Neutral Citation [2017] IEHC 11

THE HIGH COURT

[2013 No. 134 P.]

BETWEEN

OLGA DJADENKO

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 18th day of January, 2017

Introduction

1. This action arises out of an accident which occurred on 21st June, 2011. At the time, the plaintiff was working as an assistant chef with the defendant company at its shop premises situated at Ongar Village, Clonee, Dublin 15. It is alleged that on the evening in question, the plaintiff had removed a glass panel from the rear of the hot deli display counter. Having washed the pane of glass, she was holding it in both hands and was about to replace it onto the counter, when suddenly the glass slipped out of the rubber surround and began to fall to the ground. The plaintiff attempted to catch the glass in her left hand and in so doing suffered a jerking injury to her left shoulder the glass fell onto the plaintiff's ankle, causing a partial tear of the medial ligament in her ankle joint. It is alleged that as a result of this incident, the plaintiff was caused to suffer soft tissue injury to her left shoulder and, left ankle. She also developed psychiatric symptoms.

2. Initially, the defendant entered a full defence to the action, which included a plea of contributory negligence against the plaintiff. This stance on liability was continued until the morning of the hearing of the action, at which stage counsel for the defendant, Mr. Leonard, S.C., informed the plaintiff's counsel that while he was not formally conceding liability, the defendant would not be cross examining the plaintiff, or her engineer on any liability issues.

3. Prior to the hearing of the action, special damages were agreed between the parties in the sum of €5,246.

The liability evidence and conclusions thereon

4. The plaintiff stated that at approximately 18:00hrs on 21st June, 2011, she had lifted the glass panels from the rear of the hot deli counter, for the purpose of cleaning them. She had removed one of the panes of glass and had washed it. She then lifted the frame for the purpose of putting it back onto the counter. However, the glass panel fell out of the rubber frame in which it had been held and fell towards the floor. The plaintiff stated that she tried to catch the glass, but she was unable to prevent it falling onto her foot. She suffered a strain injury to her left shoulder in attempting to catch the falling pane of glass.

5. The pane of glass fell onto her left ankle and foot. It did not break. A colleague came to her assistance and lifted the pane of glass from her foot.

6. The plaintiff stated that the pane of glass simply slipped out of the rubber frame in which it had been housed.

7. Evidence was given by Mr. Patrick Hayes, consultant engineer, on behalf of the plaintiff. He had prepared a booklet of photographs showing the hot deli counter at the time of his inspection. In particular, he referred to photograph No. 4 which showed that the glass was housed in an aluminium frame. He stated that this was different to the situation which had pertained at the time of the accident, when the glass was housed in a rubber surround. There were two panes of glass and it was designed in such a way that one pane of glass could slide across the other pane of glass, so as to allow staff gain access to the trays of food in the deli counter.

8. Mr. Hayes pointed out that in photographs Nos. 12 – 14, it was possible to see the residue of the rubber channelling in which the glass had originally been housed. It was his opinion that at the time of the accident, the rubber surround on the glass had degraded to such an extent, that the glass was able to slip out in the manner described by the plaintiff.

9. Mr. Hayes pointed out that there were a number of relevant documents included in the documents which had been discovered by the defendant in advance of the hearing. In particular, there was a receipt from Martin Food Equipment dated 24th February, 2011. This indicated that work had been undertaken at the defendant's shop where the plaintiff worked and had been carried out on a Bailey & Townley Hot Deli, the piece of equipment which the plaintiff was working on at the time of the accident. That receipt noted: *"needs sliding glides for glass doors"*. Mr. Hayes believed that this referred to the rubber glides in which the glass doors sat.

10. A further receipt from Martin Food Equipment dated 22nd April, 2011, had also been discovered. There was text under the engineer's report in that receipt, however, same was illegible.

11. A service call history for Bailey & Townley Hot Deli serial 108344, had also been discovered. This document had two entries, the first of which referred to two heat blubs not working. The second entry dated 21st April, 2011, stated: *"Hot deli cabinet – doors falling out of door runners. Staff member cut her hand on door last night as a result."* That entry went on to state:- *"Resolution: parts not available – recommended [incomplete text]".*

12. Finally, discovery had been made of an email dated 28th April, 2011, from Mr. David Hughes of Martin Food Equipment to Mr. Padraig Kearney of Dunnes Stores. That email stated:-

> *"Our engineer was on site in Clonsilla as requested to look at the Bailey and Townley Hot Deli cabinet – reported that doors falling into the cabinet on top of food and that one staff member had cut herself on the door runners.*
>
> *Unfortunately we are unable to get the parts for the Bailey and Townley apart from blubs…Our only available option that we could offer is to recommend changing this machine both because of the condition of the unit and also because it injured a member of staff. I believe we recommended this after a previous visit to site."*

13. Mr. Hayes stated that the conclusion in their initial report, that the probable cause of the accident was degradation of the rubber runners on which the glass vision plates were mounted in the aluminium frame; was supported by the documents which had been

discovered by the defendant. These documents indicated that the defendants were aware of the degradation of the *"sliding glides"* in February 2011. The documentation also indicated that the glass fell out of the door runners causing an injury to a member of staff in April 2011. As such, the defendant, was fully aware of the defective nature of the doors on the hot deli cabinet, prior to the date of the plaintiff's accident in June 2011.

14. Mr. Hayes further pointed out that the accident report form completed following the plaintiff's accident, indicated that glass fell out of position onto the plaintiff's foot at the time of the accident. The defendant's accident reporting and investigation procedure, as specified in the defendant's Safety Statement which had been discovered, stated that as part of their response to an incident, the area where an incident occurred, would be made safe. Mr. Hayes stated that it was clear from the documents which had come to hand, that a member of the defendant's staff had had an incident and suffered injury at least two months prior to the plaintiff's accident. For the plaintiff's accident to occur in the manner as described and as detailed in the accident report form, the defendant did not comply with its own Safety Statement or with their statutory duty and did not make the equiptment safe.

15. In addition, Mr. Hayes stated that it was clear that the defendants did not comply with the recommendations of the maintenance engineer to make the equiptment safe. Had the defendants complied with their own Safety Statement and their statutory duty by providing safe working equipment, the plaintiff's accident could have been avoided.

16. Mr. Hayes stated that in the circumstances outlined, it was his opinion that the defendant had acted in breach of s. 8(2) of the Safety, Health and Welfare at Work Act 2005, and in breach of Regulation 31 of the General Application Regulations 2007, which placed a duty on the employer to maintain plant and equipment in a safe condition. In the circumstances of this case, the equipment had been faulty and there had been two accidents, one of which had been approximately two months before the plaintiff's accident and nothing had been done to render the equipment safe. In these circumstances, he was of opinion that there was a clear breach of statutory duty by the defendant.

17. Finally, Mr. Hayes stated that there did not appear to be any evidence of contributory negligence on the part of the plaintiff in relation to the circumstances of the accident.

18. This witness was not cross examined.

19. Having regard to the evidence of the plaintiff and to the evidence of Mr. Hayes, I am satisfied that the rubber surround on the glass had become degraded over time. I am satisfied, having regard to the documentation which has been produced on discovery, that the defendant knew of this problem in advance of the plaintiff's accident. In particular, there had been a previous similar accident where a person had been injured in April 2011. In these circumstances, there was a clear duty at common law and under statute on the employer to ensure that the plant and equipment was rendered safe. They failed to do this. In the circumstances, I am satisfied that liability for this accident must rest with the defendant.

The Plaintiff's Evidence in Relation to her Injuries

20. The plaintiff stated that when the pane of glass fell onto her left ankle, she suffered immediate severe pain in the ankle. She had also suffered a strain injury to her left shoulder. A colleague came to her assistance and she sat down and put an icepack on her ankle. After some time, she tried to continue working, but was unable to do so. She got her fiancé, who also worked in Dunnes Stores, to bring her home.

21. The plaintiff stated that she took paracetamol for the shoulder and ankle pain. She was not able to sleep that night due to pain. It was very hard to move about and she was unable to lie on her left side.

22. On the following day, her fiancé brought her to her G.P., who prescribed some anti-inflammatory medication and advised that she continue to put ice onto the ankle. Her shoulder pain was also severe and had become worse since the previous evening. Any activity, such as washing dishes, caused her severe pain.

23. On 24th June, 2011, the plaintiff asked her fiancé to bring her to James Connolly Memorial Hospital as she was continuing to experience severe pain in her shoulder and ankle. X-rays were taken and no fracture was shown. An M.R.I. scan taken in 2012, revealed a partial tear of the medial ligament in her ankle joint.

24. The plaintiff stated that in the days and weeks which followed, she continued to experience severe ankle and shoulder pain. She was unable to work. She had difficulty moving about her apartment. She was unable to place any weight on the left leg. She had approximately five sessions of physiotherapy treatment at that time. However, she found this treatment very painful. She became upset when she remained in so much pain after the physiotherapy treatment. The physiotherapist suggested that she should continue to ice her ankle and he referred her back to her G.P. At this time, the plaintiff was only able to wear one pair of shoes, which were low slung and did not touch her ankle joint.

25. The plaintiff stated that she remained disabled in the months which followed. She stated that one of her favourite pastimes had been bringing her dog for a walk. Initially after the accident she was unable to walk at all, without experiencing severe ankle pain. After a while she was able to manage very short walks, lasting for ten to fifteen minutes. She would have to sit down and take a rest during the walk.

26. The plaintiff stated that things were difficult for her and her fiancé as she was unable to work and therefore they had lost the benefit of one income coming into the house. Her fiancé had to take on extra hours, in an effort to bolster their joint finances. The plaintiff stated that over the months which followed, she became progressively more depressed. She was very frustrated and upset by her level of disability. She felt that her personality changed. Prior to the accident, she stated that she had been outgoing and a good communicator and had a good sense of humour. After the accident, she was disabled, in that she was not able to work and could not do things which she had done prior to the accident and which she enjoyed, such as running and hiking. Her friends told her that she was different after the accident. She stated that she stopped socialising and her relationship with her fiancé deteriorated. He was working long hours, but when he came home, she was not able to prepare the dinner for him, or engage in animated conversation.

27. Due to the deterioration in her mood, the plaintiff went to her G.P. He prescribed medication in the form of a Prozac type medication. However, she found this too strong as it caused her to faint on one occasion. The G.P. then changed the medication to a milder one which she took for a longer period. This medication helped in making her calmer and less anxious. Her appetite had gone down. She was slower making decisions. She did not like having to take this medication. Her G.P. also recommended counselling.

28. The plaintiff stated that she had counselling in Roselawn Medical Centre, where she was treated by a psychologist. She did this in

blocks of five – eight sessions at a time. Then she would cease having counselling for a period but would return to it later on. She stated that she had had the counselling when she had been unemployed and continued to have it after she returned to work with Dunnes Stores on 19th January, 2012. She thought that in total she had 15 – 20 sessions.

29. The plaintiff stated that in January 2012, she was passed fit to return to work. She returned to Dunnes Stores on 19th January, 2012, and was put initially working on the checkout, so that she would not be standing on her feet all day. However, she continued to have a lot of pain and stiffness in her ankle. She stated that on returning to work, she would feel pain in the ankle come on in the first hour, but the pain was manageable thereafter. After a while she was moved to work at the Electronic Point of Sale, which involved going around the shop and making alterations to the prices of various goods. This was new work, which the plaintiff found more interesting than working at the checkouts. It was easier than working at the hot food counter.

30. The plaintiff stated that her ankle continued to be swollen and painful at the end of the working day. As already noted, an M.R.I. scan of the left ankle was carried out during the summer of 2012. It revealed evidence of a small partial tear of the medial ligament of the ankle joint (deltoid ligament).

31. The plaintiff stated that a number of incidents occurred at her place of employment, which caused her to become very apprehensive about her physical safety. The first incident occurred on 20th April, 2012, when the plaintiff was bending down pricing goods on the lower display shelves. She was hit by a trolley, which was laden with goods and which was being pushed by one of the managers.

32. She stated that while she did not suffer any significant injury, it did cause her considerable upset as she was still symptomatic in relation to her ankle and to a lesser extent in her shoulder.

33. A further incident occurred on 27th December, 2012, when the plaintiff was again pricing goods on a lower shelf, when a box of sweets, weighing 700g, fell from an upper shelf and struck her on the head. The plaintiff stated that this incident had an adverse effect on her mental state. She became afraid to go to work.

34. On 24th February, 2013, the plaintiff was working at the checkout and a large bottle of liquid was caused to topple over and fall, striking her on the right forearm. Four days later on 28th February, 2013, the plaintiff was again working at a checkout, when she became very faint, due to the fact that she was working near a hot air vent. She asked a manager could she be moved, but this request was declined. Some short time later, she became paralysed and short of breath and was not able to give a customer her change. The plaintiff said that she was shaking and felt very weird. She was having a full blown panic attack. She was taken to hospital for treatment. The plaintiff stated that due to an accumulation of all these incidents, she felt unable to return to the defendant's shop. She could not even bring herself to go to the shop to do her shopping, even though it was the nearest shop to her apartment.

35. The plaintiff stated that her relationship with her fiancé continued to deteriorate. When he would come home in the evening, she was very anxious and nervous and was very upset. She was not a good communicator at that time. She stated that her fiancé had to do all the housework. She felt that her mental and physical condition had had a big impact on their relationship. She felt that she was not a good partner for him at that time, because she could not prepare the dinner or make conversation with him. Eventually, the relationship between the plaintiff and her fiancé broke up in May 2013. The plaintiff had further counselling from 21st May, 2013, until 27th June, 2013.

36. On 28th June, 2013, the plaintiff commenced training as a chef in Milano's restaurant. The training was carried out during July and August and she commenced working in September 2013. However, she only worked with them for one month, finishing up on 9th October, 2013.

37. On 10th October, 2013, the plaintiff did an interview with the Harvey Norman chain of shops, and secured employment with them, which commenced on 15th October, 2013. On 11th October, 2013, the plaintiff had delivered a letter of resignation to Dunnes Stores, wherein she stated that due to an unsafe work environment and the fact that her mental health was being seriously endangered by job stress, she felt that she had to resign from her position of employment.

38. Since then the plaintiff has taken up her current position of employment, which is with a company called Bath House in Dun Laoghaire. That company designs kitchens and bathrooms and sells them to the public. The plaintiff enjoys her work with that company.

39. In relation to her present condition, the plaintiff stated that she continued to experience some pain in her ankle. If she walks long distances, her ankle swells and is painful. She is not able to go running at all. She is unable to wear high heels, as this causes the ankle to become very painful. She stated that she was very anxious in relation to what shoes she could wear and also what items she could lift. She is not able to lift heavy things. However, she stated that her shoulder was largely better. In relation to her mental health, she stated that she was not on any medication for this and was not having counselling at the present time. She stated that she felt much better. She was happy that she was feeling better and was more optimistic.

40. In cross examination, it was put to the plaintiff that while she had seen her G.P. on a number of occasions in 2011, by 16th January, 2012, it was recorded that her left ankle was *"Much better since starting physio and wants to resume work. Feels herself she is fit for same. On exam, no swelling in ankle. Mild tenderness on palpation of anterior aspect of joint"*. The plaintiff accepted that there had been slow improvement in relation to her ankle symptoms down to January 2012. At that stage, the G.P. recommended that she could return to light duties at work. However, the defendant had said that she would have to be fully fit before she could return to work. It was put to the plaintiff that she had looked for a new job in December 2011. The plaintiff stated that, when the defendant said that she would not be able to have light work with them, she started to look for other employment.

41. It was put to the plaintiff that by the time she saw Mr. Colville in May 2012, her shoulder pain had improved considerably. She stated that her shoulder pain had not resolved at that time, but had improved. She accepted that her main problem at that time was with her ankle and foot. Mr. Colville had told her that the pain would ease in time.

42. It was put to the plaintiff that when she saw Dr. Leader, Consultant Psychiatrist, on 23rd May, 2012, she had returned to work and her mood had improved considerably. The doctor was of opinion that her symptoms had largely resolved and there were no ongoing mental sequelea. It was also put to the plaintiff that she did not see her G.P. after January 2012 for the rest of that year. The plaintiff thought she had seen her G.P. on other occasions during the year. She had been advised to have counselling, which she had on and off during 2012 and subsequently.

43. It was put to the plaintiff that the reasons why she had only seen her G.P. on two occasions in 2012, was because her symptoms had largely cleared. The plaintiff did not accept this, she stated her ankle and shoulder had improved, but her mood had not improved. She still had bad days and needed counselling.

44. The plaintiff stated that when the incident with the box of sweets falling on her head occurred in December 2012, this caused her mood to further deteriorate. She returned to counselling at that point. Some months later, a bottle of liquid fell onto her right arm. This affected her mental state, as she felt that her employers were negligent and had allowed these accidents to happen. She accepted that they were small incidents, but they were having an effect on her. The plaintiff went on to state that she then had the panic attack on 28th February, 2013, and was not able to return to work with Dunnes Stores after that date.

45. It was put to the plaintiff that her accident had occurred in June 2011 and a lot had happened in her life in the following two years. The plaintiff stated that that was correct. It was put to her that there were some sad personal things which happened, but that these could not be blamed on the accident of 2011, for example, the breakup of her relationship was not due to the accident. The plaintiff did not agree; she stated that if she did not have such mental difficulties after her accident, she would have gone on to marry her fiancé and would have had a family by now. It was put to the plaintiff that Mr. Colville was of opinion that the plaintiff had made a complete recovery. The plaintiff stated that that was dependent upon what one deemed to be a *"complete recovery"*. She stated that her left ankle looked the same as her right ankle, but she was still not able to wear high heels and she had pain in the ankle, which she never had before the accident.

46. It was put to the plaintiff that she had told Mr. Sharif in April 2014 that she was 90/95% better and only had minor pain, which would last for a number of minutes. The plaintiff stated that it all depended on how she would spend her day. If she did not walk, she would not experience pain in her ankle. If she did not wear high heels, she would not feel pain. If she did not drive for more than an hour, she would not experience pain. But if she did any of these things, then her ankle continued to cause pain.

The Medical Evidence

47. Evidence was given by Dr. Ann Leader, Consultant Psychiatrist, on behalf of the plaintiff. She saw the plaintiff on behalf of the Injuries Board on 23rd May, 2012. At that time, the plaintiff had been distressed by the effects of her injuries and had been given anti-depressant medication by her G.P. She diagnosed the plaintiff as suffering from anxiety symptoms with disturbed sleep. She did not think that the plaintiff was clinically depressed. The plaintiff had had counselling, which was continuing.

48. She next saw the plaintiff in 2014 at the request of her solicitor. The plaintiff had sent her a very detailed email, which set out how her injuries, both physical and psychiatric, had affected her since the time of the accident. This email was incorporated into the body of the doctor's second medical report. The incident at work had caused the plaintiff to suffer stress and anxiety and she had been treated for depression by her G.P. However, the doctor did not think that she was depressed when she saw her. The subsequent accidents at her place of work, made her dread going to work. She agreed with the diagnosis given by Dr. Sinanan that the plaintiff had suffered a depressive adjustment disorder due to her injuries. She also agreed that she had made a reasonably good recovery from a mental health aspect.

49. Dr. Leader was of opinion that the plaintiff had lost her relationship with her fiancé as a result of her injuries and the effect thereof on her mental health. She was grieving for the loss of that relationship. The doctor noted that her relationship with her fiancé had been fine prior to the accident. The loss of such a relationship was a very distressing event for a young woman. In addition to that, her relationship with her employer had changed since the accident and the subsequent incidents had caused her to become deeply afraid of going to work.

50. In cross examination, Dr. Leader accepted that the plaintiff had not been clinically depressed, when she saw her in 2012, or subsequently in 2014. By May 2012, she had returned to work and was much improved. She felt at that time that there should be no ongoing psychiatric sequelea. There have been a number of distressing incidents at work. However, she accepted that the trolley incident which occurred in April 2012, had not been mentioned to her, when she saw the plaintiff in May 2012.

51. It was put to the witness that the incident involving the falling sweet box in December 2012 and the incident with the falling bottle in February 2013, were not part of this case. Dr. Leader said she accepted that, however, they were part of the reason that the plaintiff wished to leave Dunnes, as being there was very anxious for her for a variety of reasons and she felt that work had become too stressful for her. Dr. Leader stated that these incidents had to be seen as part of a progression. The index accident led to strain in the relationship with the plaintiff's employers. The other accidents caused her stress and anxiety and caused her to fear going to work in Dunnes, leading ultimately to the panic attack on 28th February, 2013.

52. Dr. Leader stated that all these events were stressful factors, which had occurred to the plaintiff at a time, when she had relationship difficulties with her fiancé. She was of opinion that the first accident was the index event. It put in train the other events. She thought that the accident in June 2011, was a significant event. She accepted that the plaintiff's mood had substantially recovered by the time she saw her in 2012. Nevertheless, she felt that the first accident set in motion a chain of events causing the plaintiff to have a fear of going to work, which culminated in a panic attack and the subsequent breakup of her relationship. She had no history of depression before the first accident. The witness stated that she agreed with the opinion given by Mr. Sinanan in his report. She was of opinion that the plaintiff's condition had improved considerably over time.

53. The court was also furnished with a number of medical reports from various doctors. It is only necessary to give a brief summary of these reports, as the findings therein were put to the plaintiff and to Dr. Leader in cross examination.

54. The first report was from the plaintiff's G.P., Dr. Nicola Stapleton, from an examination on 2nd September, 2011. The plaintiff complained of feeling stiffness in the left ankle all the time, with some swelling intermittently. She experienced sharp stabbing pains in the ankle. She also had parathaesia in her ankle. She walked with a limp and experienced a sharp pain when walking. She also experienced anterior shin discomfort, as well as foot discomfort. Her shoulder had intermittent pain in certain positions e.g. lifting objects, or when she lies down. She was getting headaches since the accident. She had pain in her right leg because of the way she was walking with a limp for this.

55. Dr. Stapleton noted that there had been some progress in her leg symptoms since the accident, but she was still very symptomatic. She had been discharged from physiotherapy as it was not helping. Her shoulder symptoms had not changed. She had ongoing headaches. She had also become depressed and was on antidepressant medication.

56. Dr. Stapleton noted that the leg injury was very slow to improve. The plaintiff was still limping. She was concerned that this might cause long term problems and she needed to be assessed by an orthopaedic specialist to clarify the potential long term consequences of this. The shoulder injury had also seen little improvement. Dr. Stapleton though that she may experience longer term pain with this

injury. She also had a reactive depression, for which Dr. Stapleton expected her to be on medication for a period of six – nine months. In relation to the headaches it was unclear if they would be a long term issue or not.

57. The plaintiff was examined by Mr. Hemant Thakore, Consultant Orthopaedic Surgeon, on 12th September, 2011. He formed the opinion that the plaintiff had suffered a soft tissue injury to her left shoulder and left foot. He wished to have sight of x-rays and an M.R.I. scan before giving a definitive diagnosis. However, he thought that the plaintiff had probably damaged her rotator cuff, with signs of impingement on internal rotation and abduction. He thought that the plaintiff probably had tendonitis of the left shoulder and a sprain of the ankle, with inflammation, as a result of the injury. He recommended that the plaintiff should have further physiotherapy to her left shoulder and left foot. He also noted that the plaintiff had suffered a lot of stress as a result of the injury. This required to be addressed by counselling. Overall, his prognosis remained guarded at that time.

58. The plaintiff was seen by Mr. James Colville, Consultant Orthopaedic Surgeon, on 18th April, 2012, which was ten months post accident. The plaintiff complained of experiencing headaches. She also had back pain which began in August 2011. She stated that her foot was not one hundred percent. If she walked far, the foot would become painful. She was unable to walk fast, or run. The plaintiff stated that she also had shoulder pain, which began after the accident. It had improved by the time of the examination, but troubled her for quite some time after the accident. Examination of both shoulders revealed the right to be equal to the left and normal. Examination of the left ankle and foot revealed a full range of movement in the ankle joint. There was no external evidence of injury, the ankle joint was stable and there was no clinical evidence of arthritis. It was noted that the plaintiff walked normally.

59. Mr. Colville stated that the plaintiff's symptoms were somewhat difficult to understand, with the exception perhaps of the ankle and foot, which was still troubling her to some extent. The soft tissue injury there would be expected to recover completely given time. He anticipated that at two years from the time of the accident, she should have little, if anything, to indicate that she had had an accident. The other symptoms presenting at a later stage, in his opinion, were unrelated to the accident.

60. He recommended that the plaintiff should have an M.R.I. scan of the left ankle and foot.

61. Mr. Colville issued an addendum to his report on 4th July, 2012, having had sight of the M.R.I. scan. It showed evidence of a small partial tear of the medial ligament of the ankle joint (deltoid ligament). He stated that in summary the plaintiff sustained a relatively minor ligamentous injury to the medial aspect of her ankle joint. He anticipated that in time she would make a full recovery. There was no arthritic change in the joint and nothing to suggest that she had a significant injury there. Relating to her other complaints, i.e. headaches and back pain, in his opinion these did not relate to the accident as described to him.

62. The plaintiff was examined by Mr. Imran Sharif, Consultant Orthopaedic Surgeon, on 23rd April, 2014, almost three years post accident. The plaintiff told him that she had improved a lot since the accident. She felt about 90 – 95% better. There were minor symptoms, that did not affect her on a daily basis. She told him that the pain when it came on, lasted for minutes, or for a few hours and it settled down on its own. She did not take any painkillers at that time. She told him that she found most of the days were good, but occasionally if she was standing for long periods of time and doing heavy work, then she would get pain in her ankle.

63. Examination revealed that she walked without a limp. Examination of the left shoulder was normal. In relation to the left ankle, there was no swelling or scarring. She had a full range of movement. The ankle joint was stable. There was tenderness on the anteromedial aspect of her ankle. Other than that there was no other abnormality. The plaintiff told him that her personal and social life had been affected since the accident. She stated that she felt very depressed and because of the accidents, her life had changed a lot and she had required assessment by a psychiatrist. She told him that she had limped a lot initially, but that the limping had gradually cleared up. She found it difficult to stand for long periods of time. She had difficulty wearing high heels and walking on uneven ground.

64. Mr. Sharif was of opinion that the plaintiff had suffered injuries to her left foot and ankle when the glass had fallen onto it. She had also jerked her left shoulder. Both of these had resolved to a state where she was getting minor twinges and aches on and off. These were minor and residual. It was then almost three years since the accident. The plaintiff remained symptomatic, but it was at a minor level. She was not a candidate for any type of surgery. She was getting on with her normal life and the symptoms which she had were not restricting her daily activities. However, her injuries had affected her emotional state and she remained symptomatic with that. He advised that a report should be obtained from a psychiatrist. He believed that the minor symptoms that she had, would gradually settle down fully. He did not anticipate any long term problems arising from this injury. Arthritis was not likely to occur as a consequence of these injuries. However, he thought her psychological symptoms may affect her in the long term.

65. The plaintiff was examined by Dr. Kenneth Sinanan, Consultant Psychiatrist, on 16th November, 2016. Having taken a full history from the plaintiff and having referred to Dr. Leader's two medical reports, he was of opinion that the plaintiff had suffered a depressive adjustment reaction/disorder following the injury to her ankle and shoulder and the pain in them, from her accident in Dunnes Stores on 21st June, 2011. He stated that from the reports supplied, it appeared that over time she had made a reasonably good recovery from the psychiatric point of view. He had difficulty understanding why the plaintiff was so vague in certain of her answers and why she had so much difficulty remembering some of the details of her past and dates of her work record.

66. Dr. Sinanan was of opinion that the plaintiff had had appropriate treatment for her psychiatric symptoms and was now back working as a sales assistant. While she was emotional and distressed during the consultation, she did smile appropriately on occasion and therefore he believed that her depression had improved considerably. She indicated that she had had no psychiatric treatment, or psychiatric medication, in the previous twelve months.

67. Finally, a report had been furnished by Mr. James Colville from an examination carried out on 23rd November, 2016. At that examination, the plaintiff complained that she had slight pain in the left ankle. It troubled her when she was driving for more than an hour. Using the clutch caused her ankle to be painful. She stated that she was not able to wear high heels, due to ankle pain. She stated that she used to run a lot, but was unable to do that anymore. She did some hiking but not as much as before. She thought that she was getting better slowly. She no longer took any tablets for pain.

68. On examination, Mr. Colville noted that the plaintiff looked healthy. She walked without a limp. Examination of the left lower limb and comparing it with the right, revealed no muscle wasting. The joints of the foot were equal to the opposite side. There were no clinical signs of arthritis or instability.

69. Mr. Colville was of opinion that the plaintiff sustained a painful injury to her ankle, which would have necessitated her being away from very physical activities for a period of time – perhaps as long as six months. However, beyond that time, as far as her ankle was concerned, in his opinion the plaintiff should have made a good recovery. Based on his assessment of her at that examination, there was no residual evidence of injury and it should be anticipated that she had already returned to her pre-accident state.

Conclusions on Quantum

70. The first matter that needs to be dealt with, is a submission which was made by counsel for the plaintiff during the opening of the case. He stated that liability had initially been put in issue by the defendant in its defence. This defence was in a fairly standard form. It denied negligence and liability and also alleged contributory negligence on the part of the plaintiff.

71. That defence had been delivered on 25th February, 2014. Mr. Byrne, S.C., submitted that the plaintiff had had to live with the stress and anxiety which were caused by virtue of the fact that liability had been put in issue in the pleadings. He stated that it was only on the morning of the hearing of the action, that counsel for the defendant indicated that while he was not formally conceding liability, he would not be cross examining the plaintiff, or her engineer, in relation to any liability aspects. In these circumstances, it was submitted that the plaintiff was entitled to be compensated for the stress of having to deal with High Court litigation in which liability had been put in issue.

72. I do not think that that submission is a sound one in law. Parties are always free to adopt whatever line they wish in relation to a case that is brought against them. Often defendants will enter a full defence, with a plea of contributory negligence at the outset of the action. After further investigation of the matter and in particular when an engineer's report is to hand, or when the relevant documents have been examined, the defendant and/or its insurer, may change their minds and decide to concede the issue of liability. It is in the interests of justice and in particular in the interests of promoting the most efficient use of court time, that parties should be encouraged to narrow the issues as much as possible prior to the action coming on for hearing.

73. If I were to penalise the defendant for its decision to concede liability, albeit very late in the day, this would send a message out to other defendants, that they should not change their stance on liability, as to do so might expose them to a claim for additional damages. This would not promote the efficient use of court time and would not serve the interests of justice.

74. It seems to me that a defendant is always entitled to concede liability if it wishes to do so in advance of the hearing of the action. I do not think that they should be penalised for taking that step. Different considerations might apply if the defence which had been filed by the defendant, effectively alleged or inferred that the plaintiff was bringing a fraudulent claim, or was being dishonest in relation to the circumstances of the accident or as to the extent of her injuries. If there had been a plea to that effect and if that had been withdrawn on the eve of the hearing, a court may well decide that the defendant should be penalised for the period of time during which it put forward that unfounded claim. However, this does not arise in the present case. Accordingly, I decline to penalise the defendant for changing its stance on liability.

75. I turn now to deal with the award of damages in this case. The plaintiff is 35 years of age, having been born on 4th April, 1981. All of the available evidence, suggests that prior to her accident on 21st June, 2011, she was a fit and healthy young woman, who was in a stable long term relationship and indeed was engaged to be married to her fiancé. There is no suggestion that she had any physical or psychiatric difficulties prior to the time of the accident.

76. I am satisfied, having observed the plaintiff give her evidence in the witness box and having regard to the frank concessions which she made when being examined by various doctors, that the plaintiff is a truthful witness, who has given a fair and accurate account of her symptoms since the time of the accident.

77. As a result of the accident, she suffered a jerking injury to her left shoulder, a partial tear of the medial ligament of the left ankle and she experienced psychiatric sequelea, in the form of a depressive adjustment reaction/disorder. In the weeks and months following the accident, she experienced constant and at times severe pain in her ankle. It appears that she was rendered significantly disabled and was effectively confined to her apartment in the early months. Thereafter, she was able to take very short walks, but had to rest while so doing. She was rendered unfit for work for approximately six months from 21st June, 2011, until 19th January, 2012.

78. During the period that she was out of work, her mood deteriorated significantly. Her fiancé was obliged to take on extra hours at work, so as to augment the family budget. Due to her injuries and depressed mood, the plaintiff was not able to cook dinner for her partner, nor was she able to engage in meaningful conversation when he came home. She described how she was often distressed and upset by the end of the day. When the plaintiff's friends and her fiancé told her that she had changed since the accident, she felt it necessary to attend with her G.P., who prescribed antidepressant medication.

79. The plaintiff was also advised to have counselling and she had this in blocks of five/eight sessions at a time. She had counselling during the period that she was out of work and after she returned to work with Dunnes Stores in January 2012. In all, she estimated that she had fifteen/twenty sessions of counselling.

80. The plaintiff came under the care of Dr. Ann Leader, Consultant Psychiatrist, who saw her for the first time on 23rd May, 2012, at the request of the Injuries Board. She diagnosed that the plaintiff was suffering from reactive anxiety and stress, secondary to the injury sustained at work. The plaintiff had described her condition after the accident as being *"depressed, anxious, emotionally drained and apathetic"*. She stated that she had not been like that before the accident. After the accident, she was more easily stressed. She could not concentrate and was slow at making decisions. The plaintiff was asked to write out an account of her mental and physical condition, which she did in the course of a long email, which was incorporated into the body of the medical report furnished by Dr. Leader dated 4th July, 2014. The court has had regard to the content of this statement. The court is satisfied that it gives a fair and balanced account of her injuries and difficulties since the time of the accident. The court is satisfied that the plaintiff has not, at any stage, overstated her injuries.

81. Unfortunately, the plaintiff was involved in a number of small accidents at her place of work. She was hit by a trolley on 20th April, 2012, a box of sweets fell on her head on 27th December, 2012 and a bottle toppled over at the checkout and fell onto her arm on 24th February, 2013. Finally, the plaintiff had a full blown panic attack on 28th February, 2013, for which she was brought to hospital for treatment. She did not return to work for Dunnes Stores after that date.

82. However, the plaintiff did not remain idle. She secured employment in Milano's restaurant and subsequently in the Harvey Norman store. More recently, she has taken up employment in a company called Bath House in Dun Laoghaire, which designs and manufactures kitchens and bathrooms. The plaintiff is very happy in her job with that company.

83. In May 2013, the plaintiff broke up with her fiancé. The plaintiff is of the view that the injuries which she sustained, both physical and mental, in the accident in June 2011, were the catalyst, which, combined with the subsequent smaller accidents at her place of work, led to the significant deterioration in her mental health, which in turn resulted in the breakup of her relationship. When it was put to the plaintiff in the course of cross examination that the breakup of her relationship almost two years after the date of the accident, could not be ascribed to that accident, she stated that it was her view that, had she not suffered the injuries which she

did in June 2011, she would by now be a married woman and would possibly have had children in the interim.

84. There is support for this assertion in the medical report dated 4th July, 2014, furnished by Dr. Leader in which she stated as follows:-

> *"Olga's situation in life has changed greatly due to the loss of her relationship. She finds herself alone at 33 and is grieving the breakup with her boyfriend. It is well recognised that ongoing pain, disability and depression can damage interpersonal relationships. Her most recent account of what she suffered as a result of the accident is very clear and outlines the changes in her circumstances as a result of the accident."*

85. In her evidence, Dr. Leader agreed with the diagnosis given by Dr. Sinanan, that the plaintiff had suffered a depressive adjustment reaction/disorder as a result of the accident, for which she had been treated with anti-depressant medication and 15/20 sessions of counselling. In relation to the breakup of the plaintiff's engagement, she was of opinion that the accident in June 2011, could be seen as the trigger event which, combined with the other small accidents and the panic attack, led to the deterioration in the plaintiff's mental health to such extent that her relationship broke up.

86. On this aspect of the case, Mr. Leonard, S.C., made the following submission on behalf of the defendant: he submitted that the psychiatric aspect of the plaintiff's injury, had largely resolved by May 2012. He stated that any continuing symptoms after that date, were not referable to the accident. He stated that there was no evidence of depression when the plaintiff was examined by Dr. Leader in 2012, or 2014. He submitted that any continuing sequelea beyond May 2012, were not caused by the accident in June 2011. In particular, the breakdown of the plaintiff's relationship with her finance in May 2013, was not a foreseeable consequence of the accident in June 2011. Where it was not reasonably foreseeable that the relationship may break up, the defendant should not be held responsible for that eventuality.

87. In response, Mr. Byrne, S.C., stated that the accident had had a significant impact on the plaintiff's health. As a result of her injury, this 33 year old woman was no longer able to wear high heeled shoes. He submitted that this was a significant disability for a woman of her age.

88. In relation to the psychiatric aspect, he pointed out that the plaintiff had been in a stable relationship prior to the accident. Due to the injuries sustained in the accident, she was no longer able to care for her partner or make conversation with him, as she had done prior to the accident. Her psychiatric injury had been significant, which was evidenced by the fact that she had to be put on anti-depressant medication and required counselling. He pointed out that the circumstances relating to the deterioration in her relationship were described in detail in the email, which she sent to Dr. Leader. That doctor was of opinion that the accident and the injuries sustained therein, had been the dominant cause of the breakup of the relationship. In such circumstances, it was an event which was directly referable to the injuries sustained by the plaintiff and accordingly should constitute part of the award of damages.

89. In considering the question of the remoteness of damage, one has to bear in mind the principle long established in Irish law, that the defendant must take his victim as he finds him. In *McCarthy v. Murphy* [1998] IEHC 23, McCracken J. was dealing with a case where the plaintiff had suffered foreseeable soft tissue injury in a minor traffic accident caused by the defendant's negligence, but had gone on to develop a depressive reaction which was attributable in part to an underlying depressive condition. In the course of his judgment, McCracken J. observed as follows:-

> *"Of course the Defendant could not have anticipated that [the plaintiff] was a person with a pre-disposition to depression, but he could have reasonably foreseen a soft tissue injury, and that being so, he is liable for damage which flows from that injury, as he has to take the Plaintiff as he finds her."*

90. In *Walsh v. South Tipperary County Council* [2012] 1 I.R. 522, which was a case concerning liability for a negligent misrepresentation, Clarke J. had the following general observations on the question of remoteness of damage in personal injury actions:-

> *"[46] A driver who knocks down a young man causing a relatively straightforward broken leg (likely to be fully cured within six months) might be very surprised indeed to find a claim in damages which included an allegation of lost earnings running to many millions of euro. However, if it transpired that the plaintiff was a young South American football star having a brief holiday in Ireland before going to sign an arranged contract with a major premiership football club, then a loss of wages for a football season running into numbers of millions would be likely to be sustained. The fact that the quantum might be surprising is not the issue. It is foreseeable that causing an injury to a party may lead them to be unable to work and that there will be a loss in the shape of a loss of wages. Once a loss of wages is foreseeable the fact that, in the peculiar and unusual circumstances of the case, the amount might be surprisingly large does not render those damages unforeseeable.*
>
> *[47] Likewise, in the oft-quoted case of the injured party with the so-called 'eggshell skull' it can, on occasion, turn out that, due to some weakness or predisposition, a particular injured party suffers much more severe consequences from a relatively innocuous incident than might be expected. However, it again remains the case that, if personal injury is a foreseeable consequence of whatever wrongdoing is concerned (say the negligent driving of a motor vehicle), then the fact that those injuries may, in the peculiar circumstances of the case, be much more severe than might have been expected, does not deprive the injured party from an entitlement to recover whatever may be appropriate for those injuries."*

91. Clarke J. cited with approval the opinion expressed by the learned authors of McMahon & Binchy, *Law of Torts* (3rd Ed.) at para. 3.32, which is reproduced in the 4th Ed. at para. 3.36 as follows:-

> *"The eggshell skull rule has survived the reasonable foreseeability rule introduced by Wagon Mound (No. 1). According to this rule if the defendant could foresee a particular type of physical or psychological injury to the plaintiff then he or she will be liable for all the physical or psychological injury that follows on account of the plaintiff's particularly vulnerable pre-accident condition, even if it turns out that the injuries to the plaintiff were far more than might reasonably have been expected in normal circumstances."*

92. The learned authors went on to point out that in England in *Page v. Smith* [1996] 1 A.C. 155, the House of Lords by a majority went so far as to hold that, where the defendant negligently risks causing personal injury and the plaintiff sustained an unforeseeable psychiatric injury, liability should be imposed. Lord Lloyd observed:-

> *"The test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the plaintiff to risk of personal injury. If so, then he comes under a duty of care to that plaintiff….*
>
> *There is no justification for regarding physical and psychiatric injury as different 'kinds' of injury. Once it is established that the defendant is under a duty of care to avoid causing personal injury to the plaintiff, it matters not whether the injury in fact sustained is physical, psychiatric or both."*

93. While that approach was criticised by Goff L.J. in his dissenting judgment in *White v. Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455, in Ireland the Supreme Court in *Fletcher v. Commissioner of Public Works* [2003] 1 I.R. 465, was far less hostile to that approach. In the course of his judgment, Keane C.J. stated:-

> *"The test in every case ought to be whether the law should apply the 'eggshell skull' test in cases of psychiatric illness. Lord Goff may be right in saying that, in cases where there is no physical injury, this is to translate a rule relating to compensation into a general principle of liability. The fact remains that the test is applied routinely in personal injury cases in our courts: one is well familiar with minor soft tissue injuries which have, according to medical evidence, caused the plaintiff acute psychiatric injury which, one is assured, is of real significance to the plaintiff, however surprising his or her reaction is to the objective finder of fact. It seems to me that, logically, the same considerations should apply where there is no physical injury."*

94. Based on these authorities, I am satisfied that once it was reasonably foreseeable that the plaintiff might suffer personal injury if the defendant was negligent, then she could recover for mental injury as well as for physical injury. I am satisfied that personal injury was foreseeable in the circumstances of this case. Accordingly, the plaintiff is entitled to recover damages in respect of the injuries to her left shoulder and left ankle. She is also entitled to be compensated for the psychiatric injury suffered by her in the form of a depressive adjustment reaction/disorder as found by Dr. Leader and Dr. Sinanan.

95. As to the recovery of damages for the breakup of her relationship, I am satisfied that in principal, it could, in certain circumstances, be possible to establish that a person's physical and psychiatric injuries were of such gravity, that they led to the breakup of a long term relationship with a spouse or partner. However, one would need very clear evidence of a causal link between the plaintiff's physical or psychiatric condition and the demise of the relationship, before it could be recoverable as a component of general damages. It seems to me that it would need evidence not only from the plaintiff, but also probably from her former partner and other family members, to the effect that her injuries had been such that they led to a breakdown in the relationship.

96. In this case, the plaintiff has not presented sufficient evidence to enable the court to award damages in respect of the breakup of her engagement in 2013. The court notes that she had been able to return to work in January 2012, which was some eighteen months prior to the breakup of the relationship. She was able to cope with the demands of her work until she made the decision to leave Dunnes in February 2013, due to the smaller accidents and due to her panic attack in that month. Thereafter, she had secured alternative employment reasonably quickly. We have not heard from the plaintiff's former partner as to his reasons for the breakdown in relations. The court cannot speculate as to what reason he might have had for calling off the engagement.

97. A relationship between two people may break up for a variety of reasons. Indeed, there may well be more than one reason leading to the breakup of the relationship. On the evidence in this case, it is not possible to lay the blame for the breakup of the plaintiff's relationship with her fiancé, at the door of the accident, which occurred two years previously in June 2011. Accordingly, I decline to make any award of damages in respect of the breakup of her relationship.

98. In relation to her current mental health, it would appear that her psychiatric health issues are now behind her. She has not required any psychiatric medication or counselling in the last year.

99. In relation to her physical injuries, when seen by Mr. Colville on 23rd November, 2016, the plaintiff had the following complaints: slight pain in the left ankle when driving for more than an hour, an inability to wear high heels due to ankle pain, an inability to go running as she had done prior to the accident, however, she was able to do some hiking, but not as much as prior to the accident. I think that this represents a fair account of her current physical capabilities.

100. While the plaintiff herself did not make a huge issue of these continuing sequelea, she was upset that she was still not able to wear high heeled shoes at the time this action came on for hearing, some five years post-accident. This represents a significant continuing disability for the plaintiff. She is a young single woman, who may well want to wear high heeled shoes when going out to formal functions, such as weddings, birthday parties or dinner dances, or she may want to wear them when going out to a restaurant with a boyfriend or male companion. This continuing disability, allied to her other complaints to Mr. Colville, merit a modest award of damages into the future.

101. Taking all of these matters into consideration, I award the plaintiff the sum of €45,000 for general damages to date, together with the sum of €15,000 in respect of her continuing disability. To this must be added the sum of €5,246 as agreed special damages. This gives an overall award of €65,246.