THE HIGH COURT

[2015 No. 3336 P.]

BETWEEN

CAROLINE KENNY

PLAINTIFF

AND

MARY CRETARO AND LUCIO PATRIARCA

DEFENDANTS

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 10th day of December, 2018

Plaintiff's Evidence

1. The plaintiff began working in a takeaway shop known as "Little Chick" between seventeen and eighteen years ago. The plaintiff's evidence was that Mary Cretaro, the first named defendant, owns the establishment concerned and that at the beginning of her time working there, the first named defendant was her boss. This witness gave evidence that she had worked for 27 years in takeaway chip shops and that she got on very well with the first named defendant. The plaintiff described how she went into the establishment concerned at 5pm in the evening on the 27th day of February, 2014 to begin her shift and went to the back kitchen to get ready for the busy time. She was moving up and down to a large fridge and carrying various food items to the shop area and when she was carrying three packets of food she turned to come out of the door of the large fridge but slid and landed on a step. The plaintiff described how she was crying and how the first named defendant arranged cover for her shift. The first named defendant sent her home and she was later sent for an x-ray of her back as she was experiencing difficulty in the left upper side of her back where she described excruciating pain and the necessity to take morphine-based tablets, a form of oral morphine sulphate plus marica medication.

2. In or about the month of February 2015 the plaintiff had an MRI scan but she said she does not particularly recall that, as she had made many visits to hospital. She described how she is on a waiting list for physiotherapy and how she cannot bend down to pick up her grandchild. The plaintiff described how she was heartbroken that she could not take care of the said grandchild.

3. The plaintiff described herself as taking sixteen tablets a day but accepted that all of these were not related to this particular fall because in March 2016 she had heart difficulties and had been put on heart medication. The plaintiff described how there has been no improvement in relation to her back since the fall. The plaintiff confirmed that she had been present at a site inspection where both engineers, one from each side, were present. She described the fridge as a cold room structure and that she was in the course of taking the last buns out of this area when she landed on her back, below the step.

4. This accident took place as pleaded the 27th day of February, 2014, although just prior to the hearing the plaintiff had suffered some confusion about the date. The plaintiff gave evidence that the first named defendant had come to the scene of the accident. The plaintiff described a polystyrene container box on the floor which contained fish. This witness confirmed that the first defendant asked a third party to remain on and undertake the plaintiff's shift as the plaintiff had to go home at that point. The plaintiff confirmed that the first defendant was always her boss. The plaintiff asserts that on that occasion the first named defendant noted that this was the reason why she herself had never had fresh fish on the premises, as she stamped her feet on the puddle of liquid on the ground on her arrival.

5. The plaintiff described how, sometime after the accident she was dismissed and brought an unfair dismissal claim against Roma Grill and obtained an award against the second named defendant whom she indicated has failed to pay the monies awarded to her.

6. In terms of the organisation of this operation, the plaintiff's evidence was that the first defendant organised all the shift work in a book and in relation to the unfair dismissals action she brought, she said she was accused by the second named defendant of theft and the DPP found that there was no evidence of theft but she was obliged to make a statement to An Garda Siochána in Boyle, County Roscommon and that the DPP did not prosecute her. The plaintiff denied any wrongdoing in relation to the allegation made against her.

7. The plaintiff's evidence was that in mid-February 2014 she was informed that the second defendant would be coming in and observing the procedures for a while and when she asked the first defendant what the status of her own employment was, it was indicated that the second defendant was going to take over organising the shift work. The plaintiff claims not to have been aware that the second defendant was taking over the operation, rather she believed that he was going to be running the shop and managing it for the first defendant. Her understanding was that the first named defendant had indicated to her that the second named defendant would be running the business for her at that point. The plaintiff believed that the second named defendant would be organising orders for the shop and she contends that she always believed that the first defendant was her employer. The plaintiff contends in her evidence that the first defendant was in the shop always and that it was the first defendant to whom she went with any problems. She never obtained a P45 and she was never actually told that the second named defendant was her boss at that point.

8. Under cross-examination, the plaintiff confirmed the details on her Form A for the Personal Injuries Assessment Board which included her name and address at the time of the accident, her date of birth as the 9th January, 1968 and she described herself as unemployed at the time of the application.

9. It was put to her that she had named the first named defendant as the owner and as her former employer and she said that in answer to this that the first named defendant was her employer and her boss and she said that she believed that the first named defendant was still her boss as of the date of this accident. The plaintiff indicated that the second defendant changed the name of the shop and it was put to her that he was her employer at the date of the accident but her response to this was that the owner of the shop was the first defendant who was always her employer. This witness further elaborated on this by contending that the second defendant, while he may have taken over the responsibility of the shop, was only staff, and she was there to do a job and she considered the first named defendant to be her boss, that payment came from the first defendant and that a while after the second named defendant came into this business he paid her in cash but did not pay any cheque to her. She described him as arriving in or about the 14th February, 2014, and that was on her last shift on March 2014.

10. On the 15th October, 2015 the plaintiff confirmed that she brought a case to the Unfair Dismissals Tribunal as a personal litigant and she confirmed that while she was awarded €7,000 as against the second defendant, he never paid that to her in relation to the unfair dismissal and she agreed that he was liable as her employer. The plaintiff noted that the first named defendant had asserted to that tribunal that she was not the plaintiff's boss at the time of the dismissal.

11. The plaintiff described that she arrived at 5pm on the date of the accident and that the shop was already open. The first named defendant and Maura Shanley were both in the shop and were upstairs at that point and that she carried out regular jobs filling the fridge and yet keeping an eye on the counter.

12. This witness confirmed that it was the second defendant who introduced the fresh fish and used to cut it up and that there was a white polystyrene lid on it and that she had never opened the box of fish, that she was simply stocking the fridge for the night and that there was a light on in the cold room but that light had not been turned on and she confirmed that she knew where the switch was and that she had turned on that switch on previous occasions.

13. The plaintiff confirmed that she would have opened the door of the cold room to walk in at 5pm, that it was not dark and that lights come on in the ceiling and that she knew where everything was and that she had to go in and stock the fridge. This witness said that she could see everything and she did not look down on the floor but picked up buns and turned to walk out and slipped/slid on the floor which was soaking wet. The second named defendant had left fish there and she said there was no warning about melting ice given by him to her.

14. This witness denies that the first defendant warned her about the water on the floor prior to this accident and she said she still thought that the first defendant was her boss at that time. She described the floor of the fridge as shiny and silver and did not agree that she should have taken more steps herself.

15. The plaintiff described how the first defendant helped her after the accident and brought her into her sitting room and enquired whether she was she alright and told her that she could go home and she described her home as just being around the corner and that she had a partner at home. This witness describes sprays, lotions and potions which she procured from the chemist shop and which she used on the shoulder/back area on the left hand side. She described cramp which prevented her getting out of bed. She took four or five days to recover and the next shift was the following week and she had no choice but to go back to work and continued to work until March when she was dismissed. She confirmed that she had attended her GP prior to being sacked and that the sacking occurred after the 17th March. This witness confirmed that on the 28th April, 2014 she visited the GP post-accident but that in the meantime she had been purchasing items from the chemist in the nature of anti-inflammatory medication. The plaintiff contended that it was not a minor injury, that it was awfully sore and that the GP gave her anti-inflammatories and morphine based medication for the pain.

16. This witness agreed that she did have degenerative changes in her spine. While it was put to this witness that she was given a physiotherapy appointment which she did not attend, she was adamant that she has not been given such an appointment and that she does not remember getting a letter and believes that she did not get one and is convinced that had she received such a letter she would have turned up for such an appointment. This witness agreed under cross examination that the second defendant was legally responsible for the premises, and that the first named defendant is the actual owner of this premises. But she said she was not aware of any leasing arrangement and that the first named defendant was around the premises for many hours during the day. She confirmed that the first named defendant had raised a family in that house and lived in the house and that she still had the run of that house at that time and when the first named defendant was on shift with her they often had a cigarette and a cup of tea together. She confirmed that no instructions had been given to her that she was not allowed into the residential part of the premises. The plaintiff confirmed that she had moved address from Cooltarman to 33 Curlew View, Boyle, County Roscommon in 2017 and she confirmed that she worked with the daughter of the first named defendant, Claudia. She was aware that the first defendant had put Claudia's name on the cheques paid to her.

17. Mr. Tom O'Brien, engineer, confirmed that the premises was no longer trading as heretofore that he took part in the joint inspection with both engineers, and that the second defendant did not attend the said inspection but that the first defendant had attended. He described the premises as having been a small Italian takeaway, currently unoccupied, with most of the equipment removed.

18. On the day of the inspection, this witness noted that the first defendant unlocked the premises and was there for a long time, that the premises was near the Courthouse in Boyle and even back in the late 1980's the said premises had been a chip shop. This witness referred to photographs showing two areas, in the foreground of photograph one, a walk in freezer with a steel step up to the chill room. Photograph 3 showed the edging of the chill room and that the step to the edge was a little over one foot i.e. one foot two inches and that the chill room itself had been dismantled and the floor had been removed. He described the door of the chill room as having been centrally placed, just short of two feet and that it opened left to right. He described the temperature of same as being seven degrees with an occasional six degrees, noted on the sheets which had been left behind as the average temperature of same. He described the floor having been removed but he said that from the first defendant he understood that the floor was a stainless steel, flat and smooth surface and that the first defendant volunteered that information to him. He said it might possibly have been aluminium. He said it would be a reasonably slip resistant surface, slippery if there was any wet on the floor. He said that heating was not an issue but he also felt that he would have expected a temperature between three degrees and six degrees to have been maintained despite the sheet which had been left behind and initialled, recording seven degrees as the daily record which was signed by either Mario or Lucio.

19. The plaintiff did not have the boots worn on the occasion of the accident but wore similar boots to the inspection and said that those she wore on the date of the accident had been higher to her knee with a crepe sole. They said that in the photographs he noted the white material on the soles of her feet on the date of the inspection from standing at the fridge. He said the plaintiff's description accorded it with his own description of the scene of the accident and he had heard her evidence.

20. In terms of the duty of care, he described the necessity to have a risk assessment of the area where there was fresh fish and that sometimes ice in the chill room which will not stay as ice and that it is foreseeable that leaks will cause difficulties. This witness further opined that the flooring ought to have been of slip resistant quality, i.e. with a patterned grid rather than a smooth surface or have floor mats and he said that in his opinion he had never seen a flat surface in a chill room floor and that sometimes it is patterned to give grip. His conclusion on this was that the defendant had failed to provide a safe place of work. He noted that the first defendant had equipped the premises. This witness said that he understood she was the proprietress of the premises. This witness added that he would not fault the plaintiff as either reckless or unreasonable in her behaviour.

21. Mr. O'Brien's conclusion at para. 2.8 of his report set out his professional opinion that the plaintiff's employer was obliged to

provide a safe system of work, and a safe means of access to and egress from it. Freezers and chill rooms are artificially created environments where the temperature is regulated and controlled. He set out that there are hazards and difficulties associated with them that there is a need for hygiene and cleanliness and the surfaces must be easily cleaned and that they must be able to withstand the ambient temperatures there.

22. In addition, this witness set out his professional opinion that there ought to have been a competent risk assessment of this workplace and such an assessment would have identified the chill room and the freezer as potential accident black spots. There would have been an evaluation of the risks and appropriate counter measures should have been devised and implemented for those risks identified. This witness said that with the fish there would have to be adequate provision for the management of the melt which would naturally occur where the temperature is cold but is still above freezing point in the chill room and that it was foreseeable that floor conditions might be slippery as a consequence. The floor ought to have been of a quality that afforded reasonable slip resistance even in wet condition or alternatively the floor mats or raised grids ought to have been provided to allow for separation between the soles of the shoes worn by those entering the chill room and any liquid that might be beneath. This witness believed the employer to be in breach of ss. 81, 82A, C, D, E, F, G, K, and 1, 9, 10, 18, 19 and 20 of the Safety Health and Welfare at Work Act 2005 and s. 28 of the Safety Health and Welfare at Work (General Application) Regulations 2007. In the professional opinion of this plaintiff's engineer, Mr. O'Brien, as the proprietor provided and equipped the premises the second defendant relied vicariously upon her to ensure that it was reasonably safe and for use as a restaurant/take-away. The surface of the chill room was unsuitable and was slippery under foot. There should have been enhanced grip on the floor rather than a smooth metal surface which was the account given by the first named defendant. In Mr. O'Brien's opinion, this made it inherently unsafe and the first defendant ought to have known this. The first named defendant failed to provide a place that was reasonably safe and a means of access to and egress from it as reasonably safe. She was aware of the problem as evidenced by her remark made to the plaintiff in the immediate aftermath regarding the state of the floor.

23. Mr. O'Brien, engineer, was cross-examined as to whether he saw or inspected the actual floor and he said he did not see it but that he went on the first named defendant's description of the floor. He said by their nature metal floors are slippy when wet, that he had never seen the type of floor in a chill room, that normally there would be a check pattern and that he had never seen an unadorned unembossed floor at such a place. He said usually there would be a grid or grating and often a chill room mat or floor mat. He described a freezer's temperatures as typically minus 18o but that the chill room was between three degrees and six degrees. He said rubber mats were quite acceptable from a hygiene point of view. This witness said that the premises was rented out equipped to the second defendant. It was put to this engineer that that defendant would have been entitled to exclusive possession. This witness replied that one cannot infer exclusive possession in circumstances where the first defendant took the plaintiff upstairs after the incident. If the plaintiff believes that the wetness came from seepage from fish, such fish ought to have been put in a liquid proof container.

Evidence of Mary Cretaro, the First Named Defendant

24. The evidence of the first defendant was that she and her husband had rented the house concerned since 1976 and that she had converted the premises to a takeaway portion and that her husband had moved away and for the last three years Claudette her daughter had managed the premises and she herself had been in occupation for the past thirty-five years. This witness said that from 2014 she had rented the premises to the second defendant because she needed a break from the work and that she was hopeful of retiring if that tenant were successful. This witness agreed that the plaintiff had started working in the Little Chip eighteen years previously until she leased it to the second defendant and she confirmed that the plaintiff had also worked under her daughter and noted that she had no problem at all with the plaintiff. Prior to the second defendant signing a lease, he came to oversee the premises from a Sunday to a Friday and that the following Sunday when she said he telephoned her and indicated his interest in a lease which she said was a four-year nine-month lease and that they moved out in 1996, the intention being that the second defendant would operate it himself and she herself offered to help him for a four week period to introduce him to her customers but also to help him in terms of equipment and described the lease span as from 3rd February, 2014 until the 4th November, 2018. The second defendant and she herself signed. €200 a week was to be paid, which he did pay initially but she had problems with the rent after a while.

25. This witness noted that the second defendant paid rent for the months of February and March 2014 but she said she always had her property commercially insured with Allianz and her broker was Mr. Lorcan Egan. She did not continue the full extent of business insurance, rather she covered the building and some of the furniture upstairs and was not able to tell the court what was new in terms of insurance or what amendments there were to the new policy. This witness said she was not paid by the second defendant for her help during his first month but that he later put her on the books and she was happy to work at that rate. On the day of the accident at 11.55 am the first named defendant went into the premises and checked matters, that there were always delivery men and that she always carried in food and put it into the freezer room, not into the chill room.

26. This witness told the court that she told the girls working in the chip shop not to go into the chill room or cold room, that it was like a lake because there was polystyrene box for fish with a hole at each corner of the trays and there was a residue of liquid on the floor. She said that on the occasion of the accident, there were two girls working there and she heard the plaintiff shout and the plaintiff was lying back on the step very red in the face and asked her to leave her for a few moments. She later brought her to the living room and let her get her bearings back. This witness described how she sold frozen battered fish in her day but not fresh fish. This witness said that the second defendant had lived upstairs and that there was a little room there used by staff and that when the second defendant began his work there, the girls were barred from smoking and she said they did have a smoke that evening.

27. Under cross-examination this lady said that her daughter rented the premises from 2011 for three years to give her a break and that before that she had undertaken everything to do with the business including ordering and organising deliveries and all that work. This witness said that P45's were received from her and that a Form 16A was given out from the daughter. It was noted by counsel for the plaintiff that it was never put to the plaintiff, that the plaintiff had employed by the daughter of the first named defendant since 2011. This witness said that her staff were aware that her daughter was their employer between 2011 and 2014 and she said she gave them a P45 in 2011. This witness argued that the plaintiff lived at 10 Sycamore Crescent, Boyle, County Roscommon and that she was issued with a P45 and that this document would have been handed to the staff personally and that the plaintiff would have known the situation.

28. It was noted by counsel for the plaintiff that it was never put that the P45 was received by the plaintiff from this witness in 2011 and that if it had been the plaintiff would have been aware that the first defendant's daughter was her employer. A reference was made to para. 3A of the defence and the first named defendant conceded there was an oversight on her part when instructing to her solicitor.

29. It was put to this witness that she was in occupation of the premises from 1976 to the 3rd February, 2014, and had carried on a takeaway known as the Little Chick at that address and that she had sworn an affidavit of verification and that that affidavit verified

the contents of her defence and was sworn by Callan Tansey Solicitors. She said in response to this that it was an oversight that she had not stated that her daughter had had the premises for three years.

30. It was further put to this witness that her contention in her defence was that from 3rd February, 2014, she had leased the premises to the second defendant and it was known as the Roma Grill. She said in answer to this that she had not been paid for the first month for her assistance but that the second defendant did put her on the books after that. The accident took place on 27th February, 2014 that year and she said she leased the premises on 3rd and that the date of cessation was 9th February that year. The date of the takeover was 10th February, 2014 and the lease documents were obtained from the internet and a friend of the second defendant witnessed the document, a gentleman referred to as Antonio.

31. She confirmed that she was the owner from 1988 and that she was always in possession of a lease or a freehold. Tellingly, this witness said that she would not wash up liquid on the floor and she said that it was not as if it was a place or locus where one did not have a possibility of coming out safely. This witness said that the second defendant had indicated to her to leave such liquid, that he would clean it up later and he did not allow them to touch the fish and that there was sufficient stock in the shop. This witness said that she was not in charge but there was no one in charge and that she had gone in with a key to take a delivery and open up the shop while the second defendant was away on business.

32. This witness said that the staff were aware of the situation concerning the floor and that they were complaining about the condition of the cold room floor. This witness said that the second defendant was supposed to have been home by six o'clock that day and that she had sufficient stock taken out. In her opinion, the plaintiff knew well that she was leasing to the second defendant. There was no way that she herself was always the boss. The lease was not stamped immediately, it went out of her head for a good while and a Revenue document showed that the date of issue was three and a half years later on 4th October, 2017, after the proceedings issued.

33. Mr. Morgan, defence engineer, described himself as a consultant engineer and that he took part in the joint inspection as described by the plaintiff's engineer. He described a stainless steel surface as a standard type for a cold room having a flat surface with durability and ease of cleanliness to prevent corrosion. He said a raised profile would risk bacteria and food contamination and that grids or mats in his view were unsuitable. He agreed that the floor was removed at the time of the inspection and he accepted that the fluid from the fish on the floor would make matters more difficult and more likely that a problem would occur.

34. This witness said it was not a particularly onerous task to mop up the wet and he understood the second named defendant was the plaintiff's employer at the time.

35. Mr. Lorcan Egan from Egan Insurance gave evidence on behalf of the first named defendant and said he knew her quite well but that she was only a tenant since 2013, when she took out a combined business policy covering the building and employer's liability with cover for staff. This policy number was SORTM5670 and was paid by direct debit in a number of increments but payment lapsed and there was an issue in the bank on 21st January, 2014. He received correspondence mid-February of that year to say that the first defendant would be returning and that she needed a landlord's policy on the property. The policy number was POP5964885 and it was half the price of the previous policy and it did not cover day to day running of the business. The first defendant took out the policy in 2013 as employer.

The Plaintiff's Submissions

36. The Court notes that the said policy was not taken out by her daughter. In 2014, the first named defendant told the court that she switched to a policy as owner of the property and that there is a public liability element in the policy. Items of special damages were agreed in the sum of €350. The plaintiff's counsel made that submission that the first named defendant is liable under the Occupier's Liability Act, separate and apart from her duties as employer.

37. He said that the plaintiff had not assisted regarding who the employer was and that the plaintiff already has judgment against the second named defendant and there was a question mark as to whether the first named defendant was in control as owner or as employer.

38. It was noted that the first defendant agreed that there was a lake of water on the floor but yet she did nothing to remedy. Counsel for the plaintiff contended that it was strange that the business dealings of both defendants were discussed as strange in a business sense. The affidavit of verification was referred to where the first named defendant said that her daughter was the employer from 2011 to 2014, and that the lease creates an awkward situation.

39. Submissions on behalf of the plaintiff were to the effect that the said premises was both owned, occupied, and managed and supervised by the first named defendant and that both the first and second named defendant are jointly and severally liable.

The Defence Submissions

40. Counsel on behalf of the first named defendant argue that no case can be made out against her as employer. The lease, as a matter of law, is the exclusive issue concerning the second defendant who put fish into the cool room and this caused the plaintiff to slip. It is conceded that the plaintiff fell and that the first named defendant considered it was not her property causing her to have any obligation to clean it up. The plaintiff could therefore not claim against her.

The Medical Evidence

41. Medical reports were noted, in particular of Mr. John B. Healy, Orthopaedic Surgeon, who examined the plaintiff on behalf of the defendants and formulated a report of 27th February, 2014 in relation to an examination on 31st August, 2015. This report records the plaintiff's having fallen heavily on her back and having struck her upper thoracic area. The plaintiff described severe pain and used deep heat spray and pain killers from the chemist. Subsequently she was prescribed morphine-type tablets and Lyrica by her general practitioner and was referred for physiotherapy. The plaintiff had intervening cardiac difficulties which were treated. The plaintiff described ongoing discomfort particularly in the cold and that when she bends down it causes her a lot of discomfort. Currently the plaintiff is on Solpadol and had some difficulty weaning off morphine tablets. End plate degenerative change in the mid thoracic area with disc space narrowing was noted on foot of an x-ray dated 30th May, 2014, of the thoracic spine at Roscommon Hospital. Chest x-rays of the same date were normal. The findings on examination noted that she had a full range of movement of both shoulders but with great tenderness along the medial border of the left scapula with localised tender point which the doctor advised would benefit from local injections and ultrasound from a physiotherapist.

42. In the opinion of this Orthopaedic Surgeon, the plaintiff appears to have suffered soft tissue injuries of the upper thoracic area with some pre-existing degenerative change in the thoracic spine and she continues to have a very localised, very painful area along the medial border of her left scapula which would benefit from local injections and ultrasound from a physiotherapist. This medical

opinion was optimistic that with both remedies she should make a good recovery within three months of that report.

43. A medical report of William J. Gaine Consultant Orthopaedic Surgeon was prepared on foot of examination of the plaintiff on 9th September, 2015 and the report is dated 15th September, 2015. The report notes that the plaintiff had gone to her general practitioner two months after the accident as the pain had not settled and the diagnosis was of an upper thoracic back injury. There was no definite fracture on the x-rays referred to above already herein and this doctor agrees that there were mild end-plate changes in the thoracic vertebrae. This witness was put on strong analgesia at different stages including MST, Lyrica, Solpadol and also a sleeping tablet and she is currently awaiting physiotherapy and continues to receive analgesia from her general practitioner.

44. The plaintiff described as having an improvement over time of her more acute back symptoms but still having discomfort in the thoracic region. Chores such as hovering and cleaning aggravate her pain and she describes herself as unable to pick up her grandson. There is no radiation of the pain down her arms or legs and it is mainly located between her shoulder blades. The plaintiff on clinical examination was found to be slightly tender across the upper back region and also in between the shoulder blades. Her neck movements are normal and she was found to have no tenderness in the lower back. The plaintiff had been a smoker up until the point at which she had the cardiac difficulties but felt that the stress of the incident may have contributed to her cardiac condition. Soft tissue injuries were recorded and the view of this Orthopaedic Surgeon was that with the aid of physiotherapy over the following six-month period, the residual symptoms should gradually settle and he would not expect any long term consequences.

45. A report was also received from Dr. Barry Cosgrove of the Boyle Medical Centre in a medico-legal report of the 7th April, 2014.

46. At the time of her first visit to the surgery on 28th April, 2014 this doctor found the plaintiff to have evidence of a soft tissue back injury with pain along the lateral spinous processes along the lower thoracic vertebrae and anti-inflammatory medication was prescribed. The doctor noted that the patient was on a public HSE waiting list for physiotherapy but had not been called as of that date. He described her as now requiring escalating strengths of analgesic medication and taking oral morphine sulphate (MST 10mg bd) and Lyrica 75mg at night since May, 2014 and that this was giving her some relief.

47. In terms of the loss of the amenities of life this doctor recorded that as of the 4th July, 2014, the plaintiff had ongoing pain in her back on certain movements such as activities of daily life like washing, cooking etc. Sudden movements of her upper back triggered pain and she could not pick up her new granddaughter. This doctor noted that her sleep is disturbed and she can wake up with pain and that she continues to have muscle tenderness along her thoracic spine as previously noted. This doctor noted that she has shown no major signs of improvement to date as of the date of that report.

48. A medico-legal report of 7th February, 2018 was prepared by Dr. Barry Cosgrove, general practitioner. At that stage the plaintiff reported ongoing pain in her back on certain movements in her left scapula area and she described the pain as constant and reports this as the same pain that began after the initial fall. Over the last four years she feels it remains unchanged and on a scale of 1 to 10 in severity she rates the pain as 8 out of 10 at times. The plaintiff describes the pain as usually worse at night and she takes medication Gabapentin along with a sleeping tablet which relieves same. She describes an escalation of pain after the normal activities of daily life such as previously described. Sudden movements of her upper back trigger pain. The plaintiff continues to have muscle tenderness along her thoracic spine at the scapular area. Left arm movement brings on pain in the area and the plaintiff is right hand dominant. This area of back pain is the only injury the plaintiff associated with the accident. The plaintiff was also diagnosed with Multiple Sclerosis in March, 2016 and attends Sligo Hospital for management of same and is on daily medication and her general practitioner says that this has caused persistent balance problems, loss of coordination and memory challenge and that these illnesses including her heart condition are unrelated in his view to the accident.

49. In summary her general practitioner describes the thoracic back pain still four years later and that the plaintiff remains on medication for same. The general practitioner records that the plaintiff notes the nature and severity of the back pain has been relatively unchanged in that time period and that she has muscle weak tenderness on exam in the affected area and that the injury is consistent with soft tissue muscle injury.

Findings of Fact

50. This Court accepts the plaintiff's version of events regarding the circumstances of this accident on the balance of probabilities. This Court prefers the evidence of the plaintiff to that of the first defendant. The plaintiff does not exaggerate her injuries but continues to be symptomatic in excess of four years after this accident. She came across as truthful and was not prone to exaggerating her difficulties arising from same. The accident was reasonably foreseeable. The Court accepts that an unsafe system caused a hazard and the plaintiff slipped on water leaking from melting ice kept on a floor surface in an unsafe manner. The Court accepts the findings of the plaintiff's engineer in all the circumstances.

51. The first named defendant by contrast, was quite defensive at having to meet this claim at all by her demeanour in the witness box, in particular at the beginning of her evidence. This Court found her to be evasive on a number of points and considers it significant that the plaintiff was never aware that the first named defendant's daughter was in any sense her employer. The first named defendant apologised in relation to the inaccuracy of her affidavit of verification which she had sworn in front of her own solicitor which she accepted was not accurate. In relation to the issue of the lease, she said that the matter had gone out of her head and that the lease was stamped after the proceedings issued in 2007. This Court notes that it was not put to the plaintiff that the daughter was in fact her employer as later alleged. In all the circumstances, despite the fact that the first named defendant called an insurance broker to give evidence in relation to the policies on her premises, which it appears she claims to have varied, and while the Court accepts she may have had difficulties with the second named defendant, the Court finds that both she and the second named defendant are jointly and severely liable for the accident which befell the plaintiff. It is quite clear that the plaintiff was exposed to a risk of damage or injury which the defendants knew or ought to have known and they certainly failed to take any or any adequate precautions for the safety of the plaintiff was while she was engaged in the work she was undertaking. The first named defendant on the evidence of the plaintiff, the person in control and certainly much of the evidence of the first named defendant bears that out. It is the view of this Court that, post the events, there was an attempt to protect the first named defendant. In that regard, the Court notes the dismantling of the kitchen equipment at the locus, which hampered the investigation by the engineers of the accident. In all the circumstances this Court accepts the evidence of the engineer Mr. O'Brien on behalf of the plaintiff and prefers his evidence to that of the defence engineer.

The Law

52. This Court finds that this accident was reasonably foreseeable and occurred as described by the plaintiff and accepts the legal submissions made on behalf of the plaintiff. This Court notes the judgment of Peart J. on 21st October, 2004 in *Hackett v. Calla Association Ltd & Ors* [2004] IEHC 336. In that case, the judge found there was such mingling of functions between two defendants and that such a relationship was created by an agreement, such that it could reasonably and properly be said that the defendants are occupiers of the premises and that in that case, each owed a duty to the visiting public, including the plaintiff and found that

their liability to the plaintiff was joint and several.

53. There is a distinct parallel with the same issue in the instant case. There was a clear failure to provide a safe system of work for the plaintiff in all the circumstances.

54. In terms of quantum, this Court deems it appropriate that the sum of €60,000 be awarded to the plaintiff in terms of pain and suffering to date, given that the plaintiff has suffered from this injury since 2014. Not alone has the plaintiff suffered and continues to suffer, pain and distress and inconvenience as a result of this accident but she has also suffered from a loss of the amenities of life as set out in that she cannot do some normal chores, nor could she lift her granddaughter as a result of this injury. The Court has had regard to the revised Book of Quantum.

55. In all the circumstances this Court awards the sum in general damages to include pain and suffering to date and taking into account that for some short period of time going forward the plaintiff will continue to suffer from the said injuries, in the sum of €60,000 plus special damages in the sum of €350.