

## THE HIGH COURT

[2014 No. 1572 P.]

BETWEEN

GWEN LEOST KANE

PLAINTIFF

AND

ZOOLOGICAL SOCIETY OF IRELAND

DEFENDANT

**JUDGMENT of Mr. Justice Barr delivered on the 6<sup>th</sup> day of July, 2016****Introduction**

1. This action arises out of an accident which occurred on 12<sup>th</sup> June, 2011, when the plaintiff was visiting Dublin Zoo with her husband and young son, who was celebrating his first birthday. While walking through the zoo, the plaintiff slipped on a wet manhole cover and fell backwards onto the ground. In the course of falling she suffered a fracture dislocation of her right ankle.

2. Liability is not in issue in these proceedings. The only oral evidence given at the trial was that given by the plaintiff herself. The medical evidence in the case consisted of a number of medical reports, which were agreed in evidence.

**The Plaintiff's Evidence**

3. The plaintiff stated that on 12<sup>th</sup> June, 2011, she and her husband decided to take their young son to the zoo for his first birthday. They were accompanied by two other friends, who also had children with them. The plaintiff stated that while she was pushing her child's buggy, she was caused to slip and fall to the ground on a wet manhole cover. She stated that in falling, she heard the bones in the lower part of her right leg breaking. She stated that she was in great shock and pain immediately after the fall.

4. The plaintiff stated that when she looked at her lower leg, she could see that the foot was dangling from the leg and appeared to be held on by the surrounding soft tissues. The plaintiff remained lying on the ground. Help was summoned and an ambulance arrived after approximately 30 minutes. She was taken to the casualty department of Connolly Memorial Hospital. X-rays taken at the hospital showed a trimalleolar fracture dislocation of the right ankle. The ankle was initially reduced and was put in a cast. It was necessary for the plaintiff to have surgery on the ankle; however, due to extreme swelling of the ankle joint, she was not able to have this surgery until 16<sup>th</sup> June, 2011. Surgery involved the reduction and internal fixation of the lateral malleolus, with a plate and screws and the medial malleolus was fixed with two screws. The posterior malleolus was treated conservatively.

5. The plaintiff stated that in the initial days in the hospital until she had the operation, she experienced extreme pain in her ankle. During this time she was confined to bed and was not even able to go to the toilet. In all, she was detained in hospital for a period of ten days. She was discharged to the outpatients department on 22<sup>nd</sup> June, 2011. At this time, her ankle had been immobilised in a plaster cast. She had to use crutches to move around.

6. The plaintiff stated that after discharge from hospital, she was severely disabled in all aspects of her life. She had to go upstairs by sitting on the steps and moving up from one step to another on her bottom. She had to have help looking after her young son. Unfortunately the carer, who was looking after son, fell while carrying her son into the crèche. The owners of the crèche telephoned the plaintiff and told her that there was a problem with her son and that he had suffered a fracture in the fall. The owners of the crèche came to the plaintiff's house and gave her a lift to the hospital. The plaintiff found this particularly distressing given the fact that she could not adequately look after her son.

7. The plaintiff's ankle was in a plaster cast for seven weeks. She was obliged to keep her foot elevated during this time. She stated that her sleep was disturbed with pain and it was very uncomfortable in bed at night.

8. On 3<sup>rd</sup> August, 2011, the plaster cast was removed. The plaintiff continued to require the use of crutches. She was told that she could gradually increase weight bearing. When reviewed in September, she was advised to continue increasing weight bearing gradually. She stated that during August and September her ankle was particularly painful. In all she was required to use crutches for a period of sixteen weeks. She also used a wheelchair for a portion of this time. She stated that someone in the hospital had told her that a wheelchair would be beneficial. She used it for part of the time and in particular when looking after her young son. The plaintiff stated that the injury affected her badly, as it was very difficult for her to look after her young son. She was distressed that she was not able to carry out all of the activities that a mother would for a one-year-old child.

9. The plaintiff stated that the metal plates and screws that had been inserted into her ankle joint were painful. She said that she could feel the screws and that on certain movements of the ankle the skin would be pinched. It was particularly painful if anything hit off any of the metal work. The plaintiff stated that she lost a lot of spontaneity as a result of the injury and in particular she is unable to go walking as she had done prior to the accident. When she goes walking she is obliged sometimes to stop due to pain. She was unable to cycle her bicycle, or go running. As a result of the operation the plaintiff had been left with a 7 cm scar medially and a 10 cm scar laterally on her right ankle. She has been and remains embarrassed by the scarring.

10. The plaintiff also developed arm and shoulder discomfort as a result of using the crutches. She had difficulty working at a computer due to arm pain. She had difficulty moving her arms behind her back and she was unable to sleep on her right side. Due to the metal work in her ankle, she was unable to wear high heels, or go dancing.

11. On 22<sup>nd</sup> May, 2014, the metal plates and screws were removed from her ankle. This led to some improvement in the type of

footwear that she could wear; however she states that for comfort, she generally wears runners.

12. The plaintiff also suffered psychiatric sequelae. She stated that she was exhausted from all the pain that she had suffered in her ankle. She had nightmares about the accident. She felt uncomfortable in her role as a mother. When her son was injured in the fall going into the crèche, she was deeply sad due to the fact that she could not do anything to help him. She stated that in the nightmares, she would relive the experience of falling backwards and hearing her bones break and seeing her young son looking at her with great concern. She had come under the care of Dr. Murphy, Consultant Psychiatrist. She had been advised counselling. However, due to the fact that she was made redundant in February 2013, she could not afford counselling at that time. In more recent times, she has had counselling provided by the HSE, for which she only has to pay €10 per hour. She has been having this for the last ten months and attends on a weekly basis. She states that she still has anxiety and depression. She is anxious when she sees her son falling in the playground and when walking in the rain. She is very aware of her feet.

13. In relation to her present condition, the plaintiff stated that her foot was still swollen and scarred. She was embarrassed about the appearance of her ankle with the scars, particularly during the summer months. She stated that she continues to experience pain in her ankle every day. She has difficulty on stairs, especially descending stairs. She stated that she is not able to walk uphill or on steep slopes. She cannot walk on uneven ground or on soft ground such as a sandy beach, as her ankle feels unstable.

14. The plaintiff stated that she was unable to participate in Breton dancing, which she had enjoyed prior to the accident. She stated that it was similar to Irish dancing. In terms of her work, she had been unfit for work after the accident for a period of six months until December 2011. She was made redundant from her employment in February 2013. In recent months she has obtained part time work with a French speaking website.

15. In cross examination, the plaintiff stated that she had come under the care of Mr. Peter Keogh, Consultant Orthopaedic Surgeon, who had furnished a number of reports. She stated that she saw Prof. Michael Stephens, Consultant Orthopaedic Surgeon, on one occasion on 21<sup>st</sup> February, 2013, on behalf of the Injuries Board. It was put to the plaintiff that Mr. Keogh, having reviewed the x-rays, was of the opinion that the ankle had achieved a good anatomical result and was healing satisfactorily. He did not expect the onset of arthritis. The plaintiff accepted that as being correct.

16. The plaintiff accepted that in his second medical report Mr. Keogh thought that the removal of the metal work could be undertaken and he did not think that she would develop arthritis. The plaintiff accepted this as correct.

17. It was put to her that in the third medical report, he stated that the plaintiff's right ankle was 1.5cm bigger than the left ankle. The plaintiff stated that while that might be correct, the ankle tended to be more swollen in the evening. She accepted that the doctor found that she had a good range of movement in the ankle joint and had made a good recovery and he did not think that arthritis would be a feature. She accepted that Mr. Keogh had reached this opinion having had the benefit of the updated x-rays.

18. The plaintiff accepted that she had gone on holidays with her husband and son, during the four month period that she was using crutches. She stated that this had been a planned holiday and they went ahead with it. The plaintiff accepted that things did improve after the initial four months on crutches. She accepted that when her husband was unemployed, he was in a position to help her with general tasks around the house.

19. The plaintiff stated that she had taken painkillers initially, but she was not able to take much medication as she was allergic to it. She stated that she had taken some anti-depressant medication, which had been prescribed for her, but she found that she was intolerant to it. In terms of her psychiatric sequelae, the plaintiff accepted that there had been stress caused by separate fertility issues and her husband being made unemployed. It was put to her that Dr. Mulcahy, the defendant's psychiatrist, was of the opinion that she would not have any long time term sequelae. The plaintiff stated that she hoped that that prognosis was correct.

20. The plaintiff accepted that she had been referred to Dr. Murphy, the Consultant Psychiatrist, by her solicitor. She stated that she had been suffering emotionally and did not know how to get help. She saw Dr. Murphy on one occasion. He told her to attend with her G.P. He recommended the anti-depressant medication, Effexor; however, she did not take it, because she was on separate fertility medication at that time and she also had high cholesterol.

### **The Medical Evidence**

21. The plaintiff was first seen by Mr. Peter Keogh, Orthopaedic Surgeon, on 15<sup>th</sup> June, 2012, one year post-accident. At that time she complained of ongoing discomfort in her right ankle. She was able to walk but she limped after a long day. She was only able to walk for half an hour maximum, whereas prior to the accident she used to walk for three hours unimpaired. She was anxious about riding a bicycle and was also anxious in wet weather. She had difficulty walking on rough ground. She was not able to run. She was conscious of the scars to her ankle. She stated that her ankle would swell at night-time.

22. The plaintiff also complained of discomfort in her arms, especially in the right shoulder, which she said were sore at the time of the accident and were aggravated by using the crutches. She complained of pain when using a computer at work. She had difficulty reaching behind her back and had discomfort sleeping on the right side at night.

23. On examination, Mr. Keogh noted the presence of scars on either side of her ankle. The metal work was palpable on the lateral side. There was mild swelling of the ankle. The plaintiff had good sub-talar and mid-tarsal joint movements. Examination of the shoulders revealed a full range of movement, with tenderness anteriorly and no definite rotator cuff signs. X-rays taken on that day showed satisfactory maintenance of the ankle mortise. There were no degenerative changes in the ankle and there was good bone healing. He was of the opinion that the overall appearance was satisfactory.

24. Mr. Keogh noted that at one year post-accident, the plaintiff had ongoing symptoms and functional limitation in the ankle. These were likely to be permanent. He stated that although this was a severe injury, he did not think that she would develop arthritis in the ankle. The scarring would be permanent. He stated that the plaintiff may also have strained her shoulder and had some ongoing symptoms in the right shoulder. No serious long-term sequelae were expected.

25. The plaintiff was reviewed on 15<sup>th</sup> November, 2013, two and half years post-accident. The plaintiff complained of ongoing discomfort on the lateral side of the ankle. This was constant. She felt that her ankle was swollen and some of the metal work was prominent. She complained that if she went for a walk for leisure, sometimes she would have to stop walking due to pain. Examination revealed a 1 cm swelling of the right ankle, compared to the left. The two scars remained visible. The metal work was not palpable through the skin. X-rays taken at that time showed satisfactory maintenance of the ankle mortise. There was no evidence of degenerative change in the ankle. One of the screws at the distal end of the fibular plate may have backed out a small amount. The

fractures were solidly healed.

26. Mr. Keogh discussed removal of the metal work with the plaintiff. However, she was on other medication for unrelated issues and it was decided not to proceed with that operation at that time.

27. Mr. Keogh was of the opinion that the plaintiff had ongoing symptoms in the ankle with functional limitation as outlined. This was not surprising and such sequelae were thought likely to be permanent. Although she had a severe injury, the ankle mortise had been restored to a near anatomical position and he did not think that she would develop arthritis in the ankle. She would have permanent scarring. One of the screws had backed out and had become a little prominent. The plaintiff was discharged for review on a p.m. basis.

28. The plaintiff was reviewed by Mr. Keogh on 15<sup>th</sup> May, 2015, some four years post-accident. The metal work in her ankle had been removed on 22<sup>nd</sup> May, 2014, in Blanchardstown Hospital, where she was treated as a day case. The sutures were removed on 6<sup>th</sup> June, 2014, and she was finally reviewed in the out-patients clinic on 1<sup>st</sup> August, 2014. At that time her wounds were healed and she felt improved following removal of the metal work.

29. At the examination with Mr. Keogh, the plaintiff complained of ongoing discomfort in the ankle every day. She could not run and she could not wear high heels. She found it awkward to walk on uneven ground and had difficulty even crossing the road. She was able to do some gardening with difficulty. She was nervous walking in wet grass. She had been made redundant from her job in Air France in February 2013 and expressed a desire to go back to work. She also expressed some ongoing emotional difficulties and was going to see a counsellor in the following months. She had not returned to cycling her bicycle.

30. On examination, Mr. Keogh noted the presence of the scars. The ankle joint was swollen. There was a differential of 1.5cm on measurement around the malleoli. She had a good range of ankle and sub-talar movements. X-rays taken on 6<sup>th</sup> June 2014 showed a normal ankle mortise with no obvious degenerative change to date.

31. Mr. Keogh noted that she had ongoing symptoms in the ankle which, at that stage, he thought likely to be permanent. He was of the view that the plaintiff should not develop arthritis in the ankle. The scarring and swelling to her ankle would be permanent. She also had ongoing psychological difficulties and he suspected that that was due to loss of confidence.

32. The plaintiff had also been seen by Prof. Michael Stephens, Consultant Orthopaedic Surgeon, on behalf of the Injuries Board on 21<sup>st</sup> February, 2013, some one year and eight months post-accident. She complained that her right ankle was uncomfortable and painful, particularly when walking on uneven ground and also on grass or sand. The ankle would swell. Two weeks prior to that examination, it had swollen very badly and she nearly had to use a crutch.

33. On examination, Prof. Stephens noted the presence of the scars on either side of the ankle. He thought that these were slightly pink but not significant. She was tender around the fibular plate particularly the upper end, where she found it stretching at times. Her right ankle circumference was 1 cm larger than her left ankle. She had full plantar flexion but loss of the terminal range of dorsiflexion in the right ankle.

34. Prof. Stephens was of the opinion that the plaintiff had a very significant fracture. It was more than a fracture in the fact that the talus had moved laterally and into an externally rotated position, i.e. it was a fracture dislocation. He was of opinion that his particular fracture that involved three malleoli indicated the severity of the injury and the degree of movement of the talus in the ankle mortise, i.e. the articular cartilage is often scratched and chipped by the fact that the ankle was dislocated. This was compounded by the fact that the plaintiff was overweight and there would have been greater force on it as she went over on the ankle. He was of opinion that she had residual symptoms which were consistent with this. He thought that she would probably require the removal of the metal work during or near the end of 2013. Due to the fact that it was a very traumatic injury, there was a risk of post traumatic osteoarthritis, which he put at about 20%. The fact that it was a fracture dislocation would mean that it could cause scuffing on the articular cartilage hence giving rise to the risk of arthritis.

35. The plaintiff was seen by Dr. Dennis Murphy, Consultant Psychiatrist, on 21<sup>st</sup> February, 2014. She stated that she thought of the accident every day and could not talk about it without crying. She felt it had changed her as a person. Prior to the accident, she had been active, enjoying activities such as walking for charity or doing charity cycles. She had gradually resumed walking, but could only do short distances. She had previously enjoyed hill walking and Breton folk dancing, but was not able to pursue these activities at the time of the examination. She could no longer wear high heels.

36. The plaintiff stated that she had had nightmares following her discharge from hospital, perhaps on a weekly basis. She also had flashbacks to the accident, especially when it rained, on birthdays, when bad things happened, or indeed they could come on spontaneously. She complained that she was generally more anxious and more easily worried than before. She had previously enjoyed challenges, but this was no longer the case. She was more easily startled. She was very protective of her son and became anxious when she saw him running. She described increased vigilance for danger, especially in playgrounds. She avoided all her previously enjoyed activities.

37. The plaintiff stated that she was also subject to frequent weeping episodes and now had no sense of humour. She no longer enjoyed things and her energy was low. Her sleep was disturbed, with broken sleep and initial insomnia. She described increased appetite and increased weight due to comfort eating. She described decreased libido and increased irritability. She could get less done, particularly housework.

38. Dr. Murphy noted that on examination her mood was depressed and she was distressed at interview. He formed the view that the plaintiff had developed Post Traumatic Stress Disorder and depression following the accident. She remained symptomatic from these conditions. The prognosis was difficult to be certain about, but it was usual to anticipate gradual improvement, particularly with treatment, although in some instances symptoms could be long standing.

39. Finally, the plaintiff was seen by Dr. Michael Mulcahy, Consultant Psychiatrist, on behalf of the defendant on 5<sup>th</sup> June, 2014. He noted that the plaintiff had been referred to Dr. Murphy, Consultant Psychiatrist, by her solicitor in March 2014. She saw him once and he apparently recommended antidepressant medication, namely Effexor, which was prescribed by her GP, but she had not commenced it at the time of that examination. She was attending at the Beacon Hospital for infertility treatment.

40. On examination, Dr. Mulcahy noted that she was using an elbow crutch but was able to handle steps. She recalled the stress of

caring for her infant son, while her ankle was in plaster. She was tearful in recounting her current complaints that were based mainly on her fears regarding future employment. Both her husband and she were unemployed during most of 2013. He had since found a job. She had attended two courses at DCU, but she remained doubtful about her future job prospects. Her confidence had been eroded. Whereas previously she had been a most active person, her continuing immobility had deprived her of a valuable recreational outlet.

41. Dr. Mulcahy was of the view that the plaintiff had experienced a very stressful time on several fronts in the aftermath of her accident. She was able to cope initially and was handling the situation reasonably well, in that she was able to return to work and her son was able to attend a crèche. However, the loss of family employment had precipitated a depressive reaction. This was unlikely to resolve until she found alternative employment. The fact that she had not started her prescribed medication, indicated how she realised herself that environmental factors were predominating in causing her current low mood. Notwithstanding this, she was acutely aware of the very difficult time she experienced after the accident and the way it had affected her life. However, Dr. Mulcahy pointed out that she was a resourceful lady and there was no need to assume that she would have any long-term psychiatric problems as a consequence of her accident.

### **Conclusions**

42. In summary, this 43-year-old woman suffered an injury when she slipped on a wet manhole cover at the defendant's premises on 12<sup>th</sup> June, 2011. She suffered a tri- malleolar fracture dislocation of the right ankle. She was in a plaster of Paris cast for seven weeks and was on crutches for a total of sixteen weeks. During a portion of this time, she was required to use a wheelchair. After the accident, she was rendered unfit for work and remained so unfit until December 2011. Thereafter, she was able to continue with her employment with Air France until made redundant in February 2013.

43. I am satisfied that the plaintiff has given a fair and accurate account of her symptoms and disablement from the time of the accident down to the present time. She suffered extreme pain at the time of the accident and in the hours and days following. The ankle fracture required operative treatment, which was carried out on 16<sup>th</sup> June, 2011. This involved reduction and internal fixation of the fracture and the insertion of plates and screws. These remained in situ until 22<sup>nd</sup> May, 2014.

44. The plaintiff's progress since the time of the accident has been adequately set out in the medical reports, which have been admitted in evidence and are summarised above. At present, she continues to experience pain in the right ankle on a daily basis. She is not able to walk long distances, nor to cycle her bicycle. This has been a cause of distress to her, as she used to participate in charity walks and charity cycles prior to the accident. The plaintiff is not able to run, nor can she walk on uneven ground, or on wet grass or on sand. She is unable to participate in Breton dancing, which she had done prior to the accident. I accept Mr. Keogh's opinion that these symptoms will be permanent.

45. The plaintiff's ankle remains swollen and has an increased circumference of 1.5cm, greater than the left ankle. She has been left with two scars measuring 7cm and 10cm on either side of the ankle. These will be permanent. I have viewed the scarring and while they are not grossly disfiguring, I can well appreciate that they are a cause of some embarrassment to the plaintiff, who is a reasonably young woman.

46. The plaintiff also suffered shoulder and arm pain from using the crutches in the immediate aftermath of the accident. However, this does not appear to have caused any long-term sequelae.

47. The plaintiff also suffered from psychiatric difficulties after the accident. She had nightmares, where she relived the feeling of falling backwards, hearing bones break and seeing her young son look at her with anxiety. She was seen on one occasion by Dr. Dennis Murphy, Consultant Psychiatrist, on referral from her solicitor. He was of opinion that the plaintiff had developed symptoms of Post Traumatic Stress Disorder and depression following the accident. She remained symptomatic at the time that she saw him on 21<sup>st</sup> February, 2014. In terms of a prognosis, he stated that it was usual to anticipate gradual improvement, particularly with treatment, although in some instances symptoms can be long standing. It appears that the plaintiff was prescribed antidepressant medication, namely Effexor, but it is not clear whether she actually took this medication, or was unable to do so due to being on other medication for unrelated matters.

48. The plaintiff has received some counselling in the last ten months and this is continuing. In relation to her psychiatric sequelae, these were to some extent caused by stress, brought on by the fact that she and her husband were experiencing fertility difficulties and both were unemployed during 2013. Dr. Mulcahy was of opinion that there was no need to assume that she would have any long-term psychiatric problems as a result of her accident.

49. Finally, while Prof. Stephens thought that there was a 20% risk of the plaintiff developing degenerative arthritis in her right ankle joint, Mr. Keogh, who has seen the plaintiff on three occasions and most recently on 15<sup>th</sup> May, 2015, and also had the benefit of up-to-date x-rays, is of opinion that the plaintiff is not likely to develop degenerative arthritis in the ankle joint. I accept this as being the likely scenario.

50. In reaching the award of damages in this case, I have had regard to the helpful guidelines given by the Court of Appeal in *Payne v. Nugent* [2015] IECA 268, *Nolan v. Wirenski* [2016] IECA 56, and *Shannon v. O'Sullivan* [2016] IECA 93.

51. Having regard to the principles laid down in the above cases and having regard to all the matters outlined herein, I award the plaintiff general damages for pain and suffering and disability to date in the sum of €65,000 and general damages for pain and suffering and disability and scarring into the future, in the sum of €40,000, together with special damages of €9,988, giving a total award of €114,988.