Neutral Citation [2015] IEHC 426

THE HIGH COURT

[2011 No. 11781 P]

BETWEEN

TARA UNA McGARRY

PLAINTIFF

AND

PAUL AND URSULA McGARRY

AND

HOUSEWORKS (NI) LIMITED

DEFENDANTS

AND

RONALD SCHMITT DESIGN GMBH

AND

ROLF BENZ AG & Co KG

THIRD PARTIES

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 6th day of May 2015

1. Having considered the evidence given and the submissions of counsel made in this case the following is the judgment of the court.

2. In the spring of 2005 the 1st and 2nd defendants were in the process of building their architect designed dream home at Keaveney's Lane, Tonnaphubble, Co. Sligo. Consistent with the design concept for the house they had also decided to furnish their new home with designer branded high specification quality furniture. This they sourced from the 3rd defendant, a company incorporated in the north of Ireland with showrooms at Belfast. That company was a subsidiary of a company incorporated in this State having its head office and showrooms in Dublin.

3. It was on a visit to the 3rd defendant's showroom with a view to choosing a kitchen that the 2nd defendant saw a suite of drawing room furniture on display. This consisted of a number of sofas, a footstool/footrest and two glass top tables, one with and one without a built in lamp.

4. The suite of furniture and tables bore the designer label and logo "Rolf Benz" which is a high end German furniture manufacturer and being the 2nd third party joined in these proceedings. When the 2nd defendant saw this suite she was immediately attracted to it and decided that it was "must have" furniture for her new home. Even though it was on offer at a discounted price, the complete suite was expensive carrying a sale price of £5,000 sterling.

5. The glass tables were designed to compliment and to fit in or marry up to the sofas. The 2nd defendant was able to visualise the suite in her drawing room. As the glass table without the lamp would not be visible in the intended location her initial intention was to buy the suite without that table, however, she changed her mind on being offered a further reduction on the cost of that table.

6. At this time the new home had not reached a stage where furniture could be moved into it so the 3rd defendant, at the request of the 1st and 2nd defendants, agreed to keep the suite of furniture and tables on display in its showrooms pro tem. Eventually, in the summer of 2006, the 3rd defendant requested the 1st and 2nd defendants to come and take the furniture away. The request was responded to immediately. The 1st defendant collected the suite from the 3rd defendant's premises in a large van. He had previously gained experience of furniture removal when working in the United States and put that experience to good use when he collected the suite. He personally packed and wrapped each individual item for the road journey. With regard to the glass tables these were loaded into the van in such a way that they were not standing on the table legs. The purpose of this was to avoid road vibration being transmitted up through the legs into the glass table tops during transport.

7. By Christmas 2006 the building works were nearing completion; work on the drawing room had finished. Apart from the unpacked suite which had been unloaded and put in there, that room was empty. A few days before Christmas the sofas and tables were unpacked and placed into their intended positions.

8. The glass top table without the inbuilt lamp was located immediately to the right hand side of the right hand arm of one of the sofas as designed. The particular sofa and table were located in the drawing room in a position where the table was close to one of the two drawing room windows.

9. Apart from some slight movement involved in the course of cleaning, the suite remained in situ until the 11th October 2007 when, in the early afternoon, an accident occurred involving that glass top table and which gave rise to these proceedings.

10. The plaintiff was aged 3 at the time of the accident, having been born on the 5th of September 2004. Her mother and next friend, together with her mother's brother-in-law, since deceased, were babysitting the 1st and 2nd defendant's children in the 1st and 2nd defendant's home, they being out at work. Those two children were then aged 5 and 9 respectively.

11. Shortly before the accident the plaintiff and her younger cousin were seen by the plaintiff's mother sitting on the sofa to which the incident table had been married up.

12. The plaintiff's mother left the room momentarily to get the children a treat from the kitchen. On hearing the noise of a crash she ran back into the drawing room where she found the plaintiff standing very close to the window nearest to the glass top table. When she went over to the plaintiff she could see that the glass top of the table behind the sofa on which the plaintiff had last been seen sitting had broken away from its supporting legs. The plaintiff's cousin was standing in front of the sofa but adjacent to the place on it where she had last been seen sitting.

13. It was not immediately obvious to the plaintiff's mother that anything untoward had happened to the plaintiff. It was only after she had gone over to her and saw blood that she realised that the plaintiff had been injured as a result of the table top separating from its legs. It had fallen in such a way that it caused a full amputation of the plaintiff's left big toe distal to the interphalangeal joint as well as some other minor cuts and abrasions.

14. No one old enough and capable of giving sworn evidence witnessed the accident. The glass top table involved in these proceedings was a cantilever table, being supported by two legs attached to one side of the table top. The legs were screwed into phlanges which had been glued onto the under surface of the glass. The underside of the table had a frosted finish. During manufacture shallow impressions had been made in the underside of the glass for the purposes of receiving the phlanges which, apart from the adhesive, were not otherwise secured to the legs. The phalanges and legs were manufactured separately and designed in such a way that the legs were to be to be screwed into the phalanges as part of an assembly process intended to be carried out by the retailer or end user.

15. The other glass table differed from the incident table in a number of respects. It was of different dimensions and had a built in table lamp which was secured to the top of one of the table legs by a screw mechanism which ran through the glass table top. This design had the effect of providing additional security for the glass table top over and above the method of bonding designed for the incident table.

16. Proceedings having been issued against the defendants, the 3rd defendant was given leave to join the 1st and 2nd third parties to these proceedings.

17. The glass top tables were manufactured by a German company Ronald Schmitt Tische GmbH. That company went into liquidation by order of a German court on the 1st November 2012. It transpired that the 1st third party was not incorporated until 2013 and was not involved or otherwise connected with the design or manufacture of the table in question and was ultimately let out of the proceedings.

18. The glass top tables made by Ronald Schmitt Tische GmbH, (hereinafter Ronald Schmitt) were designed to be fitted into and to be part of a suite of furniture manufactured by the 2nd third party. These bore the logo "Rolf Benz". Ronald Schmitt prepared and had printed assembly instructions for the tables which also bore that name and logo. The design and manufacture of the tables and the preparation and printing of assembly instructions for them by Ronald Schmitt was carried out under licence as part of a business relationship between the 2nd third party and that company. The table tops and legs of the tables were packed separately in carrying/transport frames. It follows that the constituent parts have to be assembled in order to make up the table. Apart from giving assembly instructions this document also contained a warning against placing a static weight on the table exceeding 20 kilograms. For reason which will become apparent that is of significance in relation to the issues of causation and liability. In addition the instructions contained a disclaimer in respect of liability for any damage arising as a result of misuse of the table.

19. Full defences were delivered on behalf of all three defendants thereby putting the plaintiff on full proof of her claim. Likewise, the 2nd third party delivered a full defence to the 3rd defendant's claim for indemnity and/or contribution against it save that the 2nd third party admitted that it had sold the table in question to the 3rd defendant.

The accident.

20. There was general agreement between the engineers called on behalf of each of the parties that the forces involved to cause the table top to part from the table legs were not excessive. Given that the plaintiff was seen by her mother only minutes before the accident sitting on the sofa and then after she re-entered the drawing room standing near the window closest to the glass table side of the sofa, the engineers agreed that there were two probable explanations as to how the plaintiff came to be standing where she was found and also being consistent with the table top falling in a guillotine fashion onto her left foot.

21. The first of these was that the plaintiff had got off the sofa, walked along and then behind it until she came to the glass top table and that she had then tried to clamber up onto the table with a view to returning to the sofa. The other explanation was that the plaintiff had clambered over the table top from the sofa and had turned around near the edge of the table furthest away from the table legs for the purposes of getting down onto the floor when the table top broke away from its support legs.

22. I am satisfied that of these two probable explanations the preponderance of the engineering evidence warrants the conclusion that the latter explanation of what happened is the most likely.

23. In the case of the former version, if the plaintiff had been standing on the floor the table top would have been at chest height. It seems unlikely in this scenario that a 3 year old would have been able to clamber up onto the table top or otherwise lean on it with sufficient force as to cause its failure whereas on the latter version it would have been relatively easy for the plaintiff to crawl off the sofa onto the table top, moreover, by the time she had reached the edge of the table with a view to clambering down from it she would have been exerting the maximum possible dynamic forces on the table for her age and weight.

24. With regard to the failure, both phlanges which had been secured to the table top by an adhesive came away virtually intact from the table top glass. The predominant failure was of the glass and not of the adhesive or the phlanges themselves.

Causation

25. As to the issue of causation, there were a number of explanations advanced by the engineers. The first of these was that the failure occurred as a result of microscopic damage occurring to the table prior to the accident which so weakened it that it could not withstand the dynamic forces exerted on it as the plaintiff moved progressively across it. Another view was that there was an inherent design or manufacturing fault which manifested itself in a once off catastrophic failure. Alternatively, there was a combination of several causes which led to that result.

26. As to how progressive damage may have been caused, one suggestion was that the table had been knocked over, or had toppled over, or had otherwise been abused between the time when it was collected from the 3rd defendant and the time when the accident occurred. However, it was the evidence of the 1st and 2nd named defendants that nothing untoward occurred involving the tables during that period.

27. At the close of the case it was accepted on behalf of the plaintiff that on all the engineering evidence it would have been very difficult for the table to have been knocked over or for it to topple over. Whilst there had been a suggestion that marks seen on the floor of the drawing room were attributable to the table toppling over pre accident, the marks noticed and photographed at subsequent engineering inspections were most probably caused by the table top as a result of the accident itself.

28. It was accepted on behalf of the plaintiff that whilst the 1st and 2nd defendants had discharged the onus of proof in relation to that aspect of matters, it was submitted that the same could not be said for other possible causes or in respect of the time during which the suite had remained on display in the showrooms of the 3rd defendant between the date of purchase and the date when it was collected, a period of some 14 months. In that regard it seems to me, having regard to the engineering evidence in relation to the stability of the table, that whether it was located in the home of the 1st and 2nd defendants or in the 3rd defendant's showrooms would make no difference; the table would have been stable in either location and was unlikely to have been knocked over or to have toppled over in either.

29. As to carriage being a cause of microscopic damage, it was the evidence of Mr McGarry that he transported the table carefully from the 3rd defendant's premises and there was no evidence to suggest otherwise.

30. It had also been suggested that the workmen of the 1st and 2nd defendant may have damaged the table by sitting on it or knocking it over whilst the 1st and 2nd defendants were out at work but there was no evidence of such and in any event that, it seems to me, is unlikely. Work in the drawing room had finished. The tables had remained packed and wrapped in that room and were therefore protected until just before Christmas 2006. Once unpacked the incident table was in an out of the way position in the room close to a window. There was no evidence of damage being caused in any of these scenarios or otherwise whilst in the possession of the 1st and 2nd defendants.

31. It was Mrs McGarry's evidence that she was by nature very particular and very proud of her home. Having had the opportunity of observing her demeanour and presentation in court I have no reason to doubt this description which she quite willingly applies to herself and I accept her evidence that she would not have tolerated any form of misbehaviour which might have led to damage to any furnishings including the table in question.

32. Given the stability of the table in general ,whilst there was no evidence that anyone ever sat on it either in the home of the 1st and 2nd defendants or in the showrooms of the 3rd defendant ,for reasons to which reference will be made later in this judgment, I am satisfied that had a prospective adult customer in the showrooms of the 3rd defendant or an adult visitor or workman of the 1st and 2nd defendants sat on the table it would most certainly not have been able to withstand the weight or forces involved in such an action.

33. If toppling over, being pushed or pulled or knocked over or being sat on are unlikely causes for microscopic damage, the only other identified cause of progressive failure on the evidence was the over tightening of the table legs during assembly.

34. Whether there was an inherent defect in the design and/or manufacture of the table or whether there was an over tightening of the legs during assembly or a combination of both, these factors, if present, date from not later than assembly and so would have predated any of the exterior potential causes which were canvassed in the course of the trial as explaining microscopic damage.

Design and Manufacturing Standards

35. The European Committee for Standardisation, or CEN as it is also known, consists of the national standards bodies for the majority of the member states of the European Union and although a completely independent body it is recognised by it. The CEN draws up standards which, subject to modification after submissions from interested parties, are regularly adopted by the European Commission and promulgated as a European standard , also referred to as an EN .

36. Prior to promulgation of an EN the proposed standards drawn up by the CEN are published in each CEN member state as a pre European standard also known as an ENV.

37. CEN member states are required to announce the existence of an ENV in the same way as an EN and to publish same at national level. Germany, the United Kingdom and Ireland are amongst the members of the CEN. The period of validity of an ENV is generally specified within the text and after which member states are required to submit comments particularly on whether the ENV should be converted into an EN.

38. During this period it is permissible to keep any conflicting national standards in force until decision is reached on whether to convert the ENV into an EN.

39. On the 1st March 2000 the CEN published ENV 12521 (hereinafter the ENV) which provided for standards in relation to domestic furniture. Amongst other matters this ENV dealt with mechanical and structural safety requirements to be satisfied by reference to certain specific tests. There was no suggestion during the trial that there were national standards in Germany which were in conflict with the ENV. The initial validity period of this ENV was 3 years but subject to extension.

40. There was some dispute between the engineers as to whether the table involved in this case was what is described in the ENV as a "low table".

41. At 560 millimetres above floor level the table in question is less than 600 millimetres being the height up to which tables are defined in the ENV as "low tables". This is significant because the table in question is also a cantilever table by design and being a type of table which is also the subject matter of the ENV.

42. The test methods to be applied are now set out in EN 1730 2012 and prior to that in EN 1730 2000. The relevant load for the stability test of the incident table is 20 kilos or 200 N.

43. The test requirement for strength and durability in relation to low tables is that they should be able to withstand a vertical force applied to the main surface of 1000 (N) which is equivalent to just over 100 kilos or approximately 16 stone. The test requires this load to be applied at not less than 100 millimetres from the table top edge. This is particularly relevant because in addition to a height restriction, the definition in the E.N.V of "a low table" involves a table which may be subjected to misuse such as by a person sitting on it.

44. In 2009 ENV 1252, with some modifications, was converted into EN 12521 entitled "Furniture. Strength durability and safety. Requirements for Domestic Tables". This EN post dates the manufacture of the table in question by 5 years and having no

retrospective effect the EN has no application to the matters in issue in this suit. Nevertheless, it may be observed that whist there was no evidence of an extension of the ENV, the load tests to which reference has already been made were incorporated into the 2009 standard.

45. The glass top of the table involved in this case weighs twelve kilos and was made of toughened glass. It is common case that the table was manufactured by Ronald Schmitt under licence from the 2nd third party to a design which incorporated the table into the furniture manufactured by the 2nd third party and that as part of the business relationship between Ronald Schmitt and the 2nd third party the tables bore the 2nd third party's name and logo, as did the assembly instructions.

46. There was no dispute between the parties as to the purpose of the ENV .It required manufacturers to take cognisance of the test standards comprised in the ENV, to apply those to their products and thereafter to communicate their experiences in relation thereto back to the national standards body in the country where the manufacture took place.

47. No evidence was led in this case of any testing having been carried out in relation to this particular model of table nor was any evidence led that the table was manufactured in accordance with the ENV. Given the purpose of the ENV it follows that, at the very least, it would be good practice for manufactures to have regard for and to apply those standards to their products.

48. The assembly instructions which accompanied the table make reference to a 20 kilo stability test. Although the table was manufactured in 2004 it is clear from the evidence that by making such reference to this test Ronald Schmitt was cognisant of the content of the ENV. No evidence was led to suggest otherwise.

49. Although Dr Wood, consulting engineer for the 2nd third party, considered the table in question to be an "occasional table" and therefore not a "low table" within the meaning of the ENV and thus to be a table excluded from its application, the predominance of the engineering evidence given in this case warrants a conclusion that the table in question was "a low table" and that being so the ENV standard was relevant to its manufacture.

50. The reference to the 20 kilo stability test in the assembly instructions also suggests to me that the manufacturer considered the table to be "a low table" within the meaning of the ENV and that the ENV standards were applicable in 2004. As it happens this view coincides with the opinions of Mr O'Keeffe, the consulting engineer called on behalf of the 1st and 2nd defendants and Ms Kelly, the consulting engineer called on behalf of the 3rd defendant.

51. Apart altogether from making reference to a 20 kilo weight limit, the assembly instructions also contain what purports to be an exemption clause, namely that no responsibility would be accepted for damage caused by improper use of the table.

52. The engineers were broadly in agreement that at the time of the incident the plaintiff would have weighted approximately 15 kilos, perhaps a little less or a little more but given her sex and age that these were the parameters for her weight.

53. It was also apparent from the evidence of the engineers, and not surprisingly there was no great dispute between them on this aspect of matters, that if the plaintiff was crawling or clambering across the table then dynamic forces would have been exerted which would have been greater than the weight of the child and potentially greater than 20 kilos.

The business relationship between the 3rd defendant and the 2nd third party.
54. The 3rd defendant had become aware of the 2nd third party's products in the early 1990s and subsequently started to do business with that company, initially from its parent company premises in Dublin.

55. Representatives of the 3rd defendant habitually attended trade fairs on the continent and would visit the show stand of the 2nd third party. In the course of developing its business relationship the 3rd defendant opened and maintained an account with that company. It was the evidence given on behalf of the 3rd defendant that the suite, including the table the subject matter of these proceedings, was most likely seen at a trade fair and that an order would have been placed at the fair rather than afterwards as that would have generated a further discount on the trade price.

56. A confirmation of order also referred to as an invoice, for the suite issued from Ronald Schmitt. In addition to the name Ronald Schmitt, this document also bore the name of the 2nd third party.

57. As far as the 3rd defendant was concerned, however, its contractual dealings were with the 2nd third party: it was purchasing a Rolf Benz made product and it was with that company that it had an account. The 3rd defendant was aware of the existence of Ronald Schmitt but at the time of the transaction was not aware of the precise nature of the legal relationship between those companies.

58. Although the order may well have been confirmed and the goods dispatched by Ronald Schmitt, given the admission contained in the defence of the 2nd third party, it is clear that the sale of the suite, including the tables, was made between the 2nd third party and the 3rd defendant.

59. When the goods arrived in Ireland they were unpacked and assembled in the premises of the 3rd defendant by McArdles, a firm of assemblers and fitters retained for that purpose by the 3rd defendant. Like the table manufacturer , however, this firm also subsequently ceased trading

60. As to what product documents including the assembly instructions came with the tables, the evidence given on behalf of the 3rd defendant was that after assembly of the table the instructions together with any other product documents would have been placed in an envelope and that at the time of sale or delivery the practice was to give that to the purchaser. As to whether or not such an envelope had been given to the 1st and 2nd defendants, the 3rd defendant could not say.

61. When the accident occurred, however, the 1st and 2nd defendants looked for documentation and whilst some was located this did not include any instructions. That is hardly surprising since in this particular instance the tables had already been assembled for the purposes of display in the 3rd defendant's showrooms and were surplus to assembly requirements.

62. In any event on all of the evidence there was no warning on any documentation received by the 1st and 2nd defendants concerning a maximum weight limit on the table nor was there any evidence that the 1st and 2nd defendants were aware of a disclaimer for any damage arising from misuse of the tables.

63. In fact the 3rd defendant itself appears not to have been aware at the time of the delivery of the suite of the precise nature of

the assembly instructions nor was it aware of either the warning or the disclaimer contained in those instructions. Consistent with this view it is clear that neither the warning nor the disclaimer were communicated to the 1st and 2nd defendants. It was accepted on behalf of the 3rd named defendant that if it had it been aware of such information, it would have been appropriate to convey that to the purchaser.

64. Whilst the suite and tables were unpacked and the tables assembled by McArdles on behalf of the 3rd defendant at its premises and for the purposes of display in the 3rd defendant's showroom it is also clear from the content and purpose of the assembly instructions that Ronald Schmitt intended that the tables would be assembled by or on behalf of the end user. In my view there would be little point in incorporating a maximum weight warning and disclaimer in the assembly instructions if these were not directed at those most likely to assemble and use the product.

65. Where, however, a retailer assembles the product with a view to selling it then given the weight limit referred to in the instructions, which is a matter of product safety, that was information necessary to be known by the user and which the supplier was obliged to convey to the purchaser together with the disclaimer.

66. No evidence was given on behalf of the 3rd defendant in relation to the steps it took to retain or otherwise acquire actual knowledge of the assembly instructions, however, as it was selling and displaying the suite and tables and that as a matter of practice the product documentation, including the assembly instructions, was put into an envelope in its possession for transmission to the purchaser, the 3rd defendant cannot but have had knowledge of the content of that documentation.

67. Had the assembly instructions been read, as they ought to have to have been, then the 1st and 2nd defendants could and should have been told of the disclaimer and weight limit. It is a matter of conjecture as to what their reaction would have been. In the event I am satisfied they knew nothing of these matters.

68. No evidence was given on behalf of the 2nd third party as to what enquiries, if any, it had made of Ronald Schmitt with regard to compliance with any standards, including the ENV.

69. Although Ronald Schmitt was the manufacturer of the tables under licence their manufacture was on behalf of the 2nd third party. The application of the 2nd third party's name and logo to the tables and in the assembly instructions was a representation made to the world at large and, in particular, to any potential consumer, that the suite and tables was a Rolf Benz product.

Conclusion in relation to causation.

70. As to resolution of the conflict between the engineers as to whether it was an inherent design and manufacturing defect which caused the catastrophic failure of the table or whether it was due to a progressive failure or to a combination of factors, whilst Dr Jordan, engineer for the plaintiff, attributes a different cause for microscopic damage leading to progressive failure both he and Dr Wood gave evidence that there was a progressive cause of the failure rather than that being attributable to a single catastrophic event arising from design and or manufacture.

71. Dr Wood, by reference to photographs 9 and 10 of Mr O'Keeffe's photographs gave evidence that the remnants of opaque glass seen in nearly identical places towards what would have been the back of the table and which were left behind when the failure occurred could only be explained by the presence of what he described as microscopic cracking – in short these signs were consistent with and could only be explained by the presence of cracking. As to the cause of the cracking, it was Dr Woods's evidence that this was more likely attributable to over tightening of the legs when the table was being assembled rather than any other cause. Dr Jordan's opinion was that the damage arose from other causes such as damage from being abused or knocked over.

72. Whilst Mr O'Keeffe, like Ms Kelly, was of the opinion that the catastrophic failure was due to a quality design and/or manufacturing defect he accepted that over tightening of the legs could have had some effect on the glass and that could not be ruled out as a contributory cause for the failure.

73. From all the engineering evidence, it is clear that the only way by which the cause of the failure could be ascertained with greater certainty would be by testing. Unfortunately, no such testing was carried out and so the results of testing were not available for the assistance of the court either way.

74. Neither was there any evidence as to how the tables were actually assembled by McArdles. No application was made to amend the pleadings in relation to this aspect of matters nor, if there was any real prejudice to the 3rd defendant, was any application made on its behalf to adjourn the case to enable it to deal with a case that over tightening of the legs was causative, perhaps because, like Ronald Schmitt, the assembly firm had ceased trading.

75. Given the absence of any evidence that the table was abused or damaged during display in the premises of the 3rd defendant, or whilst being transported by or in service with the 1st and 2nd defendants, the only credible explanation for a failure attributable at least in part to a cause other than a design and/or manufacturing defect is, on my view of the evidence, confined to over tightening of the table legs during assembly. In this regard the court finds the evidence of Dr. Wood convincing and particularly so in circumstances where Mr. O'Keeffe accepted that over tightening of the legs could not be ruled out as a contributory.

76. This conclusion, however, does not of itself constitute a complete explanation for what happened; on the contrary it is a finding on the evidence that over tightening of the legs was, at best, a contributory cause of the failure.

77. The very fact that the table top glass, of what the court is satisfied comes within the definition of "a low table" for the purposes of the ENV, was unable to bear the weight of a 3 year old clambering across it when it ought to have been able to withstand a weight of 100 kilos or 16 stone being placed on it without failure can ,on the preponderance of the evidence, lead to only one conclusion, namely, that the table was not designed and or manufactured in accordance with the standards comprised in the ENV. Conversely, if it had been so designed and manufactured it is difficult to see how the accident would have occurred.

Causes of action.

78. The plaintiff brings these proceedings as against the 1st and 2nd defendants in negligence and for breach of statutory duty pursuant to the provisions of the Occupiers Liability Act 1995 (the Act of 1995). She also makes a case in negligence and for breach of statutory duty against the 3rd defendant pursuant to the Liability for Defective products Act 1991 (the Act of 1991).

79. The 3rd defendant seeks an indemnity or contribution against the 2nd third party on foot of contract and or, alternatively, pursuant to the provisions of the Civil Liability Act 1961 (the Act of 1961) as amended.

80. As between the plaintiff and the defendants the court has already ruled that this is a case to which the principal res ipsa loquitur applies and the trial proceeded accordingly.

Decision on the case as between the plaintiff and the 1st and 2nd defendants.
81. Having found that the there was no evidence of damage to or abuse of the table whilst it was in the possession of the 1st and 2nd defendants, that they were unaware of the disclaimer and the weight limit warning contained in the assembly instructions, the court also finds that they could not reasonably have been expected to have been aware or otherwise to have reasonably ascertained what were, as a matter of fact, latent defects in the table.

82. Accordingly, the court finds that the 1st and 2nd defendants were not in breach of the statutory duty that they owed to the plaintiff as a lawful visitor pursuant to S.3 of the Act of 1995.There being no evidence otherwise of negligence on their part, the plaintiffs claim against them will be dismissed and the court will so order.

Decision on the case as between the plaintiff and the 3rd defendant.
83. As to the plaintiff's case against the 3rd defendant, the court is satisfied on the evidence that the table was assembled by McArdles on its behalf on foot of a contractual relationship entered into between them and that ,on the balance of probabilities ,the legs were tightened in such a way as to exert sufficient tension forces to the glass so as to cause some microscopic damage ,most likely in form of cracking which contributed to the fracture of the glass table top. In assembling the table on behalf of the 3rd defendant for display in its showroom premises McArdles acted as the 3rd defendant's agents in law. The court finds that it was reasonably foreseeable that if the legs of the table were over tightened then that might likely lead to damage being caused as a result, accordingly, the over tightening of the table legs in the course of assembly constitutes negligence on the part of McArdles for which the third defendant is vicariously liable.

84. The 3rd defendant as a distributor and supplier of the table also owed a duty of care to communicate the warning contained in the instructions which accompanied the table and which ,on the evidence of the 3rd defendant, were put into an envelope with other documentation relevant to the suite. Being in possession of the instructions it is no excuse in law that the third defendant did not read nor comprehend the instructions. The warning and disclaimer contained in the instructions constituted a notice which put the 3rd defendant on enquiry as to the suitability and safety of the table but which it failed to pursue with the 2nd third party. Had it done so, the table may never have been put in circulation. Supplying a table containing a latent defect which rendered it unsafe was a breach by the 3rd defendant of the common law duty of care.

85. Quite apart from liability in negligence ,the court is also satisfied that the 3rd defendant has a liability pursuant to the Act of 1991 and which arises in the following way.

86. Section 2 (1) of the Act of 1991 defines "producer" as meaning

> "(a) the manufacturer or producer of a finished product, or
>
> (b) the manufacturer or producer of any raw material or the manufacturer or producer of a component part of a product, or
>
> (c) …
>
> (d) any person who, by putting his name, trade mark or other distinguishing feature on the product or using his name or any such mark or feature in relation to the product, has held himself out to be the producer of the product, or
>
> (e) …
>
> (f) any person who is liable as producer of the product pursuant to subsection (3) of this section."

87. Section 2 (1) provides that the producer shall be liable in damages in tort for damage caused wholly or partly by a defect in his products. Section 5 (1) provides

> "(1) For the purposes of this Act a product is defective if it fails to provide the safety which a person is entitled to expect, taking all circumstances into account, including—
>
> (a) the presentation of the product,
>
> (b) the use to which it could reasonably be expected that the product would be put, and
>
> (c) the time when the product was put into circulation."

88. Assembly is a process which involves the putting of things together to make something. See *Engineering Industry Training Board v. Foster Wheeler John Brown Boilers Ltd* [1970] 1 All ER at 498-499. The assembly of component parts although none of which are manufactured by the assembler but resulting in the production of a product can nevertheless be properly described as and coming within the meaning of the term "manufacturing". See *Prest Cold (Central) Ltd v. Minister of Labour* [1969] 1 All ER 69 at 71 – 72 C.A. per Lord Denning. The incident table was assembled for the purposes of display and sale by McArdles on behalf of the third defendant. When assembled the table constituted a finished product which the third defendant then sold to the 1st and 2nd defendants.

89. Accordingly, the court finds that the third defendant was also a producer within the meaning of the Act of 1991 and is liable to the plaintiff for breach of statutory duty as well as in common law negligence .

Decision on the 3rd defendant's claim as against the 2nd third party.
90. The table was sold to the 3rd defendant by the 2nd third party. On the findings of the court the table failed to comply with the standards comprised in the ENV. Although the table was manufactured by Ronald Schmitt that company did so as agent for and under licence of the 2nd third party. Similarly, the preparation and printing of the assembly instructions and the application of the 2nd third party's trade name and logo were also effected under the same licence .There are a number of European Directives dealing with the safety of products and which are principally designed to protect the consumer. Council Directive 85 (374/EEC) was implemented in this jurisdiction by the Liability for Defective Products Act 1991. Council Directive 92/59/EEC provides for the general safety of products and was subsequently followed by the General Products Safety Directive 2001.95.EEC.

91. Whilst the court is satisfied on the findings made that the 2nd third party is also a producer within the meaning of the Act of 1991, the plaintiff is not entitled to succeed against the 2nd third party in respect of the defect in the table since the 2nd third party has not been joined as a co-defendant to these proceedings nor, for the same reason, is the plaintiff entitled to succeed in respect of the negligence of the 2nd third party in supplying a product which it knew or ought reasonably to have known was unsafe within the meaning the directives ,which was defective within the meaning the Act of1991, and which failed to comply with the standards set out in the ENV.

92. Whilst the 3rd defendant brought a case in contract against the 2nd third party, the terms of such contract were not proved. In any event that must likely have been governed by German law or the law of England and Wales. Similarly there was no evidence as to the terms of the contract between the 3rd defendant and the 1st and 2nd defendants. That contract would most likely be governed by the law of England and Wales. However, the 3rd named defendant seeks an indemnity and/or contribution from the 2nd third party pursuant to the provisions of the Civil Liability Act 1961 as amended and in this regard seeks an indemnity and/or contribution in respect of any liability found to rest in either negligence or pursuant to the provisions of the Act of 1991.

93. As has already been observed, in the absence of engineering tests the court is placed in a position where it cannot with any certainty reach a determination by reference to test results as to the respective causative contributions of the 3rd defendant and the 2nd third party to the cause of the failure of the table. However, as a matter of law the apportionment of fault between them is to be determined not on the basis of the relative causative potency of their respective causative contributions to the damage but rather on the blameworthiness of the contributions of each to the happening of the accident.

94. In this regard I accept the submissions of the 3rd defendant that there was a high duty of care placed on the 2nd third party in circumstances where it commissioned and procured the manufacture of the table and where the table bore its trademark and was thereby represented to the public at large to be of the 2nd third party's manufacture and which required the 2nd third party to satisfy itself that that product complied with the appropriate standards. Its failure to make such enquiries or to ascertain whether or not the appropriate standards and tests had been complied with was instrumental in the table being put into circulation for public use containing as it did a latent defect.

95. Having regard to its findings and applying the law, the court considers the blameworthiness of the 2nd third party's contribution to the occurrence of the accident to be greater than that of the 3rd defendant and will apportion the fault between them 1/3rd 2/3rds in favour of the 3rd defendant.

96. The plaintiff's claim against the defendants arises as a result of a tort which occurred in this jurisdiction, accordingly, the case falls to be decided in accordance with the common law tort of negligence and the applicable statutory provisions of the Act of 1961, as amended, the Act of 1991 and the Act of 1995.

97. The 3rd defendant and the 2nd third party are concurrent wrongdoers within the meaning of the Act of 1961, each being jointly and severally liable for the same the damage. As producers liable for the same damage they are also concurrent wrongdoers within the meaning of the Act of 1961 by virtue of S.8 of the Act of 1991.

98. Having regard to the provisions of S.9 of the Act of 1991 and that as the 2nd third party has not been joined to these proceedings as a co defendant but against whom the 3rd defendant has sought an indemnity and contribution pursuant to the Act of 1961, the court will give judgment for the plaintiff in respect of the whole of the damages assessed hereafter against the 3rd named defendant but with the 3rd defendant being entitled to a contribution of two 2/3rds in respect of such judgment from the 2nd third party and the court will so order.

Injuries

99. As a result of the accident the plaintiff sustained a complete amputation of the left big toe distal to the interphalangeal joint together with a number of other smaller cuts and bruises.

100. The plaintiff was transferred to Sligo General Hospital by her parents where she underwent assessment and X-Rays. Thereafter, the plaintiff was transferred by taxi to University College Hospital, Galway where she was admitted under the care of Mr Jack McCann, Consultant Plastic, Reconstructive and Hand Surgeon. Unfortunately it proved impossible to reattach that part of the distal phalanx of the left great toe which had been amputated. Accordingly, Mr McCann proceeded to undertake a terminalisation under general anaesthetic of the left big toe at the level of the epiphysis of the bone. During this operation the nail bed of the left great toe was fully removed. The plaintiff was commenced on oral antibiotics post operatively and ultimately discharged on the 13th October 2007.

101. The plaintiff was assessed from time to time with light dressings being applied to the healing wound following which she was commenced on physiotherapy. Clinical review on the 18th March 2008 showed that healing of the tissues was complete.

102. Between the discharge from hospital and December 2007 the plaintiff mobilised via a wheelchair so as to avoid weight bearing on the left great toe.

103. There was no dispute between the parties with regard to the medical evidence in this case. The report of the plaintiff's GP, Dr Aisling Brady, dated the 28th September 2011 and prepared by Dr Brady for assistance of the court was admitted in evidence as were the reports of Mr Jack McCann dated the 12th May 2010, 9th October 2012 and 19th November 2013.

104. It is clear from these reports that in addition to physical injuries the plaintiff also developed psychological sequelae. The plaintiff did not want to go to dance lessons or for swimming lessons for some considerable time after the accident but she returned to both of these activities in 2010.

105. In addition to the foregoing the plaintiff exhibited signs of insecurity post accident and became quite clingy. She also experienced nightmares and even three years later was still sleeping with her parents.

106. When the plaintiff was reviewed in October 2011 it was noted by Mr McCann that she had progressed well both psychologically and physically although she was still sleeping with her mother. With regard to nightmares they were occurring once or twice every three months.

107. With regard to physical complaints the plaintiff' s mother told Mr McCann that during cold weather the stump of the plaintiff's left toe became painful. Not surprisingly anybody seeing the plaintiff's left foot would readily appreciate the resulting deformity consequent on the amputation and on such occasion it was not unusual for comments to be made in that connection. The plaintiff was inclined to wear socks all of the time. She experienced some difficulty wearing flip flops on her left foot because the tip of the

great toe was missing and she was not able to put pressure on it to hold the flip flop in place. The plaintiff was able to kick a football with either foot.

108. When reviewed in October 2012 Mr McCann noted that the tip of the plaintiff's left great toe remained bulbous on the lateral side. A scar on the dorsal tip of the stump had settled well and was not causing any problems nor was there any tenderness at the tip of the toe but a tickly sensation was noted where both digital nerves would be. The plaintiff was recorded as being able to walk normally when in shoes.

109. Because the epiphysis of the distal phalanx had been saved during surgery Mr McCann expected that there would be some growth of the remainder of left big toe and, indeed, that has occurred with the result that when examined in November 2013 the difference between the left and right toe in terms of length was 1.45 cm.

110. Whilst the plaintiff was still sleeping with her mother in November 2013 the nightmares had all resolved.

111. The stump of the left great toe continues to be bulbous in appearance and I had an opportunity of viewing it during the course of the trial and also speaking with the plaintiff. Mr McCann says that further surgery can be undertaken when the plaintiff gets older which would have the effect of reducing or removing the bulbous tissues thereby resulting in the left great toe stump becoming more toe like in appearance.

112. There was also the possibility of the plaintiff having a cosmetic prosthesis at some stage in the future for cosmetic purposes if the absence of the tip of the left great toe was something which bothered the plaintiff. The other option would be that a nail technician could put a small piece of nail directly onto the distal stump of the toe to simulate a normal nail. Mr McCann observed that prostheses sometimes get left aside as there is no sensation associated with them and that sometimes they become loose and fall off. It was really a matter for decision to be taken by the plaintiff when she gets older.

113. From my conversation with the plaintiff I formed the opinion that she is very well supported by her parents, particularly from a psychological point of view and that she has adjusted remarkably well to what is a permanent injury and which by my viewing of it is unquestionably disfiguring on a young girl. The nightmares have abated and the plaintiff is now living as independent a life as one can expect for someone of her age.

Assessment of damages

114. In assessing general damages the court is concerned with and required by law to make a just award, namely one which is fair and reasonable and founded on the evidence. Such damages are compensatory in nature. The purpose or object of compensatory damages is reparative and so are intended to restore the plaintiff, so far as that is possible by an award of money, to the status quo ante in respect of past and prospective losses pecuniary and non pecuniary caused by the wrong. It is self evident that monetary compensation of itself cannot restore the plaintiff to the position she was in immediately before the infliction of the injury. All the court can do is to award a sum of money which must be regarded as giving reasonable compensation.

115. As I observed in the judgment of this court in Bennett v. Cullen (unreported) H.C. 14.11.14 at para 38:

> "Loss of expectation of life, permanency of injury, mental distress, pain, inconvenience, sorrow, anxiety, irritation, mental strain and frustration, to mention but some of the consequences associated with injuries and whether categorised as separate heads or elements of damage or as constituent parts comprising what is described as pain and suffering, are all compensatable where they arise; the uninjured plaintiff being entitled to enjoy all of the attributes both physical and intellectual of which the plaintiff was possessed and were enjoyed at the time of the commission of the wrong giving rise to the injuries and loss."

116. Having regard to the decision of the court in that case and the requirement pursuant to the provisions of s. 22 of the Civil Liability Courts Act 2004 that the court have regard to the Book of Quantum published by the Personal Injuries Assessment Board pursuant to the provisions of the Personal Injuries Assessment Board Act 2003 the parties made submissions in relation to the range of damages set out in the Book of Quantum applicable to injuries such as those sustained by the plaintiff as well as the relevance of the failure of the Board to review and publish an updated Book of Quantum.

117. It was common case that the plaintiff's injury may properly be said to fall within the range of damages applicable to an amputation of the big toe namely €31,800 to €49,900. However, it was submitted on behalf of the plaintiff that for all practical purposes the Book of Quantum was being ignored by the courts because it was so out of date and did not reflect what would now be fair and just compensation for injuries such as those suffered by the plaintiff.

118. Whilst it is clear from the wording of s. 22 that when assessing general damages the court is not bound by the range of damages suggested as being applicable to any given injury that is just as well because according to the Book of Quantum it was to be kept under review and assessments were to be made by the Board in line with current levels of compensation. Indeed, when the Personal Injuries Assessment Board Bill was proceeding through the Oireachtas it is a matter of public record that the Minister responsible assured both houses that the Book of Quantum would be updated and would reflect the awards of the courts. Regrettably and notwithstanding such assurances, the Book has not been updated since it was first published in 2004. However, the court is still left with the statutory requirement to refer to the Book when assessing damages in respect of any injuries where a range of damages is specified. This is an unacceptable state of affairs and is to be deprecated.

119. It is neither the province nor the function courts but rather for those charged with the responsibility for preparing and publishing a Book of Quantum to comply with the assurances given at the time when the legislation was passing through the Houses of the Oireachtas and on foot of which ,I have no doubt ,the representatives of the people relied when enacting the legislation. Where the court is required by law to refer to the Book of Quantum when assessing damages it is unquestionably in the interests of the proper administration of justice that the Book be reviewed and be kept updated to properly reflect the awards of the courts .

120. Having referred to the Book of Quantum , having regard to the time which has elapsed since it was published and applying the principles of law to the assessment of general damages in respect of the plaintiff's injuries in this case, the court will award the sum of €50,000 for pain and suffering to date and €25,000 for pain and suffering into the future. Accordingly and there being no claim for special damages, the court will give judgment in respect of general damages for the total sum of €75,000.

121. Having due regard to this judgment I will discuss with counsel the form of the final orders, including orders as to costs, which are to be made.