how the Dunphy report came into existence. He indicated it came into existence as a health and safety document, but at some point it developed or morphed into being a litigation investigation document, and legal privilege was asserted over it. He acknowledged that different parts of the report were authored by different individuals, including two other engineers in addition to Mr. Dunphy and he said he himself would also review a draft of the document and, on foot of that review, there would be changes to the document. He said that the earlier drafts were not available because they were written over. He emphasised that the report was in the nature of a "working document" involving the gathering of information and a *continuum.* He did not accept the characterisation that earlier drafts were changed or fixed if they weren't to management's liking.

69. Mr. Power was asked about the role played by Elaine Lee, in circumstances where Elaine Lee was not called to the witness box by the defence. He said that Elaine Lee is a production manager for that particular area. He confirmed that she was not from maintenance, even though an email asserts that she carried out a check on cavity 6 after the accident. He confirmed that in the email from Elaine Lee which the defendant was seeking to have admitted into evidence, she gives no account as to what check she claims to have carried out – whether it was a visual check or a manual check or what form it took. He confirmed that there was no other documentary evidence of any check having been carried out. He also confirmed that there was no mention of this alleged check in the accident report form subsequently completed by Elaine Lee.

70. In relation to the safety stoppers, he agreed that the stoppers were not "fail-safe" and he acknowledged that it was incorrect for an engineer to regard them as being "fail–safe".

71. As to the control measures taken following the March 2012 communication, he confirmed that he could not speak to the implementation of those measures. He was asked could management not have instructed infeed operators not to load or push the towers when the outfeed operator is at the other end. He agreed that it would have been relatively easy to introduce such a system. It was put to him that that would have eliminated the risk to the safety of employees, and he disagreed because he said the end stops would have to be defective in addition to the operator pushing the towers. He acknowledged that he had dealt with incidents where towers had fallen off the racks. He confirmed that the March 2012 document represented the Bausch & Lomb response to the issue with the defective catches, and that that was the extent of the controls that were put in place. It was put to him that there was no proactive system of maintenance of the catches being operated by the defendant and Mr. Power disagreed. It was put to him that the engineer Mr. Flahavan did not have any details about a proactive system of checks or maintenance being carried out. Mr. Power

responded that checks were carried out by area managers and safety officers' inspections would have picked up on defective catches. The witness was asked if he had any documentation to show the court evidencing the carrying out of any such maintenance checks and he confirmed that he had no such documents.

72. Mr. Power was asked about the likely mechanism of the accident and the following questions and answers appear to the Court to be relevant: -

> "*Q: If the incident happened as Margaret Reid says it happened, that a [tower] came out of the rack, I mean, inexorably that means the catch failed, doesn't it?*
>
> *A: Yes.*
>
> *Q: Yes. If Margaret Reid is correct in saying in her account of the accident that the tower came out of the rack, we have the catch failed and we have somebody either loading or pushing the towers on the other side?*
>
> *A: Yes. That would have to happen because it's not mechanically driven.*
>
> *Q: Ok. So inevitably, if the conclusion of this court is that the tower came from the rack, fell from the rack down onto Margaret Reid, the court can be confident, (i) that the catch failed and that, (ii) somebody was loading or pushing towers along that rack at the time?*
>
> *A: At the same time" (Day 6, p. 70 line 456).*

73. Finally, Mr. Power answered questions concerning the steps the defendant took following the reports of defective catches in March of 2012. He was asked when the reports of defective catches came in in 2012, was the frequency of the checks on the catches increased. Mr. Power said that he was not able to recall. He was asked whether consideration was given to changing the infeed/outfeed one trolley arrangement, in the light of the reports of 2012, and he said "no, not at all". He was asked was consideration given to introducing an alert system whereby the infeed operator would alert the outfeed person that they were about

to push through. He responded “no” to that question, stating that management didn’t feel it was a necessity at the time because of the frequency as to when that would happen. He was asked whether consideration was given to training or instructing operatives not to load if an outfeed operator was at the other end, in light of the reports coming through in March 2012 of defective catches. He replied “no” to that question. Separately, he pointed out that catches could get stuck in the “up” or in the “down” position. If they got stuck in the “up” position, they would still operate as safety stoppers even though they were defective, because they would prevent a tower falling off the trolley.

Summary of the plaintiff’s case on liability

74. Counsel for the plaintiff made submissions on liability and quantum and supported those submissions with a helpful speaking note which assisted the court in identifying the core features of the plaintiff’s case and the primary criticisms of the defendant’s system of work. Counsel for the plaintiff emphasised that the only witness in a position to offer an eyewitness account as to the circumstances, was Mrs. Reid herself. The gist of her case was that whilst retrieving a tower from the bottom shelf of the stand – down trolley, she was struck by a tower of moulds that fell from overhead. It was contended that could only have occurred if a tower fell from an overhead rack. As to the defendant’s contention that the plaintiff herself may have caused the tower to fall, the plaintiff countered that there was simply no eyewitness account to that effect, or indeed any direct evidence that that is indeed what occurred.

75. Secondly, the plaintiff submitted that that allegation made little sense from an engineering or indeed common sense perspective. Counsel emphasised that Mr. Flahavan, the defendant’s engineer, could not conceive of any circumstances in which the plaintiff could have brought the tower onto herself. In point of fact, the defendant already knew and had the

experience of catches failing and towers falling previously. It was urged that the plaintiff's account was readily understandable and reconcilable from an engineering or physical perspective.

76. More fundamentally, the plaintiff contended that both engineers were agreed that the incident described by the plaintiff could only have occurred if the catch had failed and somebody was loading the trolley and pushing from the other side, at the time the plaintiff had her accident. The plaintiff contended that the fact of the incident as described by the plaintiff provides conclusive evidence of each of those facts namely, (a) that the catch had failed to prevent the tower coming off the trolley, and (b) somebody was pushing the tower at the relevant time from the other end (for otherwise it couldn't have fallen off the trolley).

77. The plaintiff contends that that is the correct starting point for any consideration of liability, particularly in circumstances where the plaintiff is effectively unchallenged in her account that she was bending down to retrieve a tower from the bottom shelf of the trolley when she was struck by a tower that fell from overhead.

78. As to the evidence of Pauline Lonergan, the plaintiff contends that she did not respond to the incident, did not provide a statement other than to the defendant's solicitor and the final account in her evidence stated that she could not be sure as to what she was doing at the relevant time. On the plaintiff's construction, she also left open the prospect that someone else may have been responsible for pushing the towers at the other end.

79. The plaintiff contends that the witness Elaine Lee was not in fact called to give evidence to face questioning on the email communication allegedly sent by her or to discuss the statement made by her to the company's investigation. The plaintiff contends that there is no evidence before the court of her alleged check of Catch 6 – assuming that is the rack from which the offending tower emanated. The plaintiff complains that the plaintiff's side has not been afforded an opportunity to cross – examine Ms. Lee on this claim and invites the court

to draw an inference from the fact that Ms. Lee was not inclined to subject herself to scrutiny on the point and nor was the defendant's side inclined to call her. Emphasis was placed on the fact that Ms. Lee did not reference the alleged check on stopper 6 in a subsequent accident report form statement which she is said to have made. The plaintiff says that this "evidence" is not before the court or capable of being afforded any weight.

80. The plaintiff submits that there is also the question of the source of the information concerning the claim that the tower had fallen from Cavity 6. The first aid witness, Annemarie Hayes claims to receive that account from the plaintiff and was clear that by the time of completion of the injury form, she had not received information on the incident from any other person. However, the plaintiff notes that the accident report form statement made by Ms. Hayes showed clearly that she had received an account of the incident from Elaine Lee. The plaintiff also contests the admissibility of documents sought to be put in evidence by the defendant, including the computer de-allocation form that was produced in court, the email of Elaine Lee and the statement of Elaine Lee. The plaintiff contends that the author of the entry on the de-allocation form was unknown and the information on the form was incomplete. The plaintiff says the onus is on the defendant to prove that the documents being relied upon are admissible. The plaintiff contends that the computer table that was obtained on instruction from the defendant's witness Tony Power in investigation of the incident for *inter alia* litigation purposes, could not be regarded as a business record within the meaning of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. In any event, the plaintiff contended that the defendant had not invoked the procedure under the Act for admitting business records and had not laid the necessary groundwork for any such application. I will come back to this admissibility dispute presently.

Plaintiff's submissions on the defendant's system of work

81. The plaintiff claims breach of duty at common law and of statutory duty. The plaintiff relies in particular on ss. 8 and 9 of the Safety, Health & Welfare at Work Act 2005 and the Regulations made thereunder, in particular Articles 28 and 33. The plaintiff contends that the system of work was unsafe and involved the known hazard of towers falling from the stand – down trolley. The plaintiff emphasises that it was actually envisaged as part of the defendant's system of work that when outfeed operatives such as the plaintiff were removing towers from the outfeed end, that routinely operators at the infeed end would be pushing towers along the rollers from the other end. Far from being discouraged, this was part and parcel of the defendant's system. The plaintiff maintained that this was inherently unsafe and gave rise to an unnecessary and avoidable risk of injury.

82. In the alternative, even if the court was not persuaded that the system itself was inherently unsafe, the system of work was such that it fell to the defendant to put in place preventative measures to protect the plaintiff from the risks thereby created. Apart altogether from the duties owed by the defendant at common law, it is urged that the defendant was under a statutory duty to put in place the necessary preventative measures to protect the plaintiff from that risk, as arising under s. 8(1)(2)(a) of the Safety, Health and Welfare at Work Act 2005. In the submission of the plaintiff, the defendant bears the burden of proving to the court that it took all such steps as were necessary to ensure, so far as reasonably practicable, that the plaintiff was not exposed to the risks created. It was contended that the defendant had not discharged that burden or come near discharging that burden. More specifically, and without prejudice to the arguments already made, the plaintiff submitted that the risk could have been eliminated by a number of measures including the following: a two trolley system that did not involve an operator collecting towers from the trolley at the same time as another operator was forcibly pushing the towers from the other end. Alternatively, it was urged that a "stand – back" arrangement should have been put in place so that when an

operator was operating the infeed function, the outfeed operator would be instructed and trained to stand back from the trolley. The defendant contended that the defendant manifestly failed in the statutory obligation and was unable to prove that the inadequate response evidenced in the 2012 document was implemented at all.

83. Moreover, the plaintiff urged that there was no evidence or at least no meaningful evidence of any risk assessment in operation in respect of the task at the time of the accident and it was suggested that the 2012 health and safety communication spoke to an approach that fell far short of what was required in terms of the necessary preventative measures. As to the absence of proper instruction being given to staff, it was noted that Pauline Lonergan gave no account in her evidence of any such instruction having been given to her. Nor was any maintenance man called to prove any system of checks and it was urged that there was simply no evidence to prove such checks or that instruction was given to maintenance staff in that respect. It was contended that the 2012 communication made clear that such maintenance arrangement as operated was not effective. The catch was not an appropriate safety device within the meaning of Article 33, and the defendant failed to eliminate the risk of falling towers in its selection of work equipment which involved a single infeed/outfeed trolley, and clearly failed to put in place appropriate arrangements to minimise the risk by separating the infeed and outfeed operation functions.

Defendant's submissions

84. Counsel for the defendant also provided the court with legal submissions on liability and quantum and supplemented these with a helpful written note. In the first instance, counsel submitted that case law indicated the duty imposed on the employer is to take reasonable care for the safety of the employee and in that regard emphasised that the employer should not be regarded as an insurer. In other words, that while there is a duty to take reasonable care, this

does not extend to a duty to guarantee that no accidents or injuries will arise in the course of the employee's employment.

85. Counsel for the defendant submitted that the plaintiff's initial case was that a named colleague had pushed towers of contact lenses at the back of the trolley and as a result a tower fell off the top shelf and hit the plaintiff's right shoulder. The plaintiff's primary contention in this regard met a roadblock because the nominated employee had made it clear in the witness box that she had not been pushing towers of contact lenses at the back of the trolley at the relevant time. The witness in question was not challenged on this in the witness box.

86. Separately, it was urged that the task the plaintiff was engaged in at the time was a task that was undertaken in the factory for many years. The staff were experienced and trained. There was no pressing evidence to suggest that the system of work had previously failed. The accident had occurred at 10:15 p.m. on the 13th of May 2015. The plaintiff was treated by the first aider Anne Marie Hayes at 10:30 p.m., and her duties including providing first aid treatment and ascertaining how the accident had occurred. The evidence was to the effect that the account of the accident as related by the plaintiff (and written down by Anne Marie Hayes) noted that: -

> "*Margaret was removing towers from Cavity 11+12. A tower from the above Cavity 6 and hit her right shoulder. Margaret in extreme pain so advised to go to A&E".*

87. Four copies of that report were furnished to various personnel within the factory including Mr. Tony Power.

88. Counsel noted that the evidence of the plaintiff's engineer Mr. Harte in his report of the 12th of December 2017 was that by the time of the accident, the plaintiff had removed approximately 22 towers from the outfeed trolley on which there are three shelves. Mr. Harte in his report makes no complaint or allegation that a catch failed, thereby causing or contributing to the accident. Nor was such a case made specifically in the pleadings.

89. Counsel for the defendant emphasised that as far as the plaintiff could ascertain the cause of the fall of the tower from the trolley was that the adjacent machine operator Pauline, while loading towers onto the trolley, pushed the row of trolleys excessively, resulting in the lead trolley being projected over a catch at the front of the trolley. The gist of this account was confirmed as having been given to Ms. Susan Tolan by the plaintiff – see her report dated the 9th of April 2019. The difficulty for the plaintiff was that the woman who was alleged to have pushed the row of trolleys excessively was Pauline Lonergan and, in her evidence, she denied putting towers onto the trolly or pushing it excessively, resulting in the lead trolley being projected over a catch. In fact, her evidence was that she was not loading towers onto the trolley.

90. Counsel pointed to the fact that Ms. Elaine Lee arrived on the scene and directed the plaintiffs to the first aid person, and it was in those circumstances fifteen minutes after the accident that the plaintiff mentioned that the tower had fallen from cavity 6. Counsel for the defendant emphasised that there was no one else at the front of the trolleys and the only other person present was a Mr. Murphy against whom no allegation was made.

91. It was submitted by counsel that in the absence of a person putting towers onto the trolley, and pushing them excessively as advanced by the plaintiff, the accident could not have happened in the manner alleged by the plaintiff. In these circumstances, it was submitted that the court should draw the inference that the plaintiff herself caused, allowed or permitted the tower to fall on her own shoulder while she was in the course of bending to collect a tower from the bottom shelf.

92. By way of separate argument, the defendant contends that the preponderance of the evidence pointed to the tower having fallen from cavity 6. Assuming that it had, that would mean that the plaintiff's body would have been approximately six inches to eight inches away from cavity 6, and any fall from that cavity would have been minimal. In other words, it was

contended that a tower falling from cavity 6 would not have had sufficient time within which to build up speed so as to have the capacity to cause anything more than a minimal injury.

93. Returning to the suggestion that the plaintiff must have been responsible for the accident, counsel for the defendant submitted that in the absence of any other personnel being identified, the only explanation for the falling of the tower is that the plaintiff herself caused or allowed the tower to fall on her own shoulder. In that vein, counsel submitted that the plaintiff made no complaint about any cavity or stopper being defective, despite having removed some 22 towers from the outfeed trolley and in particular made no complaint about cavity 6. Insofar as the plaintiff is relying on a report or communication from 2012, that was some three years prior to the accident and therefore, it is submitted, of limited relevance.

94. Counsel for the defendant also pointed to the fact that the plaintiff when attending the first aid person Anne Marie Hayes, had no bruising or cuts on her shoulder. In addition, no bruising was observed to her shoulder on her admission to hospital.

95. Counsel for the defendant also referred to the investigation carried out by the company, from which it was concluded that the tower which fell upon the plaintiff's shoulder had come from cavity 6. The evidence of Mr. Tony Power to whom personnel reported the circumstances of the accident, was that the allocator showed that the only tower that had fallen was from cavity 6. (I will come back to this issue later on in this judgment, as it necessitates a consideration of the evidence of Mr. Tony Power which I will address later on and also detailed consideration of the legal submission made by counsel for the plaintiff concerning the admissibility of some of the documents sought to be adduced in evidence by the defendant, in particular relating to the post – accident investigation.)

96. Finally, it was submitted that the potential hazards that had been identified by the communication in 2012 had been addressed by the defendant. A safety catch or stopper was inserted at the outgoing end where the plaintiff was working to prevent any trolley from

being projected over the edge. The person nominated by the plaintiff as having excessively pushed the towers from the other side, had denied putting towers onto the trolley or pushing them excessively. These were the potential hazards that had been identified three years earlier. There was no evidence of any continuing problems with the catches. The plaintiff could report any irregularity in a catch, and there was no evidence of an irregularity despite the plaintiff removing some 22 towers from the trolley at the time she had her accident. In these circumstances, it was urged that the defendant had taken all such necessary steps to ensure that the plaintiff was not exposed to falling towers. It was urged that the defendant had taken all reasonable and practical steps to make and keep the place of work safe.

97. Whilst it was acknowledged that the evidence of Mr. Flahavan, the engineer for the defendant was wrong when he contended that the defendant's system in relation to the catch was "failsafe" it was urged that the height of the plaintiff when she was bending to the bottom shelf would have placed her approximately adjacent to cavity 6. Therefore, it was urged, the accident could not have occurred as contended by the plaintiff. The evidence of Mr. Power that the staff should report any unsecured equipment and Mr. Power's evidence that there was also independent checking in place on a regular basis, was sufficient to demonstrate that the system of work was safe.

Admissibility of certain documentation

98. I will now turn to the admissibility issue on which the court heard legal argument. The defendant submits that the court should receive into evidence an accident investigation report authored apparently by a health and safety engineer, Robert Dunphy, together with an email sent by a shift manager, Elaine Lee, to management, dated Sunday 31st of May 2015 and a towers de–allocation table prepared by an unknown person and included as Appendix 7 to the report of Robert Dunphy. The defendant also sought to adduce in to evidence a number of

other documents that were included as appendices to the Dunphy report. The parties agreed that the documents could be provided to the court on a *de bene esse* basis, but with the plaintiff reserving her right to resist the admissibility of the documents. At the conclusion of the evidence in the case, Ms. Morgan SC for the plaintiff objected to the admissibility of the documents and relied particularly on the absence of key witnesses, some of whom either authored, or had a role in the preparation of, the documents sought to be admitted.

99. The backdrop to the admissibility dispute is that on the first day of the hearing, counsel for the plaintiff had made certain complaints about the defendant's failure to provide relevant documentation on foot of a data request made by the plaintiff's solicitor in October 2017. This data request had sought all data held by the defendant in respect of the plaintiff to include any report form completed in respect of the accident and any documents in respect of an investigation carried out by the defendant into the accident. The response of the defendant was to provide the plaintiff's personnel file and nothing else. Neither any accident report form nor any investigation documents were disclosed. Counsel for the plaintiff submitted that the documents had been given to the defendant's expert witness, Mr Flahavan but not to the plaintiff. It was submitted that this was unfair and breached the plaintiff's entitlement to access documents that have been viewed by the expert.

100. In the light of the complaint made on behalf of the plaintiff, counsel for the defendant sought some time to take instructions and then, subsequently, certain accident report statements were handed over to the plaintiff's solicitor. Counsel for the plaintiff sought an assurance that that was the full extent of the documents sought in the data request from 2017 and it was indicated that it was.

101. Unfortunately, it was necessary for counsel for the plaintiff to raise the issue of non-disclosure again on day 3 of the hearing (Friday, 21 April 2023). It was indicated that that morning, for the first time, the plaintiff had been provided with the investigation report of

Robert Dunphy and a number of appendices to that report containing witness statements and other documents. It was submitted that this should have been provided previously on foot of the data request and also as part of the S.I. 391 process. Counsel complained that there appeared to be a drip-feed of information and documents and this was unfair. In his reply, counsel for the defendant indicated that initially the defendant had claimed legal privilege over the Dunphy report but that the privilege was now being waived, and the documents were being disclosed. Counsel indicated that on his instructions everything that was being sought had now been furnished to the plaintiff.

102. In the view of the Court, the defendant's approach to the disclosure of documents in this case was unsatisfactory. The documents in question were clearly relevant and should have been disclosed long before the hearing date. It is unsatisfactory that the issue had to be raised prior to counsel's opening of the case. It is doubly unsatisfactory that the full report and appendices was not furnished until the third day of the hearing. It is also unclear on what basis legal privilege was originally claimed over the documentation, particularly having regard to the later evidence of Tony Power concerning how the Dunphy report came to be created. In my view, the late disclosure issue is a factor to which the Court is entitled to have regard when exercising its discretion regarding the admissibility of the documents in question.

103. I accept the evidence of Tony Power for the defendant that the document commenced life as a health and safety enquiry and then developed / morphed into a litigation inquiry. For reasons that remain unclear, however, the defendant asserted legal privilege over the Dunphy report, but then later thought better of this decision and waived the privilege. The document was disclosed to the plaintiff's side at some stage *after* the case was opened by Ms. Morgan. This occurred in circumstances where the plaintiff's counsel had complained prior to the

opening about non – disclosure of documents relating to the accident circumstances and indicated that she was assured all relevant documents had been disclosed at that point.

104. In his evidence, Mr. Power accepted that the report went through a number of drafts over a period of four or five days, but unfortunately earlier drafts are not available because they were apparently overwritten. Mr. Power told the court that an earlier draft had what he regarded as inconsistencies in it and so he (Mr. Power) directed that the document should be revisited in certain specific respects. As it was a Bank Holiday weekend, the engineers responsible for that area weren't available until later in the week. Mr. Power accepted that a consequence of his asking the gentleman concerned to review the report in certain respects was that a different revised report came into existence. It was put to Mr. Power that the later report he was happy with, in contrast to the first iteration of the report. Mr. Power did not agree with that characterisation and replied that the later report was complete. Mr. Power explained that the Dunphy report was in the nature of a working document, being continually worked on over some number of days during the week following the accident. He accepted that as well as Mr. Dunphy, there were also other persons who had provided input into the contents of the report including two engineers, Noel Harrington and Helen Grimes. Mr. Power himself acknowledged that he had also added certain observations to the report.

105. Moving to the question of admissibility of the Dunphy report with the appendices, it seems to me that I am entitled to weigh in the scales the unsatisfactory manner in which the defendant dealt with disclosure of the documentation. It is correct to say there was no application for discovery brought by the plaintiff. However, a data request was made in 2017 and this covered the materials now sought to be admitted by the defendant. Whilst I am taking account of the issue of late disclosure, I do not regard that as a significant factor and therefore do not propose to base my decision on it. In my view, a much more relevant consideration is the fact that the defendant did not call Mr Dunphy who is apparently the

main author of the document, or Noel Harrington or Helen Grimes, two engineers who also had input, and who participated into a review of the incident the subject of this case. That gives rise to a fair procedures difficulty because if the report goes in, the authors can not be cross examined on their conclusions or their methodology. Whilst the parties have referenced some of the matters covered in the report in evidence called by some of their *viva voce* witnesses, it seems to me that I should not admit the report itself into evidence. Much of the report consists of opinion and belief evidence which is ordinarily not admissible. I am not satisfied that the defendant has laid the necessary groundwork to show that it would be in the interests of justice to admit the Dunphy report, particularly in the absence of Mr. Dunphy and the other two engineers.

106. It is a matter for the parties what evidence they do or do not call. However, a decision not to call a witness and/or an inability to call a witness, may have consequences for the party concerned. Here, for whatever reason, none of Robert Dunphy, Noel Harrington, Helen Grimes or Elaine Lee has been called as a witness. It was indicated through counsel that Mr. Dunphy was abroad, and Ms. Lee was indisposed through injury. That may well be. However, the possibility of giving evidence remotely by video link – now an embedded feature in our courts system – was not pursued.

107. In addition, I have read the email from Elaine Lee which the defendant seeks to rely upon to support the case being made that the tower that fell on the plaintiff fell from cavity 6 and secondly that Elaine Lee on the night checked cavity 6 after the accident and found the stopper to be in working order. In my view, it would be singularly unfair to admit into the evidence the Elaine Lee email without that witness being available for cross – examination by the plaintiff's lawyers. This point was pressed in submission by Ms. Morgan, and I agree with it. Mr. Power confirmed in evidence that Elaine Lee is a production manager for the area concerned and is not from the maintenance department. The email doesn't say what sort of

examination she carried out of the trolley, whether it was a visual check, whether it was a manual check, or whether she checked any other stoppers. I note as well that there was no mention of this alleged check in the accident report form statement that she completed, which is included as a separate appendix to the Dunphy report. These are all matters which counsel would explore, had the witness presented herself for cross – examination.

108. In relation to the de – allocation table which is included at Appendix 7 to the Dunphy report, Mr. Power candidly acknowledged that the identity of the person who made the relevant entries is not known and therefore has not been called to give evidence. It is clear from the evidence I have heard that this document was created by way of human input and is not a document which was automatically generated by a computer. As with the Elaine Lee email, were I to admit the de – allocation sheet, the plaintiff would be denied an opportunity to cross – examine the author of the relevant entries, and in my view, that would be unfair.

109. As I understand the defendant's position, it is urged that these documents should be admitted because they were documents generated in the course of the defendant's business and effectively constitute business records under s. 14 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. Ms. Morgan for the plaintiff objects to this and points out that no notice of business records evidence was ever served on the plaintiff's solicitor, whether in accordance with s. 15 of the Act or otherwise. Section 15 (1) of the Act requires that for business records evidence to be admitted, a notice of intention so to give the information in evidence, together with a copy of the documents sought to be admitted, must be served on the other party to the proceedings. This is supposed to happen not later than 21 days before the commencement of the civil trial. Apart from the absence of a 21 – day notice, counsel submits that the difficulty is compounded by the late disclosure of the documents in question and the assurance given to the court at the opening stage that all documents relating to the defendant's investigation into the accident had been handed over.

110. Whatever about the temporal objection, in my view, the material point is s. 16 of the Act, which deals with the admission and weight of business records. S. 16 (1) provides that: -

> "In any civil proceedings, information or any part thereof that is admissible in evidence by virtue of section 14 shall not be admitted if the court is of the opinion that in the interests of justice the information or that part ought not to be admitted".

111. There is then set out in subs. 2 of s. 16 the different circumstances to which the court ought to have regard. These include:

> *"(a) whether or not, having regard to the contents and source of the information and the circumstances in which it was compiled, it is a reasonable inference that the information is reliable,*
>
> *(b) whether or not, having regard to the nature and source of the document containing the information and to any other circumstances that appear to the court to be relevant, it is a reasonable inference that the document is authentic, and*
>
> *(c) any risk, having regard in particular to whether it is likely to be possible to controvert the information where the person who supplied it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to any other party to the civil proceedings or, if there is more than one, to any of them".*

112. In my view, having regard to the unavailability of the three engineers associated with the report, the unavailability of Elaine Lee, who authored the email, and the unavailability of the unknown person who made the relevant entries in the de – allocation sheet, it would be unfair to the plaintiff in this case to admit any of the three documents.

113. However, that is not the ed of the matter because section 16 (2) (c) in my view, also requires that I give consideration to whether the admission or exclusion of the documents in question will work an unfairness on the defendant. In my view, any prejudice to the

defendant in this case by excluding the documents is quite limited. The defendant has availed of the opportunity of calling a number of other witnesses to deal with the issues traversed by the documents in question. The defendant has also, entirely appropriately, cross – examined the plaintiff in considerable detail on the circumstances of the accident and has also been able to put to the plaintiff the evidence of Anne Marie Hayes and Pauline Lonergan.

114. I take Ms Morgan's point that no 21 day Notice has been served. However, in my view, the main consideration that I ought to weigh when exercising my discretion on the admissibility issue is the factor provided for at s. 16 (1) of the 2020 Act, namely that the documentary evidence in question should not be admitted if the court is of the opinion that in the interests of justice the information ought not to be admitted. The statutory test also requires that I give consideration to the reliability and authenticity of the documents and whether excluding the evidence would work an injustice on the defendant. It seems to me that the test requires the court to consider all of the circumstances of the case in the round and, where there is potential prejudice on both sides, strike a balance between the competing interests, all the time keeping to the forefront of the court's mind the overarching test within s. 16 (1) as to whether in the interests of justice the information or part of the information ought not to be admitted.

115. Dealing firstly with the Dunphy report itself, it seems to me questionable whether the report meets the criteria within s. 14 (b) for admission of business records. The section requires that the information sought to be admitted:

> *"(a) was compiled in the ordinary course of a business,*
>
> *(b) was supplied by a person (whether or not he or she so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with . . .".*

116. Since the Dunphy report was authored by a number of different people, and since it is not clear which contributor wrote which part, it is very difficult for the court to be satisfied that the information in the report that is sought to be admitted was supplied by a person with personal knowledge of the matters dealt with. Secondly, the report strikes me as being a rather partial document, lacking balance. The conclusion part of the report reads like a litigation report, which is what at some stage the document became. Mr. Power properly accepted that the report commenced life as a health and safety enquiry but ultimately developed into a litigation report. That being so, that calls into question whether in accordance with s. 16 (2) (a) of the Act, the information in the report can be regarded as fully reliable. On that second basis, I decline to admit the main body of the report.

117. However, that is not the end of the matter, because the report also contains a number of appendices. They are as follows:

(i) the first aid report of Anne Marie Hayes;

(ii) the email of Elaine Lee dated the 31st of May 2015;

(iii) the typed statement of Elaine Lee;

(iv) the typed statement of Anne Marie Hayes;

(v) photographs of the stand – down trolley including photographs of the safety stoppers;

(vi) a letter from Dr. Malachy Coleman of the Keogh Practice dated the 11th of June 2015;

(vii) the towers de–allocation table.

118. It seems to me that a number of the appendices are unobjectionable and can be admitted without creating undue prejudice for either party. Some of the documents have already featured in the evidence and have been proven by alternative means. Annemarie Hayes gave evidence and was in a position to prove the first aid report and the witness

statement that she prepared. Moreover, the reliability and authenticity of certain of the documents is not in question. Exercising my discretion in accordance with the factors that the 2020 Act requires that I take into account, I will admit into evidence Appendix (i), the first aid report of Anne Marie Hayes, Appendix (iv) the typed statement of Anne Marie Hayes, Appendix (v) the photographs of the stand – down trolley and stoppers, and Appendix (vi) the letter from the Keogh Practice, to which neither side objected. I will exclude Appendix (ii) the email of Elaine Lee, Appendix (iii) the statement of Elaine Lee, and Appendix (vii) the towers de – allocation table. In the case of the three excluded documents, the author is not available for cross – examination.

Safety Health and Welfare at Work Act 2005

119. Section 8(1) of the Safety Health and Welfare at Work Act, 2005 provides that every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees. Subsection 2 of section 8 provides that the employer's duty in that regard extends, *inter alia*, 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 …

(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;

120. 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 preventative 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."

121. It is clear from the case law that the law does not require an employer to ensure in all circumstances the safety of its employees. The duty owed by an employer will vary depending upon the knowledge and experience of the individual employee. Moreover, the more hazardous the work in which the employee is involved, and the more obvious the risk of injury, the more stringent the duty of the employer to protect the worker. The case law indicates that the duty is met once the employer takes reasonable and practicable steps to avoid accidental injury, since it is not possible to eradicate all risks and accidents. The case law also indicates that once an employer has identified potential hazards likely to affect the safety and health of the employee, then there is an onus on the employer to take appropriate steps, whether through training or the implementation of practicable procedures and precautions, to guard against and mitigate those risks.

122. In *Martin v Dunnes Stores* [2016] IECA 85 Irvine J. for the Court of Appeal stated as follows at para. 24:

> *"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 to 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."*

123. In the same case Irvine J. characterised the obligation of the employer in the following terms:

> *"To identify potential hazards and then implement procedures designed to protect the employee from the risks pertaining to such hazards …"*

124. The judgment of Egan J. in *Quinn v Topaz Energy Group* [2021] IEHC 750 provides a helpful summary of the legal principles relating to employer liability at common law and statute. In *Quinn*, Egan J. considered the employer's obligations under the 2005 Act and also reviewed the Court of Appeal's decision in *Martin*. Then at para. 15 of her judgment in *Quinn* Egan J. stated the following:

> *"Not every failure to comply with the 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."*

125. In the same case, having considered the definition of *"reasonably practicable"* in s. 2(6) of the 2005 Act, and having noted 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 their own safety.. went on to say the following at para. 51:

> *"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 defendants devised and overcomes 'excellent' systems/protocols. 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 – 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 …"*

126. It is clear from the above caselaw that it can not be sufficient for an employer to simply identify hazards that may present a risk to employees in the workplace and devise procedures to address those risks. An important second part of the employer's duty is the duty to ensure that those procedures and precautions are actually implemented on the ground, by properly training their employees and providing them with appropriate safety equipment.

127. A separate issue that I have to consider is the legal question as to (a) which party bears the onus of proof to show a work arrangement is presumptively unsafe and involves a risk of injury; and (b) which party bears the onus of proof, where (a) is established, of showing that the employer acted so far as was reasonably practicable to ensure that persons, such as the plaintiff, were not exposed to a risk of injury. Barniville J. considered these

issues in *McWhinney v Cork City Council* [2018] IEHC 472. In *McWhinney* Barniville J. considered the decision of the Supreme Court in *Boyle v Marathon Petroleum (Ireland) Limited* [1999] IESC 14, [1999] 2 IR at 460 which concerned an action for damages by an employee who worked on an offshore platform owned by the oil company. At para. 37 of his judgment in *McWhinny,* Barniville J. stated the following:

> *"It should be noted that in that case the Supreme Court held that the onus of proof did rest on the defendant to show that what it did was reasonably practicable. That conclusion must be viewed in the context of the fact that it was common case that the place in which the accident occurred was unsafe in the conventional sense. That having been conceded by the defendant, it was then for the defendant to demonstrate that it was so far as was 'reasonably practicable' safe in the particular circumstances and having regard to the balance which had to be struck by the defendant. The Supreme Court was not stating that in all cases the onus of proof was on the defendant at the very outset to show that it had taken all steps as were 'reasonably practicable' to make and keep the place safe. In a case, such as the present case, where it is not conceded by the defendant that the presence of the open drain in the rear yard of the fire station was unsafe, the onus must first rest on the plaintiff to demonstrate at least to a prima facie level that the presence of the open drain was a hazard or potentially unsafe and only then would the onus or burden pass to the defendant to demonstrate that it had acted so far as was reasonably practicable to ensure that persons, such as the plaintiff, were not exposed to a risk to their safety, health or welfare."*

128. Having reviewed the evidence in the case, Barniville J. stated the following at para. 44:

"In light of that conclusion, it seems to me that consistent with the approach taken by the Supreme Court in Boyle, the onus of proof passes to the defendant to show that what it did was reasonably practicable. In the context of s. 12 of the 2005 Act, the onus passes to the defendant to show that it took such steps as were necessary to ensure, so far as was reasonably practicable, that a person such as the plaintiff was not exposed to a risk to his safety, health or welfare. I am not satisfied that the defendant has discharged that onus. The plaintiff's engineer identified one measure which could have been taken by the defendant which would have eliminated the risk of the accident occurring. That involved covering the drain. It was not disputed by the defendant that the drain could have been covered by a grate, such as a metal grate. Nor was it disputed that the drain to the front of the fire station is covered by such a grate as is a drain outside the substation at Ballyvolane. It was accepted that there was no engineering or design reason why the drain crossing the rear yard of the fire station could not have been covered by such a grate. While Mr. Fullam advanced two reasons on behalf of the defendant as to why the defendant may not have felt it appropriate to cover the drain, namely, that the grate may have been broken or damaged as a result of traffic passing over it and that it would have been required to be maintained, in the sense of requiring it to be cleaned out twice a year, there was no evidence from the defendant that it even considered either of these issues. In any event, I am not satisfied that either reason is sustainable. The defendant accepts that in engineering terms the drain could have been covered. A metal grate would probably not have been susceptible to the sort of damage referred to by Mr. Fullam. Further, having to clean out the drain twice a year is not excessively burdensome and does not provide a legitimate reason for not covering the drain. I am satisfied that if

*the drain had been covered, the accident would not have occurred and the plaintiff would not have sustained the injuries which he did sustain." (*emphasis added).

129. Applying that analysis of Barniville J., which in turn was based upon the rationale of the Supreme Court in *Boyle*, I conclude that the onus in this case was on the plaintiff to show that the defendant's system of work in this case was presumptively unsafe and involved an identifiable risk of injury. Secondly, I hold that where it has been established by the plaintiff that a system of work is presumptively unsafe and involves an identifiable risk of injury, the onus is then switched to the employer to show that it acted so far as reasonably practicable to ensure that employees such as the plaintiff were not exposed to a risk of injury.

130. For reasons which I will presently outline, I am satisfied that on the facts of this case the plaintiff has discharged the primary onus that she faces, and I am also satisfied that the defendant has failed to discharge the onus of establishing that it acted so far as reasonably practicable to ensure the plaintiff's safety. I should also say that if I am wrong in the conclusion that the latter onus switches to the defendant once the first proposition is established, I am in any event entirely satisfied on the facts of this case that the plaintiff has discharged that onus.

Conclusions on liability

131. Based on the evidence that I have heard, the facts as agreed by the parties or otherwise found by me are as follows:

(1) In the course of crouching down to remove a tower of moulds from the bottom shelf of the stand-down trolley, the plaintiff was struck by a tower that fell from overhead. I accept the plaintiff's evidence in this regard.

(2) I accept the plaintiff's evidence that initially she did not know what had hit her but then after she stood up she saw debris from the tower of moulds that had hit her scattered on the floor.

(3) The first aid attendant, AnneMarie Hayes confirms that in the immediate aftermath of the accident the plaintiff was in extreme pain and that she was very concerned for the plaintiff's welfare. Ms. Hayes told the court that the plaintiff's presentation was such that Ms. Hayes advised the plaintiff to go to hospital straight away.

(4) I accept the plaintiff's evidence, and find as a fact, that when she was seen by the consultant in University Hospital Waterford that her shoulder had swollen up and she was given pain relief. This evidence is corroborated by the report of her GP Dr Feeney which mentions the Emergency Department notes. The letter from Dr Coleman of the Keogh practice dated 11 June 2015 also corroborates her injuries, though it does not mention swelling or cuts or bruising.

(5) I accept the plaintiff's evidence that the tower hit her on her right shoulder and neck, and that she remembers jerking her neck to the left and then trying to stand up.

(6) I accept the plaintiff's evidence that she believes the tower came from the top shelf of the trolley, and the reason which she gave for that belief. I also accept that she did not see the tower fall and was unsure about where it came from.

(7) The characteristics of the tower that fell on the plaintiff were as follows: The dimensions of the tower were 7 inches by 7 inches by 12 inches. The tower was a heavy item weighing 5.63 kilograms which is about 12.5 pounds. It was made of metal but was not sharp edged.

(8) I regard as likely, and indeed inevitable, that an object of this weight and nature falling without warning from above, onto a person's neck and shoulder would be likely to cause injury. This would be compounded if the person's neck was outstretched.

(9) I accept the evidence of the plaintiff's engineer that the height of the three shelves of the stand-down trolley were as follows:

- lowest shelf (from which the plaintiff was retrieving a tower while crouched down) is 490mm above floor level;
- the middle shelf was 900mm above floor level;
- the top shelf was 1320mm (approximately 4 and a half feet) above floor level.

(10) Accepting as I do that the tower fell off the trolley, I accept the evidence of the plaintiff's engineer and the defendant's engineer Mr. Flahavan, and also of the defendant's head of health and safety Mr. Power, that this must mean (a) the safety stopper failed and (b) that somebody was pushing or loading towers on the tracks of the stand-down trolley at the time.

(11) Since there has been no evidence that the plaintiff knocked against or somehow dropped the tower, I find as a fact that the plaintiff played no role in causing the tower to fall from the trolley.

(12) I am also satisfied that by the tower in question falling off the stand-down trolley, the plaintiff suffered the injury of which she now complains. I will elaborate on this causation finding below.

(13) The issue as to the identity of the person who was pushing the tower from the other end along the rollers at the time of the accident, is not material.

(14) The evidence establishes in my view that the defendant was aware of the risks presented by the in-feed/out-feed one trolley arrangement. I am satisfied that the defendant was aware of this systemic risk certainly no later than 2012 when it received reports of defective safety catches on the trolley. This was some three years *before* the plaintiff's accident.

(15) The evidence also establishes that no later than 2012, and possibly earlier, the defendant was aware of reports of defective stoppers. The EHSS Department communication dated 7th March, 2012 indicates that the defendant was aware that stoppers were malfunctioning and that stoppers could become damaged if the row of towers hit the end stopper with too much force, or if towers were loaded too aggressively.

(16) Notwithstanding this awareness, there is no evidence that in the wake of the reports of defective catches in March 2012, that the defendant took any meaningful or documented steps to increase the frequency of the maintenance checks on the safety stoppers. Merely because employees had not been injured in this way before, does not explain or justify this failing. Nor was consideration given to instructing the in-feed operator to alert the out-feed operator that they were about to load or push through some towers. Nor were in-feed operators told not to load if an out-feed operator was at the other end. These points were acknowledged by Mr. Power in his evidence.

(17) No maintenance man was called by the defendant to testify as to the maintenance checks said to have been carried out by the defendant following the March 2012 communication, or since. Nor was the court provided with documentation evidencing any such maintenance regime. There was evidence given by Mr. Power that maintenance checks were carried out but I found that

evidence to be lacking in specifics. It is also surprising in my view that the defendant was unable to produce a single document or record to corroborate the contention that the safety catches were regularly checked.

(18) In an inspection carried out on the 2nd June, 2015 (three days after the plaintiff's accident) in-house engineers found that a stopper on the stand-down trolley was not working and was stuck in the horizontal position when it was flipped. Both engineers referenced this information without objection. Moreover, I note from the photographs taken by both engineers that some of the safety stoppers have their numbers missing. In my view, both of these facts are consistent with a less than rigorous inspection or maintenance regime with respect to safety stoppers on the trolleys.

(19) I accept the plaintiff's unchallenged evidence that she herself had previous experience of safety stoppers not working on a trolley (albeit this was in relation to a different trolley).

(20) Photograph 3 of Mr. Flahavan's photographs show that the bottom shelf of the stand-down trolley houses cavity numbers 9, 10, 11 and 12; the middle shelf houses cavities 5, 6, 7 and 8 and the top shelf houses cavities 1, 2, 3 and 4. The parties are agreed, and common sense dictates, that the tower cannot have fallen from the bottom shelf because the plaintiff's shoulder height would have been above the level of the tower occupying that cavity. The court can therefore eliminate from consideration the possibility that the tower fell from cavities 9, 10, 11 or 12 on the bottom shelf.

(21) More difficult is the question whether the tower fell from the middle shelf or the top shelf. The gist of the defendant's position was that the tower fell from cavity 6, which is located in the middle shelf of the trolley. The defendant

relies on the evidence of the first aid attendant, Annemarie Hayes in that regard who says that the plaintiff told her in the aftermath of the accident that the tower had fallen from cavity 6. The defendant urges that Ms Hayes got that information from somebody and didn't take it out of thin air. I regard it as more likely, however, and find as a fact by inference, that the tower fell from the top shelf of the trolley. Based on the plaintiff's evidence that the towers were less tightly packed on the top shelf and the engineering evidence that I have heard, and the agreed position of the parties that the plaintiff was in extreme pain after the tower had fallen on her, I find that it is more likely that the tower fell from the top shelf of the trolley. By operation of the laws of gravity, this would mean that the tower would have picked up more speed by the time it impacted the plaintiff's shoulders. Such was the plaintiff's pain in the immediate aftermath of the accident that she was unable to open her locker.

(22) I am not satisfied to accept the evidence of AnneMarie Hayes, the first aid attendant, that the plaintiff told her in the aftermath of the accident that the tower had fallen from cavity 6. Ms. Hayes did not see the accident but she told the court that she met Mrs. Reid approximately 15 minutes after the accident. Ms. Hayes completed a treatment injury report form which, as I have referenced earlier, went on to form appendix 4 to the report of Robert Dunphy. In that form she notes the plaintiff as having told her that she was removing a tower from cavity 11 and 12 when the accident happened. In the next line of the form after the pre-printed words "person's account of how injury occurred" Ms. Hayes has inserted in handwriting the following:

"A tower from the above cavity 6 (sic) fell out and hit her (right) shoulder. Margaret in extreme pain so advised to go to A&E."

Ms. Hayes told the court that she did not invite the plaintiff to co-sign the document as this was not her practice. She also acknowledged that she was relying fully on the contents of the written form and had no independent recollection of the conversation. She accepted that the injury treatment report was not a formal accident report form, and that she had in fact herself completed the more formal accident report form some days later. That more formal statement constitutes appendix 4 to the Dunphy report.

(23) I am not satisfied to accept Ms. Hayes' evidence that the plaintiff told her the tower fell from cavity 6 for a number of reasons. Firstly, I accept the plaintiff's evidence that she simply did not know where the tower had fallen from, and therefore could not have conveyed this information to anyone. Secondly, I found aspects of Ms. Hayes' evidence to be uncertain and inconsistent, even though I accept the witness was doing her best to give an accurate account. The witness was asked in cross-examination if she had received any account from Elaine Lee as to what happened in the accident, prior to speaking with the plaintiff. Ms. Hayes replied that she had not and that she was certain that she had not. Later on in her evidence, when the contents of her more formal accident statement were put to her, the witness gave a somewhat different account and agreed that she had in fact received information from Elaine Lee about the incident prior to meeting the plaintiff. Counsel for the plaintiff then put it to Ms. Hayes that she had information from Elaine Lee about the nature of the incident and what had happened. Ms. Hayes replied

that *"... she may have said that a tower fell. I, I am not sure."* In fairness to the witness, she later maintained her position that the cavity 6 information had come from the plaintiff. However, I think it is important to bear in mind, as the witness herself acknowledged, she had no independent recollection of the conversation with the plaintiff and was fully reliant on the documents.

(24) Thirdly, I note that in her more formal witness statement, which unlike the injury treatment form was addressed to the actual circumstances of the accident, there is no mention of the cavity 6 information, one way or the other. This point was put to the witness in cross-examination and she was unable to explain the omission. Finally, for completeness I note that the copy of the injury treatment report form that was furnished to the court references a treatment date of the 30/05/2015 at 10:30am (*sic*) and bears a Bausch and Lomb date stamp of the 2nd June, 2015.

132. For these reasons, while I accept Ms Hayes was an honest witness, I believe she was mistaken in attributing that information to the plaintiff. It is more likely in my view that someone else relayed to Ms Hayes the information or understanding that the tower had come from cavity 6. Since the source of that information is uncertain and unknown to the Court, its reliability can not be properly tested or evaluated. The fact that cavity 6 is mentioned in the description of injury form is not in my view determinative of the question as to which cavity the tower had come from. In all the circumstances, for the reasons already outlined above, I find it is more likely that the tower in question fell from the top shelf of the trolley.

133. However, I should indicate that, if I am wrong in that conclusion, and if in fact the tower came from cavity 6, that does not mean in my view that the plaintiff's case on liability or causation fails. A conclusion that it came from cavity 6 would mean that the tower had a

shorter distance to travel before hitting the plaintiff's shoulder, and presumably therefore the laws of gravity would have had shorter opportunity to take hold. However, as acknowledged by some witnesses, we don't know how far out from the trolley the plaintiff was standing, to what extent she was stooping, whether in falling the tower flipped over, or what level of force may have been applied by the operator who pushed the tower at the infeed end from the other side of the trolley. In the view of the Court, these matters make it difficult to be precise as to how far the tower fell in the air before impacting the plaintiff's shoulder.

134. I note that when Mr Harte was asked to give his estimate as to the likely falling difference, giving the plaintiff the benefit of the doubt, he said that, taking the top of the tower, and assuming for the purposes of the argument that the tower fell from cavity 6, that would mean the top of the tower would have been 8 inches from the plaintiff's shoulder. It seems to the Court therefore that even if, contrary to the Court's conclusion, the tower fell from cavity 6 on the middle shelf, that would still give rise to a likelihood of injury. In the Court's view, the 3 dominant factors on causation are the *agreed* position as to the nature and weight of the tower, the *agreed* position that in the immediate aftermath of the accident the plaintiff was in great distress and considerable pain and the *agreed* position amongst the medical professionals that the accident caused the injuries to the plaintiff's neck and shoulder.

135. It should be noted that this is not a case in which the defendant has pleaded a case of "minimum impact" that one sometimes sees pleaded in motor injury cases. More importantly, the doctors on both sides of this case accept that the plaintiff suffered significant injury in this accident and that objective signs of injury are evident on MRI scans and on findings made by clinicians. As a matter of ordinary common sense, therefore, it is not difficult to accept that a metal object almost a stone in weight falling on top of a person's neck and shoulder area – that may have been outstretched – and that almost certainly would not have been prepared for

impact, would be likely to cause injury. For all these reasons, I find as a fact that this is what occurred. I find that, whichever shelf of the trolley the tower came from, the falling tower caused the plaintiff's injuries.

136. I accept the evidence of the plaintiff's engineer, Mr. Harte that the defendant's system of work in this case was open to significant criticism. I accept the engineer's starting point that the simultaneous loading and unloading feature of the work system, whereby an operator is loading and pushing towers along rollers at one end of a trolley and another operator is simultaneously removing towers from the other end of the same trolley, inevitably creates a risk of injury for the operative at the out-feed end, or indeed for passers-by who may be struck by a tower falling off the out-feed end. I note that Mr. Harte did not condemn that feature of the work system outright, but rather was content to focus his criticism on the point, which I accept, that the fact the in-feed/out-feed one-trolley arrangement created such an obvious risk of injury in the workplace, meant that there was a heightened onus on the employer to take appropriate control measures to mitigate the risk of injury which the chosen system of work presented.

137. I regard as reasonable and sensible Mr. Harte's evidence that in order for the employer to meet its obligations under the Safety Health and Welfare at Work Act, 2005, the defendant should firstly identify the hazards in a place of work under its control and assess the risks presented by those hazards; and then secondly, should carry out an assessment of those risks and actually take control measures to remove or reduce the risks arising. I accept Mr. Harte's evidence that, having regard to the nature of the system of work that was in issue here, the defendant should have taken practical and proactive steps to reduce the risk of possible failure of the safety stoppers on the trolley, particularly in circumstances where the defendant was aware operatives would occasionally push the towers too vigorously along the tracks of the trolley, such that they impacted with force the safety stoppers at the end of the

tracks. Mr. Harte gave evidence, and I accept, that there should in the circumstances have been regular inspections and maintenance of the safety stoppers, the safe operation of which was pivotal to the entire work arrangement. Mr. Harte offered the view, and I accept, that the inspection and maintenance regime should take place once a week. This would not be an onerous obligation because it should only take a few minutes. But such inspections should in my view be methodically done, with maintenance checks being properly documented and recorded.

138. Neither the plaintiff's engineer nor the defendant's engineer had come across this kind of in-feed/out-feed single trolley arrangement before. In my view, since the defendant chose to organise the working arrangement in this fashion, and placed so much reliance on the safety stoppers being in working order, there was a heightened duty on the defendant to take practical steps to ensure the safety stoppers were readily inspected and maintained. On the evidence available to the court, that duty owed by the employer was breached.

139. Moreover, I accept the engineer Mr. Harte's evidence that the defendant should have either eliminated the dual action of loading and unloading simultaneously or, at the very least, introduced proper effective measures to mitigate the risks presented by that system. To his credit, the defendant's head of safety Mr. Power acknowledged to the court that in the wake of the May 2012 reports of defective stoppers, he was unaware whether the frequency of checks and maintenance had increased. Mr. Power confirmed as well that no consideration was given to introducing an alert system whereby the in-feed operator would alert the out-feed operator that they were about to push towers through. Mr. Power also confirmed to the court that no *"stand-back"* instruction was issued to staff whereby in-feed operators would be instructed not to load if an out-feed operator was at the other end. All of these points support the conclusion that the system of work was unsafe and that the employer had failed to take the necessary steps to reduce the risks presented by the chosen working arrangement.

140. Insofar as there is a dispute between the expert evidence of Mr Harte and Mr Flahavan, I prefer the evidence of Mr Harte. I do not accept that the safety stoppers were "fail-safe" or could be remotely described as such. That characterisation was conceded by Mr Power as being incorrect, and rightly so. In fairness to Mr Flahavan, it may be that the "fail-safe" characterisation was as much an error of language as substance, but one way or the other the agreed evidence is that the stoppers from time to time did not work. It is also agreed between the parties that the accident could not have occurred as it did, without the safety stopper from the cavity in question being defective and failing to do its job. Insofar as the engineers differed on the adequacy of the defendant's system of work, I prefer the evidence of Mr Harte. However, in many respects, the engineers agreed on core issues in their evidence.

141. For instance, I note that in his evidence, Mr Flahavan accepted in cross examination that " *…sometimes the catches stick for some reason or another. I can't explain why."* He accepted, quite properly, that the statement in his report that his instructions were *" that the stoppers at the end of the tracks were examined after the incident and found to be working satisfactorily*" was incorrect. He also accepted that as a matter of basic and common life experience hinges [on the stoppers] can fail and secondly, that the reality was that the risk of the springs and hinges on the stoppers failing was all the greater because under the defendant's system of work they are taking the impact of towers being rolled into them on a constant basis. He also stated that hinges on the stoppers could fail due to the presence of much or dirt. All of these reasonable acknowledgements to my mind speak to the necessity for a dedicated maintenance and checking system, involving a recorded system of documented inspections.

142. I also accept Mr Flahavan's acknowledgement that if one takes away the stoppers from the equation, one has a situation where the infeed operator is rolling the towers towards the outfeed end, and may not even see the outfeed operator, and that such a system in the absence of safety stoppers would not be safe. Such a system would not be safe because it would create a clear risk that towers would fall out from the other side. He also accepted that this system of work seemed to be unique to Bausch &Lomb and he had not seen it before in another context. Nor had he seen any Safety Statements for this particular working set-up. He also accepted fairly that he was unable to think of any logical way in which the plaintiff might have brought down the tower on top of herself.

143. I find that Mr Harte's criticisms of the defendant's system of work have not been answered. In the light of all the evidence in the case, the court is coerced to conclude that the defendant's system of work was unsafe and that the defendant failed to meet its obligations under the Safety Health and Welfare at Work Act, 2005. More specifically, I am satisfied that the plaintiff has established breaches of the following provisions of s. 8(2) of the 2005 Act:

(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 its employees;

(c) ensuring, so far as is reasonably practicable, the design, provision and maintenance of plant and machinery that are safe and are without risk to health;

(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 its employees;

(h) determining and implementing the safety, health and welfare measures necessary for the protection of the safety, health and welfare of its employees when identifying hazards and carrying out a risk assessment;

(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 its 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 or imminent danger.

144. I also accept Mr. Harte's evidence on the issue of causation that, had the defendant implemented the control measures in question, and had the safety stoppers on the trolley been properly and readily inspected and maintained, the plaintiff's accident would not have occurred. For all these reasons, I am satisfied that the plaintiff must succeed on liability.

Medical evidence as to the plaintiff's injuries

145. According to the plaintiff's Consultant Neurosurgeon, Mr. Jabir Nagaria, in the accident the subject of the proceedings the plaintiff sustained a direct impact injury to the right trapezius and shoulder area, as a consequence of which she started experiencing neck pain and right-sided arm pain. She developed a significant musculoskeletal type of injury to the right side of the neck and trapezius area and in addition she also developed significant

right-sided arm pain in the nerve distribution. According to the conclusion section of Mr. Nagaria's report dated the 24th August, 2018, it would appear the plaintiff developed a mechanical musculoskeletal type of injury but in addition developed right-sided neuropathic pain for which she required surgery. This consisted of an anterior cervical discectomy and fusion at the C5/6 level. Unfortunately, complications manifested themselves after the surgery and it transpired that the plaintiff had vocal cord palsy which the court was told was a recognised risk of the anterior cervical discectomy and fusion surgery that was performed. I will come back to the voice element of the plaintiff's injuries presently.

146. In his evidence, Mr. Nagaria told the court that he first assessed the plaintiff in March of 2016 which was about 9 months post-accident. On examination of the plaintiff he made a clinical diagnosis of a cervical C6 radiculopathy – in other words that there was a C6 nerve root issue. He made this diagnosis in light of his findings that there was pain radiating down the plaintiff's arm which was associated with involvement of the plaintiff's index finger, but also some involvement of the middle finger. He told the court that that indicated a C6 nerve root issue. In addition, Mr. Nagaria had the benefit of a scan which he stated confirmed that there was a broad based disc protrusion at the C5/C6 level which was compressing the nerve root in the lateral recess on the right side.

147. The court was also provided with a short one paragraph report from a Radiologist, a Dr. T. Murray, summarising the findings of an MRI scan of the plaintiff's shoulder taken on the 2nd April, 2016. This report indicates that:

> *"There was slight thinning and altered signal of the supraspinatus tendon indicating tendinopathy with a mild chronic partial tendon tear. There was slight irregularity of the articular surface near the greater tuberosity with some reduction of the subacromial space indicating mild impingement. There was a very slight trace of fluid surrounding the supraspinatus tendon indicating mild bursitis. OA changes*

were shown in the right A/C joint. The anterior glenoid labrum was detached, particularly towards its superior aspect indicating a SLAP injury. The remainder of the visualised skeleton and the overlying soft tissues showed no other specific abnormality."

148. Mr. Nagaria told the court that based on his clinical assessment of the plaintiff, his assessment that the plaintiff's pain was radiating down the arm and was associated with involvement of the plaintiff's index finger, coupled with the objective findings on the MRI scan which confirmed that there was a broad based disc protrusion at the C5/C6 level, he was satisfied to determine that there was a C6 nerve root issue as well as a significant soft tissue injury to the right neck and trapezius area.

149. In his report of the 24th August, 2018 he notes that following examination of the plaintiff in March of 2016 clinically there was evidence that the plaintiff had significant tenderness over the facia joints on the right hand side and the mid-axial spine although the movements were reduced with restricted lateral rotation. Her shoulder movements at that point were full and there was some tenderness over the biceps tendon and there seems to be decreased sensation in the right C5 distribution. At that stage he advised the plaintiff that she should consider injection treatment and she received right-sided C4/5 and C5/6 injections in April 2016.

150. Following the organisation of the MRI scan Mr. Nagaria felt that the plaintiff should be reviewed by a shoulder specialist and he referred the plaintiff to Mr. Hannan Mullett for an opinion. She was seen by Mr. Mullett in September 2016 and she had image guided injections of the right shoulder performed. She was also referred on to Dr. Conor O'Brien for the purpose of nerve conduction studies which confirmed that the plaintiff had evidence of a right-sided carpal tunnel syndrome. Essentially, following the injection treatments, when the plaintiff remained in significant pain, the plaintiff having discussed the position further with

Mr. Nagaria opted to consider surgical intervention after the conservative approach that was initially followed had not worked. Mr. Nagaria told the court that in seven out of ten cases patients will respond to a conservative approach involving injections into the affected area. However, when that approach was tried and failed and in circumstances where the plaintiff continued to be in severe pain, coupled with the fact that there was nerve root compression, it was decided that surgical intervention was required. The surgery was a discectomy and fusion at the C5/6 level with an anterior cervical approach. This means that the surgeon makes an incision at the front of the spine and basically approaches the spine from the front, identifies the space and removes the disc. He explained in evidence that the surgery involved taking the disc and the components from the back of the dura of the spinal cord and the nerve roots and then you put a spacer between the bone and then secure it. He explained that there was a risk of swallowing and speech difficulty with a serious operation such as this and he said generally about 15 to 20% of people will have some hoarseness, but that would be on a temporary basis. In a small percentage of cases, perhaps 2 to 3% of people could have a more permanent hoarseness. Unfortunately, it transpired in the plaintiff's case that that risk was realised and her vocal cords were compromised in the surgery, necessitating a referral on to an ENT surgeon.

151. In addition, Mr. Negaria told the court that the plaintiff also had a right shoulder pain which was extremely painful and there was a right shoulder scan done which showed that she had degenerative changes of the acromioclavicular joint, which is the joint between the clavicle and the chromium. There was also some tendinopathy and some other findings of a degenerative nature in the shoulder and that is why he referred the plaintiff to Mr. Mullett for an opinion. The two other specialists had provided injection treatment for the plaintiff's shoulder but did not recommend surgery.

152. Mr. Nagaria said in evidence that post-operatively after the surgery in 2016 the plaintiff initially had some relief from the radicular pain. The neck pain continued but then the radiculopathy also became an issue after that. It was predominantly an axio-mechanical pain issue. He felt that the plaintiff had some improvement but not complete improvement.

153. In answer to questions from the court, Mr. Negaria explained what was involved in the discectomy and fusion surgery. He explained that the purpose of the surgery was to remove or reduce the pain by removing the disc at the C5 and C6 level. He explained that one has a vertebrae above and a vertebrae below and in between the two there is a disc. The surgeon goes in and excises that disc using the interoperative microscope, he will identify the posterior longitudinal ligament which is the piece of ligament that runs through the entire spine. The operation involves opening that ligament and decompressing the spinal cord and the nerve roots, typically the one on the right hand side because that was the one that was affected. He explained that when the surgeon is looking under the microscope he will be able to see the spinal cord, he then goes more laterally out into the sides and will be able to see the nerve root as well once the surgeon has performed the decompression which involves separating the disc and the cord. The hope for the operation is that the pain will reduce and the sensory symptoms will also reduce. In Mrs. Reid's case he said that at further reviews her pain had certainly remained quite severe and there had not been any significant resolution. On that basis, he suggested a form of pain clinic rehabilitation programme and he also recommended consideration of a spinal cord stimulator. The latter procedure involves a battery being placed underneath the skin subcutaneously. There are leads that are attached to the battery that run up into the spine to provide a lateral stimulation. He explained that in a majority of instances the spinal cord stimulator is used for lower back problems, but in some cases they are also used for cervical spine problems. It is basically used as a last resort where all other steps have failed. He emphasised that he was not a pain management specialist and

he does not carry out the procedure putting in the spinal cord stimulator. He confirmed the diagnosis in his reports that the plaintiff has significant chronic pain syndrome which is a pain syndrome which has basically not responded to any other modalities of treatment. Her symptoms had remained severe and had become chronic.

154. As to causation, he confirmed the view expressed in his main report from August 2018 that the neck pain, in terms of the musculoskeletal pain and the right sided arm pain in terms of the neuropathic pain are directly related to the incident on the 30th May, 2015. That caused her significant discomfort for which she ultimately required surgical intervention. Her quality of life had certainly been affected as a direct consequence of the accident and he felt that the plaintiff's various injuries were entirely consistent with the episode of trauma that happened in this accident at work. The plaintiff was still describing some degree of pain following the cervical discectomy and fusion operation and, as of August 2018, could take almost five years to improve. In relation to the soft tissue musculoskeletal injury they should also improve with appropriate therapy but he felt this could take up to about five years to improve for these symptoms as well. He said at that point there was a 20% chance that the pain could become refractory but he predicted there was about a 70 to 80% chance that the plaintiff's symptoms should improve over the next two to three years.

155. Mr. Nagaria's best estimate of the likely period of symptoms and pain in the early stages would bring us up to approximately the summer of 2020, which basically indicated a pain/symptoms duration of five years approximately.

156. Mr. Nagaria also dealt with a diagnosis of carpal tunnel syndrome on the right side. This necessitated the plaintiff being referred to a neurophysiologist, a Mr. O'Brien. Mr. Nagaria stated it was his view that the carpal tunnel syndrome was incidental and he didn't feel it was related to the accident the subject of the proceedings. Counsel for the plaintiff

acknowledged that the carpal tunnel syndrome element of the plaintiff's case therefore falls away on causation grounds.

157. Mr. Nagaria concluded his evidence in chief by explaining some potential consequences of the disc fusion procedure that was carried out. He explained that ordinarily two vertebrae will operate independently but the effect of the fusion surgery is to link them in their operation. He explained that this may have an effect in the longer term on the surrounding vertebrae. *"There is a school of thought which suggests that one can develop adjacent segment problems at the level above. There is a possibility that because the patient has two vertebrae fused together the level above will become more mobile*. He explained that this may in some cases mean that a patient gets accelerated degenerative changes. However, the incidence of this occurring is not very high". He said he doesn't get too many patients returning saying that one of their upper levels is gone. *"Nonetheless, as a general point, adjacent segment problems can develop as a consequence of the fusion surgery and this is one of the risks that I pointed out to the patient pre-operation".*

158. Under cross-examination by Mr. Walsh for the defendant, Mr Nagari confirmed that the plaintiff had made complaints of widespread pain and discomfort in the right neck and shoulder region during the period of five or so years that he had seen her. He explained that a chronic pain syndrome does not mean that a patient has pain all the time because a patient can have significant exacerbations and then, at other times, can get relief from pain because of using analgesia. The main difficulty was that a patient can get significant exacerbations of pain which can last for some times, days and weeks. The pain doesn't last all the time. He confirmed that the plaintiff had conveyed to him in their consultations that she remained in a lot of pain the majority of the time. It was put to him that the plaintiff had complained of significant pain in her neck and shoulder that was restricting her everyday activities and basically ruining her life. Mr. Nagaria said that he wasn't sure that he had ever heard the

plaintiff use that expression but he did agree that she conveyed that she remained in a lot of pain the majority of the time and that her quality of life had certainly been affected. This was a constant feature from 2016 to 2021. Mr. Nagaria stated that the MRI scan of the cervical spine was in 2016 and this showed evidence of the right sided C6 nerve root deformity.

159. Mr. Nagaria was asked about the plaintiff's shoulder injury and the opinion of Mr. Hannan Mullett, having read the shoulder scan, that it was essentially normal for the plaintiff's age, showing degenerative changes of her rotator cuff but no full thickness rotator cuff tear. Mr. Nagaria emphasised that he was a neurosurgeon whose role was to treat the cervical spine whereas Mr. Mullett was treating the plaintiff's shoulder. There were separate scans involved. He emphasised that in relation to the plaintiff's shoulder he would defer to Mr. Mullett regarding treatment and diagnosis. It was put to him that Ms. Ruth Delaney, another shoulder specialist had also felt similarly that the scan did not show any significant structural injury to the shoulder. Mr. Nagaria declined to comment on that aspect, again emphasising that that was not his area. He indicated that he would defer to the opinion of Mr. Mullett and Ms. Delaney in relation to the plaintiff's shoulder and he did not demur from their view that the shoulder injuries should be dealt with conservatively, using injections.

160. Mr. Nagaria was asked whether from his point of view the neck surgery was a success. He said that initially certainly the symptoms had improved after the operation but then the symptoms had returned and there was evidence of ongoing neck pain and also pain radiating down the plaintiff's arm. He agreed that this was on the basis of complaints made by the plaintiff. He also agreed that technically the neck surgery was a success. When asked by counsel if at the time of performing the surgery he would have expected the arm pain would have eased, Mr. Nagaria said that the most important thing from his point of view was that Mrs. Reid had extremely severe radiculopathy. So what he was trying to treat was her

arm pain because of the severity and also because she had sensory symptoms affecting the index finger and the middle finger.

161. Mr. Walsh then played the video footage from the private investigator and asked Mr. Nagaria a number of questions arising from that footage. In a part of the footage the plaintiff is seen shopping in a supermarket and is seen to lift six individual two litre bottles of mineral water using her right arm. Mr. Nagaria acknowledged that a lot of the movement on the video seemed to be coming from the right shoulder and there was good movement in the right shoulder and that the plaintiff appeared to be able to lift things up from the top shelf in the video. He agreed that the footage appeared to show *"pretty normal movement that one might expect from a lady perhaps in her early sixties"*. Later on there is further footage, this time of the plaintiff lifting a six pack of two litre bottles of water weighing, it was said, some 12kg. Mr. Nagaria is asked what he thinks of the plaintiff's range of motion and strength in her right arm based on that footage. He agreed that the strength in her arm appears to be alright and she appeared to be able to lift the item in question. He agreed that it seemed from the footage that the plaintiff appeared perfectly happy to use her right hand and arm, notwithstanding the presence of her son close by. He was asked his view as to whether the plaintiff appeared to be in severe pain in the video and Mr. Nagaria said he did not think so.

162. The footage then continued and Mr. Nagaria was asked if he saw the plaintiff reversing her car and moving her neck in the motor car and Mr. Nagaria confirmed that he could see that. He confirmed that he was happy that the video showed a pretty good rotation of her neck. It is put to Mr. Nagaria that in consultation with Dr. Ruth Delaney in July of 2021 the plaintiff was raising her shoulder at 10 to 15% of normal. Mr. Nagaria agreed that in the footage the plaintiff is able to lift a bit more than that. Mr. Nagaria was then shown footage of the plaintiff lifting up her pet dog to bring him to the Vet. The footage appeared to show the plaintiff reaching up to the open boot of her car and then electing to lift the dog with

her right arm and then her left arm into the boot of the car. Mr. Nagaria agreed that there seemed to be a good range of movement there in the shoulder. Mr. Walsh also asked him to comment on whether there was neck movement and the witness said that the plaintiff seemed to be able to turn at least 30 degrees to the right and left.

163. Later in the cross-examination, Mr. Walsh elicited from Mr. Nagaria that he had a misunderstanding as to the size of the tower that fell upon the plaintiff. He had the impression that the tower was above the plaintiff's height and that it fell onto her shoulder. It was put to Mr. Nagaria that, assuming the tower had fallen from cavity 6 of the trolley, it would have fallen from a distance of perhaps six inches onto her shoulder. It was put that this calculation is based upon the tower falling from cavity 6 and that it takes into account the plaintiff's height of approximately 5 feet and the fact that she was crouched. The witness said that he did not have that impression. He said that 6 or 7 kilograms is a very heavy weight to fall onto the shoulder. Asked whether a weight of that type would leave marks, the witness answered that it might not have marked the shoulder at all. It depends on how blunt the item is and what way it impacts the shoulder. Mr. Nagaria said it could leave a mark, it could cut the shoulder, or could leave a bruise on the shoulder or it may simply land on the shoulder and fall off.

164. In redirect, Ms. Morgan asked Mr. Nagaria to elaborate upon his description as to the plaintiff's neck movements on the video showing rotation of the neck to the extent of 30 degrees. He was asked what is the full healthy neck degree of rotation and he said that it could be up to 90 degrees. Mr. Nagaria also confirmed that at the time of his examination of the plaintiff she had full movement of the shoulders. He emphasised that as far as he is concerned the footage shows that most of the plaintiff's arm movements were coming from her shoulder, as distinct from her neck. The witness was asked if the plaintiff had at all times presented in consultation as being completely disabled and he said that that was not the case.

He was asked to comment upon reports from Mr. Hannan Mullett and Dr. Ruth Delaney regarding the plaintiff's shoulder. He agreed that those reports appeared to indicate that both specialists felt it necessary to arrange injections for the plaintiff's shoulder and that both specialists held a concern as to the plaintiff's ongoing shoulder complaint. As to causation, when Mr. Nagaria was asked in conclusion what, generally speaking, would be the implication of a 12 pound weight falling from a height onto a person's neck and shoulder. He stated that that was a significant weight and would give rise to consequences. What those consequences will be will vary from person to person.

165. While I have considered the evidence of all of the experts in this case, I propose in this judgment to focus on the evidence of Mr. Nagaria for the plaintiff and Mr. O'Riordan for the defendant as they are the principal two witnesses called by the respective sides to deal with the plaintiff's physical injuries. I will deal more briefly with the evidence of the other doctors who examined the plaintiff.

Evidence of Mr. O'Riordan, the defendant's orthopaedic surgeon

166. The court was provided with three reports from Michael O'Riordan dated the 11th December, 2017, 12th February, 2020 and 14th November, 2022. I think it is important to point out that in the prognosis section of his first report from December 2017, Mr. O'Riordan summarised the plaintiff's injuries and symptoms as follows:

> *"This lady's prognosis would appear to be guarded. She has severe ongoing pain in the shoulder which I feel is likely to need further investigations or treatment. She has relief of her neck pain following surgery but has essentially no movement in the cervical spine. At least she did not demonstrate any movement in the cervical spine to me. She also had a right carpal tunnel syndrome. It is highly unlikely that the blow to the shoulder would have caused carpal tunnel syndrome. She does have pain in the*

left wrist but no symptoms suggestive of carpal tunnel syndrome. However it could still be a form of carpal tunnel syndrome. Carpal tunnel syndrome can occur spontaneously and does not necessarily have to be caused by a particular event. The pain in the left wrist and left knee, while they are very troublesome, it is my opinion that they are not related to the injuries sustained in May 2015. Given that this lady is now 65 years of age i.e. retirement age it is not likely that she's going to get back to work. I think she is likely to have persistent ongoing symptoms and is likely to require further medical and/or surgical treatments …"

167. Elsewhere in the same report Mr. O'Riordan noted that the plaintiff was still attending physiotherapy (this was two and a half years after the accident). She takes Baclofen, perindopril and duloxetine for pain relief. She is significantly incapacitated by the pains. Upon examination he noted that there was a scar on the right side of the cervical spine and another scar on the right wrist where surgery was carried out. She appears to have had a very limited range of motion of the shoulder and movements were very painful. She exhibited no motion at all in the cervical spine. Median, radial and ulnar nerve function appears normal. There was no evidence of muscle wasting. Coordination was normal and all reflexes were present and normal. It was very difficult to assess the shoulder as all movements appear to be causing pain.

168. Mr. O'Riordan also noted that the plaintiff had an MRI scan of the right shoulder carried out which showed thinning of the supraspinatus tendon and apparently the labrum was detached from the superior aspect. He said this gives what is known as a SLAP lesion. I will come back to the significance of that finding on the shoulder MRI presently.

169. Mr. O'Riordan was brought through his evidence by Mr. McCarthy for the defendant. Like Mr. Nagaria, Mr. O'Riordan was shown the video footage taken by the investigator Mr. O'Brien. He was brought through the *"highlights"* of the footage. Mr. O'Riordan was asked

to correlate the complaints made by the plaintiff to him in the December 2017 and February 2020 consultations, with the plaintiff's movements as seen on the video footage. Without reprising all of the surgeon's evidence, Mr. O'Riordan said that when he saw the plaintiff on the 12th February, 2020 (his second report) she said that she had lost her independence, she had to get other people to do her shopping and to bend down for her and to reach shelves for her. The plaintiff informed him that her shoulder was pulling on the right vocal cord and that she had been advised by Mr. Riley the ENT Consultant that she could have an operation for this, but that she had declined. She reported that she was weak and stiff all over and in constant pain. She reported that she constantly dropped things and had to do ironing with her left hand. She could not dress beds in her home. She was taking Neurontin and Palexia for pain relief. She was very frustrated as she had to potter around. She reported that she started jobs but takes ages to finish them. She told him she was unable to go for a walk. She reported that she could drive in a straight line but she could not drive on roads as she could not turn her head to see around corners or reverse a car. He said that essentially she told him that she was totally disabled.

170. Mr. O'Riordan said in evidence that the video footage was inconsistent with the plaintiff's complaints as relayed to him in February 2020. On the video she was able to use her arms quite freely, she was able to turn her neck and she was able to drive her car and reverse. Mr. O'Riordan said that these were all things she told him she could not do. In addition, Mr. O'Riordan said that the plaintiff's reporting to him in the first consultation in December 2017 was also inconsistent with what could be seen on video three years later.

171. In relation to his examination of the plaintiff on the 12th February, 2020, this was no more than a month after the dates of the video footage. He felt there was a major inconsistency between the two. The plaintiff was doing all the things that she said she couldn't do, *i.e.* driving, reaching for shelves, bending down, lifting and carrying weights.

He said that in his examination of the plaintiff in February 2020 it really wasn't possible to examine her as all movements appeared to be painful. Even passive movements were painful. Movements were accompanied by groans and moans. He felt that the plaintiff *"catastrophised her injuries"*. He felt there was a huge psychological element to the plaintiff's symptoms and until that is resolved it is impossible to give a meaningful opinion on the plaintiff's condition.

172. Mr. O'Riordan also told the court that he examined the plaintiff on the 14th November, 2022. She reported that things were mostly the same since he had last seen her two and a half years earlier. She had had some injections to her shoulder from Mr. Nagaria in February of 2022. These were of marginal benefit. The plaintiff had informed him that she had another fall in August 2022, landing on her hands, and this aggravated her general situation. She reported that she was currently on Naproxen, Palexia, Butrans patches and Neurontin. In terms of physical activity, she reported she was not able to drive or do hoovering. She could do small jobs about the house. She could dress herself, but her husband put on her socks. If she has to go shopping she has to shopping with someone else as she cannot lift or carry a shopping bag. She complained of pain in her neck and both shoulders. This pain goes down the left hand and wrist. This may be partly due to the fall. She has two granddaughters this year but she was not able to lift them.

173. Of note, Mr. O'Riordan also commented upon the plaintiff's voice and hoarseness difficulty. He indicated that November 2022 was the first time the plaintiff exhibited any hoarseness. With regard to the hoarseness, a report should be sought from an ENT surgeon on this aspect of her claim. Mr. O'Riordan indicated that he was sceptical about it: *"Certainly in my 40 years of practice I have never heard of somebody complaining of hoarseness following a blow to the neck or shoulder"*. In summary, Mr. O'Riordan stated that the plaintiff had catastrophised whatever injury she had. The findings, such as they are,

are greatly in excess and exaggerated to what one would expect from such an injury. He stated that he had no doubt that the plaintiff was greatly exaggerating her injury and she is not as disabled as she claims to be.

174. Mr. O'Riordan was then cross-examined by Ms. Morgan for the plaintiff. He was tackled on his scepticism about the plaintiff's hoarseness and voice complaint. He confirmed that the first time he noticed an issue with the plaintiff's voice was in November 2022. He confirmed that in the earlier two consultations from December 2017 and February 2020 he had no recollection of the lady having a problem with her voice. It was put to the witness that the plaintiff had a complication of discectomy surgery in 2017 and this had led to the problem with her voice. Mr. O'Riordan said that he had only just read that in the report from Mr. Nagaria. It was put to him that this was a common well-known complication of discectomy and fusion surgery and he agreed. It was put to him that such surgery represents a major undertaking for a patient and he agreed. It was put to him that there had been evidence before the court that fibre optic assessment of Mrs. Reid post-surgery showed a total loss of the right-sided vocal nerve. The witness agreed. He said he was well aware of the complications of cervical spine surgery and he said that this is a rare but well-known side effect of such surgery. He said that he feels he would have noticed the complication as *"it's a red flag sign of surgery"*. It is put to him that physiologically the plaintiff had this complication and that that had been proven clinically and objectively and he agreed that he didn't doubt that. He maintained the first time he noticed it was on his examination of the plaintiff in February of 2020. It was put to him that the only reason for that was that he was not paying attention. Mr. O'Riordan said that he didn't agree but he couldn't understand how it was missed. It was put to him that it wasn't simply a question of him missing or failing to notice the symptoms. It was put to him that, much more than this, the voice palsy issue caused his view of the plaintiff to "flip". The voice palsy issue … *"is the credibility rock on*

which Mrs. Reid perished in your eyes". The witness agreed that he attached significant relevance to that conclusion in terms of the plaintiff's credibility.

175. Mr. O'Riordan was then brought through the prognosis that he had given in his conclusion section of his first report from December 2017 where he had emphasised that the plaintiff's prognosis was guarded and that realistically she is never going to get back to work. It was put to him that *"You flip within five years"*. The witness indicated that that was because the circumstances changed. It is put to him that in November of 2022 he had decided that the plaintiff was a liar about the hoarseness issue, which for some reason he had never before observed and it was put to the witness that that was why he *"flipped"*. Mr. O'Riordan responded that it was more than just the voice – there were other aspects of her complaints, namely that she couldn't drive, that she couldn't use her arms and the fact that he wasn't able to examine her properly.

176. Later on the following exchange occurs between Mr. O'Riordan and counsel in cross-examination:

> *"Q: And there is nothing medically between 2017 and 2022 that changes your mind, apart from a cynicism, Mr. O'Riordan?*
>
> *A: No, I'm not being cynical. On the, on the basis of this lady's ongoing examinations I felt that they were no longer within the clinical limits, that they were beyond normal findings for a person who has had this sort of procedure and injury.*
>
> *Q: So, so you didn't think that she had improved but you thought that the degree of disimprovement wasn't acceptable; is that what you are saying?*
>
> *A: Exactly.*
>
> *Q: OK. So the prognosis from 2017 holds but you don't think she was, or would have been, as bad as she was when she came to you in 2020 and 2022?*
>
> *A: That's correct.*

Q: So it's a question of degree only, Mr. O'Riordan?

A: Yes."

177. Mr. O'Riordan was asked about his methodology in terms of examining patients. He was asked how long each of his consultations with Mrs. Reid took. He said they would usually last about 20 minutes. He was pressed on this and asked if they might have been shorter and he said sometimes they were shorter, sometimes longer. Obviously the first meeting is going to take longer than the subsequent meeting. He was asked how much talking did Mrs. Reid do in these consultations. It was put to him that Mrs. Reid must not have done much talking if, in fact, he didn't even notice her hoarseness in either December 2017 or February 2020. The witness responded that patients are always given the chance to talk and they are always asked at the end of the consultation if there is anything else they want to say. The witness confirmed that in relation to spinal and neck injury, he would defer to the treating doctor Mr. Nagaria who had a different specialty. It was put to him that Mr. Negaria found on the plaintiff's clinical presentation that she had a radiculopathy complaint that was consistent with a C6 nerve root irritation. The witness acknowledged that he had seen that in the report. It was put to him that doctors are always very alive to the consistency of a patient's presentation with the neuropathic pathways. Mr. O'Riordan agreed. It was put to him that that is a very good indicator of positive credibility *"because Joe Soap doesn't know what the nerve pathways are …"*. Mr. O'Riordan agreed with that proposition. There then followed the following exchange between counsel and the defendant's orthopaedic surgeon:

"Q: So, if this plaintiff goes in, and Mr. Nagaria's evidence was that she came in with radicular complaints and symptoms consistent with a C6 nerve pathway, that is significant isn't it Mr. O'Riordan?

A: Oh indeed. I have no doubts about the problem that she had in the cervical spine. I am, I have no doubts that the injury was caused by the, was probably caused by this box striking her on the neck and shoulder.

Q: Yes.

A: But it's her subsequent symptoms after her surgery I can't understand.

Q: Okay. We'll agree that then. We are agreed she had a cervical nerve injury in consequence of this incident?

A: Absolutely.

Q: Yeah. Because MRI scanning then, which is of course the second line of verification of a patient's presentation, showed compression of the C6 nerve root?

A: That's correct.

Q: Yeah. This lady, Mr. O'Riordan, from the get go is a true bill with the neurosurgeon; you accept that?

A: I do.

Q: Yeah. Now Mr. Negaria in his wisdom, having tried and failed with conservative treatment, decided that cervical discectomy was a correct way to go?

A: Yes, correct.

Q: It's a major undertaking, I think you have already agreed?

A: Absolutely yes.

Q: For a plaintiff. And fusion, in fact, of the discs. So it goes beyond discectomy, fusion as well?

A: You always fuse the cervical spine."

[See Day 5, Page 35 of the trial Transcript]

178. Mr. O'Riordan then reiterated his point that he felt the video footage from the private investigator showed up inconsistencies between the plaintiff's reporting of symptoms and her claimed level of disability, versus what was evident on the video:

> *"There is abnormal-normal and then there is abnormal-abnormal and this lady falls into that category in my opinion."*

It was then put to Mr. O'Riordan that that was not his opinion when he saw the plaintiff in December 2017 at 18 months post-surgery and the witness agreed. He says that his opinion changed on the basis of further information and further examination. It was then put to him that he changed his position only to a degree and the witness agreed with that proposition. Significantly, it was then put to him that the opinion of Catherine Corby, a consultant liaison psychiatrist, was that the plaintiff has a chronic pain syndrome and Mr. O'Riordan responds: *"She may well do, yes"*. It was put to the witness that that is a very significant circumstance for an individual and Mr. O'Riordan agreed. It was put to him that there is an interplay between mental health and physical symptoms and complaints and Mr. O'Riordan agreed. He also agreed that psychiatric problems can alter the experience of pain and can alter the perception of pain and can also alter one's perception of function and capacity to deal with pain.

179. Counsel for the plaintiff then put to Mr. O'Riordan the MRI findings report from the Radiologist Mr. Tom Murray. This refers to the anterior glenoid labrum being detached, particularly towards its superior aspect indicating a SLAP injury. It was put to him that this is not a shoulder *"in rude good health"* and the witness agreed. It was put to him that this is a shoulder which would be particularly vulnerable to trauma and again the witness agreed. It

was put to him that this is a plaintiff who is on a cocktail of medications every single day and was on a combination of anti-depressant medications for some five years and the witness agreed. It was put to him that the witness was on various other types of pain relief medication to include two types of opioid medication and the witness agreed. It is put to him that a patient isn't put on opioid medication if they don't have significant problems and the witness agreed.

180. At the conclusion of his evidence Mr. O'Riordan was asked some questions by the court about the findings on MRI of the plaintiff's shoulder by the Radiologist Tom Murray dated the 22nd April 2016. He confirmed that he was accepting of a causal connection between the item falling on the plaintiff's shoulder and the pain symptoms relating to the shoulder in particular. Insofar as the MRI scan reports slight thinning and altered signal of the supraspinatus tendon indicating tendinopathy with a mild chronic partial tendon tear, he was content to associate that with the accident. He said however that an injury like that would not cause significant disability. He was asked him about the finding on MRI that: *"There is slight irregularity of the articular surface near the greater tuberosity with some reduction of the subacromial space indicating mild impingement"*. He was asked to translate that into lay terms, and he said that the acromion is the bone, the uppermost bone on the shoulder. He said that the humeral head is the bone just underneath it. The tendon passes between the two. If there is a narrowing of the space then the humeral head can impinge upon the tendon going underneath the acromion and this can cause pain. Mr. O'Riordan had explained earlier that the labrum is the capsule around the glenoid, which is the socket of the scapula. According to the MRI scan, part of the labrum had been torn off [Day 5, Page 9 and Page 49]. Mr. O'Riordan also dealt with the finding on MRI *"of a slight trace of fluid surrounding the supraspinatus tendon indicating a mild bursitis"*. The witness said that a bursa is a lubricating mechanism often surrounding a tendon and if there is inflammation

going on, extra fluid will accumulate in the bursa. The witness agreed that this is suggestive of inflammation and also agreed that this can give rise objectively to pain, particularly with movement.

181. Mr. O'Riordan also helpfully explained what is meant by the SLAP injury. The relevant part of the MRI read as follows:

> *"The anterior glenoid labrum is detached, particularly towards its superior aspect … indicating a SLAP injury."*

Mr. O'Riordan explained that this means superior labral anterior posterior lesion, hence SLAP. Mr. O'Riordan confirmed that it represents an objective finding on the MRI. Mr. O'Riordan also confirmed that in a general sense, he was prepared to accept and stand over the prognosis that he had initially given in his first report from December 2017. He also said that usually most persons would be symptom free or back to normal about two years post-surgery, as a general rule. He was also accepting of the proposition that a plaintiff who has these objective findings would be more susceptible to injury and would also likely have a longer duration of symptoms. He also stood over his stated misgivings as to what the plaintiff reported to him in his second examination in February 2020 versus the plaintiff's level of movements on the video footage.

Evidence of Mr. Neil Riley, Consultant Ear Nose and Throat Head and Neck Surgeon

182. Mr. Riley provided a report to the court dated the 3rd September, 2019 and he also gave oral evidence via video link which basically confirmed the contents of his report. In his report he refers to the plaintiff's operation in June of 2016 where it was decided to perform a spinal fusion surgery. This was due to an identified nerve compression injury between C4 and C5 of the cervical vertebrae. Surgery involved a right anterior neck incision on the 30th

June, 2016. Since then, the plaintiff has had hoarseness. This got markedly worse one month following the surgery and has not recovered since. She is unable to raise her voice and cannot sing. On examination he noted that Mrs. Reid was quite healthy but had a very weak voice characteristic of one weak vocal cord. Fibre-optic examination of the larynx showed the right vocal cord to be suffering from a complete palsy and not moving at all on vocalisation or attempting a cough. The left vocal cord although it has compensated to a certain extent by moving beyond the midline does not actually approximate with the right vocal cord which is the manoeuvre required to produce proper voice. On coughing however Mrs. Reid was able to approximate both vocal cords.

183. Mr. Riley says that vocal cord palsy of this form is characteristic of damage to a recurrent laryngeal nerve which supplies the muscles involved in moving the vocal cord. In his view at this late stage there is not going to be any spontaneous recovery. A relief of vocal weakness following such a vocal cord palsy is established when the contra-lateral vocal cord strengthens enough to be able to cross the mid-line and meet the right vocal cord. Although Mrs. Reid is able to do this on coughing she is not able to do it on speech. In the view of Mr. Riley no medical therapy would improve the vocal cord function. It should be possible to perform a surgical procedure where the vocal cord could be medialised to allow approximation with the left cord.

Evidence of the plaintiff's Psychiatrist, Dr. Catherine Corby

184. Dr. Corby saw the plaintiff for the first time on the 17th November, 2022 which was some seven years post-accident. Dr. Corby took a detailed personal history from the applicant. It isn't necessary in this judgement to go into the minutiae of the plaintiff's background. She was from a family of six and she was the youngest. Suffice to say, she had a difficult upbringing and an unhappy childhood. It is not necessary to go in to the details of

this, save to indicate she was not inclined to elaborate upon this and she has never attended for counselling in relation to her childhood experiences. She never returned to the family home after her mother died. The plaintiff went to boarding school for her secondary years in Dungarvan and after leaving school she went to Cork to study to become an accountant. She gave up accountancy when she started having her children and subsequently went back to work in the role of factory operative at Bausch and Lomb.

185. The plaintiff reported to the psychiatrist that she was markedly limited from a functional perspective. She did not go back to Bausch and Lomb having taken redundancy. She gained a couple of stone in weight and moved slowly and feels she is obese.

186. As to past psychiatric history the plaintiff had a previous history of depression after her mother's death in 1998 and she became quite unwell and was admitted for a brief period to Waterford University Hospital under the care of the mental health team. She was prescribed medication and discharged home. She coped well over the years by staying busy and working and keeping herself active. For that reason, she reported that her accident was a huge trigger for her in terms of mental health issues because she lost her level of independence that she had previously enjoyed. Moreover, her role within the family as a mother and now grandmother and also her role as a wife was also significantly impacted and she had also never resumed her career.

187. In Dr. Corby's view, the plaintiff was affected psychologically by the accident the subject of these proceedings. She had a prior history of treated depression after the death of her mother in 1998 with difficult family circumstances going back many years. She had a brief admission to a psychiatric unit at that time and was on medication. She also had a previous history of anxiety after a road traffic collision in 2010. She was not on any medication for a couple of years prior to the incident the subject of the proceedings. In the view of the psychiatrist the plaintiff presented with a moderate severity depressive disorder

with persistent low mood, tearfulness throughout the assessment, social withdrawal, biological symptoms of depression and pessimism regarding her future. She did not acknowledge any current societal suicidal ideation but did ask what is it all for. In the opinion of the psychiatrist she meets the DSM 5 criteria for moderate severity depressive disorder.

188. Dr. Corby felt that the plaintiff would benefit from the introduction of a more effective anti-depressant medication and would also benefit from psychological therapy, but she is reluctant about this because she has never found it easy to talk about what happened during her lifetime. She coped with her difficulties by applying herself and keeping herself busy with practical tasks. Unfortunately, these tasks have become more limited because of her physical symptoms and hence her emotional health has deteriorated. In the opinion of Dr. Corby her prognosis for the future is guarded given the chronicity of these symptoms and the effect on her quality of life.

189. In cross-examination Dr. Corby acknowledged that her assessment of the plaintiff took place some seven years after the accident and that this was the first time she had seen the plaintiff. Moreover, she was in large measure reliant upon the plaintiff's reporting of her symptoms and had not obtained medical notes or other reports for the purpose of cross-referencing or assessing whether medical records corroborated to the history that was given to her.

190. In her oral evidence, Dr. Corby stated that depression and chronic pain are closely linked and the 2 elements can have a circular relationship, one reinforcing the other. She stated that in the plaintiff's case, her depression was not a big issue for her before the accident, but as a result of the pain from the accident, this triggered her underlying vulnerability to develop depression, particularly because she wasn't improving as much as she hoped. She stated that the plaintiff's perception of pain can be increased because of her

depression. She stated that it is well documented that people with depression tend to feel pain symptoms worse than others. She stated that depression can exaggerate the symptoms for the individual because of a process called "psycho-sensory amplification", where people with depression and anxiety syndromes can feel the pain a lot more severely. This can influence the subjective view of the individual as to the prospect of recovery. The key features of depression are cognitive features with negative thinking. She stated that if someone is in pain and then they attribute negative thoughts to the pain, it can worsen their prognosis and even their enthusiasm to engage in therapies.

191. Dr Corby stated that the plaintiff's difficult upbringing and her early circumstances as a child had affected her ability to cope with the effects of her accident. She stated that her underlying vulnerability and low self esteem that was related to her own childhood experiences made her more vulnerable to getting depression when something as significant as this accident happened in her life and she has lost her role within the family which was very important to her. Based on her presentation and the high level of medications that she remained on, the psychiatrist assessed her prognosis as guarded. This was based on the chronicity of her symptoms, her chronic pain, the fact she had had surgery, and was still left with this chronic state, the fact she had limited functionality relative to where she had been, and the extent to which her quality of life was affected.

192. The report of Dr. Corby is in large measure consistent with, and reflected in, the evidence of the plaintiff's General Practitioner, Dr. Caroline Feeney. Dr. Feeney was the plaintiff's current GP and she provided a report dated the 8th November, 2022. Prior to that, for a long number of years, the plaintiff had been under the care of Dr. Pat Devlin. Dr. Feeney examined the plaintiff on the 18th May, 2021 and the 8th November, 2022. The plaintiff was feeling at a particularly low ebb during the consultation. She notes that the plaintiff doesn't express any anger with the physical condition she finds herself in but was

certainly dysthymic and somewhat resigned to her lot. Dr Feeney noted that the plaintiff was still in pain and on high dose transdermal opioids for this. Power was reduced in her right arm and this prevented her from carrying out many tasks of daily living. The plaintiff has low mood and apathy and the GP was working on a treatment plan for her in that regard. In Dr. Feeney's view, the plaintiff's situation was very sad as Mrs. Reid had had her independence and the accident had significantly affected this. She was now a very quiet, gentle spoken lady who was clearly emotionally distraught and who relives the night's events with photographic clarity. She has had to self-fund a huge amount of medical procedures in an attempt to get back some of her quality of life. The family had to make financial sacrifices to allow Mrs. Reid get the treatments and the surgeries that she needed.

193. A report was also provided to the court from a psychiatrist retained by the defendant, Dr. Noreen Keating. Dr. Keating's report is dated the 12th April, 2023. The report is based on an interview with Mrs. Reid on the 7th April, 2023. Mrs. Reid reported to the psychiatrist that before the accident she loved her life and was busy and enjoyed meeting people. However, since the accident in 2015 her function has been impaired on account of her upper limb weakness. She reported that she was unable to hoover, has to be careful about doing the laundry, and needs to use a light iron. She needs help with shopping. She reports that she can only cook simple meals. She is no longer able to knit or crochet and these are activities she enjoyed a lot previously. She is unable to lift her grandchildren who are young. She is able to do a small bit of driving. Her pain is constant and sometimes so severe it keeps her up at night.

194. In terms of her mood, Mrs. Reid reported to Dr Keating that her mood is variable, being up and down to being angry, frustrated and fed up. She can be in good cheer when distracted by family or by music. She has low energy. Her sleep is very poor. Her appetite has increased and she has gained about four stone. Her interest in meeting people and going

out is reduced. She reports reduced social activities, socialisation and quality of life. She feels hopeless at times but denies any passive death wish, any thoughts of self-harm or suicide. She denies any evidence of anxiety disorder, any panic attacks, any post-traumatic stress disorder or obsessive-compulsive disorder. She denies any features of psychotic illness. As to her mental state examination on the 7th April, 2023, the psychiatrist felt there was an inconsistency in her reporting in that in the carpark prior to the appointment she happened to bump into the psychiatrist and she was friendly and bubbly. Once in the interview room, her demeanour changed somewhat and she was quite guarded and somewhat defensive. Subjectively, she reported her mood as depressed, objectively her mood was variable, somewhat cheerful in the car park, and flat and despondent in the interview room. The plaintiff was preoccupied by the accident in 2015 and feels that it has had a negative impact on her overall life. She reported feeling hopeless at times, but denied any passive death wish or suicidal ideation. She was oriented in time and place and person and there was no evidence of psychotic illness.

195. In the conclusion to her report, Dr. Keating stated that she finds it hard to be definitive around a diagnosis. She considers that the plaintiff may meet the criteria for dysthymia as evidenced by her reports of a seven year history where she feels her mood is recurrently low, she has reduced energy, interest and enjoyment, reduced self confidence and insomnia. She regards as unusual that Mrs. Reid has not been recommended by her GP for an adjustment of her anti-depressant medication or for psychotherapy input or referral to a psychiatrist.

Plaintiff's submissions on quantum of damages

196. At the invitation of the court, counsel for the plaintiff made submissions on quantum. Counsel prefaced her remarks by referring to the judgment of the Court of Appeal in *Shannon* v *O'Sullivan 2016 IECA 93* which referenced the general principles to be taken into account.

These include the requirement that damages be fair and reasonable, must be proportionate, should take account of societal factors and, obviously, bear a proportion to injuries in other types of cases, mindful of the cap of €500,000 in respect of general damages. And the overarching principle that damages must reflect the personal circumstances of the plaintiff and how the accident has affected her overall enjoyment of life and day to day living. Counsel emphasised the seriousness of the physical injuries but also the chronic psychological injuries which reduced the plaintiff's ability to cope with pain and with functional limitation and also impacted her *perception* of pain and her perception as to the level of her functional limitations. In that regard, counsel relied upon the evidence of the psychiatrist Dr. Corby and also the plaintiff's current general practitioner Dr. Feeney. Counsel emphasised the plaintiff's difficult upbringing and past psychological difficulties. It was submitted that the plaintiff coped over the years by keeping herself very busy and looking after her home and family. It was submitted that once that sense of busyness was gone and particularly once the voice palsy dawned on her in the months after the discectomy and fusion surgery, *"The wheels came off the wagon psychologically"*.

197. In terms of specifics as to the physical injuries, counsel submitted that the plaintiff's neck injury was the dominant injury. It was submitted that the *Personal Injuries Guidelines* did not apply and that therefore the court should first of all look at the *Book of Quantum.* The most severe category for neck injury in the Book of Quantum prescribes a range of damages between €44,600 and €77,600. In counsel's submission, that did not meet the full extent of the plaintiff's neck injury. That band of damages essentially describes a discrete neck injury and the need for a collar but, in counsel's submission, it didn't factor in the neuropathic side of this plaintiff's injury, her radiculopathy, her neck scar that resulted from the discectomy/fusion surgery, the fact that the surgery has failed/not been a full success and the claim that the plaintiff is now looking at spinal pain and possibly the insertion of a spinal

stimulator. Counsel submitted that the Court of Appeal have made clear that the Book of Quantum provides helpful guidelines, but they should not be viewed as rigid or binding. For this reason counsel submitted that the range of compensation in the most severe category of neck injury does not meet the circumstances of the case. Counsel suggested a figure of €120,000 in respect of the plaintiff's neck injury in view of the surgery and the duration of symptoms. When asked where that figure was coming from, counsel submitted that the range for the neck injury is much more akin to a vertebrae fracture as discussed at page 33 of the Book of Quantum. That sort of injury attracts a higher band of damages. In view of the plaintiff's operation and by analogy with the vertebral fracture type of injury, counsel submitted that the suggested figure of €120,000 for the neck injury was appropriate.

198. As to the shoulder injury, counsel submitted that the shoulder injury fell within the moderate soft tissue range at p. 38 of the Book of Quantum with a value range between €22,000 and €60,900. Counsel submitted that because of the plaintiff's ongoing problems a figure of €50,000 was reasonable in respect of the shoulder injury.

199. As to the vocal compromise element of the claim, counsel submitted that this is a very significant limitation for anybody. In view of the evidence of the ENT Surgeon Mr. Riley and the fact that the vocal impairment is continuing, it was submitted that general damages on a standalone basis in the region of €75,000 was appropriate for this element.

200. In terms of the psychological/psychiatric element of the plaintiff's injuries, it was submitted these are again not dealt with in the Book of Quantum but are addressed in the new Guidelines. The Guidelines indicate a compensation range of €80,000 to €170,000 for severe psychiatric injury which is described as involving *"marked interference with quality of life, education and work"*. Counsel submitted that the plaintiff falls within that range, in fact falls at the upper end of the range, even though it was acknowledged the guidelines did not have

application. On that basis, counsel suggested a figure of €120,000 general damages for the psychiatric element of the plaintiff's injuries.

201. The estimates submitted by counsel, if one tots up €120,000 in respect of the plaintiff's neck injury, €50,000 in respect of the plaintiff's shoulder injury, €75,000 in respect of the vocal compromise and €120,000 in respect of the plaintiff's psychiatric injuries, that yields a total of €365,000. Counsel acknowledged that the guidelines in the case law make clear that one doesn't simply tot up in a straight line all the individual figures to arrive at a grand total. Rather, that the overall award must be considered in light of the fact that there is an overlap in time frame between the various physical and psychiatric symptoms. Secondly, the principle of proportionality requires the court to assess the overall figure in accordance with where in the overall spectrum of injuries this particular plaintiff's injuries fall and to bear in mind the current general damages cap of €500,000 for catastrophic spinal injury, and also to maintain a level of proportionality with awards in other similar cases.

202. Drawing all of these points together, counsel for the plaintiff submitted that general damages of no more than €300,000 and no less than €250,000 was appropriate, given where the plaintiff is at seven years later. In addition, counsel suggested a figure of at least €50,000 in respect of the plaintiff's *"loss of opportunity"* of returning either to a role as an accountant or, at a minimum, as a factory operative. Counsel emphasised that the plaintiff at 54 years of age was out of the workplace at the time she took redundancy. The consensus amongst the vocational assessors was that she was not going to get back to work and it was submitted that was a very significant consequence for a woman of the plaintiff's age. Both vocational assessors agreed that, at the very least, the plaintiff could have got back to entry level retail general operative type work, but for the occurrence of the accident. Counsel submitted that Ms. Tolan, the Vocational Assessor for the plaintiff had acknowledged there is no guarantee that Mrs. Reid would have got back to life as an accountant or in a professional capacity but

she clearly could have got back to work in the retail area or as a general operative. All told, counsel suggested a figure of €75,000 in respect of the loss of opportunity element of the claim. In summary therefore, counsel urged that damages should lie in the region of €325,000 to €375,000.

Discussion of quantum of damages

203. In the view of the court, the plaintiff's submissions on quantum fail to take in to account or address sufficiently the private investigator's video footage of the visit to the vet on Friday the 27th of October 2017 and the visit to the two supermarkets on Friday the 10th of January 2020 and Saturday the 11th of January 2020. In my view, the plaintiff's submissions on quantum also fail to take into account the evidence of the various medical practitioners, once they had been shown the video footage. Having reviewed the video footage a number of times myself and having heard the evidence as to what the plaintiff told various medics during the period of her injuries; I am satisfied that the plaintiff's perception of her injuries became flawed and that she over – stated the extent of her injuries in certain important respects. In my view, the level of functional limitation and difficulty which the medical reports record as having been conveyed by the plaintiff to certain doctors at some of the consultations was not borne out by, or consistent with, the video footage taken by the private investigator.

204. In one part of the video footage, the plaintiff is filmed bringing her dog to the vet in what was a distressing incident for her because the dog was elderly and needed to be brought speedily to the surgery. In the footage, the plaintiff appears able to use her right arm quite freely and she is able to lift up what seems to be a reasonably large – sized dog into the boot of her car. In parts of the footage, she appears to be able to drive her car and turn her neck, and in other parts of the footage she appears able to reverse her car without difficulty or pain.

205. It is apparent from the second page of the investigator's report of the 20th of January 2020 that the background briefing given to the investigator was that the plaintiff claims to be suffering from alleged neck and shoulder injuries and greatly restricted movement of her right arm and hand. The report notes that as a result of the injuries to her right arm and hand, the subject claims she cannot return to work. The investigator was invited to place the subject under surveillance and report on her current level of activity. Having viewed the footage a number of times, and having heard the reaction and evidence of doctors who viewed the footage, I am satisfied that in relation to the plaintiff's right arm and hand in particular, the video footage exposes as incorrect a number of things that the plaintiff is recorded as saying to doctors, and precludes the Court from accepting as reasonable the plaintiff's evidence as to the level of continuing disability in her right shoulder, arm and hand.

206. In my view, had the defendant not obtained the footage, that would have meant that the court had an incomplete picture of the plaintiff's overall injuries. Had the footage not been available, this would almost certainly have led the court to believe that the plaintiff's injuries to her right shoulder and arm were greater than they actually were. In summary, but for the video footage, the court would have had an over – stated impression of the extent of the injury, and an overly generous impression of the duration of the plaintiff's symptoms, particularly of her shoulder and right arm.

207. Having reached that conclusion, however, it seems to me that this is not a situation where the justice of the case requires a dismissal of the action or a near – total fractioning of general damages. I come to that conclusion for a number of reasons. First and foremost, having carefully observed the plaintiff giving her evidence over a number of days, and having listened to all the medical practitioners in the case, I am satisfied that the plaintiff was an honest witness who at all times sought to give an accurate and fair account of her injuries. I am satisfied that the plaintiff subjectively believed that her functional limitations were as bad

as she described them to be in her consultations with doctors. It is my view, however, that the plaintiff's perception of her injuries and symptoms became muddled and distorted and this caused the plaintiff to amplify her symptoms in her mind. I accept the evidence of the plaintiff's psychiatrist, Dr Corby that the plaintiff's perception of pain increased because of her anxiety and depression. I accept the psychiatrist's evidence that the plaintiff's psychological difficulties seriously impacted the plaintiff's ability to cope with her pain. In Mrs Reid's case, this caused a spiral of depressive symptoms which impacted her subjective view of her pain and condition, wore down her enthusiasm to engage in therapies or take on life's challenges and led her to believe that her future was bleak and that she had no prospect of recovery.

208. Secondly, I accept the evidence of the plaintiff's psychiatrist and general practitioner that there was a strong element of overlap between the plaintiff's physical injuries and her psychological injuries and that each element "fed into" the other. Moreover, I accept the evidence that the plaintiff's depressive state and low mood and overall psychological profile significantly impacted the plaintiff's perception of her injuries and symptoms, and her perception of the extent of her functional limitations. I think there is substance to counsel's submission that after it became apparent to the plaintiff that the discectomy and fusion surgery had not solved all her physical problems, and in fact caused a new problem with the vocal cord palsy and loss of voice, at that point "the wheels came off the wagon" from a psychological point of view.

209. I accept the evidence of Dr. Corby that depression and chronic pain are closely linked, and they can have a circular relationship, one reinforcing the other. She said that in the plaintiff's case her depression was not a big issue for her before the incident and that being in pain over an extended period triggered her underlying vulnerability to develop depression. Dr. Corby also said, and I accept, that the plaintiff's perception of pain was increased because

of her depression. She says it is well documented that people with anxiety or depression tend to feel pain symptoms worse than others. She said that depression and low mood can exaggerate the symptoms for the individual concerned because of a process known as psycho – sensory amplification, where people with depression and anxiety syndromes can feel the pain a lot more severely. This can influence the subjective view of an individual as to the prospect of recovery or as to the prospect of their functional ability returning. The key features of depression are cognitive features with negative thinking.

210. Thirdly, in accordance with the evidence of the psychiatrist, it seems to me that as the plaintiff's psychological difficulties spiralled, she became unable to cope properly with the effects of her injuries and this in turn had consequences for her confidence, her self-esteem, her perceived loss of independence and her perception as to the erosion of her central place within her family, as chief homemaker, providing for the needs of her husband and children.

211. On this basis, I infer from the evidence of Dr. Corby and also from the evidence of Dr. Feeney, the GP, that the plaintiff lost a sense of perspective as to the true extent of her physical injuries and limitations, and that she in effect became overwhelmed by her situation. While it is true that a defendant must take a plaintiff as they find her, in my view it would be stretching the limits of the eggshell skull principle to visit upon the defendant responsibility for causing functional limitations which the plaintiff subjectively believed she was suffering from, but which on a more correct and objective view, she was not.

212. It is abundantly clear from the medical evidence that the plaintiff was not a "good candidate" for an accident such as this – both from a physical injury point of view, and a psychological point of view. This may well have been due to unaddressed issues from childhood, or pre – existing psychiatric difficulties associated with the loss of her mother. Whatever the source of the plaintiff's background difficulties, it seems to me that Mrs. Reid suffered from chronic symptoms of low mood and depression and she had a flawed

perception of her functional limitations, particularly in her right shoulder and arm. The plaintiff's resilience and ability to maintain perspective appears to have suffered, and this in turn, according to the medical evidence I heard, led to a spiral of low mood, withdrawal from activities, an overall sense of resignation and a much reduced ability to participate in the enjoyment of daily living.

213. I take the view that while the surveillance footage shows the plaintiff doing certain things that she had told some doctors she had great difficulty doing, it also shows a woman struggling with life, not in exuberant form, not meeting people or playing sports or hobbies, not going shopping on her own, and generally not enjoying or smiling her way through the challenges of daily living. I consider that there is substance to counsel's point that the video footage is not all one – way. On two out of three occasions on which she is followed by the private investigator, the plaintiff has to be accompanied by a helper to help her do the shopping. Her GP Dr Feeney also noted in her evidence that anytime the plaintiff came to the surgery, she had to be driven by a family member. To my mind, that is a serious limitation and handicap for a person of the plaintiff's age.

214. It should also be borne in mind that the defendant has at no stage pleaded, or sought to make out a case, that this was a fraudulent claim. No application was made to the court under s. 26 of the Civil Liability and Courts Act 2004. I consider that that is significant. I do not criticise the defendant for the decision not to make such an application, as it seems to me it reflected the realities of the evidence heard by the court, particularly the psychological evidence.

215. I take the view that had the defendant made an application under s. 26, such an application would have failed. I am satisfied that the plaintiff did not hold a subjective intention to mislead the court and did not knowingly exaggerate her injuries so as to wrongfully enlarge her damages. In *Foxe v. Codd* [2022] IEHC 35, Sanfey J. considered the

criteria that were laid down by the Court of Appeal in *Nolan v. O'Neill* [2016] IECA 298. Sanfey J. noted that s. 26 applications were to deter fraudulent claims and were not designed to allow a forensic assault on a plaintiff's evidence. While the defendant in the present case did put to the plaintiff and some of her medical witnesses that she had exaggerated her claimed level of disability, at the end of the day it needs to be borne in mind that this was not a case in which the defendant made any application under s. 26. Nor was it a case in which a s. 26 application would have succeeded.

216. I think a factor to which I think the court should give considerable weight is the fact that over the years since her accident in 2015 the plaintiff has expended significant sums of money paying privately for medical procedures and treatments to help get herself better and to help bring to an end her symptoms of chronic pain. The special damages in this case are agreed at €50,703 and they consist largely of medical fees and vouchers for medical procedures, treatments and consultations. This was money which the plaintiff herself could ill afford and I accept the evidence that she paid for these expenses out of her husband's modest inheritance and also the redundancy payment she received from the defendant. In my view, the level of this expenditure which it is agreed the plaintiff undertook, speaks to the overall legitimacy of the claim. I think it unlikely that the plaintiff would have spent her family's hard-earned money to address medical problems that she genuinely didn't feel she had. As Dr Feeney noted towards the end of her evidence, the plaintiff was in the position of not having a medical card and not having private health insurance : "*She was self funding all of her investigations, MRIs, nerve conduction studies, consultant visits … that's part of the reason I feel this woman has tried everything to try and get resolution of her symptoms, including putting herself under financial pressure."*

217. It is noteworthy that the plaintiff volunteered to Dr Feeney in her consultation in November 2022 that she had had an accident in Canada when visiting her sister when she

tripped over a beam that was lying on the ground. She had put her two hands out to help her fall and this had hyperextended her neck. She told the GP that she was finding it difficult to drive since that accident. To my mind, this is not the actions of a claimant seeking to wring the last ounce out of a claim. This is a plaintiff who is volunteering information to her doctor that her current symptoms are attributable to an unrelated accident : hardly the badge of a fraudster. I note as well in that regard that the plaintiff disclosed the accident in Canada to Dr O'Riordan, the defendant's orthopaedic surgeon. Obviously, there is an obligation on all plaintiffs to disclose such matters to doctors, so there is no question of the present plaintiff earning special accolades for complying with her disclosure obligations. Nonetheless, the fact that this information was readily volunteered to her own doctor and to the defendant's doctor, speaks to the genuineness of the claim.

218. Elsewhere in her evidence, Dr Feeney notes the plaintiff as having told her at a consultation in May of 2021 that her ironing abilities were limited, not that she could not iron, she was able to iron and make beds but she found these tasks very difficult; and that driving was difficult, not that she could not drive.

219. A separate aspect of the plaintiff's case that in my view is very material is the extent of tablets and pain medication that the plaintiff was prescribed over the years for her symptoms. When Dr Feeney took over from Dr Pat Devlin as the plaintiff's GP due to Dr Devlin's retirement, the plaintiff was on a cocktail of medications for her symptoms. She was on Venlapraxine which the court was told is an anti-depressant used quite commonly for moderate to severe depression. She was on a moderate dose of 150 milligrammes. She was on something called Mirtazapine which is taken at night to help sleep and mood improvement. She was on a moderate dose of 30 milligrammes. She was previously on Gabapentin or Neurontin which is used for peripheral nerve pain – 400 milligrammes three times a day. She was on Baclopar/ Baclofen which is used for muscle spasms. She was on a morphine patch

on a maximum dose of 20 micrograms. It is a transdermal morphine patch that is used once a week. She was also on an oral opioid called Palexia which she takes three times a day. Dr Feeney referred to the opioids regime as "quite a robust dose of opioids". She said from time to time the plaintiff also takes Paracetomol. Not surprisingly in light of all this medication, the plaintiff herself said in her evidence that her medication was very very strong and "can space you out".

220. In the view of the court, all of these factors strongly reinforce the legitimacy and seriousness of the plaintiff's claim. This is a plaintiff whose life was very seriously impacted by the accident the subject of the proceedings. I am satisfied that from a causation perspective, the plaintiff's claim ought to succeed. The evidence of the defendant's orthopaedic surgeon Mr. O'Riordan, is particularly relevant in that regard. Mr. O'Riordan accepted that the plaintiff had genuine problems with her cervical spine, and he accepted that the neck injury that resulted in the fusion operation was probably caused by the box in question striking the plaintiff on the neck and shoulder. He also accepted as correct the evidence of Mr. Nagaria that the plaintiff had presented with radicular complaints and symptoms consistent with a C 6 nerve pathway, and he also accepted the proposition that that constituted a significant injury. Mr. O'Riordan also accepted that the plaintiff had a genuine injury to her shoulder and that there were objective findings to be seen on the scan of her shoulder as recorded by the radiologist Mr. Murray. As to causation, he also accepted that there was a causal connection between the item falling on the plaintiff's shoulder and the injuries evident on the MRI scan. Separately, he accepted the proposition that the plaintiff's shoulder would be particularly vulnerable to trauma because the MRI showed that she had degenerative changes in her shoulder and that this was not a shoulder "in rude good health". He also accepted that the plaintiff was a lady who was on a cocktail of medications every

single day and he accepted that a patient would not be on opioid medications if they didn't have significant problems.

221. In addition, Mr. O'Riordan was prepared to stand over the prognosis of the plaintiff that he had given in his first report from December 2017. At that time, he felt that the plaintiff's prognosis was guarded; she had severe ongoing pain in the shoulder which was likely to need further treatment. She had relief of her neck pain following her surgery but at the consultation did not demonstrate any movement in the cervical spine. He felt that given the plaintiff was now 65 years of age, i.e., retirement age, it was not likely she was going to get back to work. Overall, he felt that she was likely to have persistent ongoing symptoms and was likely to require further medical or surgical treatments.

222. In the view of the Court, it was unfair and erroneous for Dr O'Riordan to disbelieve the plaintiff's voice complaint and I do feel it influenced significantly his overall scepticism of the plaintiff's ongoing complaints. The surgeon's error in that regard undoubtedly played a part in his changed attitude towards the plaintiff in his later 2 reports. Having said that, I think Dr O'Riordan was justified in having concerns about the inconsistency between the plaintiff's reporting of symptoms in 2020 and the level of movement evident in the video footage, particularly insofar as her right shoulder and arm are concerned. In the Court's view, Mr Nagaria gave balanced and accurate evidence as to the nature and extent of the plaintiff's ongoing injuries and was appropriately cautious about not straying beyond his area of expertise. Insofar as the two experts differed on the plaintiff's prognosis with respect to the plaintiff's neck and shoulder complaints, I prefer the evidence of Mr Nagaria.

223. Pausing for a moment and stepping back from the individual elements of the plaintiff's case, it seems to me that, viewing matters in the round, the plaintiff has suffered very significant injury as a result of this accident and furthermore, for a long number of years her injuries and symptoms have impacted her daily enjoyment of life. In my view, when

measured against the list of factors identified by Irvine J. in *Shannon v. O'Sullivan* [2016] IECA 93, this case warrants significant compensation. While the incident the subject of the proceedings was on one view somewhat innocuous, its effects on the plaintiff's mind and body have been considerable. I agree that the dominant injury in this case was to the plaintiff's neck. After conservative treatments such as physiotherapy and injections had failed, the plaintiff on the advice of her consultant neurosurgeon underwent a very significant procedure in June 2016 involving a discectomy and fusion of vertebrae. While the operation had initially been thought to have gone well, the plaintiff's pain symptoms returned and the hoped – for let up in symptoms did not materialise. When in the months following the operation, it became clear that the risk of vocal cord compromise had occurred, the plaintiff's mood and overall wellbeing deteriorated.

224. The plaintiff's loss of voice and hoarseness difficulty would now appear to be permanent. I understand and accept her reluctance to undergo yet another operation. I accept the evidence of the consultant ENT surgeon Mr. Riley. Indeed, in the course of the hearing I noticed myself that the plaintiff's voice weakened from time to time. It is not difficult to imagine how this would affect a person's confidence and enjoyment of life, and inclination to participate in social activities. I regard this aspect of the plaintiff's injuries as being significant on a standalone basis.

225. Moreover, I accept the evidence of Mr. Nagaria concerning the objective findings on the MRI, as underpinning separate injuries to the plaintiff's neck and shoulder areas. I accept his evidence that when he examined the plaintiff he made a clinical diagnosis of a cervical C 6 radiculopathy, based on the pain radiating down the plaintiff's arm, which was associated with the plaintiff's index finger. Moreover, the MRI scan of the neck confirmed there was a broad-based disc protrusion at the C 5 / 6 level which was compromising the nerve route in

the lateral recess on the right side. I accept Mr. Nagari's evidence that the plaintiff's clinical presentation was consistent with these objective findings.

226. The plaintiff also had pre – existing degenerative changes in her neck and I accept the evidence – from both sides – that this rendered her shoulder more susceptible to injury from trauma.

227. In my view, the plaintiff's ongoing shoulder complaints were also supported by the objective findings in the shoulder MRI performed by the radiologist Mr. Murray, and I accept the plaintiff's evidence that her quality of life was severely affected by this aspect of her injuries. In my view, it is significant that Mr. O'Riordan was prepared to stand over and affirm the prognosis that he had given in his first report, namely that the plaintiff's prognosis was guarded, and she had severe ongoing pain in her shoulder at that point. He also accepted that the plaintiff's neck injury was real; was caused by the accident; and involved a cervical nerve injury. He also accepted, understandably, that the fusion / discectomy surgery was a major undertaking and furthermore that the vocal cord palsy was a recognised risk complication from such surgery. He also to my mind accepted the legitimacy of the chronic pain syndrome commented upon by the psychiatrist Dr. Corby. He accepted the underlying objective basis for the shoulder complaints, and he fairly acknowledged the SLAP injury that was evident on the MRI of the shoulder. He also accepted that the plaintiff was on a cocktail of medications for a very long period, including opiates for pain and also antidepressant medication.

228. Turning now to an assessment of the plaintiff's individual injuries, it seems to me the neck injury was the dominant injury and was undoubtedly serious, necessitating surgery in the form of a discectomy and a fusion of vertebrae. I am satisfied from the evidence in the case that the plaintiff's neck complaint has not fully resolved and continues to give her trouble. I accept Mr. Nagaria's estimate that on the private investigator's video footage the

plaintiff's neck movements are limited to about 30 degrees, whereas for a person in the full of their health, the movement should be 90 degrees. I am also building in the possibility, again accepting Mr. Nagaria's evidence, that there may be associated weakness in the adjoining vertebrae at some point into the future.

229. I propose not to ascribe a specific sum for the plaintiff's operation scar, as I take the view that the scar element should be factored into the overall damages for the neck complaint. I accept the plaintiff's evidence that she is conscious of the scar and regards it as a disfigurement. In my view, for the reasons outlined by counsel for the plaintiff in her submissions, the plaintiff's neck injury is not sufficiently provided for in the Book of Quantum. Taking everything into account including the video footage, I assign the figure of €100,000 for the neck injury.

230. For the shoulder and arm injury, and for the reasons already discussed, I propose to apply a significant discount in light of the private investigator's evidence and the evidence of Mr. Nagaria and Dr. O'Riordan who viewed the footage. Taking into account the objective findings of the MRI scan of the shoulder and taking into account the acknowledgements made by the two specialists on the evidence, I think it is appropriate to "book-end" the plaintiff's shoulder and arm complaints to a four-year period post – accident. Nonetheless, the shoulder and arm injury in my view constituted quite a significant injury and clearly affected the plaintiff's enjoyment of life and her ability to go about her tasks and day to day living. On a stand – alone basis, I assign damages under this heading at €30,000.

231. For the vocal cord palsy, I have no doubt that this continues to affect the plaintiff today and constitutes a major loss for her. The hoarseness problem affects her confidence, affects her ability to converse with family and friends, affects her in social situations and also contributes to her overall sense of tiredness and resignation. As Mr Riley the ENT Surgeon notes, her right vocal chord is not going to recover spontaneously at this stage and the

plaintiff will be left with a weak voice forever. While it may not be a major handicap, she will never sing and will probably never be able to give a speech in public. If she had to attend an interview, her voice would be limited and people would strain to hear her. In all the circumstances, I think damages of €50,000 are not unreasonable for this element. Both Mr. Nagaria and Mr. O'Riordan agreed that the vocal cord palsy is a recognised risk of the discectomy / fusion surgery. The defendant has not sought to argue that the vocal cord palsy represented a *novus actus interveniens* and therefore in my view damages under this heading are recoverable.

232. For the plaintiff's psychiatric and psychological injuries, I accept the evidence of the psychiatrist Dr. Corby and her GP Dr. Feeney that the plaintiff has struggled psychologically since the accident and has developed a moderately severe depressive disorder. While Dr. Corby only saw the plaintiff once, I accept the psychiatrist's evidence – corroborated by other source material and by the thrust of Dr. Feeney's evidence – that the plaintiff presents to this day with persistent low mood, tearfulness, social withdrawal and pessimism regarding her future.

233. I accept the view of the plaintiff's doctors that in the light of her difficult and sad upbringing and childhood, and in view of her prior history of treated depression, it is likely that the plaintiff was pre – disposed to psychological injury and was, as the expression goes a "poor candidate" for this type of trauma. The plaintiff is fortunate to have the support and love of her husband and children and I note that throughout the hearing she was accompanied by her husband and by one of her daughters, who were very clearly concerned for the plaintiff as she became tearful and upset in the course of giving her evidence. All told, I regard this element of the plaintiff's case as significant as it affects most aspects of her daily life. The person one sees on the video footage is not a person who is enjoying life.

234. I hope that in the fullness of time, as recommended by Dr. Corby, the plaintiff will take proactive steps to seek counselling to address the longstanding and unresolved psychological issues in her life. For all these reasons, I accept her doctors' views that her prognosis for the future in relation to her psychiatric and psychological wellbeing is guarded. I assess this aspect of the plaintiff's injuries at €70,000.

235. In relation to the plaintiff's claim for loss of employment opportunity, I find that this heading of claim has not been made out on the evidence. While I accept the helpful figures and guidance provided by the vocational assessor Ms. Tolan, I am inclined to agree with Mr. McCarthy's points that the evidence establishes that the plaintiff had submitted her redundancy application in 2014 which was prior to her accident. She appears to have made a life decision to retire at that point. She took no steps to upskill or refresh her qualifications for accountancy and she has not provided the court with any indication or evidence that she applied for specific employment roles. All told, I am not satisfied that it would be appropriate or fair to the defendant to award damages under this heading.

236. As I mentioned already, the figures that I have outlined above are no more than indicative figures for each heading of injury, viewed on a category-by-category basis. In *Meehan v. Shawcove Limited & Ors* [2022] IECA 208, the Court of Appeal (Noonan J.) set out the approach to be followed in "multiple injury" cases where the plaintiff's injuries involve a number of discrete elements. Noonan J. held (at para. 64): -

> ". . . *whatever individual categories of injury a plaintiff may have suffered, and whatever the values attributable to those categories may be, the court must strive to take an holistic view of the plaintiff and endeavour to place the plaintiff's particular constellation of injuries and their cumulative effect on the plaintiff within the spectrum in a way that is proportionate both to the maximum and awards made to other plaintiffs*".

237. This necessity to take an holistic approach has an echo in an earlier judgement of Barton J in the High Court in a case called *Healy v O'Brien* [2018] IEHC 602. In that case, Barton J cautioned that where a plaintiff suffers a serious injury to an arm and by way of example other injuries to a pelvis and a leg or an ankle, each of which results in painful symptomology, the unfortunate victim is generally aware that different parts of the body have been injured and experiences separate and distinct symptoms, the intensity and duration of which may be quite different. Barton J. stated " *In carrying out an assessment, account has to be taken of all of the injuries sustained and the contribution each has had on the victim as a whole person; to do otherwise runs the risk of under compensating the plaintiff*".

238. In a more recent decision called O'Sullivan v Brozda [2022] IECA 163, the High Court (Barr J) had awarded the plaintiff €146,000 general damages. The Court of Appeal (Faherty J.) upheld the award and rejected the defence criticism of the High Court for having allegedly failed to engage with the Book of Quantum. Faherty J, stated as follows :

> "*It is not unreasonable to expect that there will always be some cases where the bands of general damages provided for in the relevant guidelines will prove an insufficient mechanism for the assessment of general damages. Indeed, this is acknowledged in the caselaw relied upon by the defendant here. When such a case arises (as arose here), a trial judge can not be expected to shoehorn the pain and suffering (past and, if applicable, future) of a particular plaintiff into a category of damages in the Book of Quantum (or the Personal Injuries Guidelines) that may be ill-equipped to meet the exigencies of a particular case. <u>It must be recalled that the fundamental premise is that the process of assessment of general damages is "personal to the plaintiff" albeit this process is imbued with the requirement for objectivity and rationality. "</u>* (emphasis added).

239. Accordingly, the guidance of the Court of Appeal indicates that in multiple injury cases, it may be necessary to stand back from the compilation of individual figures, in order to assess whether the award for pain and suffering and loss of amenity should be greater than the sum of the parts, in order to properly reflect the combined effect of all of the injuries on the plaintiff's quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In addition, the Court of Appeal have emphasised the importance of not losing sight of the case as a whole or "*not seeing the wood for the trees*". The case law indicates that the court should take an holistic view of the plaintiff's injury profile and endeavour to locate the plaintiff's constellation of injuries within the overall spectrum of personal injury cases.

240. The caselaw also makes it clear that, while regard should be had to the Book of Quantum where it applies, this should not be done inflexibly and the core obligation remains to award general damages that are fair and reasonable and personal to the circumstances of the individual plaintiff. That is why for this plaintiff's dominant injury to the neck area, I have considered it necessary to assign an award that exceeds the band provided for in the Book of Quantum. On that basis, I deem the appropriate figure to be €100,000.

241. In addition, the caselaw says that in multiple injuries cases, once the values for individual injuries have been assigned and aggregated, the court should stand back and assess whether the global aggregate figure would be proportionate both to the maximum cap of €500,000 and to awards made to plaintiffs in other cases.

242. While *Meehan* was a new regime "guidelines" case, it seems to me that the principles outlined are in essence an application of the doctrine of proportionality. Applying the approach set out within the caselaw from the Court of Appeal, and mindful that there is a degree of overlap between at least the first two elements of this plaintiff's injuries, I propose

to discount the indicative figure of €250,000 by the sum of €25,000 resulting in a final figure for general damages of €225,000.

243. In summary, the plaintiff is entitled to general damages of €225,000 and the agreed special damages of €50,703, making a total award of €275,703. The plaintiff is also entitled to her costs.

Signed :

Micheál P O'Higgins

Appearances :

Stephen Lanigan O'Keeffe SC, Elaine Morgan SC and Zoe Cahill BL instructed by Jacob & Twomey Solicitors, Enniscorthy, Co Wexford for the plaintiff.

Paddy McCarthy SC and Johny Walsh BL instructed by Nolan Farrell and Goff Solicitors for the defendant.